NO.: 93, 355

IN THE SUPREME COURT OF FLORIDA

JANA P. VEST, as Personal Representative of the Estate of THOMAS C. VEST, deceased,

Plaintiff/Petitioner

v.

TRAVELERS INSURANCE COMPANY,

Defendant/Respondent.

AMENDED ANSWER BRIEF OF DEFENDANT/RESPONDENT

CECIL L. DAVIS, JR.
Florida Bar No.: 0242721

FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL AND BANKER, P.A.
Post Office Box 11240
Tallahassee, Florida 32302
(850) 681-0411

CERTIFICATE OF SIZE, TYPE AND STYLE

Defendant/Respondent, TRAVELERS INSURANCE COMPANY, submits this brief, typed in a 14 point "Times Roman" proportionally spaced.

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STATEMENT OF CASE AND FACTS

Respondent, Travelers Insurance Company, adopts the petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The issue before the trial court was whether the Petitioner, Jana P. Vest, had a valid claim for bad faith against her UM carrier, Travelers Insurance Company, pursuant to section 624.155, Florida Statutes, for its alleged failure to pay UM policy limits to petitioner on a timely basis.

Travelers contends that it had no "duty" under the facts of this case to pay the UM policy limits to petitioner before petitioner resolved her claim against the tortfeasors, Mr. and Mrs. Adcox, based upon the provisions of section 624.155, the provisions of the Florida UM statute, and the relevant UM policy provisions. The allegations of petitioner's complaint for bad faith against respondent, Travelers, focused entirely on alleged acts of Travelers which took place before the petitioner ever settled her underlying wrongful death claim against the tortfeasors, Mr. and Mrs. Adcox, for their liability insurance policy limits of $1,100,000.00, and before Travelers had any duty to pay the UM policy limits.

Travelers also contends that the petitioner's civil remedy notice of violation letter should be considered null and void. It was prematurely given to Travelers some nine months before the petitioner settled her wrongful death claim against the tortfeasors, failed to state any legitimate "violation" under Section 624.155, Florida Statutes, and denied Travelers a legitimate 60-day cure period that was intended by

Section 624.155.

Finally, Travelers submits the trial court's ruling as a matter of law that respondent had not breached any duty of good faith to petitioner by acts which took place before the petitioner settled her underlying wrongful death claim against the tortfeasors was never assigned as error before the First District below. Further, the decision of the First District below did not disturb this ruling by the trial court in any manner. Thus, Travelers contends this ruling by the trial court is the law of the case and the decision of the First District below should be affirmed on that basis alone.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL PROPERLY UPHELD THE TRIAL COURT'S SUMMARY FINAL JUDGMENT FOR RESPONDENT, TRAVELERS INSURANCE COMPANY, BECAUSE TRAVELERS HAD NO DUTY UNDER SECTION 624.155, FLORIDA STATUTES, AND THE CIRCUMSTANCES OF THIS CASE, TO PAY ITS UM POLICY LIMITS TO THE PETITIONER, MRS. VEST, BEFORE PETITIONER REACHED HER SETTLEMENT WITH THE TORTFEASORS.

Travelers Insurance Company contends that the First District Court of Appeal was correct in ruling that Travelers had no duty under section 624.155, Florida Statutes, and the facts of this case, to pay its UM policy limits to the Petitioner before the Petitioner had reached her settlement with the tortfeasors, Mr. and Mrs. Adcox, for their liability insurance policy limits. As Travelers paid its UM policy limits to the Petitioner shortly after the Petitioner settled with the tortfeasors, the First District Court of Appeal was correct in affirming the trial court's Summary Final Judgment and ruling that Petitioner had no valid first party bad faith claim against Travelers.

Petitioner focuses her arguments entirely on the principle that a person with underinsured motorist coverage is not obligated to first bring an action against a

tortfeasor before resolving a claim against her own UM carrier. Respondent has no dispute with this principle of Florida law as applied in the cases cited by the Petitioner in her initial brief. If the Petitioner had chosen to do so, she had the right to proceed first against her UM carrier, Travelers, by demanding arbitration under the UM policy. If Travelers had refused arbitration under the policy, petitioner could have filed suit against Travelers before ever suing the tortfeasors in this case, Mr. and Mrs. Adcox. State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982); Woodall v. Travelers Indem. Co., 699 So. 2d 1361 (Fla. 1997). Arrieta v. Volkswagen Ins, Co., 343 So. 2d 918 (Fla. 3d DCA 1977).

Travelers contends that if the petitioner exercised her right to sue Travelers directly for UM benefits before ever suing the tortfeasors or settling the liability claim against the tortfeasors, this would not mean that Travelers had a duty under section 624.155, Florida Statutes, to pay the UM policy limits before resolution of the case. If the Petitioner had directly pursued a claim against Travelers for UM benefits before resolving her claim against the tortfeasors and the tortfeasors' liability carrier, she would have had to prove at arbitration or at trial that the tortfeasors were negligent in causing the accident and the amount of damages proximately caused by the tortfeasors' negligence. The comparative negligence of

the decedent, Mr. Vest, would also have been determined by the arbitrators or the jury. Allstate Insurance Company v. Boynton, 486 So. 2d 552 (Fla. 1986). Further, the arbitration award or verdict against the UM carrier, if any, must have exceeded the full amount of the tortfeasors' liability insurance coverage of $1,100,000.00 before there could have been a determination that the tortfeasors were underinsured motorists and that Travelers was liable for UM benefits under the UM policy . See, Section 627.727(6)(c), Florida Statutes.

If the arbitration award or jury verdict did not exceed the liability insurance coverage limits of $1,100,000.00, there would have been no resolution or judgment against the UM carrier for UM benefits because the tortfeasors would not have been found to be underinsured. If the arbitrators or jury had determined that Petitioner was "legally entitled to recover damages" from the tortfeasors in an amount in excess of the liability insurance coverage limits of $1,100,000.00, then there would have been a determination at that time that the tortfeasors were underinsured motorists and the Petitioner would have been entitled to recover the amount of damages which exceeded the tortfeasors' liability coverage limits, up to the UM policy limits.

Petitioner did not demand arbitration under the UM policy in question, but filed a wrongful death suit against the tortfeasors, Mr. and Mrs. Adcox, and also

filed suit against Travelers for breach of contract and for bad faith. The petitioner's claim against the tortfeasors, Mr. and Mrs. Adcox, was later settled for the tortfeasors' automobile liability coverage policy limits of $1,100,000.00. Travelers tendered to petitioner the UM policy limits of $200,000.00 within 60 days of the petitioner's settlement with the tortfeasor.

Travelers contends that the central issue before the court is whether the Petitioner's UM carrier, Travelers, had a duty under section 624.155, Florida Statutes, under the circumstances of this case, to pay the UM policy limits to Petitioner before the petitioner settled the underlying wrongful death claim against the tortfeasors, Mr. and Mrs. Adcox, and their liability insurance carrier.

Travelers contends that its position in this case is supported by the law of Florida on good faith settlement. Under Florida law, any person may bring a civil action against an insurer when they are damaged by the following act of the insurer:

> Not attempting 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;

Section 624.155(1)(b)(1), Florida Statutes.

The failure to settle cause of action under section 624.155, Florida Statutes, does not accrue until after the resolution of the underlying arbitration or litigation.

Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994); Blanchard v. State Farm Mutual Automobile Insurance Company., 575 So. 2d 1289 (Fla. 1991); and Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co., 952 F. Supp. 773 (M.D. Fla. 1996).

Petitioner contends that the First District below misapprehended the decisions of this court in Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So. 2d 1289 (Fla. 1991) and Imhof v. Nationwide Mutual Insurance Company, 643 So. 2d 617 (Fla. 1994). This court held in these cases that a cause of action cannot exist for a bad faith failure to settle as to a first party cause of action under Section 624.155, Florida Statutes, unless there has been a "determination" of the following issues:

1. The existence of liability on the part of the uninsured tortfeasor for the plaintiff's injuries; and

2. The extent of the plaintiff's damages.

Travelers agrees that the first requirement stated above can be satisfied by settlement of the claim by the plaintiff against the tortfeasor.

As to the second requirement stated above, Travelers agrees that current case law provides that the payment of the UM policy limits by the UM insurer “is the functional equivalent of an allegation that there has been a determination of the insured’s damages”. See, Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA 1994);

Allstate Ins. Co. v. Clohessy, 1998 WL 839818 (M.D. Fla). Travelers also agrees that this court in Imhof, did not require that the determination of the extent of the plaintiff's damages for bad faith purposes be made by litigation or that the insured plead a specific amount of damages. Thus, Travelers would agree that after it paid the UM policy limits to the petitioner, the two conditions required by this court in Blanchard and Imhof, had been satisfied for the accrual of a potential cause of action for bad faith under Section 624.155, Florida Statutes.

Travelers contends, however, that no "violation" took place on its part before it paid the UM policy limits to the petitioner that would constitute a breach of any good faith duty Travelers had under the UM policy in question, the UM statute, or the provisions of Section 624.155, Florida Statutes.

As a condition precedent to bringing an action under Section 624.155, the claimant must give the insurer and the Florida Department of Insurance sixty days written notice of the "violation". See, Section 624.155(2)(a)-(b), Florida Statutes. The statute further states "No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." Section 624.155(2)(d), Florida Statutes. This 60 day window of time is obviously designed to be a cure period to encourage payment of the claim and avoid unnecessary bad faith litigation. See, Talat Enterprises, Inc. v. Aetna Cas. & Sur.

Co., 952 F.Supp. 773 (M.D. Fla. 1996).

If the petitioner's interpretation of Section 624.155, Florida Statutes, is correct, then the cure provisions of this statute would be rendered ineffective and unreasonable. The petitioner gave her civil remedy notice of violation letter to Travelers and the Department of Insurance some nine months before she settled the underlying wrongful death case against the tortfeasors and before her cause of action for bad faith could have potentially accrued. Travelers timely responded to this notice of violation within 60 days by denying it had any responsibility at that time to pay the UM benefits. (R. Vol. I, pp. 39-44) The petitioner later filed a wrongful death suit against the tortfeasors after settlement discussions did not resolve the case.

Travelers contends that the petitioner's 60 day civil remedy notice of violation letter was premature, designed to attempt to create a bad faith claim long before one could have accrued, and should be considered null and void. What was the "violation" that could have been the subject of the petitioner's notice of violation letter at that early stage? Do the provisions of Section 624.155, Florida Statutes, not impose a duty of good faith on the insured as well to not file a premature civil remedy notice of "violation" before there is some reasonable basis for a bad faith claim and some "violation" of the UM insurer's duties to the insured?

Travelers is not aware of any decision in Florida that gives clear guidance on when a person can file the 60 day civil remedy notice of "violation" letter under Section 624.155, Florida Statutes. As noted above, the 60 day window of time is designed to be a cure period to encourage payment of the claim and avoid unnecessary bad faith litigation. See, Talat Enterprises, Inc., 952 F. Supp. 773. The 60 day notice provision under the statute refers to a "violation" and allows the circumstances giving rise to the "violation" to be corrected within the 60 day window of time. If this provision is to help avoid unnecessary bad faith litigation, then it would seem logical that the legislature did not intend for a person to be able to file this notice at any point after an accident that may give rise to an underinsured motorist claim. If a UM insured filed the 60 day notice in a premature fashion, the UM insurer is then faced with the prospects of either prematurely paying the policy limits before a reasonable opportunity has been given to evaluate the case and follow the guiding provisions of the UM policy and the UM statute or facing the potential cost and expense of a bad faith suit.

Travelers submits that a fair reading of Section 624.155, Florida Statutes, and the provisions of the UM statute, Section 627.727, Florida Statutes, *in para materia*, leads to the conclusion that the 60 day notice of insurer "violation" letter in this case was premature because it was filed before the petitioner settled her wrongful death

claim with the tortfeasor and the tortfeasors' liaiblity insurance carrier, and before any legitimate "violation" could have been committed by Travelers in its decision to settle the petitioner's underinsured motorist claim.

Section 627.727(i), Florida Statutes, provides in relevant part as follows:

> [u]ninsured motor vehicle coverage is provided... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles .... (emphasis supplied)

Section 627.727(3) and 627.727(3)(b), Florida Statutes, provide:

> (3) For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages; (emphasis supplied)

The petitioner's UM policy issued by Travelers contains a similar definition of "uninsured motor vehicle". The Uninsured Motorists Section, Coverage D endorsement of petitioner's policy provides on page 1 as follows:

> C. "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> 2. To which a bodily injury liability ... policy applies at the time of the accident but the amount paid for "bodily injury" under that ...

> policy to an insured is not enough to pay the full amount the insured is legally entitled to recover as damages. (Emphasis supplied)

No challenge has been made in this case by Petitioner to any of the provisions of the UM policy issued by Travelers to the Petitioner.

In Louis v. Allstate Insurance Company, 667 So.2d 261 (Fla. 1st DCA 1995), the First District Court of Appeal held that a plaintiff/insured is entitled to recover uninsured or underinsured motorist benefits when he is "legally entitled to recover damages" from the uninsured motorist. The court held the phrase "legally entitled to recover" means that the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of law. The Florida Supreme Court reached this same interpretation in Allstate Insurance Company v. Boynton, 486 So. 2d 552 (Fla. 1986). Travelers again submits that until the settlement was reached in the underlying wrongful death case between the petitioner and the tortfeasors, there was no determination that the plaintiff was "legally entitled to recover" against the tortfeasors/underinsured motorists.

Based upon the UM statutory provisions stated above, Travelers contends that there was no sufficient determination that Petitioner was "legally entitled to recover" damages from the underinsured tortfeasors in this case and no duty on Travelers' part to pay UM benefits pursuant to Section 624.155, Florida Statutes, until the

petitioner resolved her underlying claim with the tortfeasors and the tortfeasors' liability carrier by way of settlement. As the Petitioner's allegations of bad faith under count II of the complaint only refer to acts of Travelers before the settlement of the petitioner's claim against the tortfeasors, Travelers submits that no cause of action exists against Travelers as a matter of law for bad faith failure to settle under Section 624.155, Florida Statutes, and the facts of this case as set forth in the record.

It appears that Petitioner seeks to read and apply the provisions of Section 644.155, Florida Statutes, alone, without considering these provisions *in para materia* with the provisions of Section 627.727(6)(a), Florida Statutes, and the other provisions of the Florida uninsured motorist statute. Basic principles of statutory construction provide that statutes are to be construed to harmonize with existing law. The legislature is also presumed to know existing law at the time it enacts a statute. Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990). Travelers submits that its interpretation of Sections 644.155, 627.727(l), 627.727(3)(b), and 627.727(6)(a), Florida Statutes, allows each statutory provision to harmonize with the other and furthers the legislative intent of each statute.

One of Florida's neighbor states, Alabama, has wrestled with some of the same issues that arise in this case. In LeFevre v. Westberry,, 590 So. 2d 154 (Ala. 1991), an insured brought an action against an automobile insurer for breach of

contract, bad faith refusal to pay an uninsured motorist claim, and intentional infliction of emotional distress. The Alabama uninsured motorist statute closely resembles the Florida uninsured motorist statute. Both statutes provide that in order to recover uninsured or underinsured motorist benefits, the plaintiff must prove that he is "legally entitled to recover" damages from the owner or operator of an uninsured motor vehicle. In discussing the meaning of the phrase, "legally entitled to recover" in the context of the plaintiff's bad faith claim, the court stated as follows:

> Uninsured motorist coverage in Alabama is a hybrid in that it blends the features of both first-party and third-party coverage. The first-party aspect is evident in that the insured makes a claim under his own contract. At the same time, however, third-party liability principles also are operating in that the coverage requires the insured to be "legally entitled" to collect -- that is, the insured must be able to establish fault on the part of the uninsured motorist and must be able to prove the extent of the damages to which he or she would be entitled. The question arises: When is a carrier of uninsured motorist coverage under a duty to pay its insured's damages?
>
> There is no universally definitive answer to this question or to the question when an action alleging bad faith may be maintained for the improper handling of an uninsured or underinsured motorist claim; the answer is, of course, dependant upon the facts of each case. Clearly, there is covenant of good faith and fair dealing between the insurer and the insured, as with direct insurance, but the insurer and the insured occupy adverse positions **until** the uninsured motorist's liability is fixed; <u>therefore there can be no action based on the tort of bad faith based on conduct arising prior to that time, only for subsequent bad faith conduct</u>." (emphasis supplied).

Further, the Alabama Supreme Court referred with approval to its earlier decision of Quick v. State Farm Mutual Automobile Insurance Co., 429 So. 2d 1033 (Ala. 1983). In Quick, the Alabama Supreme Court held there can be no breach of an uninsured motorist contract and, therefore, no bad faith, until the insured proves he is "legally entitled to recover" against the tortfeasor/uninsured motorist.

The Florida Supreme Court stated in a similar fashion in Allstate Insurance Company v. Boynton, that UM coverage in Florida is a limited form of third party coverage and is not first party coverage even though the policyholder pays for it. Travelers submits that the reasoning of the Alabama Supreme Court in LeFevre is consistent with this court's decisions in Imhof and Blanchard. Travelers also contends that the reasoning of the Alabama Supreme Court supports the conclusion that in an underinsured motorist claim like the case at issue, and based upon the provisions of both the UM statute and the first party bad faith statute being interpreted *in para materia*, no "violation" of a good faith duty to settle could occur before the petitioner settled the underlying wrongful death claim with the tortfeasor and the tortfeasor's liability insurance company. As no "violation" of a good faith duty to settle could occur before the settlement of the underlying wrongful death claim, then Travelers contends that the civil petitioner's remedy notice of

"violation" letter was premature before that event occurred. Thus, Travelers was denied a legitimate 60 day cure period intended by Section 624.155(2)(d), Florida Statutes.

As Justice Anstead stated in his concurring opinion in Woodall v. Travelers Indemnity Company, 699 So.2d. 1361 (Fla. 1997) any analysis of uninsured/underinsured motorist claims "must begin with the fact that the insured is suing the insurer for not living up to the terms of the bargain." Based upon the provisions of the UM policy and the provisions of the UM statute stated above, Travelers contends that there could have been no legitimate "violation" of the "terms of the bargain" between the parties in this case sufficient to allow the petitioner to file a valid 60 day notice of insurer "violation" letter with Travelers until the petitioner settled her wrongful death claim with the tortfeasors and the tortfeasors' liability insurance carrier.

Under the Petitioner's uninsured motorist policy with Travelers, the Petitioner was free to immediately demand arbitration of the underinsured motorist claim after this accident in order to secure a prompt and just settlement of her UM claim. See, (R.39,58); State Farm Mut. Auto. Ins. Co. v. Kilbreath, 419 So. 2d 632 (Fla. 1982); Baxter v. Royal Indem. Co., 285 So. 2d 652 (Fla. lst DCA 1973). If the Petitioner had requested arbitration in accordance with the policy and the parties had

agreed to arbitration, there would have been a determination by the arbitrators of the liability of the tortfeasors and the damages of the Petitioner. In that situation, there would have been a determination as to whether the petitioner was "legally entitled to recover" damages from an uninsured motorist as required by the above provisions of the UM statute. The Petitioner, for whatever reason, did not choose the option of arbitration under the policy. The Petitioner should not now be heard to complain of Travelers' actions in waiting on the resolution of the underlying settlement between the petitioner and the tortfeasors when this was a proper route under the uninsured motorist statute and UM policy in order for there to be some determination that the Petitioner was "legally entitled to recover" damages from the tortfeasor.

The Petitioner settled her wrongful death claim with the tortfeasors and the tortfeasors' insurance carrier on January 12, 1996. Travelers approved this settlement and within 60 days, sent the Petitioner a check for the UM policy limits of $200,000.00. (R. Vol. I, pp. 33-37, 92). Thus, Travelers paid the UM policy limits to the Petitioner within 60 days after the petitioner settled the underlying wrongful death case with the tortfeasors.

Travelers contends that it paid the UM policy limits before any legitimate 60 day window period expired under Section 624.155(2)(a), Florida Statues. Travelers

is not aware of any decision in Florida where a court has upheld a first party UM cause of action for bad faith failure to settle under Section 624.155, Florida Statues, when the 60 day notice letter under Section 624.155(2)(a), Florida Statues was allowed to be sent to the UM insurer before the Plaintiff settled the underlying claim with the tortfeasor and the tortfeasor's liability insurance carrier.

In State Farm Mutual Auto. Insurance Company v. Laforet, 658 So.2d 55 (Fla. 1995), the facts showed that Veronica Laforet was injured in an automobile accident in 1986 and she and her husband filed suit against the tortfeasor for damages. The tortfeasors' insurer, Travelers Insurance Company, then tendered its liability policy limits of $10,000.00. Thereafter, the Laforets' sought to recover UM benefits from their UM carrier, State Farm.

In Woodall v. Travelers Indemity. Company, 699 So.2d 1361 (Fla. 1997), Ronnie Woodall was injured when his motor vehicle was struck from behind by a motor vehicle operated by John Stewart. Almost six years after the accident, Mr. Stewart's liability insurance carrier tendered its $10,000.00 liability limits to Ronnie Woodall and his wife. It was after this point that the Woodalls sought UM benefits from their UM insurer, Travelers, that a dispute arose over the payment of these benefits, and that suit was filed against Travelers for recovery of uninsured motorist benefits.

In Imhoff v. Nationwide Mutual Insurance Company, 643 So.2d 617 (Fla. 1994), Imhoff, with the approval of Nationwide Mutual Insurance Company, settled with the tortfeasors for the tortfeasors' liability policy limits of $10,000.00. At a later date, Imhoff made a claim against Nationwide's underinsured coverage and tried to settle. Imhoff alleged that Nationwide failed to respond. Imhoff then filed a notice of insured's violation under Section 624.155, Florida Statutes.

In Opperman v. Nationwide Mutual Fire Insurance Company, 515 So.2d 263 (Fla. 5th DCA 1986), rev. denied, 523 So.2d 578 (Fla. 1988), the plaintiff/UM insureds alleged (1) that their insurer knew the severe extent of their injuries; (2) that the value of their claim was greatly in excess of the $40,000.00 offered by the UM insurer; (3) that liability and the no-fault threshold were not issues; and (4) that the insurer asserted a non-viable seatbelt defense. The facts of the case showed, however, that the tortfeasor's liability policy limits had already been paid to the Plaintiffs before the plaintiffs sought relief under their UM policies and before the UM claim was filed by the Plaintiff against the UM carrier for bad faith. It was in this context that the court found that the facts alleged by the plaintiff were sufficient to state a cause of action for first-party bad faith under Section 624.155(1)(B)(1), Florida Statutes. The court does not discuss when the plaintiff filed the notice of violation letter or the purpose of the 60 day cure period under Section 624.155,

Florida Statutes.

In Brookins v. Goodson, the claim arose out of the wrongful death of the insured's minor daughter who was killed when she was a passenger in an uninsured vehicle. The tortfeasor had liability policy limits of $10,000.00. The plaintiff had UM policy benefits of $100,000.00. The decision seems to imply that the tortfeasor's liability policy limits were paid before the plaintiff made a demand for the payment of UM benefits. The decision also seems to imply that the civil remedy notice of violation letter which alleged the UM insurer's bad faith failure to settle for the policy limits was sent after the plaintiff settled the underlying wrongful death claim with the tortfeasor for the liability insurance policy limits of $10,000.00.

In Talat Enterprises, Inc. v. Aetna Casualty & Sur. Company, 952 F. Supp. 773 (M.D. Fla. 1996), the court held that under Section 624.155, Florida Statutes, the failure to settle a cause of action does not accrue until after the conclusion of the underlying litigation or arbitration. Under the facts in Talat, the Court held that Talat's cause of action of bad faith did not arise until February 3, 1995, when the arbitrator's returned an award in favor of Talat. On March 15, 1995, approximately one month and twelve days after this arbitration award, Talat issued a statutory notification of intent to pursue a bad faith claim against Aetna pursuant to Section 624.155, Florida Statutes. The Court held that 60 days after Talat's filing of the

notice of its bad faith claim would be May 16, 1995, and that no action would lie under Section 624.155, Florida Statutes, if the circumstances giving rise to the violation were corrected by May 16, 1995. Aetna timely paid the damages on or about March 3, 1995, and corrected the circumstances giving rise to the violation well before the 60 day cure had expired. Thus, the court held that, as a matter of law, no action could lie against Aetna for not attempting in good faith to settle claims.

The court also stated in Talat as follows:

> One might fairly infer from language in **Brookins** that an insurer may escape liability for failure to attempt to settle in good faith by paying the policy limits before the 60 day "window" expires... 952 F.Supp. 773 at 766 and 777.

Similarly, in Allstate Insurance Company v. Clohessy, 1998 WL 839818 (M.D. Fla.), the court held that the filing of a 60 day notice of insurer violation required by Section 624.155(2)(a), Florida Statues, is a condition precedent that must be satisfied in order for one to perfect the right to sue under Section 624.155, Florida Statutes. Due to the failure of the defendant/counter-plaintiffs to comply with the condition precedent, the court found it imperative to dismiss the defendant/counter-plaintiff's counterclaim for first-party bad faith under Section 624.155(1)(B), Florida Statutes.

The practical sense of Travelers' position is supported by the record. As noted in Travelers' Motion for Summary Judgment before the trial court, the tortfeasors in the underlying wrongful death case had raised the defense of comparative negligence and the seat belt defense in their defense of the Petitioner's claim for damages. (R. 39,58) These same defenses were raised in Travelers' affirmative defenses which were a part of its Answer to the Petitioner's Complaint for breach of contract and bad faith filed herein. (R. 16) The seat belt defense and the comparative negligence of the decedent, Mr. Vest, were proper substantive defenses raised in the context of this vehicle roll-over case. The only injured party was the decedent who was not wearing a seat belt, was ejected from the vehicle, and the vehicle then fell upon the decedent. Thus, legitimate issues existed which the parties to the underlying case had to evaluate and resolve before there was a determination of the liability and damages issues by way of settlement between the Petitioner and the tortfeasors.

If the underlying case had not been settled in January of 1996 between the Petitioner and the tortfeasors, Mr. and Mrs. Adcox, and the case had gone to trial, the jury could have potentially found no fault against the tortfeasors, or the jury could have found significant comparative fault against the decedent, Dr. Vest, for the operation of his vehicle and his failure to have his seat belt on at the time of the

accident. All of these potential results could have led to a determination that the petitioner did not have a claim which exceeded the liability insurance policy limits and that petitioner did not have an underinsured motorist claim. Under these circumstances, how can the Petitioner argue that the value of this case clearly exceeded the tortfeasors' liability policy limits of $1.1 million and that Travelers had a good faith duty to pay its UM policy limits before the settlement was reached and the case resolved between the Petitioner and the tortfeasors?

The trial judge agreed with Travelers' arguments and stated in his Summary Final Judgment as follows:

> In VEST's suit filed against the tortfeasors, the torfeasors raised the defense of comparative negligence and the seat belt defense. These same defenses were raised by TRAVELERS as affirmative defenses to VEST's complaint in the instant action. The seat belt defense and the comparative negligence of VEST were proper substantive defenses raised in the case against the tortfeasors and the instant case where the only injured party was VEST who was evidently not wearing a seat belt and was ejected from the vehicle which then rolled over on VEST. Therefore, legitimate issues of liability existed in the case against the tortfeasors and the instant case which both carriers had to resolve before there was a determination of liability and the extent of damages for purposes of settlement. Because of the potential impact of these defenses with respect to any verdict that may have been realized in the suit against the tortfeasors, it cannot be said that the value of VEST's case against the tortfeasors was in excess of $1,100,000.00 and therefore TRAVELERS had a duty to pay its U.M. limits before any settlement or verdict was realized in the suit by VEST against the tortfeasors.

In effect, the trial judge ruled as a matter of law that the petitioner had raised no genuine issue of bad faith under the undisputed facts of this case, that there were plausible reasons for Travelers' delay in paying the UM benefits besides bad faith, and that Travelers had good cause under the facts of this case to wait until the plaintiff resolved her claim with the tortfeasors and the tortfeasors' liability carrier before having any duty under Section 624.155, Florida Statutes, to pay any UM benefits under penalty of bad faith. This ruling of law by the trial judge as to the petitioner's bad faith claim was not assigned as error in petitioner's appeal to the First District and the First District did not reverse this finding by the trial judge in any way in its decision below. Thus, Travelers submits that this finding by the trial judge is the law of the case in this action. Travelers contends that the decision of the First District and the trial court's Summary Final Judgment should be upheld on this ground alone. See, Clauss v. Fortune Insurance Company, 523 So.2d 177 (Fla. 5th DCA 1988); Avila v. Travelers Ins. Companies, 481 F. Supp. 431 (C.D. Cal. 1979); Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976); rev.denied, May 10, 1976; Bueno v. Khawly, 677 So.2d 3 (Fla. 1st DCA 1996), rev. denied 1996; and Williams v. Minneola, 619 So.2d 983 (Fla. 5th DCA 1993), rev. denied 1993.

CONCLUSION

Accordingly, based upon the foregoing arguments, Respondent, Travelers Insurance Company, respectfully requests the court to affirm the decision of the First District below which upheld the trial court's Summary Final Judgment, and deny Petitioner's Motion for Attorney's Fees.

DATED this 9th day of February, 1999.

CECIL L. DAVIS, JR.
Florida Bar No.: 0242721

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 11240
Tallahassee, Florida 32302
(850) 681-0411
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by U.S. Mail, upon **JAMES F. McKENZIE, ESQUIRE,** McKenzie & Soloway, P.A., 905 East Hatton Street, Pensacola, Florida 32503 this 9th day of February, 1999.

CECIL L. DAVIS, JR.