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.

JURISDICTIONAL 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 (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.

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.

This Court in Woodall, supra, found that an insurer could not disavow "no action" and "exhaustion" clauses in its policy even though those clauses violated public policy and, therefore, the statute of limitations on an underinsured motorist claim was tolled until resolution of the tort claim. That case did not hold that an underinsured carrier could not be in bad faith for failing to pay underinsured motorist benefits until resolution of the tort claim. Additionally, 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 these cases creating conflict. Pender v. State, 700 So.2d 664 (Fla. 1997).

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. The decision of the district court below expressly and directly conflicts with Brookins, supra.

ARGUMENT

INTRODUCTION

The Plaintiff, Mrs. Vest, sued the Defendant, Travelers, for underinsured motorist benefits and for bad faith pursuant to Section 624.155 of the Florida Statutes for the wrongful death of her husband in an automobile accident (R. Vol. I, pp. 39-44). The Defendant had initially resisted the underinsured motorist claim asserting that it had no obligation to pay underinsured motorist benefits until such time as Mrs. Vest settled with the tortfeasor. Mrs. Vest had in response filed a Civil Remedy Notice of Insurer Violation (R. Vol. 1, pp. 6-15). Subsequent to suit being filed, Travelers gave consent to settling with the tortfeasor and thereafter unilaterally paid its underinsured motorist limits without detriment to Mrs. Vest continuing with

the lawsuit (R. Vol. 1, pp. 87-92). Travelers then moved for summary judgment arguing that it could not have acted in bad faith since it had no obligation to pay its underinsured motorist benefits until Mrs. Vest concluded her claim against the tortfeasor. The trial court accepted Travelers argument and granted summary final judgment (1st Dist. decision p. 4).

The District Court of Appeal, First District, affirmed finding that, although Mrs. Vest had a right to proceed immediately against the underinsured motorist carrier without first resolving the claim with the tortfeasor, Mrs. Vest still did not have a claim against Travelers under Section 624.155 of the Florida Statutes because Travelers could not be in bad faith until such time as the claim against the tortfeasor concluded citing 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).

This Court's conflict jurisdiction may be established by showing a misapplication by the District Court of Appeal of the law established in another decision of this Court. Pender v. State, 700 So.2d 664 (Fla. 1997); Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039 (Fla. 1982); Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). The district court decision in this case misapplied several decisions of this Court and directly conflicts with decisions of this Court and other district courts of appeal.

ISSUE I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT 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); IMHOF v. NATIONWIDE MUTUAL INSURANCE COMPANY, 643 SO.2D 617 (FLA. 1994); OR STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. KILBREATH, 419 SO.2D 632 (FLA. 1982) BY MISAPPLYING THE PRINCIPLES OF LAW IN THOSE CASES

The decision of the district court below found that this Court's decision in Woodall v. Travelers Indemnity Company, supra, authorized Travelers to refuse payment of the underinsured motorist benefits until such time as Mrs. Vest settled with the tortfeasor thereby obviating any bad faith as a matter of law. The district court stated as follows (1st Dist. decision, p. 5):

> ". . . the effect of the no-action and exhaustion clauses was to toll the statute of limitations until the insured settled the claim against the tortfeasor's liability carrier. . . ."

The facts in Woodall were materially different from the facts in this case and the issues were entirely different. The insured in Woodall had sued Travelers for underinsured motorist benefits more than five years after the date of the accident. The lawsuit was dismissed based upon expiration of the statute of limitations and the dismissal was affirmed by the First District. The insurance policy in that case (identical to the policy in this case) contained no-action and exhaustion clauses that provided that no payments were required under the uninsured motorist coverage until the claim had been resolved against the tortfeasor(s). Although this Court found that such clauses

violated "public policy" and were invalid, it held that Travelers could not disavow the provisions of its own policy. Therefore, the effect of the no-action and exhaustion clauses was to toll the statute of limitations for the insured to sue his insurer for underinsured motorist benefits until such time as the insured resolved the claim against the tortfeasor. Woodall in no way held that an insurer, whose policy contains no-action and exhaustion clauses, cannot be in bad faith under Section 624.155 of the Florida Statutes, for failing to negotiate an underinsured motorist claim until such time as its insured concludes the claim against the tortfeasor. This misapplication of the law in the Woodall creates direct and express conflict with this Court's decision in Woodall. Pender v. State, supra.

The District Court of Appeal also found that the decisions in Blanchard v. State Farm Mutual Automobile Insurance Company, supra, and Imhof v. Nationwide Mutual Insurance Company, supra, controlled over this Court's holding in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), that an insured has a right to pursue the underinsured motorist claim before resolution of the claim against the tortfeasor. The District Court acknowledged that ". . . Kilbreath squarely supports appellant's position." However, the Court found that because Imhof and Blanchard held that the action for bad faith damages required a prior determination of the extent of damages suffered as the result of the negligence of the tortfeasor, that the insurer cannot commit bad faith until after

resolution of the claim against the tortfeasors. Although Blanchard and Imhof do hold that a resolution of the underlying claim for underinsured motorist benefits is a prerequisite to the accrual of the cause of action for bad faith under section 624.155, neither case holds that the conduct of the insurer before accrual cannot constitute bad faith nor that the insurer cannot be in bad faith until such time as the claim against the tortfeasor is concluded. The misapplication of the decisions in Kilbreath, Blanchard and Imhof by the District Court of Appeal below creates direct and express conflict with those decisions. Gibson v. Avis Rent-A-Car Systems, Inc., supra.

ISSUE II

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL FIRST DISTRICT, BELOW CONFLICTS WITH THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN BROOKINS v. GOODSON, 640 SO.2D 110 (FLA. 4TH DCA), REV. DEN., 648 SO.2D 724 (FLA. 1994)

The First District below held in effect that the unilateral payment of the underinsured policy limits by Travelers in this case precludes a determination of the extent of tort damages and, therefore, no cause of action for bad faith can accrue. In Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA), rev. den., 648 So.2d 724 (Fla. 1994), after the insurer failed to respond to a settlement demand, the insured filed a Civil Remedy Notice of Violation pursuant to Section 624.155, Florida Statutes, alleging bad faith. The insurer responded that the claim was premature. The insured sued and, thereafter, accepted the policy limits, allegedly preserving his right to pursue the bad faith action. The trial court dismissed the bad faith suit because the

underlying underinsured motorist claim was settled without a trial. The District Court of Appeal, Fourth District, reversed finding that although Imhof required an allegation that there has been a determination of damages to state a cause of action under Section 624.155, Imhof did not require that the damages be determined by litigation. The Fourth District held (Brookins, supra at 112):

> "We hold that the payment of the policy limits by the insurer 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 had a valid claim."

The decision of the District Court of Appeal, First District, below expressly and directly conflicts with the decision of the District Court of Appeal, Fourth District in Brookins v. Goodson, supra.

CONCLUSION

Conflict with the above cited decisions has been demonstrated. Jurisdiction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 5 copies of the foregoing has been provided to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1925, by U.P.S. 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 7th day of July, 1998.

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Appendix

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.

APPENDIX OF PLAINTIFFS/PETITIONERS

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IN THE DISTRICT COURT OF APPEAL 215

FIRST DISTRICT, STATE OF FLORIDA

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

Appellant,

v.

TRAVELERS INSURANCE COMPANY,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 96-4651

Opinion filed January 21, 1998.

An appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge.

James F. McKenzie of McKenzie & Soloway, P.A., Pensacola, for Appellant.

Cecil L. Davis, Jr. of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tallahassee, for Appellee.

JOANOS, J.

In 1995, Thomas Vest was killed in an auto accident involving an underinsured motorist. The decedent was insured by Travelers

Insurance Company (Travelers), with uninsured/underinsured (UM) motorist coverage in the amount of $200,000.

On March 28, 1995, appellant's counsel notified Travelers that State Farm, the tortfeasor's insurer, had tendered its policy limits of $1.1 million in settlement of the Vest wrongful death claim against the tortfeasors. Appellant's counsel requested authorization to accept those limits, and enclosed Dr. Vest's 1992 and 1993 tax returns. The letter further states:

> As you can see, this claim is worth in excess of Three Million Dollars ($3,000,000.00). We, therefore, hereby demand that Travelers pay its $200,000.00 in underinsured motorist limits.

On May 30, 1995, appellant filed a Civil Remedy Notice of Insurer Violation with the Department of Insurance, with copies to Travelers in Hartford, Connecticut, and Travelers in Tampa. Service was by certified mail, return receipt requested.

On August 9, 1995, appellant filed suit against Travelers. Count I of the complaint alleged that plaintiff had made demand upon Travelers to settle the underinsured motorist claims under decedent's policy with Travelers, but the parties had not agreed to a settlement. Count II alleged that Travelers had acted in bad faith in failing to pay the policy limits of plaintiff's policy, that plaintiff had filed the 60-day written notice pursuant to section 624.155(1)(b)(1), and the 60 days had elapsed without settlement.

Travelers filed an answer and affirmative defenses, alleging decedent's comparative negligence with respect to operation and maintenance of his vehicle, and his failure to wear an available and operational seat belt. On November 2, 1995, Travelers filed a motion for summary judgment, on grounds that the complaint failed to allege there had been a determination as to the extent of appellant's damages; and appellant had not settled her claim with the UM tortfeasor and had filed an action against the third-party tortfeasor. Alleging no UM claim had been perfected, Travelers asserted entitlement to summary final judgment as a matter of law.

At some point, Travelers gave written approval to settle the liability claim against the tortfeasors in accordance with section 726.727(6)(a), Florida Statutes. An order approving the settlement was entered by the circuit court on January 12, 1996. On February 22, 1996, Travelers offered appellant its policy limits of $200,000.00. On March 12, 1996, Travelers sent appellant a check for $200,000.00, the UM policy limits in this case.

Travelers again filed motion for summary judgment. Travelers argued:

> there was no duty on the part of Travelers to tender its UM policy limits until the plaintiff had reached its settlement with the underlying tortfeasor and the tortfeasor's liability insurance carrier had tendered its liability policy limits to the plaintiff. The plaintiff's complaint for bad faith focuses entirely on acts of Travelers before the plaintiff ever settled with the tortfeasors and before Travelers ever had a duty to pay the UM benefits.

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, appellant argues that the trial court erred in ruling that a cause of action in favor of an insured against his insurer for underinsured motorist benefits does not accrue until resolution of the claim against the tortfeasor. Appellant relies upon State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982), to support this proposition.

We concede that Kilbreath squarely supports appellant's position. However, the issue upon which this case turns is not when appellant could have sued appellee for underinsured motorist benefits, but rather, whether appellant had a cause of action for bad faith under section 624.155, Florida Statutes. On this pivotal point, our situation is controlled by 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). Those cases hold that an action for bad faith damages requires a prior determination of the extent of damages suffered by the plaintiff as a result of the uninsured (or underinsured) tortfeasor's negligence. Consequently, we affirm.

In reaching this result, we are not unmindful of the dilemma that can occur in a case because of the principle set out in Kilbreath, that the cause of action for an uninsured/underinsured motorist claim arises on the date of the accident, and the principle pronounced in Blanchard and Imhof concerning when an action for bad faith accrues. Our decision in this case is governed by Blanchard and Imhof.

A similar concern was addressed by this court in Woodall v. Travelers Indemnity Company, 695 So. 2d 735 (Fla. 1st DCA 1996). The Woodall panel certified a question to the Florida Supreme Court concerning the applicability of the statute of limitations to a UM policy which contained a no-action/exhaustion clause, providing that payment would be made only after the limits of liability had been used up under all applicable bodily injury liability policies. The supreme court held that the holding in Kilbreath still applies to underinsured motorist claims, and the effect of the no-action and exhaustion clauses was to toll the statute of limitations until the insured settled the claim against the tortfeasor's liability carrier. See Woodall v. Travelers Indemnity Company, 699 So. 2d 1361, 1364-1365 (Fla. 1997).

Accordingly, we affirm the grant of summary final judgment in favor of Travelers.

BOOTH and WOLF, JJ., CONCUR.