Electronically Filed 08/30/2013 06:32:17 PM ET

RECEIVED, 8/30/2013 18:33:38, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

ADRIAN FRIDMAN,

Petitioner,

v.

CASE NO. SC13-_____
DCA No. 5D12–428

SAFECO INSURANCE COMPANY OF ILLINOIS,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Fifth District, State of Florida
Case No. 5D10-1852

Michael S. Rywant, Esq.
Kerry C. McGuinn, Jr., Esq.
RYWANT, ALVAREZ, JONES RUSSO & GUYTON, P.A.
109 N. Brush St., Ste. 500
PO Box 3283
Tampa, FL 33601
Phone: (813) 229-7007
Appellate Counsel for Petitioner

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STATEMENT OF THE CASE AND FACTS

Petitioner ADRIAN FRIDMAN ("FRIDMAN") asks this Court to review the opinion of the Fifth District Court of Appeal issued on May 24, 2013. (A true and correct copy of which has been attached hereto as **APPENDIX "A"**). This opinion remands the case for entry of an Amended Final Judgment deleting any reference to the jury verdict and directing jurisdiction not be reserved to amend the complaint to add a count seeking relief under Florida Statutes Section 624.155. The facts to the underlying litigation are as follows:

On January 8, 2007, FRIDMAN sustained serious injuries in an automobile accident. The insurer for the underinsured tortfeasor tendered its policy limits of $10,000 to FRIDMAN. On October 13, 2008, FRIDMAN asked SAFECO INSURANCE COMPANY OF ILLINOIS ("SAFECO"), FRIDMAN's insurer, to pay the $50,000 uninsured motorist ("UM") coverage policy limits. SAFECO refused; FRIDMAN filed a Civil Remedy Notice pursuant to Florida Statutes, Section 624.155. SAFECO neither responded to nor attempted to cure the Civil Remedy Notice by settling the claim within the 60-day period. FRIDMAN then filed a single-count complaint for UM coverage against SAFECO on April 29, 2008.[1] Trial began on September 12, 2011.

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[1] See ***Allstate Ins. Co. v. Jenkins***, 32 So.3d 163 (Fla. 5th DCA 2010) (holding that the bad faith action is a separate and distinct cause of action, which did not accrue until completion of the initial UM action).

Shortly prior to trial, SAFECO tendered a check for the policy limits to FRIDMAN and filed a Motion for Entry of Confession of Judgment. The trial court denied the motion on September 6, 2011, finding that SAFECO's actions constituted an attempt to limit their potential liability in a future bad faith claim and contrary to the "plain legislative intent of section 627.727(10)." At trial, the jury awarded FRIDMAN $1 million in damages. The trial court entered the Final Judgment for the policy limits[2] but reserved jurisdiction to consider a request to amend the Complaint to add a count for statutory bad faith against SAFECO.

SAFECO appealed the Final Judgment, arguing that the trial court improperly denied its Motion for Entry of Confession of Judgment and that tendering policy limits prior to trial rendered the trial moot. FRIDMAN argued that her Civil Remedy Notice was a statutory condition precedent to filing a bad faith action. As such, following the expiration of the Notice, there was a presumption of bad faith, the upper limits of liability for which would be determined by the jury's award in accordance with Florida Statutes, Section 627.727(10). SAFECO's confession of judgment attempted to insulate itself from liability and the remedies provided by Section 624.155.

In its opinion issued on May 24, 2013, the Fifth District Court of Appeal held that the trial court erred in denying SAFECO's Motion for Entry of

[2] ***Nationwide Mutual Ins. Co. v. Voigt***, 971 So.2d 239, 242 (2nd DCA 2008) (holding that the judgment amount can only be for the policy limits).

Confession of Judgment and found the determination of damages in the underlying action moot. The District Court held that the trial court should have entered the Confession of Judgment and required FRIDMAN to file a another complaint alleging the confessed judgment as a basis for bad faith.

The May 24, 2013 opinion has since become final. The District Court denied FRIDMAN's Motion for Rehearing on July 8, 2013. FRIDMAN initiated the instant proceeding invoking this Court's Discretionary Jurisdiction on August 6, 2013, and has filed instant Initial Brief on Jurisdiction with this Court on August 30, 2013.

SUMMARY OF THE ARGUMENT

FRIDMAN is respectfully requesting this Court exercise its discretionary jurisdiction to review the Fifth District Court of Appeal's May 24, 2013 opinion which is in direct and express conflict with this Court's decisions in ***Vest v. Travelers Insurance Company***, 753 So.2d 1270 (Fla. 2000), ***Imhof v. Nationwide Mutual Insurance Co.***, 643 So.2d 617 (Fla. 1994), and ***Blanchard v. State Farm Mutual Automobile Insurance Co.***, 575 So.2d 1289 (Fla. 1991). In these cases, the court has established the two conditions precedent to filing a first-party bad faith claim as (1) the establishment of liability and (2) a determination as to the extent of Plaintiff's damages. Because the Fifth District's opinion effectively removes the second of these prerequisites and establishes that the determination of

damages is not a condition precedent to filing a statutory action for bad faith but an element to be proven after a bad faith action is initiated, this Court should exercise its discretionary jurisdiction to review the Fifth District Court of Appeal's May 24, 2013 opinion.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal opinion that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art. V, Sec. (3)(b)(3) Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT'S COURT'S OPINION BECAUSE IT CONFLICTS WITH ***VEST***, ***IMHOF***, AND ***BLANCHARD***. THIS OPINION CONTRADICTS THESE DECISIONS BY PREVENTING THE DETERMINATION OF EXCESS DAMAGES NECESSARY TO ESTABLISH AN ELEMENT OF A STATUTORY CLAIM FOR INSURER BAD FAITH.

FRIDMAN requests this Court exercise its discretionary jurisdiction to consider whether the Fifth District's opinion expresses a misstatement of Florida law, as the opinion directly and expressly conflicts with this Court's decisions in ***Vest***, ***Imhof***, and ***Blanchard***.

In ***Blanchard***, this Court held: "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," effectively making the resolution of the underlying suit and an actual determination of the extent of Plaintiff's damages a condition precedent to the filing of a bad faith claim. *Blanchard*, 575 So.2d at 1291. (emphasis added). (*See also* ***Imhof***, wherein this Court held that there is no cause of action for a first-party bad faith claim absent a determination of the Insured's damages. *Imhof*, 643 So.2d 618.) This Court further held that, as the existence of liability and the extent of damages are prerequisites to a bad faith claim, there was nothing improper about filing the underlying claim prior to, and independent of, the bad faith claim.

In ***Vest***, this Court "continue[s] to hold in accord with *Blanchard* that bringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract. This avoids the problem *Blanchard* dealt with, which was the splitting of causes of action." *Vest*, 753 So.2d at 1276. This Court has previously held that the issues regarding damages in the underlying claim and the potential liability in a bad faith action should not be joined. Additionally, this Court has also repeatedly held that the determination of the extant of damages is a condition precedent to initiating a bad faith action. A failure to allege a

determination of damages in excess of the policy limits results in no viable cause of action.[3]

Contrary to this Court's decisions in ***Vest***, ***Imhof***, and ***Blanchard***, the Fifth District Court has concluded the opposite: despite the expiration of the statutorily provided 60-day time period to cure pursuant to a civil remedy notice, once SAFECO had tendered the policy limits and confessed judgment, the issue at hand became moot. The District Court improperly concluded that the Motion for Entry of Confession of Judgment, filed over three years after the expiration of the Civil Relief Notice issued by FRIDMAN, established the existence of damages, and that extent of these damages owed to Plaintiff were not a condition precedent to the bad faith claim as the a count for bad faith was not included in the original Complaint.

The Civil Remedy Notice provided the language necessary to put SAFECO on notice of the bad faith issue and perfect FRIDMAN's rights to pursue a bad faith claim. SAFECO's failure to cure the Notice, or to even respond, created a rebuttable presumption that SAFECO acted in bad faith. The 60-day time period provided to cure the Notice effectively ensures that the insurer timely evaluates the claim and attempts to avoid unnecessary bad faith litigation. The "obligation on

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[3]***Conquest v. Auto-Owners Ins. Co.***, 773 So.2d 71, 74 (2nd DCA, 1998) (holding that damages are a necessary element explicitly required by the language of Section 624.155(1), and stating that it is precisely because the jury awarded the plaintiff less than her last demand for settlement that she cannot establish that she was damaged).

the part of an insurer requires the insurer to *timely* evaluate and pay benefits owed on the insurance policy." *Vest*, 753 So.2d at 1275. (emphasis added). FRIDMAN clearly issued this Notice to perfect FRIDMAN's rights to pursue a bad faith claim as this Court has repeatedly held that to have done so would have premature and should be dismissed as such. *See Id.* at 1276. Additionally, it is well-settled that once the liability is established, the actual extent of the Insured's damages must be determined. *See Vest*, 753 So.2d at 1273; *see also Blanchard*, 575 So.2d at 1291. "The carrier effectually stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge." *Allstate Ins. Co. v. Boynton*, 486 So.2d 552, 557 (Fla. 1986).

Under the decisions rendered by this Court in ***Vest***, ***Imhof***, and ***Blanchard***, the two prerequisites to a first-party bad faith claim is the establishment of liability and a determination as to the extent of injuries.

> It is well settled that a statutory first-party bad faith action is premature until two conditions have been satisfied: (1) the insurer raises no defense which would defeat coverage, or any such defense has been adjudicated adversely to the insurer; and, (2) the actual extent of the insured's loss must have been determined. *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co.*, 753 So.2d 1270, 1273 (Fla. 2000), (*citing Vest*, 753 So.2d at 1273 and *Blanchard*, 575 So.2d at 1291).

The opinion of the Fifth District Court of Appeal issued on May 24, 2013, effectively removes the second of these prerequisites and established that the determination of damages is not a condition precedent to filing an action for bad

faith but an element to be proven after a bad faith action is initiated. This Fifth District opinion constitutes a direct and express conflict with the law established by ***Vest***, ***Imhof***, and ***Blanchard*** for which this Court should exert its discretionary jurisdiction to review.

CONCLUSION

WHEREFORE, for the reasons stated above, FRIDMAN respectfully requests that this Court exercise its discretionary jurisdiction to review the opinion of the Fifth District Court of Appeal issued on May 24, 2013, and further requests that this Court direct the respective parties to submit Briefs on the Merits.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by **e-Service** this 30TH day of August, 2013, to:

Anthony J. Russo, Esq. arusso@butlerpappas.com
Butler Pappas Weihmuller Katz Craig LLP
777 S. Harbour Island Blvd., #500
Tampa, FL 33602

Jeffrey M. Byrd, Esquire AttorneyByrd@aggressiveattorneys.com
2620 E. Robinson Street
Orlando, FL 32803

Robert E. Vaughn, Jr. Robert.Vaughn@LibertyMutual.Com
Law Office of Glenn G. Gomer
Employees of Liberty Mutual Ins. Co.
600 North Westshore Blvd.
Tampa, FL 33609

Maddge B. Penton, Esquire maddge.penton@libertymutual.com
300 S Orange Ave, Ste 1275
Orlando, FL 32801-5405

Mark A. Risi, Esq. mrisi@risilaw.com
The Law Office of Mark A. Risi
2699 Lee Road, Suite 101
Winter Park, Florida 32789

Respectfully submitted,

Michael S. Rywant, Esq.
Florida Bar No.: 240254
Kerry C. McGuinn, Jr., Esq.
Florida Bar No.: 982644
RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A.

109 N. Brush St., Ste. 500
PO Box 3283
Tampa, FL 33601
Phone: (813) 229-7007
Fax: (813) 223-6544
msrywant@rywantalvarez.com
kmcguinn@rywantalvarez.com
Appellate Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Respectfully submitted,

Michael S. Rywant, Esq.
Florida Bar No.: 240254
Kerry C. McGuinn, Jr., Esq.
Florida Bar No.: 982644
RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A.
109 N. Brush St., Ste. 500
PO Box 3283
Tampa, FL 33601
Phone: (813) 229-7007
Fax: (813) 223-6544
msrywant@rywantalvarez.com
kmcguinn@rywantalvarez.com
Appellate Counsel for Petitioner