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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-1607

ADRIAN FRIDMAN,

Petitioner,

vs.

SAFECO INSURANCE COMPANY OF ILLINOIS,

Respondent.

ANSWER BRIEF ON THE MERITS OF SAFECO INSURANCE COMPANY OF ILLINOIS

On Review from the Fifth District Court of Appeals
Case No.: 5D12-428

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STATEMENT OF THE CASE AND FACTS

Nature of the Case: This lawsuit stems from an uninsured/underinsured motorist (UM) claim brought by Mr. Adrian Fridman ("Fridman") against his auto insurance carrier, Respondent, Safeco Insurance Company of Illinois ("Safeco"). (R1. 1.) The Safeco policy provided $50,000 in UM coverage. (R1. 2.) Fridman was involved in an automobile accident with an underinsured driver. (R1. 2.) Fridman and Safeco did not agree on the amount of UM benefits due. (R1. 18.) Fridman filed a Civil Remedy Notice, and then he sued Safeco in a one-count complaint to recover the UM benefits. (R1. 2, ¶6.)

After two years of litigation, Safeco learned that Fridman had undergone back surgery. (R3. 369.) This information prompted Safeco to reevaluate the claim and, three days later, Safeco paid Fridman his policy limits of $50,000. (R2. 321.)[1] Safeco then filed its "Motion for Entry of Confession of Judgment," arguing that the UM case had been fully resolved by its payment. (R2. 302.) The court denied Safeco's motion. (R3. 409.) A few months later, the court convened a trial, empanelled a jury, and tried the case. The jury found the underinsured motorist was 100 percent responsible for the accident, and determined that Fridman suffered exactly $1,000,000 in loss or damage from the accident.

[1] Safeco first tendered a check with the notation "Full and Final Settlement of UIMBI claim;" and this tender was rejected. Safeco thereafter tendered a check unconditionally, with no limitations. The check was accepted. (R3. 359-60.)

(R3. 367.) Safeco filed motions for new trial and remittitur based on erroneous rulings made at this UM trial. (R4. 692, 697.) The motions were denied. (R4. 715.) The trial judge entered a "Final Judgment in Accordance with the Verdict," reducing the judgment to the UM policy limits - which had already been paid - and purported (1) to reserve jurisdiction to determine Fridman's right to amend his complaint to seek statutory bad-faith damages, and (2) to establish Fridman's entitlement to $1 million in damages in that future bad-faith action. (R4. 709.)

Safeco appealed, asserting four errors: (1) the pretrial denial of its motion to confess judgment; (2) two rulings contained in the final judgment, the first purporting to retain jurisdiction to consider some future amendment of the action, and the second ruling purporting to entitle Fridman to the $1 million stated in the verdict in some future bad-faith action; (3) the denial of Safeco's remittitur motion on the wage loss and lost earning capacity claims; and (4) the denial of Safeco's motions for mistrial based on improper arguments at trial by the Plaintiff's counsel. The Fifth District reversed the judgment, addressing only Issues I and II. The district court's opinion contains no indication the errors asserted in Issues III and IV (Issue V this Response Brief) were subjected to appellate review.

STATEMENT OF THE FACTS

The accident and Fridman's injuries. On January 8, 2007, Ms. Nemorin, an underinsured driver, came to a complete stop at a stop sign. (R15. 986.) She looked left, looked right, and then looked left again. (*Id.*) She saw that the road ahead was clear, and started into the intersection. (R15. 987.) Nemorin then saw Fridman's truck, 2.5 to 3 truck lengths away, approaching her on the cross street. (R15. 998.) She braked, he swerved, but they were unable to avoid the collision. (R15. 1017.) Nemorin testified Fridman was "going really fast." (R15. 989.) When asked if the accident could have been avoided, she answered " . . . . if he wasn't going so fast, he could have stopped, so the impact wouldn't have been as bad . . . so, yes." (R15. 991.) Fridman alleged that he sustained injuries to his neck and lower back. (R11. 358.) Fridman made a claim to Safeco for underinsured motorist benefits. Fridman and Safeco disagreed as to whether Nemorin was fully liable for the accident, and disagreed as to the amount of damages recoverable by Fridman. (R1. 18, affirmative defenses 5, 7, 9, 11, 12.)

Fridman files a Civil Remedy Notice and a lawsuit. On October 13, 2008, Fridman filed a Civil Remedy Notice of Insurer Violation pursuant to § 624.155(1)(b)(1), alleging that Safeco failed to attempt in good faith to settle his claim for UM benefits. (R3. 380-83.) On April 25, 2009, Fridman filed a one-count complaint against Safeco seeking UM benefits. (R1. 1.)

The parties agree Fridman's action is for UM benefits pursuant to § 627.727, Fla. Stat. (R1. 1, ¶ 6; R1. 19, ¶ 9.)

Safeco paid its $50,000 policy limits after learning that Fridman had undergone surgery, and then it moved to confess judgment.

- In June, 2009, Safeco served an interrogatory asking Fridman what medical treatment he had received as a result of the accident. Fridman's response revealed he had received emergency, diagnostic, and palliative care, but no surgery. (R1. 46-47.)
- On May 26, 2010, Fridman did undergo surgery on his spine. (R12. 574.) Fridman did not provide Safeco contemporaneous notice of the surgery. (R15. 1045.)
- On January 15, 2011 Safeco served a notice to Fridman requiring his attendance at a compulsory medical examination (CME) on February 28, 2011 in Orange County, the venue of the action. (R1. 105; R3. 369.)
- On February 15, 2011, thirteen days before the CME, Safeco learned from Fridman's counsel, that Fridman had undergone spinal surgery. (R3. 369.)
- On February 18, 2011, Safeco paid Fridman the $50,000 policy limits. (R3. 369-70.)

On June 15, 2011, Safeco responded to Fridman's request that Safeco admit or deny it valued the UM claim at the policy limits of $50,000. (R2. 292.) Safeco

responded that it "has evaluated the claim and tendered the Policy limits of $50,000 to the Plaintiff." *Id.* On July 18, 2011, Safeco moved for entry of confession of judgment. (R2. 302.) Safeco argued:

> 1. Defendant has confessed judgment in favor of Plaintiff, ADRIAN FRIDMAN, in this action for the sum of Fifty Thousand Dollars ($50,000.00), which is the Uninsured/Underinsured Motorist policy limits plus taxable costs and concedes judgment to be entered against it accordingly.
>
> 2. With . . . such Confession of Judgment, all contractual exposure to liability is resolved.

Safeco argued at the hearing on this motion that the action for UM benefits had been fully resolved, a judgment for policy limits should be entered, and that no trial to determine liability or the dollar value of Fridman's damages was necessary. (R3. 357.) Safeco relied on the rule restated in *Nationwide Mut. Fire Ins. v. Voigt*, 971 So. 2d 239 (Fla. 2d DCA 2008), that a judgment in a UM case is limited to the UM policy limits. (R3. 356 [mistakenly reported as the "Boyd" case]; R3. 358.) Safeco also relied on *Brookins v. Goodson*, 640 So. 2d 110 (Fla. 4th DCA 1994) for the proposition that the payment of the policy limits by the insurer is the equivalent of an allegation that there has been a determination of the insured's damages.

In pertinent part, Safeco's argument to the trial court, the issue addressed by the district court, was this: Once the UM carrier pays its UM limits, the carrier's contractual exposure is resolved, and the trial court should not conduct a trial to

determine (a) the liability of the tortfeasor, and (b) the total personal injury damages of the UM policyholder. (R3. 356-357.) Safeco agreed that entry of the confessed judgment would ripen Fridman's bad faith case.[2] (R3. 356-57.)

The trial court denied Safeco's motion to confess judgment. On September 6, 2011, the trial court entered an order denying Safeco's motion to confess judgment. (R3. 409.) The case was tried three months later, and a judgment was entered. Safeco appealed the order denying its motions for confession of judgment, remittitur, and for new trial based on improper argument of Fridman's counsel at trial. (Initial Brief p. i.) Nothing in the district court's opinion shows the remittitur and improper argument issues were addressed. Safeco does not waive these issues. Thus, the facts and argument related to these two issues must be stated.

Fridman's counsel improperly injects claims handling issues into this UM trial. (District Court Initial Brief, Issue IV.) Dr. Troiano, Safeco's Broward

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[2] Safeco's counsel argued: "So we're looking for the entry of a final judgment in this case against Safeco inasmuch as we've already paid the [policy limits]. We've also supplied a satisfaction of the judgment. Provided that [the Plaintiff's] counsel has perfected his civil remedy notice so that he can get past the clerk's office for a bad faith case, then it [i.e., the bad faith case]would be [ripe] and we [i.e., Safeco] would have to meet that bad faith case on the merits, but that is another case, another day in another jurisdiction. Maybe you [,Your Honor], maybe not, depending on how it is assigned downstairs [in the clerk's office.] But I don't find that there's anything [for Your Honor] to try if we have paid the policy limits when we've been sued for breach of contract." (R3. 356-57.)

County CME surgeon, was deposed on November 3, 2011. The deposition was videotaped so that it could be played at trial in lieu of the doctor's live appearance. During the deposition, Fridman's counsel questioned the CME doctor about claims handling matters :

> Q. Do you have any idea why the insurance company being sued [i.e. Safeco] would wait until literally days before the case is supposed to go to trial to have a doctor do an examination of Mr. Fridman?
>
> [MS. PENTON]: Objection. It's an improper question for the doctor.
>
> [THE WITNESS]: I would – I would have no reason to know why that would be.
>
> [BY MR. BYRD]: All right.
>
> [MS. PENTON]: And I move to strike that question also.

(SR1. 790:24-791:10.) At a pre-trial hearing on December 1, 2012, the trial court overruled this objection, and these lines of testimony and Safeco' s objections (but not the court's rulings) were heard by the jury and placed in the trial transcript. (R4. 556.) Thus, the trial transcript (R15. 1062) gives the false impression that defense counsel had timely objected, but failed to obtain a ruling. Fridman's counsel continued his questioning at SR1. 793:23; R15. 1063:3.

> MR. BYRD. All right, Doctor. How about we focus on my question that I asked. Do you know why it is in as much as you're the first doctor four and a half years after a crash that has said that Mr. Fridman has sustained injuries that have supposedly resolved?

> Do you know why it is then that the insurance company waits until four and a half years after a crash to conduct such examination when there is a pending trial within weeks of your examination, or does that sound to you like the insurance company was able to find a doctor that was able to state those opinions as they needed in order to defend a legal claim?

At SR1. 794:12-14, defense counsel objects: MS. PENTON: "Objection. Mischaracterization of evidence. This is harassing." But the objection is deleted from the trial video. And so the trial transcript, at R. 1062:15, fails to reflect defense counsel's objection. (See R4. 556, p. 2, ¶ 2.c.) The witness then goes on to answer the question. (See SR1. 794:15-795:3.) The trial record fails to reflect Safeco's timely objection and the court's ruling.

Because the court overruled Safeco's objections before trial, Safeco was forced to inquire at trial, in voir dire, as to the jurors' attitudes towards a UM insurer's right to investigate claims. As the trial began, Safeco knew the court had already overruled its objections to Fridman's questions to Dr. Troiano that insinuated Safeco improperly delayed investigation of Fridman's claim. To assess the potential jurors' attitudes on the subject of an insurance company's right to investigate, Safeco's counsel asked questions in voir dire such as "[d]o you feel that if somebody pays a premium for insurance that they should be automatically paid . . . if they make a claim without the insurance company investigating the claim?" (R10. 239.) And, "[w]ould you hold it against the insurance company if

they investigated the claim?" (R10. 239.) Safeco's voir dire did not "open the door" to this argument, the door was opened by Fridman's counsel before trial.

Fridman's counsel improperly attacks Safeco's claims handling in this UM case throughout the trial: 1. Opening statement: Fridman's counsel raised the delay issue in opening statements telling the jury that even though the case was almost 5 years old, Ms. Nemorin [the underinsured motorist] was "not deposed until just a couple of weeks ago." (R3. 325.) Ms. Nemorin was a law student at the time of the trial (R15. 1005), and final examinations prevented her from testifying live at trial (R11. 347). Her deposition was videotaped and played to the jury. (R15. 985, et seq.) Further in opening statements, Fridman's counsel implied Safeco's retention of Dr. Troiano was untimely:

> You are going to hear that this case was supposed to have gone to trial five months ago. So, literally, he [Dr. Troiano] was getting involved just immediately before this case was to go to trial. And so, a case where an insurance company submits that they have the right to investigate, ask yourself, in review of the evidence, does that sound like an insurance company that has been investigating for four and a half years when there is no medical evidence, before four and a half or before that – during that four-and-a-half year period, that suggested his injuries were not caused by the crash.

(R11. 332.) Safeco objected (R11. 333) and was overruled. (R11. 333.)

2. Plaintiff's case in chief. Fridman's counsel pressed the claims handling allegation during direct examination of his treating surgeon, Dr. Katzman, asking him if Safeco had taken his deposition during the year and a half he had been

treating Fridman. (R12. 647.) Dr. Katzman responded, "No." (R12. 647.)

Fridman's counsel then asked:

> [MR. BYRD]: Don't you think that if they had done that, because all they merely wanted to do was investigate a claim –
>
> [SAFECO]: Objection. Scope.
> . . .
>
> [MR. BYRD]: -- that they could have gotten useful information from you to allow them to better investigate a claim?
>
> [SAFECO]: Objection. Scope.
>
> THE COURT: Overruled. You can answer.
>
> [DR. KATZMAN]: Obviously, it would be helpful to investigate the claim to talk to who was treating the patient. (R12. 647-48.)

Safeco moves for a mistrial. Following this testimony, Safeco moved for a mistrial. (R13. 665.) Safeco contended that Fridman's counsel had improperly "alluded both indirectly and directly that the insurance company did not conduct a sufficient investigation in this case." (R13. 665.) Safeco argued:

> Your Honor, as you are aware, this is not a case about claims or claims handling or bad faith. These references that somehow the insurance company was not in search for the truth by not deposing Dr. Katzman and not deposing Ms. Nemorin is irrelevant and highly prejudicial.
>
> The issues to be decided in this case are liability and damages. What specific investigation was done, why certain witnesses were not deposed is completely irrelevant in this case. Suggesting that the

> absence of deposition means somehow that the insurance company did not care about the truth, is not only highly prejudicial, irrelevant, and highly inflammatory, it misleads the jury.
> . . .
>
> These errors have extinguished my client's right to a fair trial. . . . It is impossible for my client to refute these misleading statements since this is not a bad faith case and any evidence I'm allowed to present can only about relief of liability or damages.
> . . .
> Further, plaintiff has repeatedly stated his opinion, either expressly or by inference, as to the credibility of my client, its character, and insinuating that it did not care about the truth. These errors cannot be cured by appropriate instructions to the jury. . . .

(R13. 665-69.) The trial court denied Safeco's motion for mistrial. (R13. 744-48.)

(3) Defense case in chief. Fridman's counsel twice raised the delay issue during Safeco's case in chief, in cross-examination of Dr. Troiano (videotaped and played at trial.) (R15. 1062, 1063.) After the deposition was played to the jury, Safeco renewed its motion for mistrial "based on these portions of the deposition that are in there that are prejudicial to my client." (R14. 975.) The trial court denied Safeco's renewed motion for mistrial. (R14. 976.)

Fridman's meager evidence as to lost wages and loss of future earning capacity. Safeco challenged the trial court's denial of its motion for remittitur as to past wage loss, and loss of future earning capacity. (District Court Initial Brief, Issue III.) In pre-trial answers to interrogatories, Fridman swore he had not lost any income or suffered any diminution of earning capacity. (R1. 48, ¶ 14.) In his pre-trial deposition, he stated he was not claiming any loss of future income.

(R3. 480:13-15.) That changed at trial, where he testified on the date of the accident, he had been unemployed for 2 to 3 months, and was searching for a warehouse so he could open a wholesale tile and marble business. (R14. 908-910.)

Fridman did open his tile and marble business two months after the accident. (R14. 910, 912.) But his business lasted only 20 days. (R14. 910.) The business did not make any money. (R14. 912.) Instead, Fridman lost money. (R14. 912.) Nevertheless, at trial Fridman claimed that his earning potential in the marble industry was $100,000 to $200,000. (R14. 882.) Fridman admitted, three times, on cross examination that his $100,000 projection was speculation. (R14. 975.)

After his marble and tile business failed, Fridman found other work earning more money after the accident than he had earned the year before the accident. (R14. 913-14.) In fact, he was making more money than he did when he actually worked in the tile and marble business. (R15. 955.) Fridman testified he missed approximately 2 weeks of work following his surgery. (R14. 880.) And if he decided to undergo the surgery that was recommended by Dr. Katzman, he would miss an additional 3 to 4 months of work. (R14. 889-890.)

The jury verdict. The jury found that Nemorin was 100 percent responsible for the accident (R4. 637) and that Fridman sustained a permanent injury. (*Id.*)

The jury found in its verdict:

• Past medical expenses:	$ 80,000
• Future medical expenses:	$ 300,000
• Lost earnings:	$ 45,000
• Loss of future earning capacity:	$ 225,000
• Past pain and suffering:	$ 100,000
• Future pain and suffering:	$ 250,000
TOTAL:	$1,000,000

Safeco filed motions for new trial and remittitur. (R4. 692.) Safeco argued that the $45,000 award for past lost earnings should be reduced to $2,400, as Fridman missed only two weeks of work following the surgery. (R4. 694.) Safeco further argued that the $225,000 award for loss of future earning capacity should be reduced to $20,160, as Fridman expected to miss four months of work following his possible future surgery. (R4. 695.) (Fridman was earning $1,200 per week.) Safeco's motions for new trial and remittitur were denied. (R4. 715.)

The December 29, 2011 judgment. On December 29, 2011, the trial judge entered a judgment entitled "Final Judgment in Accordance with the Verdict." (R4. 709.) The judgment contained three paragraphs:

> 1. That the Plaintiff, ADRIAN FRIDMAN, recovers from Defendant, SAFECO INSURANCE COMPANY OF ILLINOIS, the sum of $50,000.00, that shall bear interest, pursuant to Florida Statute § 55.03 for which let execution issue, notwithstanding the excess jury verdict rendered in this matter.
>
> 2. The Court reserves jurisdiction to determine the Plaintiff's right to Amend his Complaint to seek and litigate bad faith

damages from the Defendant as a result of such jury verdict in excess of policy limits. If the Plaintiff should ultimately prevail in his action for bad faith damages against Defendant, then the Plaintiff will be entitled to a judgment, in accordance with the jury's verdict, for his damages in the amount of $980,072.91 plus interest, fees and costs.

3. The Court hereby also reserves jurisdiction to consider any applicable attorney's fees and costs incurred in the Plaintiff's prosecution of this action for the purpose of entering a supplemental judgment in favor of the Plaintiff upon proper motion.

(R4. 709) Safeco appealed stating four issues, summarized as follows:

I. The trial court should have granted Safeco's motion to confess judgment.
II. The judgment was void insofar at trial court had no authority to (a) reserve jurisdiction in the judgment to allow an amendment to the pleadings; or (b) establish Fridman's damages to be awarded in a future § 624.155 action
III. The trial court erred in denying Safeco's motion for remittitur.
IV. the trial court erred in denying Safeco's motions for mistrial and new trial based on Fridman's counsel's improper arguments at trial.

The Fifth District reversed, addressing Safeco's Issues I and II. But nothing in the *Fridman* opinion indicates the district court reviewed Issues III and IV.[3]

[3] **Matter of transcripts.** Fridman notes Safeco did not file the transcript of some hearings in this case, and implies the record on appeal is somehow deficient. Safeco did not include transcripts that were not needed to adjudicate the issues that it presented. The errors that Safeco asserted can be ascertained from the record as presented, and thus the record is sufficient. *Cf. Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). No rule requires an appellant (or a Respondent) to include the transcript of every hearing in a record. Fridman never explains how any of the transcripts he mentions are important to these proceedings.

The standard of review. Issues I – IV address the jurisdiction or power of the trial court to act after the conclusion of a case, and is reviewed de novo. *Baker & Hostetler, LLP v. Swearingen,* 998 So. 2d 1158, 1160 (Fla. 5th DCA 2008). The construction of the UM statute and obligations under an insurance contract are reviewed de novo. S*tate Farm Florida Ins. Co. v. Campbell*, 998 So. 2d 1151, 1153 (Fla. 5th DCA 2008). Issue V addresses trial court errors subject to an abuse of discretion standard. *See Brown v. Estate of Stuckey*, 749 So. 2d 490, 494 (Fla. 1999); *but cf. Special v. Baux*, 79 So. 3d 755 (Fla. 4th DCA 2011) (stating test for harmless error conflicting that stated in *Estate of Stuckey*), review pending, 90 So. 3d 273 (Fla. 2012) (accepting jurisdiction).

SUMMARY OF ARGUMENT

Safeco utterly satisfied its contractual obligations to Fridman when it unconditionally paid him the UM policy limit. That payment also satisfied Fridman's pleaded demand for relief – payment of UM benefits. Because Fridman's lawsuit sought only the recovery of UM benefits, the trial court could grant no further relief. His UM case thus became moot. Because the UM case was moot, the trial court's power to conduct further proceedings in the case came to an end. Safeco then moved to enter a judgment against itself for the policy limits in order to bring the UM case to a conclusion. Safeco acknowledged that once Fridman's UM case was concluded, Fridman could file his § 624.155 action.

Safeco's suggested course of action - denied by the trial court – would not have encroached on Fridman's rights, and it would have avoided the senseless waste of judicial labor to conduct a pointless UM trial.

The trial court should have granted Safeco's motion and concluded the UM case. Its decision, instead, to convene a trial and empanel a jury to generate an unreviewable, unusable UM verdict, was error. Neither case law nor statutory authority supports what the trial court did in this case. The Fifth District Court of Appeal appropriately reversed the deeply-flawed judgment of the trial court on the narrowest of grounds. The Fifth District applied well-established principles of jurisprudence that respect the limits of judicial authority over moot questions. Its opinion is fully harmonious with the precedent of this Court, and its decision gives full effect to the legislative commands set out in § 627.727 and § 624.155, Florida Statutes. The *Fridman* opinion should be approved.

Issue I

The Fifth District's decision was correct in all respects. Safeco's payment mooted Fridman's UM case, and so it had to be concluded. Safeco's motion to enter a confessed judgment was the appropriate procedural vehicle to do so. After entering a judgment, the trial court had no power to consider future motions to amend the pleadings, or to fix the amount of damages to be awarded in some future bad faith case.

a. Fridman sued Safeco solely to recover $50,000 in contractual UM benefits; no other damages could be recovered in his pleaded cause of action.

The Safeco policy is an insurance contract that included $50,000 in Uninsured/Underinsured motorist ("UM) coverage. (R1. 2.) UM coverage protects policyholders, like Fridman, "who are legally entitled to recover damages from owner or operators of uninsured motor vehicles because of bodily injury . . . ." § 627.727(1), Fla Stat.

Fridman was involved in a motor vehicle accident with an underinsured motorist, and after recovering PIP benefits, and settling with the tortfeasor's liability carrier, he made a claim to Safeco for UM benefits. Safeco disputed that the tortfeasor was fully liable for the accident, and it disputed, initially, the amount of loss or damage that Fridman claimed he had suffered in the accident. (R2. 231-232.) After filing a Civil Remedy Notice, Fridman sued Safeco in a one-count complaint to recover the $50,000 contractual, UM policy benefits. (R1. 2, ¶6.).

If a jury, in a UM case such as this, were to find the underinsured tortfeasor liable to the plaintiff policyholder for damages at a dollar point in excess of the UM policy limits, the court would enter a judgment against the insurer reduced to the UM policy limit. *Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239, 242 (Fla. 2d DCA 2008). Fridman could never recover a judgment in excess of the $50,000 UM contract limit because UM actions are "exclusively a claim for benefits under the policy . . . ." *Voigt*, 971 So. 2d at 242. [4]

Only in a subsequent § 624.155 bad-faith case, where a claim for damages is made for "a violation of the duties owed by virtue of that policy," might Fridman recover sums in excess of the UM policy limit. *Voigt*, 971 So. 2d at 242. Damages identified in § 627.727(10), whatever they are, are not recoverable in the UM action; the legislature has provided those damages can only be recovered in an action brought pursuant to § 624.155 (a bad faith action.)

b. Safeco's payment of the $50,000 UM limit rendered Fridman's UM claim and case moot, and a moot case should be dismissed. So long as Safeco contested Fridman's claim that the tortfeasor was liable for the accident, or

[4] An action to recover UM benefits is based on a contract, even though "it has its underpinnings in tort liability." *Mercury Ins. Co. of Florida v. Moreta*, 957 So. 2d 1242, 1251 (Fla. 2d DCA 2007); *and see Geico General Ins. Co , Inc. v. Graci*, 849 So. 2d 1196, 1199 (Fla. 4th DCA 2003) (holding a suit to recover UM benefits "is indeed, an action on the contract of insurance, it is not an action for breach of that contract, but it is an action filed pursuant to the contract.")

so long as it asserted Fridman's claimed losses caused by the accident were less than the UM policy limit, the trial court had contested issues to adjudicate. The trial court would empanel a jury to resolve the factual disputes as to the tortfeasor's liability for the accident, Fridman's comparative fault, and the extent of damages caused by the accident.

But once Safeco learned of the surgery, it changed its valuation of his claim. Safeco promptly paid its UM limit of $50,000 and, after that payment, there were no longer any live issues to adjudicate. The case became moot. Safeco's payment had resolved the only issue Fridman raised in his pleadings, i.e., whether Safeco owed Fridman any UM benefits. (R1. 1.) A case is moot when the issues have ceased to exist, and a moot case generally will be dismissed. *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). In the case of *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, (Fla. 2d DCA 2005), the Second District explained:

> The doctrine of mootness is a corollary to the limitation on the exercise of judicial power to the decision of justiciable controversies. Generally speaking, an appellate court will dismiss a case if the issues raised in it have become moot . . . . An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist. The settlement of a case renders it moot . . . . <u>The voluntary payment of a disputed charge has the same effect.</u>

Id. at 599-600. (Citations and internal quotations omitted.)

The rule discouraging courts from the adjudication of moot issues is derived from the principle that the existence of judicial power depends upon the existence of a case or controversy. *See Montgomery v. Dep't of Health and Rehab. Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985). A case becomes moot when, by a change of circumstances, an intervening event makes it impossible for the court to grant a party any effectual relief. *A.G. v. Dep't of Children & Family Servs*., 932 So. 2d 311, 312 (Fla. 2d DCA 2006). The "intervening event" in this case was Safeco's payment of the UM limits. *See also Tobkin v. State*, 777 So. 2d 1160, 1163 (Fla. 4th DCA 2001) ("[T]he word 'jurisdiction' ordinarily refers to 'subject matter' or 'personal' jurisdiction, but there is a third meaning ('case jurisdiction') which involves the power of the court over a particular case that is within its subject matter jurisdiction.")

c. Safeco's payment of the UM limits was the equivalent of a verdict or judgment in Fridman's favor. "When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217, 218 -219 (Fla. 1983). Once the full measure of UM benefits was paid, the power of the court to grant relief sought in the pleadings – payment of the $50,000 - was exhausted. "It is the function of a

judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue." *Carlin v. State*, 939 So. 2d 245, 247 (Fla. 1st DCA 2006). The trial here was an improper exercise of judicial power because it produced a verdict that had no effect on any matter in issue.

d. No exception to this rule of mootness applies. At *Godwin*, 593 So.2d at 212, this Court identified three exceptions to the rule of mootness, noting two of the exceptions were developed in *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984) ("It is well settled that mootness does not destroy an appellate court's jurisdiction, however, when the questions raised are of great public importance or are likely to recur.") These two exceptions address an appellate court's jurisdiction, not the trial court's power to try a moot case. This Court then held, "Third, an otherwise moot case will not be dismissed if collateral legal consequences that affect the rights of a party flow from the issue to be determined." *Godwin*, 593 So. 2d 211.

The *Fridman* dissent asserts Safeco's payment did not moot Fridman's case because "the collateral consequences doctrine would apply." *Fridman*, 117 So. 3d at 29. That "collateral legal consequence" appears to be Fridman's loss of a jury determination (in the UM case) of his personal injury damages from the auto accident. This is Fridman's argument, as well. Initial Brief at p. 25. But the

"collateral legal consequences" exception cannot supply a trial court with the power or case jurisdiction to:

- force the insurer to defend a moot UM case in which it has admitted its responsibility to pay, and already paid, its limits;
- empanel a jury and convene a trial, to generate a verdict that is unusable in any future bad faith suit, as the verdict may be the result of errors (like the remittitur and new trial issues in this case) that are unreviewable by a district court of appeal; [5]
- assuming errors in the verdict were reviewable on appeal, empanel a jury and convene a trial, at great expense, to render an advisory verdict that may or may not be used in a future case, depending on whether or not the trier of fact in that future § 624.155 action found the insurer had acted in bad faith;
- generate a verdict that has absolutely no legal effect in the UM case;
- generate an advisory verdict that, if reviewable, would be used in some a different, future, possible § 624.155 action.

[5] *See Geico Gen. Ins. Co. v. Bottini*, 93 So. 3d 476, 477 (Fla. 2d DCA 2012) (errors in the UM verdict not affecting the UM judgment are harmless errors). But the error-ridden UM verdict is ported over to the § 624.155 action and used as unassailable evidence of damages. The UM insurer is deprived of due process when this error-ridden verdict is applied to assess its liability, when the insurer was never afforded the opportunity for an appellate court to take up the merits of its challenge to these errors on appeal.

The First District rejected application of the collateral consequence exception in *Lund v. Dep't of Health*, 708 So. 2d 645, 647 (Fla. 1st DCA 1998) when the trial court's continued work on a case would only produce the mere *possibility* of an award. The First District doubted that a contingent award created "a sufficient interest to overcome the fundamental appellate principle that cases will be dismissed as moot when, due to a change in circumstances, when an actual controversy no longer exists." *Id.* The trial court's judgment in this case contained just such a "possible" award. *See also Gov't Employees Ins. Co. v. King*, 68 So. 3d 267, 271 (Fla. 2d DCA 2011) (en banc, holding no contingent awards will be made in a UM case for use in any bad faith action that follows.)

e. Safeco's motion to enter a confessed judgment for the policy limits was the appropriate procedural vehicle to bring this moot case to a close. Safeco's motion for entry of a confessed judgment against itself would have concluded the UM case, providing Fridman with a "favorable resolution" of his UM action that would allow him to file a § 624.155 action. Safeco's counsel argued to the trial court that Fridman's bad faith action would become ripe if the Court would just grant Safeco's motion to confess judgment. (R2. 302.) The trial court would have retained jurisdiction to award fees, costs, and interest. *Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567 (Fla. 2010). Fridman would suffer no prejudice from a confessed judgment.

f. The trial court had no authority to retain jurisdiction over the case, after entering a final judgment, to consider allowing amendment of the pleadings. The first paragraph of the judgment on appeal (R4. 709) unmistakably marked the conclusion of the UM action; it resolved all of the substantive issues raised in the pleadings. *Welch v. Resolution Trust Corp*., 590 So. 2d 1098, 1099 (Fla. 5th DCA 1991) (stating test for a final order is whether decree disposes of the cause on its merits leaving no questions open for judicial determination).

But paragraph two of the judgment purported to reserve "jurisdiction to determine the Plaintiff's right to Amend his Complaint to seek and litigate bad faith damages." No pleading or motion invoked in the Court's power to grant that relief. That ruling was, at inception, or quickly became, a judicial nullity.[6] Once a judgment disposes of the only action properly before the court, and the time for filing a petition for rehearing or motion for new trial or appeal has run, there is no action remaining before the trial court on which it can base an amendment, even if that court had seen fit to permit one. *DiPaolo v. Rollins Leasing Corp.*, 700 So. 2d 31, 32 (Fla. 5th DCA 1997). "[W]hen a case has merged into a final judgment and an appeal has been perfected therefrom the cases seem to hold that jurisdiction in

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[6] The second paragraph of the judgment states in part: "2. The Court reserves jurisdiction to determine the Plaintiff's right to Amend his Complaint to seek and litigate bad faith damages from the Defendant as a result of such jury verdict in excess of policy limits. . . ." (R4. 709.)

the trial court terminates." *State ex rel. Am. Home Ins. Co. v. Seay*, 355 So. 2d 822, 824 (Fla. 4th DCA 1978). *See also Travelers Cas. & Sur. Co. of Am. v. Culbreath Isles Prop. Owners Ass'n, Inc.*,103 So. 3d 896, 899 (Fla. 2d DCA 2012) (granting prohibition because court exceeded its jurisdiction by allowing the filing of supplemental amended complaint after the judgment had become final.) Potential causes of action (like bad faith) alluded to, but not pled, do not survive a final judgment. *See Seddon v. Harpster*, 438 So. 2d 165, 167 (Fla. 5th DCA 1983). Similarly, the practice of allowing a plaintiff to amend a UM action to state a bad-faith claim was disapproved by the Fifth District in *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163, 165-166 (Fla. 5th DCA 2010). Finally, paragraph two of the judgment, purporting to adjudicate damages for a future § 624.155 action, had no basis in the pleadings. "Fridman had appropriately not included a bad faith count in his complaint." *Fridman,* 117 So. 3d at 19. The judgment exceeded the reach of the pleadings; it contained significant errors; it was properly reversed.

Issue II

Neither *Vest, Imhof*, nor *Blanchard* require a UM policyholder to obtain an "excess" jury verdict in a UM action as a condition precedent to filing an action pursuant to § 624.155. The Fifth District's *Fridman* decision fully conforms to the principles articulated in these three cases.

Section 627.727(10), Florida Statutes (2013), provides that the damages recoverable from a UM carrier, in an action brought under s. 624.155, shall include the total amount of the claimant's damages, "including the amount in excess of the policy limits . . ." But nothing in § 627.727(10), and no case precedent, requires a jury trial in a UM case to establish damages for use in a § 624.155 action. This point – Safeco's principal contention - is solidly established by *Vest*, *Imhof*, and *Blanchard*, the very cases Petitioner claims conflict with the *Fridman* decision.

a. *Fridman* does not conflict with *Vest*. Consider first, *Vest v. Travelers Ins. Co.,* 753 So. 2d 1270 (Fla. 2000). The policyholder made a claim for UM benefits; the insurer delayed payment; the policyholder filed a Civil Remedy Notice that was not cured within 60 days; the policyholder then sued the UM carrier. While the UM case was pending, but before the UM trial, Travelers paid its UM limits. Up to this point in the proceedings, the procedural posture of

Vest and *Fridman*, are nearly identical.[7] After paying the UM limit to Vest, Travelers sought a summary judgment on the remaining bad faith count. *Vest*, 753 So.2d at 1272. This Court explained that the trial court granted Travelers motion, and the reason it was affirmed by the district court of appeal.

> The district court decided that Vest had no cause of action based upon this Court's decisions in *Blanchard* and *Imhof*. The district court stated, "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."

Vest, 753 So. 2d at 1273. This Court then rejected the district court's reasoning. Importantly, the reasoning that this Court rejected in Vest is exactly the reasoning that Fridman advances in this case, i.e., "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."

This Court, in *Vest*, noted that an insurer's payment of the policy limits is the functional equivalent of an allegation there has been a determination of the insured's damages and that neither *Blanchard* nor *Imhof* require resolution of the insured's UM claim by trial or arbitration. *Vest*, 753 So. 2d at 1273-74. This Court held, in *Vest*, that the bad faith claim should have been allowed to proceed

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[7] Unlike Fridman, Vest filed a two-count complaint: Count I to recover UM benefits; Count II alleging bad faith pursuant to § 62.155. *Vest v. Travelers Ins. Co.*, 710 So. 2d 982, 983 (Fla. 1st DCA 1998), decision quashed, 753 So. 2d 1270 (Fla. 2000).

even though there was neither a UM verdict nor any determination of damages. (That determination of damages in *Vest* necessarily, and obviously, would be left for decision in the bad faith case.) These holdings in *Vest* are Safeco's positions in this case, and both are fully consistent with the Fifth District's *Fridman* decision.

Safeco avoided the error made by the UM insurer in the *Vest* case. There, Travelers argued the policyholder had no right to bring his bad faith action because there had been no determination of the extent of damages. *Vest*, 753 So. 2d at 1272. This Court rejected The Traveler's argument. By contrast, Safeco never contested Fridman's right to bring his bad faith claim once Safeco paid the UM limit. Just the opposite is true: After paying the UM limit, Safeco's lawyer argued to the trial court that it should dismiss the UM action so that Fridman could file his bad faith case. (R3. 356-57.) Safeco *does not* argue Fridman cannot state a cause of action under § 624.155 because he failed to first obtain a determination of his damages in the UM case.

b. *Fridman* does not conflict with *Imhof*. Consider next, *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994). There, the policyholder claimed UM benefits; the insurer failed to respond; the policyholder filed a Civil Remedy Notice. *Id* at 618-619. At some point, there was an arbitration (*Id.* at 620) that resulted in an award that was below policy limits. *Id.* The policyholder then commenced a § 624.155 action. The trial court dismissed the bad faith

complaint because it failed (1) to allege a determination of damages in excess of the policy limits and (2) it failed to allege any determination of damages whatsoever. The district court affirmed, certifying a question: Does *Blanchard* require an allegation of a determination of damages as a prerequisite to filing a bad faith case? This Court answered the question in the affirmative, but remanded so that the plaintiff could amend his complaint to allege there had, indeed, been such a determination. In the course of the decision, this Court held:

> Neither *Blanchard* nor § 624.155(2)(b) require the allegation of a specific amount of damages. . . . It follows that there is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith.

Imhof , 643 So. 2d at 618. This is fully consistent with the holding of the Fifth District in *Fridman*. *Imhof* required no predetermination of the exact amount of damages before stating a claim for bad faith. In *Imhof*, the bad faith damages would be determined in the bad faith action. Fridman does not "need to allege an award exceeding the policy limits to bring [his] action for insurer bad faith." *Id*.

c. *Fridman* does not conflict with *Blanchard*. Finally, consider *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991), the earliest of the three cases. Petitioner refers repeatedly to one line from that opinion: "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." *Id.* at 1291. *Blanchard* was not a UM action; it was brought pursuant to § 624.155. The extent of damages had been determined already by a verdict and judgment in a UM case.[8] The question presented was whether the policyholder was required to bring the UM and bad faith actions simultaneously. This Court answered the question in the negative, describing the two prerequisites to the accrual of a cause of action for bad faith, i.e., a determination of the tortfeasor's liability, and the extent of the policyholder's damages. This general formulation set out in *Blanchard* was refined in subsequent cases like *Vest* and *Imhof*. Those refinements establish that a UM policyholder is not required to obtain a UM verdict, or a determination of a specific amount of damages as a prerequisite to stating an action under § 624.155.

Issue III

Neither § 627.727(10), nor any case law requires Fridman to obtain a UM jury verdict before he may file a § 624.155 action.

Section 627.727(10), Florida Statutes (2013), provides that damages recoverable from a UM carrier, in an action brought under s. § 624.155, shall include the total amount of the claimant's damages, "including the amount in excess of the policy limits . . . ." But nothing in this statute required the Court to

[8] "The Blanchards won a verdict in the amount of $396,990. Judgment was entered against the tortfeasor in the full amount of damages and against State Farm in the amount of the policy limits of $200,000. No appeal was taken from the state court judgment." *Blanchard.,* 575 So. 2d at 1290.

conduct a trial to establish Fridman's damages for use in a subsequent § 624.155 action.

a. Section 627.727(10) does not require a policyholder to obtain a UM jury verdict as a prerequisite to bringing a § 624.155 action. Prior to 1982, third-party bad faith actions existed at common law, but first-party bad-faith actions did not. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995) (describing history of bad faith in Florida). In 1982, the Legislature enacted § 624.155, and "created a first-party bad-faith cause of action by an insured against the insured's uninsured or underinsured motorist carrier, thus extending the duty of an insurer to act in good faith to those types of actions." *Id.* at 59. In 1990, the Legislature amended § 624.155, adding the following subsection laying out the damages recoverable in a § 624.155 action:

> (7) . . . . *The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits.*

In *McLeod v. Continental Ins. Co.*, 591 So. 2d 621 (Fla. 1992) this Court approved the District Court's decision that the measure of damages in first-party bad-faith claim against a UM insurer is the verdict against tortfeasor, up to the UM policy limits, plus damages proximately caused by insurer's bad faith. *McLeod v. Cont'l Ins. Co*., 573 So. 2d 864, 867 (Fla. 2d DCA 1990) approved, 591 So. 2d 621 (Fla. 1992) (superseded by statute.) This Court concluded, in its review of

McLeod, that § 624.155(7) did not authorize the UM policyholder to recover the excess of a judgment, in a wrongful death action against the tortfeasor, over the UM policy limit. This Court reasoned that recovery of those personal injury damages against the UM carrier, beyond the UM policy limit, "would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause." *Id.* at 60.

After the decision in *McLeod*, the Legislature passed Ch. 92–318, § 79, Laws of Florida, which added subsection (10) to § 627.727, superseding *McLeod*.[9] *See Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1228 n.2 (Fla. 2005) (noting that "previous actions of this Court limiting the relief afforded under § 624.155 based upon distinctions between first-and third-party claims have been rebuked by the Legislature.").[10]

However, this 1992 amendment does not establish a statutory right in a UM policyholder to a UM trial when the UM case is moot. This legislation does not

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[9] § 627.727, Florida Statutes. (2013) provides: "The damages recoverable from an uninsured motorist carrier in an action brought under s. § 624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor."

[10] *See also Brookins v. Goodson*, 640 So. 2d 110, 114 (Fla. 4th DCA 1994) (noting subsection (10) supersedes *McLeod* "only to the extent of recognizing explicit statutory authority for awarding excess judgment damages as part of the insured's damages in a first party bad faith claim.")

supply jurisdiction or power to a trial court to convene a trial to generate a contingent, advisory, verdict in a moot UM case. Petitioner cites to a Staff Report to SB170H, s.49, comprising some of the legislative history of subsection (10). The Staff Report, which is not the law, at one point contemplates subsection (10) would allow a UM policyholder to recover those "amounts of an unpaid judgment against the tortfeasor." Another point of the Staff Report, not quoted by Fridman, states:

> A bad faith suit may arise in a situation of an insured as a victim of a tort, a first-party bad faith action, suing their uninsured motorist carrier for amounts of an unpaid judgment against the tortfeasor.

Senate Staff Analysis, June 2,1992, SB170H, p. 9. This Staff Report plainly equates the term "excess judgment" with an "unpaid judgment against the tortfeasor." This Staff Report does not support Fridman's argument that subsection (10) applies to jury verdicts in UM actions. Nothing in this legislative history supplies the trial court with the power to convene trials in moot UM cases. No authority allows or requires Fridman to obtain what he calls an "excess judgment" in a UM case before he can bring a § 624.155 action.

b. No case precedent requires the policyholder to obtain a UM jury verdict as a prerequisite to bringing a §624.155 action. Just as section 627.727(10) does not require Fridman to obtain a UM verdict as a prerequisite to stating a § 624.155 action, neither does any case precedent. *See, e.g., Brookins v.*

Goodson, 640 So. 2d 110 (Fla. 4th DCA 1994), *rev. den'd,* 648 So. 2d 724 (1994), *disapproved of on other grounds by State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 110, 113 (Fla. 1995). In *Brookins*, the policyholder made claim for UM benefits; the insurer did not respond; the policyholder filed a Civil Remedy Notice and thereafter filed a lawsuit; the insurer then paid, more than 60 days later, the policy limits. *Brookins*, 640 So.2d 111-112. [11]

The trial court in *Brookins* dismissed the bad faith case because the underlying UM claim had been resolved without a trial. *Brookins*, 640 So. 2d at 114. The insurer had argued "the addition of subsection (10), an excess judgment is now a prerequisite to a statutory bad faith cause of action" *Id.* Note that the insurer's argument in *Brookins* is the same one advanced by Fridman in this case. The insurer's argument was correctly rejected, 22 years ago, in *Brookins.* Fridman's same argument today should be rejected by this Court. *See also Clough v. Gov't Employees Ins. Co.*, 636 So. 2d 127, 128 (Fla. 5th DCA 1994) (disapproved in part, on other grounds), *Laforet*, 658 So. 2d 55 (Fla. 1995)

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[11] These are the same facts as *Fridman*, with an immaterial distinction that was noted in the *Fridman* dissent. In *Brookins*, the UM case was resolved by a *settlement* that included – according to the plaintiff there – an agreement that he had preserved his right to pursue his bad faith claim. Safeco understands that Fridman's UM claim was resolved with a confession of judgment, and not an agreed *settlement*. But Safeco does not contest that Fridman may pursue his bad faith claim now. Thus the "agreement" that the policyholder could maintain his bad faith action in the *Brookins* settlement does not distinguish that case from *Fridman*.

(rejecting only the court's retroactive application of § 627.727(10)). In *Clough*, the Fifth District held that no UM verdict was needed to establish the policyholder's right to bring a bad-faith case, since "the exact amount of the damages can be determined in that [§ 624.155] action." In sum, no case law required the trial court here to conduct a trial in this UM case, because a UM verdict was not a prerequisite for Fridman to bring his § 624.155 action.

Issue IV

A verdict or ruling in a UM case cannot be used to establish damages to be awarded in some separate, subsequent § 624.155 lawsuit.

a. Jurisdictional and constitutional impediments preclude the use of UM verdicts as evidence of damages in subsequent actions brought under § 624.155. These impediments are illustrated in *Geico General Ins. Co. v. Bottini*, 93 So. 3d 476 (Fla. 2d DCA 2012), a UM case. Geico's UM limit was $50,000; the UM trial produced a personal injury verdict of $30 million; judgment was entered for the $50,000 UM policy limit. GEICO appealed asserting that errors at trial acted to inflate the amount of damages determined by the jury. *Bottini*, 93 So. 3d at 478. Geico conceded that, after finding liability, a jury would be free under the facts of that case to award a total of $1,050,000 even in the fairest of trials. Id. The Second District then affirmed, holding:

> [W]e are satisfied that even if Geico were correct that errors may have affected the jury's computation of damages, in the context of this case and the amount of the judgment, any such errors were harmless. Thus, we do not address further Geico's claims of error.

Bottini, 93 So. 3d at 477. The concurring judge challenged the proposition that district courts even have the jurisdiction to review errors in verdicts [12] where correction of those errors does not affect the judgment.[13]

At least one federal district court has recognized the constitutional infirmity of saddling an unreviewed UM verdict on an insurer in a subsequent bad faith case. In *King v. Gov't Emps Ins. Co*., 2012 WL 4052271 (M.D. Fla. Sept.13, 2012) , the federal trial court ruled the plaintiff bringing a § 624.155 action "must prove their damages in the bad faith action and are not entitled to rely on the underlying verdict [from the state court UM case] as conclusive proof of those damages . . . ."

The federal court reasoned that "insurers are left without due process if the verdicts returned in the underlying liability [should be UM] actions are held to be final determinations of the damages owed the insureds in subsequent bad faith

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[12] See Florida Rule Appellate Procedure 9.030(b)(1) and Fla. Const. art. V, § 4(b): "(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court."

[13] "[A]t least one judge on this panel has not decided that the verdict is correct or incorrect as to damages awarded in excess of $1,050,000 because that issue is not within our permissible scope of review." *Bottini*, 93 So. 3d 476, 478. (Altenbernd, J., concurring).

actions." *King* , 2012 WL 4052271 at *6 . Florida federal district courts, a common venue for bad faith suits, have addressed the issue in disparate ways. *See Harris v. Geico Gen. Ins. Co.*, 961 F. Supp. 2d 1223, 1232 (S.D. Fla. 2013) (following *King*, and rejecting the use of a jury verdict from the state court UM action as the proper measure of bad faith damages in the § 624.155 action.) *Cf. Batchelor v. Geico Cas. Co.*, 2014 WL 2573260 (M.D. Fla. June 9, 2014) (disagreeing with *King*, noting disparate rulings).

If Safeco is to be held liable for $1 million in Fridman's forthcoming bad faith action, then Safeco is entitled, under article V, section 4(b) of the Florida Constitution, to appellate review of the asserted errors at trial as set forth in Safeco's issues III and IV in the district court, regarding remittitur and improper argument. *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996) ("[W]e construe the language of article V, section 4(b) as a constitutional protection of the right to appeal.") That appellate review has not yet occurred. To make Safeco liable for a jury verdict that is not subjected to appellate review would improperly deprive Safeco of due process.

b. District Courts of Appeal refuse to allow trial courts to generate advisory awards in UM actions for use in any separate bad faith case. In *Government Employees Ins. Co. v. King*, 68 So. 3d 267 (Fla. 2d DCA 2011 (en banc), the Second District observed it had been the practice of that court for many

years to award UM policyholders the attorney fees they incurred in their UM actions, on a contingent basis, for use as damages in their subsequent bad-faith actions. *Id.* at 269. That court awarded fees on a contingent basis because a prevailing policyholder cannot recover fees in a UM action under § 627.428 when coverage is not contested. *See* § 627.727(8).

However, these same attorney fees, the ones that are incurred but are not recoverable in the prosecution of an action for UM benefits, may be recoverable as an element of the policyholder's damages in a subsequent § 624.155 bad-faith action. *See* § 626.727(10). The Second District decided to end its practice of generating contingent fee awards in UM cases explaining:

> The fact that the [UM] verdict . . . might be introduced into evidence in a subsequent lawsuit alleging bad faith presents no legal basis for the trial courts in these [UM] cases to make any determination of fees that might be awardable as damages in the subsequent [§ 624.155] lawsuit. Likewise, [the UM policyholder] is not entitled to an award of attorneys' fees in this appeal at this time, and **there is no legal basis** for this court to order the trial court to determine a contingent award of appellate attorneys' fees for use in any subsequent lawsuit . . . . . .

King, 68 So. 3d at 270. (emphasis supplied). In the same vein, "there is no legal basis" for the UM trial court to establish, on a contingent basis, the entitlement to, an amount of, economic and non-economic damages in excess of the UM policy limit for use as the basis of damages in any subsequent bad-faith lawsuit.

The Second District, in *King*, followed *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163 (Fla. 5th DCA 2010). In *Jenkins*, the court denied a UM policyholder's motion for conditional award of fees for use in a separate bad faith case, stating: "The bad faith action is a separate and distinct cause of action, which did not accrue until completion of the initial action and thus cannot be used to obtain attorney's fees under the demand for settlement filed in the initial [UM] action." *See also GEICO Indemnity Co. v. DeGrandchamp*, 99 So. 3d 625, 626 (Fla. 2d DCA 2012) (disapproving the practice of making preemptive determinations of issues in a UM case that may or may not arise in a subsequent action for bad faith).

Like the contingent award of attorney fees for a future bad-faith action in the *King* case, the adjudication of Fridman's bad faith damages is properly reserved for the court and the jury in the future § 624.155 bad-faith action. The trial court's decision to adjudicate Fridman's damages for use in a future bad-faith action is thus contrary to both the Second District's decision in *King*, and the Fifth District's decision in *Jenkins*. No district court case allowing or requiring a UM verdict to be used as conclusive evidence of damages in a § 624.155 action has been found or by either party.

Issue V

The trial court erred in denying Safeco's motion for remittitur and denying Safeco's motions for a mistrial and for a new trial based on Fridman's counsel's derogatory comments and improper argument. None of these errors were reached by the Fifth District.

Should this Court disapprove *Fridman*, then before the judgment can be reinstated, Safeco is entitled to appellate review of the erroneous rulings it asserted in its district court brief, Issues III and IV. Those two issues were never addressed or reached by the district court. Safeco does not abandon these arguments, and so sets them out here. Should this Court approve *Fridman*, this issue would not be reached.

a. Fridman showed he suffered no more than $2,400 in lost wages; the jury's determination he lost $45,000 was not supported by any evidence. Generally, a trial court must use the criteria in § 768.74(5), Fla. Stat. to determine whether a verdict is excessive. Specifically, an award for past lost earnings should equal:

> the difference between what [the plaintiff] *probably could have earned* but for the harm and any lesser sum that [the plaintiff] actually earned in any employment or, if [the plaintiff] failed to avail himself of opportunities, the amount that [the plaintiff] probably could have earned in work for which he was fitted, up to the time of trial.

Restatement (Second) Of Torts, § 924 (emphasis added). See *Ludwig v. Ladner*, 637 So. 2d 308, 309-310 (Fla. 2d DCA 1994). Fridman claimed he could have

made $100,000 to $200,000 a year in the marble and tile industry, but he adduced no evidence, such as a business plan or documentation, to substantiate his claim.

In making this award of past lost wages, the "trier of fact . . . arrived at the amount of damages by speculation or conjecture." § 768.74(5)(c). The $45,000 award was not supported by the evidence and could not "be adduced in a logical manner by reasonable persons." § 768.74(5)(e). The trial court abused its discretion in denying Safeco's motion for remittitur as to past lost earnings.

b. Fridman adduced no evidence to support the jury's determination that he lost $225,000 in future earning ability. There was no competent evidence to support the jury determination of $225,000 for future lost earning ability. Future economic damages must be "established with reasonable certainty." *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995). A trial court abuses its discretion in denying a motion for remittitur when the evidence shows only that the plaintiff might suffer damages for loss of future earning capacity. *Truelove v. Blount*, 954 So. 2d 1284, 1289 (Fla. 2d DCA 2007).

Fridman's only evidence that his future earning capacity was diminished was his testimony that, from his prior experience in the industry, he thought he had the potential to make $100,000 to $200,000 per year in the business. But Fridman could not recall if he even collected a paycheck when he worked in the tile business back in 2004-2006. And when he did open a tile and marble business, the

business lasted 20 days and he lost money. Moreover, Fridman was making substantially more at the time of trial than he did at the time of the accident. The only quantifiable evidence of future lost earning ability was limited to $20,160, based on the 3-4 months of work Fridman is expected to miss following surgery that may occur in the future.

The "trier of fact . . . arrived at the amount of damages by speculation or conjecture." § 768.74(5)(c). The amount awarded is not "supported by the evidence and is [not] such that it could be adduced in a logical manner by reasonable persons." § 768.74(5)(e). Therefore, the trial court abused its discretion in denying Safeco's motion for remittitur. *See Miami-Dade County v. Cardoso*, 963 So. 2d 825 (Fla. 3d DCA 2007).

c. Fridman's counsel's improper trial arguments and comments ruined the fairness of this trial. The verdict was inflated because of jury prejudice against Safeco. That prejudice was incited by Fridman's counsel's improper remarks at trial. He repeatedly attacked Safeco, accusing it of not conducting a sufficient or timely investigation of Fridman's claim. It is improper for policyholder's counsel to insinuate a UM insurer has acted in bad faith in defending an action rather than paying the benefits. *State Farm Mut. Auto. Ins. Co. v. Revuelta*, 901 So. 2d 377, 380 (Fla. 3d DCA 2005) (remanding for a new trial based on cumulative prejudicial comments); *see Mercury Ins. Co. of Fla. v.*

Moreta, 957 So. 2d 1242, 1247 (Fla. 2d DCA 2007) (finding attack on insurer's claims-handling practices and litigation tactics in a UM case to be improper). An attorney may not argue a party should be punished for contesting liability. *Carnival Corp. v. Pajares*, 972 So. 2d 973, 977 (Fla. 3d DCA 2007).

Here, as in *Revuelta* and *Moreta*, *Pajares*, 972 So. 2d at 977 Fridman's counsel argued in closing that the defendant refused to accept responsibility for the accident. Objection and ruling at R16. 1200. Fridman's counsel repeatedly argued Safeco delayed the claim by (1) failing to timely depose Dr. Katzman, (2) waiting 4.5 years to take Nemorin's deposition, and (3) hiring Dr. Troiano on the eve of trial to refute Fridman's claims. Fridman's counsel made these improper comments starting in opening statements, his case in chief, on cross examination of defense witnesses in Safeco's case, and in closing, as documented in the statement of case and facts. Safeco's lawyer made contemporaneous objections that were overruled, and a timely motion for mistrial that was denied. They are detailed in Safeco's Initial Brief in the district court. Thus, this issue has been preserved for appellate review. The outsized verdict is the proof of harmfulness of the errors.

"[T]he trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.'" *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006). "[T]he

cumulative prejudicial effect of the improper comments noted herein requires a new trial to protect the overall fairness of the trial court proceedings, and to ensure that [Safeco] receives a new trial." *Pajares*, 972 So. 2d at 979; *see Revuelta*, 901 So. 2d at 380.

CONCLUSION

The decision and opinion of the Fifth District Court of Appeal should be approved in all respects. If the decision is disapproved, Safeco should be provided a new opportunity for appellate review of the rulings raised in its motions for new trial and remittitur.

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