D67

NO.: 93,355

IN THE SUPREME COURT OF FLORIDA

---

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

Plaintiff/Petitioner,

v.

TRAVELERS INSURANCE COMPANY,

Defendant/Respondent.

---

# REPLY BRIEF OF PLAINTIFF/PETITIONER

---

JAMES F. McKENZIE
Florida Bar Number: 163790
McKenzie & Taylor, P.A.
905 East Hatton Street
Pensacola, Florida 32503
(850) 432-2856

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## 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

The following statement of Travelers made at page 2 of its brief accurately reflects what it has argued in this case and the basis for the summary judgment in the trial court and the affirmance by the district court of appeal:

> "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 cites no case or statutory authority for the proposition that it had no "duty" to pay UM benefits or to even negotiate the UM claim until such time as Mrs. Vest resolved the claim against the tortfeasors. In fact, Travelers acknowledges that the law of Florida is clear that the insured has the right to proceed with the underinsured motorist claim before any resolution of the claim against the tortfeasor.

The practical effect of the Defendant's argument is that, although the insured has the right to sue the underinsured motorist, the underinsured motorist carrier has no "duty" to pay. That argument is illogical. If the UM carrier has no "duty" to pay, then the insured has no "right" to sue for payment.

What is obvious from Travelers' convoluted argument is that it has confused "accrual" of the cause

of action with the acts constituting the statutory violation. The real gist of its argument is that only acts of the insurer occurring subsequent to accrual of the cause of action can constitute violations of section 624.155 of the Florida Statutes. For instance, Travelers correctly cites Imhof v. Nationwide Mutual Insurance Company, 643 So.2d 617 (Fla. 1994) and Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So.2d 1289 (Fla. 1991), for the proposition that the bad faith case under section 624.155, F.S., does not accrue until resolution of the underlying litigation or arbitration[1]. Travelers then argues as follows:

> ". . . The petitioner gave her civil remedy notice of violation letter to Travelers and the Department of Insurance some nine months before she settled the

---

[1] Travelers, however, connotes this as resolution of the claim against the tortfeasor. However, those cases make it clear that it is resolution of the underlying insurance claim, i.e., the underinsured claim in this case, that is the triggering event, not any resolution of the claim against the tortfeasors. This Court in Blanchard, supra at 1291, made that clear.

> 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.1, pp.39-44)."

If an injured insured must show acts of the insurer occurring subsequent to accrual of the cause of action that violate section 624.155, F.S., then no cause of action could ever be asserted under the statute. Section 624.155(2) requires that a notice be filed with the Department of Insurance. That notice must specify the acts constituting violation of the statute. Then the insurer has 60 days to cure the violation. Since the cause of action also does not accrue until these statutory preconditions are met, then no acts of the insurer could ever constitute a violation because the insured could never meet the statutory requirement of specifying those violated acts (that have not yet occurred).

Travelers also attempts to argue that somehow Mrs. Vest had not shown legal entitlement to recover from the tortfeasors at the time of the filing of the Insurer Notice of Violation pursuant to section 624.155, F.S. However, Travelers apparently overlooked its own statement of the holding in Louis v. Allstate Insurance Company, 667 So.2d 261 (Fla. 1st DCA 1995) to the effect that the phrase "legally entitled to recover" means that the insured has a claim against the tortfeasor which could be reduced to judgment in a court of law. There is no question that Mrs. Vest had such a claim in this case for the wrongful death of her husband at the time she filed the Insurer Notice of Violation.

Travelers also attempts to make the argument that it could not be in bad faith until settlement with the tortfeasor because it could not predict the outcome of the case. It asserts that the claim against the tortfeasors might have resulted in a verdict of less than the tortfeasors' policy limits and, therefore,

Mrs. Vest would not have been entitled to any underinsured benefits. It also points to the defenses of comparative negligence including the seatbelt defense[2]. This is the same type of argument made in virtually every bad faith case, third party and first party alike. These are factual issues for the trier of fact to determine on the issue of whether Travelers acted in bad faith. See, e.g., Campbell v. Government Employees Insurance Company, *306 So.2d 525 (Fla. 1975)*; John J. Jerue Truck Broker, Inc. V. Insurance Company of North America, 646 So.2d 780 (Fla. 2d DCA 1994); Odom v. Canal Ins. Co., 582 So.2d 1203 (Fla. 1st DCA 1991). These are not a basis for judgment as a matter of law.

In every bad faith case, the insurer is placed in the position of being required to evaluate the case

---

[2] However, Travelers ignores the fact that there was absolutely no evidence before the trial court concerning the comparative negligence defenses. Consequently, those defenses could not sustain the summary judgment. Moore v. Morris, 475 So.2d 666 (Fla. 1985); McCraney v. Barberi, 677 So.2d 355 (Fla. 1st DCA 1996).

upon a reasonableness standard as to liability and damages. In a third party context, if the value of the case reasonably could result in a verdict in excess of the available liability coverage, the insurer has a "good faith" obligation to settle the case within the policy limits if possible. Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980); Government Employees Ins. Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975), cert. disch., 332 So.2d 13 (Fla. 1976). In a first party underinsured context, if the value of the case reasonably exceeds the available liability coverage, the UM insurer is required to negotiate with its insured in good faith. F.S. §624.155(1)(b)(1) (1994).

This Court pointed out in McLeod v. Continental Insurance Company, 591 So.2d 621, 623 (Fla. 1992), that the Legislature in section 624.155 did not differentiate between first and third party bad faith actions. Therefore, just as the insurance carrier in the third party action must use diligence and due care

in the investigation and evaluation of the claim and settle within the policy limits when appropriate, so should the underinsured motorist carrier to avoid liability for the statutorily imposed damages. Brookins v. Goodson, 640 So.2d 110, 113 (Fla. 4th DCA), rev. den., 648 So.2d 724 (Fla. 1994).

Travelers also argues that Mrs. Vest did not assign as error these factual rulings of the trial judge below. As this Court is fully aware, Florida no longer requires nor permits "assignments of error" on appeal. Rule 9.040, Florida Rules of App. Proc. However, a review of the briefs below will show that Mrs. Vest argued that the trial court erred in ruling that there was no bad faith as a matter of law because Travelers had raised the defense of comparative negligence including the seatbelt defense (Reply Brief of Appellant, pp. 9-10).

Travelers' arguments in the brief ignore the public policy behind section 624.155, F.S. That policy is the promotion of the quick resolution of insurance

claims. Imhof v. Nationwide Mutual Insurance Company, supra at 618. The position taken by Travelers that it has no obligation to negotiate the underinsured claim until such time as the claim against the tortfeasor is resolved would wreak havoc upon that policy.

## CONCLUSION

Travelers in this case has convinced the trial court and the District Court of Appeal to engraft a new requirement and a precondition to filing a valid Notice of Insurer Violation pursuant to section 624.155, F.S., i.e., that the claim against the tortfeasor must be resolved. That precondition is contrary to longstanding Florida law that allows an insured to proceed against his underinsured carrier without the necessity of resolving a claim with the tortfeasor. The decision of the District Court below emasculates the "good faith" requirement of the statute in the underinsured context. The decision should be reversed with directions to reverse the summary judgment entered by the trial court in this cause.

## 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 States First Class Mail. 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 17th day of February, 1999.

JAMES F. McKENZIE
Florida Bar Number: 163790
McKenzie & Taylor, P.A.
905 East Hatton Street
Pensacola, Florida 32503
(850) 432-2856
Attorneys for Plaintiff/
Petitioner