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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.

INITIAL BRIEF OF PLAINTIFF/PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

On February 25, 1995, Thomas Vest died as the result of injuries sustained in a motor vehicle accident (R. Vol. I, pp. 1-2). Dr. Vest, survived by a wife and three minor children, was insured by Travelers for underinsured motorist coverage (R. Vol. I, p. 2). On March 28, 1995, Mrs. Vest requested authorization to accept the tortfeasor's policy limits and demanded that Travelers pay its policy limits (1st Dist. decision, p.2). After receiving no offer from Travelers, Mrs. Vest filed a Civil Remedy Notice of Violation against Travelers with the Department of Insurance pursuant to F.S. §624.155, alleging bad faith (R. Vol. I, pp. 6-15). Travelers responded that it had no duty to pay the claim until resolution of the claim with the tortfeasor (R. Vol. I, pp. 39-44).

Mrs. Vest then sued for underinsured motorist benefits and violation of the Unfair Claims Practices Act (R. Vol. I, pp. 1-4). Travelers filed a motion for summary judgment arguing that neither the underinsured

motorist claim nor the bad faith could be maintained because the underlying tort claim had not been resolved (R. Vol. I, pp. 22-24). A predecessor judge denied the motion for summary judgment and stayed the bad faith count until resolution of the underinsured motorist count (R. Vol. I, pp. 29-30).

Mrs. Vest settled with the tortfeasor on January 12, 1996, with Travelers' approval (R. Vol. I, pp. 33-37). On March 12, 1996, Travelers unilaterally paid its $200,000.00 underinsured limits to Mrs. Vest without detriment to her right to pursue her lawsuit (R. Vol. I, pp. 87-92).

The trial court thereafter granted Travelers' second summary judgment motion ruling as follows according to the District Court below (1st Dist. decision, p. 4):

> "The trial court entered summary final judgment in favor of Travelers. The court ruled that appellant was not legally entitled to recover UM benefits from Travelers until she had settled with the tortfeasors' carrier for liability policy limits, the suit against

Travelers for bad faith was premature, and Travelers duly paid its UM policy limits upon appellant's settlement with the tortfeasors."

On appeal, the First District Court of Appeal found that, although the Supreme Court's ruling in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), ". . . squarely supports" Mrs. Vest's position, the decisions in Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So.2d 1289 (Fla. 1991), Imhof v. Nationwide Mutual Insurance Company, 643 So.2d 617 (Fla. 1994) and Woodall v. Travelers Indemnity Company, 699 So.2d 1361 (Fla. 1997), controlled and affirmed the summary judgment. Timely Motions for Rehearing and Certification were denied by the District Court of Appeal on June 4, 1998.

This Court accepted jurisdiction by Order dated December 18, 1998.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN INSURER CANNOT VIOLATE THE PROVISIONS OF SECTION 624.155, FLORIDA STATUTES, BY FAILING TO NEGOTIATE AN UNDERINSURED MOTORIST CLAIM IN GOOD FAITH BEFORE RESOLUTION OF THE CLAIM AGAINST THE TORTFEASOR

SUMMARY OF ARGUMENT

Mrs. Vest sued Travelers for underinsured motorist benefits for the death of her husband and bad faith pursuant to F.S. §624.155. Subsequent to settlement for the tortfeasor's policy limits with Travelers' consent, Travelers unilaterally paid Mrs. Vest its policy limits without detriment to the continuation of her lawsuit. The trial court granted summary final judgment to Travelers finding that Mrs. Vest could not establish bad faith because Travelers had no obligation to pay underinsured motorist benefits until Mrs. Vest had resolved her claim against the tortfeasor. The District Court of Appeal affirmed holding that although Plaintiff had a right to sue for underinsured motorist benefits before resolution of the tort claim under State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), the decision in Woodall v. Travelers Indemnity Company, 699 So.2d 1361 (Fla. 1997), 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), stood for the proposition that an underinsured motorist insurer could not be in bad faith for failure to pay underinsured motorist benefits until the underlying tort claim was resolved.

Although this Court held in Blanchard and Imhof that the cause of action for bad faith does not accrue until conclusion of the claim for underinsured motorist benefits, neither case held that an insurer was insulated from being in bad faith for failure to negotiate in good faith until such time as the tort claim was resolved. Therefore, the district court misapplied those cases. Additionally, neither of those cases held that the conduct of an insurer could not be bad faith under Section 624.155 of the Florida Statutes, if the conduct was before resolution of the underinsured motorist claim or the claim against the tortfeasor. Since the statute itself requires the nature of the bad faith conduct to be specified in the notice of insurer violation (which is also a

precondition for accrual of the cause of action), F.S. §625.144(2) the holding of the First District is contrary to the statute.

This Court's holding in State Farm Mutual Automobile Insurance Company v. Laforet, 658 So.2d 55 (Fla. 1995), is also in conflict with the holding of the District Court below. In that case this Court affirmed a bad faith verdict under F.S. §624.155 based upon the failure to pay an underinsured motorist claim by an insurer denying coverage. Since obviously the conduct of the insurer in denying coverage occurred before resolution of the coverage issue through a lawsuit with the insured (accrual of the bad faith cause of action), this Court recognized that conduct occurring before accrual is actionable.

Further, in Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA), rev. den., 648 So.2d 724 (Fla. 1994), the Fourth District, on virtually identical facts, found that it was error to dismiss a complaint under Imhof and Blanchard because the payment of the

underinsured policy limits by the insurer was equivalent to a determination of the insured's damages for purposes of the bad faith claim under section 624.155, Florida Statutes.

ARGUMENT

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN INSURER CANNOT VIOLATE THE PROVISIONS OF SECTION 624.155, FLORIDA STATUTES, BY FAILING TO NEGOTIATE AN UNDERINSURED MOTORIST CLAIM IN GOOD FAITH BEFORE RESOLUTION OF THE CLAIM AGAINST THE TORTFEASOR

This underinsured motorist claim arose as the result of the death of Thomas Vest, a 41 year old dentist, in an automobile crash on February 25, 1995 (R. Vol. I, pp. 1-2). Dr. Vest, survived by a wife and three minor children was insured by Travelers for underinsured motorist benefits (R. Vol. I, p. 2). On March 28, 1995, Mrs. Vest advised Travelers of the tender of policy limits by the tortfeasor's insurer, requested authorization to accept those limits, and demanded Travelers pay its underinsured limits. After no offer was made by Travelers, Mrs. Vest filed and served a Civil Remedy Notice of Violation against Travelers pursuant to F.S. §624.155, alleging bad faith (R. Vol. I, pp. 6-15). Travelers responded that it had

no duty to pay the claim until resolution of the claim with the tortfeasor (R. Vol. I, pp. 39-44).

Because of inability to resolve certain property damage issues with the tortfeasor's insurer, suit was filed against the tortfeasor for damages from the accident (R. Vol. I, pp. 33-37). Suit was also filed against Travelers for underinsured motorist benefits and violation of F.S. §624.155 (R. Vol. I, pp. 1-4). [1] In January, 1996, Mrs. Vest settled the claims against the tortfeasor for the liability policy limits plus an additional amount associated with the bad faith handling of the property damage issues (R. Vol. I, pp. 33-37). By letter dated March 12, 1996, Travelers tendered a check for its underinsured policy limits without detriment to Plaintiff's right to pursue the lawsuit which tender Plaintiff accepted (R. Vol. I, pp. 87-92).

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[1] Upon an earlier motion for summary judgment, a predecessor judge had denied summary judgment but did stay the count for bad faith pending resolution of the count for underinsured benefits. (R. Vol. 1, pp. 29-30).

The Defendant, thereafter, moved for summary judgment which the trial judge granted ruling that, because the Plaintiff was not legally entitled to recover underinsured motorist benefits from Travelers until such time as the claim against the tortfeasor was resolved, the payment by Travelers promptly after settlement with the tortfeasor insulated Travelers from liability under F.S. §624.155. On appeal, the First District found that State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), supported Plaintiff's position that she had the right to pursue the underinsured motorist claim before resolution of the claim against the tortfeasor. However, the First District affirmed the summary judgment finding that, because the claim for bad faith under F.S. §624.155 does not accrue until the determination of the extent of damages sustained as the result of the negligence of the underinsured tortfeasor, Travelers could not have been in bad faith in this case citing 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).

The law of Florida is clear that the Plaintiff has the right to pursue a claim for underinsured motorist benefits on the date of the accident since the cause of action accrues on that date. Kilbreath, supra, at 633-34. However, the holding of the District Court in this case nullifies that right by finding that the insurer has no obligation to pay that claim in good faith pursuant to F.S. §624.155 until resolution of the extent of damages caused by the negligence of the tortfeasor through resolution of the claim against the tortfeasor. The District Court in so holding misapprehended the decision of this Court in Blanchard, supra; Imhof, supra; and by confusing accrual of the cause of action with the prohibited conduct supporting the cause of action.

In Imhof and Blanchard, this Court established that the cause of action for violation of F.S. §624.155

does not accrue until resolution of the underlying insurance claim (underinsured motorist claim in this case). However, neither case conditioned accrual of the cause of action upon resolution of the claim against the tortfeasor. Therefore, the District Court incorrectly applied those decisions.

Even if the District Court's decision were interpreted to be consistent with Imhof and Blanchard as to accrual, neither of those cases supports the District Court's decision. Neither case holds that, the conduct of the insurer in refusing to negotiate the underinsured motorist claim in good faith prior to accrual of the cause of action, is not actionable under F.S. §624.155. Since the conduct representing a violation of the statute must necessarily occur before conclusion of the underinsured motorist claim, no cause of action would ever exist for violation of the statute under that holding.

A first party bad faith action under section 624.155, Florida Statutes, is completely statutory.

State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So.2d 55, 59 (Fla. 1995). As pointed out by this Court in Laforet, supra, the statute allows an insured to sue its underinsured carrier for bad faith failure to settle pursuant to section 624.155(1)(b)(1). That statutory subsection provides as follows:

> "(1) Any person damaged . . .
>
> * * *
>
> (b) By the commission of any of the following by an insurer:
>
> 1. 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 interest; . . ."

In that case this Court recognized that the insurer's conduct in not settling the underinsured motorist case would support the bad faith verdict against the insurer even though the insurer's refusal to settle was based upon a denial of coverage which was later resolved against the insurer. The conduct constituting the

statutory violation in that case related to the denial of coverage. Since the cause of action for bad faith did not "accrue" until the coverage question was resolved, obviously the actionable conduct in Laforet occurred before accrual of the cause of action.

Moreover, F.S. §624.155 imposes no requirement that the conduct resulting in the statutory violation occur at any specific time. The statutory requirement is that the insurer fail to 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. . ." The statute does require as a precondition to accrual that notice of "violation" be given to the insurer and the Department of Insurance Commissioner as follows (F.S. §624.155(2)):

> "(2)(a) As a condition precedent to bringing an action under this section, the department and the insurer must have been given 60 days' written notice of the violation. . .

> (b) The notice shall be on the form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation."

As can be seen from the above quoted statutory language, the cause of action cannot accrue until the precondition is met. Part of that precondition is to identify the statutory violation and specify the facts showing a violation. The statute also mandates that the insurer be given sixty (60) days to cure the violation. Therefore, the insurer's bad faith conduct must not only occur before accrual of the cause of action, but also must be specified in the pre-accrual

notice. Obviously, the statute contemplates that the actionable conduct will occur before accrual.

Although Mrs. Vest did not have a right to pursue the count alleging violation of section 624.155 of the Florida Statutes until after the resolution of the underinsured motorist claim against Travelers, the unilateral payment by Travelers of its policy limits in this case was the final act allowing accrual. Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA), rev. den., 648 So.2d 724 (Fla. 1994). In Brookins, the Fourth District held under similar facts as follows (supra at 112):

> "We hold that the payment of the policy limits by the insurer [underinsured carrier] here is the functional equivalent of an allegation that there has been a determination of the insured's damages. It satisfies the purpose for the allegation - to show that the insured has a valid claim."

The same is true in this case. The unilateral payment of the policy limits by Travelers is an acknowledgment

that Mrs. Vest's claim was worth in excess of the tortfeasor's policy limits. It is up to the trier of fact to now determine if the delay in payment of the UM limits was in bad faith.

Moreover, assuming arguendo that Plaintiff's claim for violation of section 624.155 of the Florida Statutes had not yet accrued because no judicial finding had been made of the extent of damages caused by the underinsured motorist, it was still error for the trial court to find, as a matter of law, that Plaintiff could never establish a violation of the statute on the basis that the underinsured motorist carrier has no duty to pay the claim until resolution of the claim against the tortfeasor. As pointed out above, this Court's holdings in Imhof and Blanchard do not require resolution of the claim against the tortfeasor for accrual of the cause of action. Rather, those decisions require resolution of the extent of damages by a resolution of the underinsured motorist claim. They did not change the longstanding law of

Florida that the Plaintiff can pursue his underinsured motorist claim without having resolved the claim against the tortfeasor. Woodall v. Travelers Indemnity Company, 699 So.2d 1361 (Fla. 1997); Kilbreath, supra.

Nevertheless, even assuming that the Blanchard and Imhof requirements were not met by the unilateral payment of the policy limits by Travelers, the count for damages under the underinsured motorist provisions of the policy was still pending. Travelers' payment of the underinsured limits was without prejudice to the Plaintiff to pursue her lawsuit. The Defendant cannot have its cake and eat it too. Florida law prohibits such "gotcha" litigation. E.g., Insua v. Chantres, 665 So.2d 288 (Fla. 3d DCA 1996); Glantzis v. State Automobile Mutual Ins. Co., 573 So.2d 1049 (Fla. 4th DCA 1991); American Eastern Corp. v. Henry Blanton, Inc., 382 So.2d 863 (Fla. 2d DCA 1980). Plaintiff should not be prohibited from trying the underinsured case and establishing the extent of damages even if this Court disapproves of the holding in Brookins v.

Goodson, supra, since Plaintiff has not released the underinsured motorist claim in accordance with the Defendant's "no strings attached" payment. In fact, Plaintiff should have the option to proceed with trial on that claim to establish the extent of damages or the option to try damages as a portion of the bad faith trial.

In summary, the decision of the District Court of Appeal affirming summary judgment misapplies this Court's decisions in Imhof, supra, and Blanchard, supra; is contrary to this Court's holdings in Woodall, supra and Kilbreath, supra; and is directly contrary to the Fourth District's decision in Brookins, supra. Further, the District Court has erroneously confused the conduct supporting a cause of action with the concept of accrual of the cause of action such that no conduct of an insurer could be ever be actionable under section 624.155 of the Florida Statutes.

CONCLUSION

Based upon the foregoing arguments, the decision of the District Court of Appeal below should be reversed with directions to reverse the summary judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies of the foregoing have been provided to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1925, by United Parcel Service Overnight Delivery. A copy of the foregoing has been furnished to Cecil L. Davis, Jr., Esquire and R. William Roland, Esquire, Post Office Box 11240, Tallahassee, Florida, 32302-0229, by United States First Class Mail, properly addressed and postage prepaid on this the 11th day of January, 1999.

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