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 RESPONDENT

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

FOWLER, WHITE, GILLEN, BOGGS,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Travelers submits that the issue before the district court below was whether Petitioner had a valid claim against Travelers for "bad faith" failure to settle a UM claim under Section 624.155, Florida Statutes. The issue below was not when the Petitioner could have initially sued Travelers for her underlying breach of contract claim for underinsured motorist benefits.

The decision of the district court below does not expressly and directly conflict or misapply the decisions in Woodall v. Travelers Indemnity Company, 699 So.2d 1361 (Fla. 1997), Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So.2d 1289 (Fla. 1991), Imhof v. Nationwide Mutual Insurance Co., 643 So.2d 617 (Fla. 1994), and State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982). The district court referred to the Woodall decision only to address the statute of limitations dilemma that could occur in a UM breach of contract case when the statute of limitations begins to run on the date of the accident and the UM policy provides under a UM "exhaustion clause" that as a condition precedent to bringing the UM cause of action, the limits of liability coverage must be used up under all applicable bodily injury liability policies. Unlike the district court decision below, the Woodall decision does not address itself to a bad faith claim under Section 624.155, Florida Statutes.

Further, the district court below did not misapply the decisions in Blanchard, Imhof, and State Farm v. Kilbreath. The lower court referred to the Kilbreath decision for the principle that Petitioner had the right to pursue her underinsured motorist breach of contract claim against Travelers before resolution of the underlying tort claim against the tortfeasor. The court did not refer to the Kilbreath decision for any interpretation of Section 624.155, Florida Statutes, as the Kilbreath decision does

not address itself to the interpretation of that statute. The court referred to the Blanchard and Imhof decisions for its holding that the Petitioner did not have a cause of action for bad faith under Section 624.155, Florida Statutes.

Finally, the district court decision below did not expressly and directly conflict with Brookins v. Goodson, 640 So.2d 110(Fla. 4th DCA 1994). The district court below and the court in Brookins v. Goodson, supra both relied upon the Blanchard and Imhof decisions for their holdings concerning bad faith claims under Section 624.155, Florida Statutes. Further, the facts of the case at bar do not involve substantially the same facts as those found in Brookins v. Goodson, supra.

ARGUMENT

ISSUE ONE:

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, CONFLICTS WITH THE DECISIONS OF THIS COURT IN WOODALL v. TRAVELERS INDEMNITY CO., 699 So.2d 1361 (Fla. 1997); BLANCHARD v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 575 So. 2d 1289 (Fla. 1981); IMHOF v. NATIONWIDE MUTUAL INSURANCE CO., 643 So.2d 617 (Fla. 1994); or STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. KILBREATH, 416 So.2d 632 (Fla. 1982) BY MISAPPLYING THE PRINCIPLES OF LAW IN THOSE CASES.

The jurisdiction of the Supreme Court because of alleged conflicts depends upon whether the conflict between decisions is express and direct and not upon whether the conflict is inherent or implied. Department of Health and Rehabilitation Services v. National Adoption Counseling, 498 So. 2d 888 (Fla. 1986). Further, the Supreme Court's jurisdiction to review decisions of district courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a law previously announced by the Supreme Court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975).

As a brief introduction, Travelers submits that the issue before the district court below was whether Petitioner had a valid claim against Travelers for "bad faith" failure to settle an underinsured motorist claim under section 624.155, Florida Statutes. The issue below was not when the Petitioner could have initially sued Travelers for her underlying breach of contract claim for underinsured motorist benefits.

Petitioner argues in her brief on jurisdiction that "[the decision of the district court below found that this Court's decision in Woodall v. Travelers Indemnity Co., 699 So.2d 1361 (Fla. 1997), 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." Respondent, Travelers Insurance Company, submits that the plain wording of the decision below indicates that the district court did not rely upon Woodall for the conclusions suggested by Petitioner. Rather, the First District Court of Appeal cited to Woodall only to address the statute of limitations dilemma that can occur in a UM breach of contract case when the statute of limitations begins to run on the date of the accident and the UM policy provides under an "exhaustion clause" that as a condition precedent to bringing the UM cause of action, the limits of liability coverage must have been used up under all applicable bodily injury liability policies. The Woodall decision resolved this concern by stating that "the language of the Travelers policy had the effect of tolling the statute of limitations for the UM breach of contract case until such time as the Woodalls received payment from Starts (the tortfeasors) liability carrier". The Woodall decision, however, does not address the issue of a bad faith UM claim under section 624.155, Florida Statutes, which is the subject of this case.

Additionally, the Woodall decision recognizes the well-established principle of law that an injured party may directly pursue a claim against it's underinsured motorist carrier, without first

having to resolve the claim against the tortfeasor's liability carrier. Id. at 1363. The district below also fully recognized this principle of law, as reflected on page 4 of its decision.

Petitioner also states in her jurisdictional brief that "Woodall in no way held that an insured, 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 it's insured concludes the claim against the tortfeasor". Petitioner goes on to argue that "[this misapplication in the law creates direct and expressed conflict with this court's decision in Woodall." Travelers would again state that the Woodall decision by this Court did not address itself to an interpretation of section 624.155, Florida Statutes, or to any UM bad faith issues and the district court below did not refer to this case in the manner as suggested by Petitioner. Thus, Travelers contends that the district court below did not misapply the law in Woodall or announce a rule of law which conflicts with the rule of law previously announced by this court in Woodall.

Petitioner further contends in her Brief on Jurisdiction that the district court below found that "the court's decisions in Blanchard v. State Farm Mutual Automobile Insurance Co., supra, and Imhof v. Nationwide Mutual Insurance Co., supra, controlled over this court's holding in State Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982), that an insured has the right to pursue the underinsured motorist claim before resolution of the claim against the tortfeasor." Travelers contends that the lower court did not reach such a conclusion. Rather, the lower court referred to the Kilbreath decision for one issue and to Imhof and Blanchard for an entirely different issue, as shown by the following statement by the district court:

> 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).

Moreover, when the district court below stated in its decision that "Kilbreath squarely supports appellant's position", it was clear that the court was referring to the Petitioner's position that she had a right to pursue her underinsured motorist breach of contract claim against Travelers before resolution of the underlying tort claim against the tortfeasor. The district court below went on to correctly state in its decision, however, that "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," in regard to the UM claim. On that pivotal point, the district court stated that the facts before it were controlled by Blanchard v. State Farm Mutual Automobile Insurance Co., supra and Imhof v. Nationwide Mutual Insurance Co., supra.

Further, Respondent contends that the district court below did not misapply the decisions in Blanchard v. State Farm Mutual Automobile Insurance Co., supra and Imhof v. Nationwide Mutual Insurance Co., supra. The district court below stated that "[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 un insured (or underinsured) tortfeasor's negligence." The district court below also held that those cases establish when an action for bad faith accrues under section 624.155, Florida Statutes, in regard to an insured or underinsured motorist claim.

In Blanchard v. State Farm Mutual Automobile Insurance Co., supra, the issue considered by the Federal trial court and certified to the Florida Supreme Court dealt with when a first party statutory cause of action for bad faith arises under section 624.155, Florida Statutes. The Florida

Supreme Court held as follows:

> If an uninsured motorist is not liable to the insured for damages arising from an accident, then the insurer has not acted in bad faith in refusing to settle the claim. Thus, an insured's underlying first-party action for insurance benefits against the insurer must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue. It follows that an insured's claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits. Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle. 575 So.2d at 1291. (Emphasis supplied).

Similarly, in Imhof v. Nationwide Mut. ins. Co., supra, the Florida Supreme Court held that an action for bad-faith damages pursuant to Section 624.155(1)(b)(1), Florida Statutes, is barred by Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla. 1991), where the complaint fails to allege that there had been a determination of the extent of appellant's damages as a result of the uninsured tortfeasor's negligence. Further, the court stated that section 624.155, Florida Statutes, promotes quick resolution of insurance claims. It was obvious, however, that the arbitration decision regarding the UM claim for benefits against Nationwide was a pivotal point to the court's resolution of the case. In the arbitration proceeding of the UM claim, the arbitrators would have determined 1) the existence of liability on the part of the underinsured tortfeasor and 2) the extent of the plaintiff's damages. It was after that point when the court held that the plaintiff was entitled to a speedy resolution of his UM claim. The court stated that "the amount of the arbitration award shows that Imhof had a valid claim. Imhof thus had a legitimate interest in the speedy resolution of his claim." Id. at 619.

Unlike the facts in Imhof, the Petitioner filed the civil remedy notice of violation letter and

bad faith action against Travelers months before the Petitioner settled the underlying wrongful death claim against the tortfeasor.

Accordingly, Travelers submits that the district court below correctly applied the decision of Blanchard and Imhof to the facts of this case. Under Blanchard and Imhof, no cause of action existed for a bad faith claim for uninsured motorist benefits until there was "a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages...." Blanchard, at 1291. It was only after that point that Petitioner had the right to initiate the bad faith action under section 624.155, Florida Statutes. Talat Enterprises, Inc. v. Aetna Caves. & Sur. Co., 952 F. Supp. 773 (M.D. Fla. 1996).

ISSUE TWO:

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, BELOW CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IN BROOKINS V. GOODSON, 640 So.2d 110 (FLA. 4TH DCA 1994), REVIEW DENIED, 648 So.2d 724.

Travelers contends that the decision of the district court below does not expressly and directly conflict with Brookins v. Goodson, 640 So.2d 110 (Fla. 4th DCA 1994), rev.denied 648 So.2d 724 (Fla. 1994). In that case, the court referred to the Blanchard and Imhof decisions, supra, and explained that these cases required that there must be a "determination" of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages before a cause of action can exist for a bad faith failure to settle on the part of the UM insurance company. The court went on to explain that in its opinion, the Supreme Court in Blanchard and Imhof, supra, did not suggest that the required resolution of the plaintiff/insured's underlying claim for damages be by trial or arbitration. The court noted that the bad faith statute, section 624.155, Florida Statutes, does not impose a requirement of a judgment as a condition precedent to a bad faith claim. However, the

court stated that the Florida Supreme Court in Blanchard, supra, required a "resolution" of some kind in favor of the insured before a bad faith cause of action could exist for failure to settle on the part of a UM carrier.

In determining whether there had been a "determination" of 1) the existence of liability on the part of the uninsured tortfeasor and 2) the extent of the plaintiff's damages, or a resolution of some kind in favor of the plaintiff/insured, the court held that the plaintiff/insured would be able to allege that there had been a "determination" of the uninsured tortfeasor's liability by virtue of the plaintiff's settlement with the underinsured tortfeasor. The court also held that resolution of the second requirement under the Blanchard and Imhof decisions, supra, which required a determination of the extent of the plaintiff's damages, could be proven by the plaintiff without litigation and could be established by virtue of the UM insurance company's earlier settlement with the plaintiff. The court held that by settling for the UM policy limits, the UM insurer had in effect conceded that the plaintiff/insured had a valid UM claim and the plaintiff/insured's damages had a minimum value set at the amount of the UM policy limits.

As noted earlier, the Supreme Court's jurisdiction to review decisions of district courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a law previously announced by the Supreme Court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975). In applying this principle to the facts of this case, Travelers submits that the district court below did not announce a rule of law that conflicted with the law previously announced by this court in Blanchard and Imhof, or by the district court in Brookins. Rather, the district court below carefully relied upon the Blanchard

and Imhof decisions for its holding, just as the Brookins court relied upon these two decisions for its holding.

In further applying the above-stated principle of appellate law in Mancini v. State, supra, Travelers submits that the facts of the case at bar are substantially different from those found in the Brookins decision. Thus, Travelers contends that the district court below did not apply a rule of law to produce a different result in a case which involved substantially the same facts as Brookins v. Goodson, supra.

Unlike the facts in the Brookins decision, the facts in the case at issue show that when the Petitioner filed her breach of contract suit against Travelers for contractual UM benefits, Travelers filed an answer and affirmative defenses, alleging the decedent's comparative negligence with respect to the operation of his vehicle and his failure to wear an available and operational seat belt. If the underlying wrongful death case between the Petitioner and the tortfeasors had not been settled in January of 1996 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 for the operation of his vehicle, or the jury could have potentially placed a great deal of comparative fault on the decedent, even 100 percent, for the failure of the decedent to have his seat belt on at the time of the accident. Therefore, as long as this underlying wrongful death suit by the Petitioner against the tortfeasors remained unsettled, it was impossible for Travelers to know if the Petitioner's claim against the tortfeasors would ever exceed the liability insurance policy limits of the tortfeasors of $1.1 million. If this wrongful death case by the Petitioner against the tortfeasors had gone to trial and a verdict had been returned for less than the tortfeasor's liability insurance policy limits of $1.1 million, there would have been no "underinsured motor vehicle" or underinsured motorist claim

whatsoever.

Additionally, the Brookins decision implies that the claim by the plaintiff against the tortfeasor was settled for the tortfeasor's liability insurance limits of $10,000.00 before the plaintiff initiated his claim for underinsured motorist benefits against State Farm and before the plaintiff filed the civil remedy notice of violation letter which gave State Farm 60 days to cure the alleged bad faith violation. In the case at bar, the plaintiff sent the civil remedy notice of violation letter and filed the bad faith action months before the Petitioner settled her underlying wrongful death suit against the tortfeasors in January of 1996 and months before there had been any determination that the Petitioner was legally entitled to recover damages from the underinsured motorists/tortfeasors. Under these circumstances, the Petitioner's civil remedy notice of violation and bad faith suit were clearly premature as to Petitioner's attempt to bring an action under Section 624.155, Florida Statutes. See, Imhof v. Nationwide Mutual Insurance Co., supra; and Talat Enterprises, Inc. v. Aetna Caves. & Sur. Co., 952 F. Supp. 773 (M.D. Fla. 1996).

Accordingly, Travelers contends that the district court decision below does not "expressly" and "directly" conflict with the decision in Brookins v. Goodson, supra.

CONCLUSION

Based on the foregoing, Respondent, Travelers Insurance Company, respectfully requests the court to deny the Petitioner's request for jurisdiction in this case.

DATED this 3rd day of August, 1998.

CECIL L. DAVIS, JR.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five copies of the foregoing has been provided via hand-delivery to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925. A copy of the foregoing has been furnished to James F. McKenzie, McKenzie & Soloway, P.A., 905 East Hatton Street, Pensacola, Florida 32503 by U.S. Mail this 3rd day of August, 1998.

CECIL L. DAVIS, JR.