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IN THE SUPREME COURT OF FLORIDA

ADRIAN FRIDMAN,

Petitioner,

v.

CASE NO. SC13-1607
DCA No. 5D12–428

SAFECO INSURANCE
COMPANY OF ILLINOIS,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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

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STATEMENT OF THE FACTS AND OF THE CASE

A. Introduction

The question presented in this case is what procedure an injured plaintiff whose insurance company refuses a claim for uninsured or underinsured motorist benefits must follow to collect the benefits due and, if appropriate, pursue a claim for bad faith. This type of bad faith claim is commonly referred to as a first-party bad faith claim. Since the legislature expressly recognized claims for first-party bad faith, litigants and case law have litigated such claims similar to the manner in which claims for third-party bad faith are litigated. That is, the insured files an underlying lawsuit to determine not only the insurer's liability to pay benefits under the policy, but also the full amount of damages the plaintiff sustained. If the jury finds damages that exceed the policy limits, the amount of the judgment initially entered against the insurer is limited to the policy limits. But the amount of the verdict in excess of the policy limits, the "excess judgment," becomes a measure of damages if the plaintiff can prove that the insurer's bad faith in denying the claim.

The insurer in this case, Safeco, sought to thwart that process. After litigating the case for two years and facing an impending trial, Safeco sought to confess judgment in the amount of its policy limits, $50,000, and avoid entirely the

scheduled trial to determine Fridman's full damages. That way, Fridman would have to file an entirely separate case (or cases) and start over to litigate his damages. Consistent with the insurance statutes and the case law, the trial court denied that request. It proceeded with a trial on damages and the jury returned a verdict concluding the plaintiff's total damages were $1 million. Judgment was entered for the policy limits but also reserved jurisdiction to seek amendment of the complaint to assert a bad faith claim. The judgment noted the jury's verdict and allowed for appropriate setoffs.

The Fifth District reversed. It concluded that Safeco's confession of judgment mooted all issues in the case and prevented a trial on any issue, including Fridman's full damages. According to the majority, that issue would have to be relitigated in a bad faith claim. But one judge dissented. He concluded the majority misread the pleadings and the law.

The dissent was correct. The Fifth District's decision is not only contrary to Florida statutes and case law, it is bad policy. It permits an insurer like Safeco to force an insured to litigate his claim for liability and damages, only to risk dismissal of the claim if the insurer later confesses judgment to avoid a trial. Having spent personal and judicial resources to litigate damages, the insured will be required to start from scratch to litigate the same damages in a bad faith claim. This is not the result required by law, nor should it be.

B. Fridman is permanently injured and seeks underinsured motorist benefits of $50,000 from his insurer Safeco, but Safeco denies the claim.

In January 2007, Fridman was seriously and permanently injured when an underinsured motorist negligently cut in front of him, violating his right-of–way and causing a crash. As a result of the collision and the injuries it caused, Fridman suffered significant damages including medical expenses, lost wages, permanent injuries and noneconomic damages including pain and suffering. These damages occurred in the past and continued into the future.

Fridman had an insurance policy with Safeco that provided for $50,000 in uninsured and underinsured motorist (UM) benefits. R. 1-3.

Before filing suit, Fridman tried to resolve his UM claim with Safeco. When his efforts were unsuccessful, he filed a Civil Remedy Notice (CRN) with the Department of Financial Services on October 13, 2008. R. 381. Fridman alleged that his own insurance company was not attempting in good faith to settle his claims when, under all the circumstances, it could have and should have done so, had it acted fairly and honestly towards him. As a result of the failure to settle (or even respond to the CRN), Fridman filed suit on April 29, 2009. R. 1. Fridman specifically contended in the CRN that:

(1) Safeco failed to pay UM benefits of $50,000 in a clear liability crash with substantial property damages;

(2) his medical bills were in excess of $16,800 and treatment was ongoing;

(3) he suffered multiple herniations in his neck and low back;

(4) EMG testing confirmed neck radiculopathy;

(5) he had no health insurance to obtain future medical treatment; and

(6) Safeco made a wholly inadequate settlement offer of $5,000.

C. Fridman is forced to file suit against Safeco to seek the underinsured motorist benefits in his insurance policy; Safeco vigorously defends and delays the suit.

Safeco did not even respond to the CRN—much less attempt to settle Fridman's claim. Since the lack of a response raises a presumption of bad faith, it was incumbent on Safeco to explain its conduct. No explanation was provided either the trial court or on appeal. As a result, Fridman filed suit against Safeco on April 29, 2009, seeking the UM benefits he was entitled to under his policy of insurance. R 1-3.

The Complaint sought damages for economic and non-economic damages proximately caused by the accident. In addition, the Complaint alleged that Fridman had sustained a permanent injury. In his Complaint, Fridman never "capped" his damages at the policy limits; Fridman demanded "judgment in excess of $15,000 for damages." R. 1-3.

For over two years, Safeco aggressively defended the lawsuit on the theories that the accident was caused by the negligence of Fridman, not the uninsured motorist, and that any injuries Fridman suffered were not a result of the crash. R.18-20. Fridman served a Proposal for Settlement upon Safeco on February 23, 2010. R. 78. This proposal was not accepted by Safeco. Safeco, not Fridman, noticed the case for trial on July 7, 2010, stating that "this action is ready to be set for trial." On August 24, 2010, the trial court set the trial for March 28, 2011. R. 79-84 On December 30, 2010, Fridman filed a Notice of Trial Experts, listing multiple medical providers who Fridman would have testify at trial. R. 95-97. Similarly, on February 7, 2011, Fridman filed a Witness and Exhibit list setting forth a variety of medical providers and medical records that would be utilized at the time of trial. R. 117-121. Safeco conducted no depositions of any of the witnesses identified by its insured.

On January 18, 2011, Safeco moved to continue the trial. R. 100-101. On January 25, 2011, Safeco noticed a Compulsory Medical Exam (CME) for February 28, 2011, with Dr. Craig Jones. R 105-106. On February 23, 2011, Fridman timely filed a Response/Objection to the CME. R. 124-136. Fridman argued Safeco was engaging in tactics designed to seek a continuance. Fridman argued that Safeco unilaterally noticed the CME to occur in Orlando, when Safeco knew Fridman resided in south Florida; case law requires any such exam be in the

county of the insured's residence. Also, Fridman argued the doctor selected by Safeco was unfit to conduct a CME as a result of his actions/conduct in other legal cases.

Safeco did not seek a ruling on Fridman's objections prior to the unilaterally scheduled exam. Instead, Safeco filed a Motion for Sanctions and a Motion for Summary Judgment, contending that Fridman failed to comply with his contractual obligations, thereby relieving Safeco of any duties under the insurance contract. R. 139-217, and 218-219.

A hearing was held on March 21, 2011, for which there is no transcript provided by Safeco in the record. R. 235. An additional hearing was held on March 23, 2011, for which Safeco provided no transcript. R. 260-261. At the hearing of March 23, 2011, the trial court heard all of the various motions that had been filed by Safeco. An order following the hearing was signed on March 31, 2011. R. 262-263. The trial court agreed with Fridman's objections concerning the location of the CME and further required that such exam be coordinated with Fridman's counsel. The trial court denied Safeco's Motion for Sanctions and Motion for Summary Judgment. Fridman requested that the case be placed back on the trial docket as soon as possible. R. 262-263.

On April 29, 2011, Safeco scheduled a CME for May 17, 2011 with Dr. Christopher Troiano. R. 264-265. On June 9, 2011, Fridman asked to place the

case back on the trial docket (R. 282-283), which the trial court granted. R. 284-285. On June 15, 2011, the trial court entered a preliminary Pre-Trial Order setting the case on the trial docket of September 12, 2011. R. 286-291. As a result, while Safeco's motions were unsuccessful, the trial was nonetheless moved from March, 2011.

D. After litigating the suit for more than two years, Safeco seeks to simply confess judgment in the amount of the policy limits and to have the case dismissed.

Shortly after the case was rescheduled for trial, Safeco filed a "bare-bones" motion for confession of judgment that cited no case law. R. 302. Safeco contended it was willing to pay the policy limits of $50,000 plus taxable costs and concede entry of a judgment in that amount. Simultaneously, Safeco also filed a "Confession of Judgment." R. 303. Both the Motion and Confession reflect that "all contractual exposure to liability is resolved."

At the hearing on Safeco's motion and confession of judgment, Safeco argued that under Brookins v. Goodson, 640 So.2d 100 (Fla. 4th DCA 1994) and Nationwide Mut. Fire Ins. Co. v. Voigt, 971 So2d 239 (Fla. 2d DCA 2008), a carrier's payment of policy limits conclusively resolves the questions of liability and damages in a breach of contract action against that carrier. R. 355, line 20 through R. 356, line 1. Safeco improperly suggested that "the excess judgment

damages are not a measure of your damages in a UM case." R. 364. Fridman responded that Safeco's case law did not address the issues raised and were easily distinguished. Fridman's counsel further noted that he had never heard this argument made in similar cases, much less on the eve of trial in a case in which damages were in the hundreds of thousands of dollars. R. 361-363. Because the trial court had never encountered Safeco's argument before—and because Fridman's motion and confession had neither made this specific argument nor cited any case law—the trial court required both sides to prepare and file memoranda of law on whether Safeco's confession of judgment mooted all remaining issues in the case. R. 357, line 11, 20; 361-363.

E. The trial court denies Safeco's request to dismiss the case and a jury concludes that the underinsured motorist's negligence caused Fridman $1 million in damages.

After the August 19, 2011 hearing, multiple legal memos were filed with the Court by each party. R. 384-393, 394-396, and 397-408. Thereafter, on September 6, 2011, the trial court entered a detailed order denying Safeco's Motion to Dismiss the action. The Order stated:

The Court has closely reviewed the Brookins decision and the other related case law and statutes that have arisen thereafter, and finds the Defendant's argument is without legal support The Brookins decision has very little to do with the issues in this case as the statutes upon which the decision was based have substantially changed. Both Florida Statute §624.155 and §627.727 have been modified since the Brookins accident of 1988, and the law now clearly permits the

recovery of the "total" damages, including those that are in excess of the UM policy limits, upon a finding of bad faith. If the Court were to follow the Defendant's argument in this case, it would ignore the plain legislative intent of §627.727(10), which provides:

> §627.727 (10): The damages recoverable from an uninsured motorist carrier in an action brought under §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. R. 410.

The trial court denied the motion and relief requested by Safeco. R. 409-411. On September 6, 2011, the trial court set the case for trial on September 19, 2011. R. 412. On September 13, 2011, Safeco filed an Emergency Motion to Continue Trial. R. 522-523. The trial court moved the trial to December 5, 2011. R. 530. Thereafter, Safeco took two trial depositions, Dr. Christopher Troiano on November 3, 2011, and Dalourny Nemorin, the underinsured motorist that Fridman blamed for the crash, on November 9, 2011. The trial court itself scheduled a hearing on December 1, 2011, to review the objections asserted in the depositions of Nemorin and Troiano. R. 555. No transcript of the hearing of December 1, 2011, has been filed by Safeco. However, a detailed order on the deposition excerpts was prepared, which suggests the trial court closely reviewed the entire deposition testimony. R. 556-558.

Trial commenced on December 12, 2011. The jury returned a verdict on December 15, 2011 in Fridman's favor for $1,000,000 in total damages. The jury also concluded that the crash had caused Fridman permanent injuries and that his damages were entirely the fault of the tortfeasor. R. 637-639.

F. The trial court enters judgment against Safeco and Safeco appeals.

Following the jury verdict, Fridman moved for entry of a final judgment. R. 682-676. Safeco timely filed post-trial motions. R. 677-691. The trial court entered judgment on December 29, 2011. R. 709-710. This judgment provided for execution on the sum representing the policy limits and reserved jurisdiction to "determine the Plaintiff's right to Amend his Compliant to seek and litigate bad faith damages from Defendant..." The trial court denied Safeco's post-trial motions. R. 715.

Following the resolution of post-trial motions, Safeco appealed the judgment (to include its various pleadings relative to "confessing" judgment to avoid a trial on the merits).

G. The Fifth District Court of Appeal reverses the judgment in a split decision with one judge dissenting.

After briefing and oral argument in the Fifth District Court of Appeals, that court reversed the trial court in a 2-1 decision with an extensive dissent by Judge

Sawaya. In reversing, the majority determined the jury's verdict was meaningless and remanded the case for entry of a judgment for the contract benefits (policy limits) only. The majority opinion determined further judicial labor was unnecessary in that a "confessed judgment" would provide sufficient basis for a bad faith claim and there was no need for a determination of the full extent of Fridman's damages, who caused the accident, permanency or causation. In a lengthy dissent, Judge Sawaya examines the claims and litigation conduct (to include the failure to respond to the CRN) of Safeco, the statutory purpose of Florida Statutes §624.155 and §627.727(10), and the Florida Supreme Court decisions that require a prior determination of the full extent of the insured's damages in the UM litigation.

Fridman filed his notice to invoke this Court's conflict jurisdiction on August 6, 2013. This Court accepted jurisdiction on April 14, 2014.

SUMMARY OF ARGUMENT

The Fifth District erred when it concluded that Safeco's confession of judgment resolved all issues in Fridman's claim and rendered moot a trial on liability, causation, permanency, and the full amount of Fridman's damages.

A. The jury's verdict properly determined the damages recoverable under section 627.727 (10).

B. The Fifth District erred in concluding the confession of judgment would provide the Plaintiff a sufficient basis to pursue a bad faith claim.

C. The Fifth District erred in requiring the Plaintiff to include a count for bad faith, because such a count would have been dismissed or abated.

D. The procedure endorsed by the Fifth District results in multiple trials wasting judicial and litigation resources.

ARGUMENT

A. The jury's verdict properly determined the damages recoverable under §627.727(10).

Section 627.727(10), Florida Statutes (2011) provides the damages recoverable in an action against a UM insurer "include the total amount of the claimant's damages, including the amount in excess of the policy limits," and those damages are recoverable "whether caused by an insurer or third-party tortfeasor." A claim for underinsured motorist benefits is a precursor to a bad faith claim under the current statutory framework. Under the statute, the initial action against the insurer to recover benefits not only deals with the breach of contract but permits a jury to determine the full extent of damages. Safeco's efforts to suggest that the issue of damages must be tried in a separate bad faith case is contrary to Florida law. The determination of the plaintiff's total damages is set by the jury's verdict in the original UM action.

This Court has already addressed this issue in State Farm Mutual Automobile Insurance Company v. Laforet, 658 So.2d 55 (Fla. 1995), and specifically acknowledged that a judge or jury deciding an uninsured motorist claim may award damages in excess of the claimant's policy limits. Those damages, while not reduced to judgment in the underlying claim, become an

element of the damages the claimant may be entitled to in a bad faith claim against the carrier. Laforet twice states the damages recoverable under Section 627.727(10) are the damages determined in the underlying UM suit:

> Section 627.727(10) provides that the damages recoverable from an uninsured motorist carrier in a bad faith action brought under Section 624.155 and the 1990 amendment thereto shall include the total amount of the claimant's damages, including any amount in excess of the claimant's policy limits **awarded by a judge or jury in the underlying claim.**

658 So.2d at 56-57. (emphasis added). Later, Laforet reiterates:

> On July 7, 1992, Section 627.727(10) became law. That statute provides that the damages recoverable from an uninsured motorist carrier in a bad faith action filed under section 624.155, such as the one at issue here, are to include the total amount of the claimant's damages, **including any amount awarded in the underlying claim** in excess of the claimant's policy limits.

Id. at 57 (emphasis added).

The issue in Laforet was whether Section 627.727(10) could be applied retroactively to causes of action that accrued prior to its enactment. The court concluded it could not be applied retroactively because such application would essentially be penal. 658 So.2d at 61. The analysis required the Florida Supreme Court to consider exactly what was made recoverable by Section 627.727(10) ; it determined that to be "the total amount of a claimant damages ... awarded by a judge or jury in the underlying claim." Id. at 57.

Laforet specifically construed Section 627.727(10) as allowing recovery of the total amount of damages awarded by the judge or jury in the underlying suit. That is, the verdict from the underlying UM claim becomes binding as a determination of damages in the subsequent bad faith action.

Laforet's interpretation of Section 627.727(10) is supported by the background and legislative purpose of Section 627.727(10). The history behind the Florida Legislature's enactment of this section makes it clear that its purpose is to allow the plaintiff to recover the excess portion of the damages awarded by the jury in the underlying UM suit.

Originally, Florida did not recognize any cause of action for bad faith in the first party context—that is, an action brought by the insured against his or her insurer. Laforet, 658 So.2d at 58-59. It did, however, recognize a cause of action for third party bad faith. Id. at 58. As this Court knows, third-party bad faith typically arises out of an insurer's failure to settle a liability claim against the insured. If the insurer breaches its duty of good faith and a judgment is entered against the insured for amount exceeding the policy limit, the insurer will be held liable for the entire judgment including the portion in excess of the policy limit. Laforet, 658 So.2d at 58. Such a judgment, referred to as an "excess judgment," is the main element of damages in an action for third-party bad faith. See Dunn vs. National Security Fire & Cas. Co., 631 So.2d 1103, 1106 (Fla. 5th DCA 1993).

In 1982, the Florida Legislature enacted Section 624.155, Florida Statutes, which created a statutory cause of action for first party bad faith. For the next 10 years, it was unsettled whether a successful plaintiff in an action for first-party bad faith could recover the excess judgment as is true in third-party bad faith. This Court addressed that issue in McLeod v. Continental Insurance Company, 591 So.2d 621 (Fla. 1992). In McLeod, this Court held that the excess judgment was *not* an element of damages recoverable in action for first party bad faith.

The Florida legislature promptly responded to overturn the Court's ruling in McLeod. It enacted Section 627.727(10) that same year. Its express purpose was to overturn McLeod and make the excess judgment recoverable in bad faith actions against UM insurers. A Senate Staff Analysis and Economic Impact Statement of the bill which created Section 627.727(10) (attached as **Appendix A**) discusses McLeod and comments,

> Thus, as interpreted by the Supreme Court, excess judgments are not automatically recoverable for first party bad faith actions.
>
> This bill provides that on uninsured or underinsured motorist case, the total amount of the claimant's damages are recoverable whether caused by an insurer or the third-party tortfeasor.

(App. A, p. 10). The following page states:

> The bill will expose insurers to additional costs for liability on first-party bad faith claims **by requiring recovery of excess judgments**. Insureds obtaining these increase bracket [sic] financial awards will financially benefit from these provisions.

(App. A, p.11) (emphasis added). Page 12 of the statement similarly refers to "the amendments authorizing the collection of excess judgment awards." (App. A, p.12)

The Legislature's express purpose in creating Section 627.727(10) was to make the excess judgment recoverable in bad faith actions against UM insurers just as it was in third-party bad faith actions. Case law also recognizes that 627.727(10) overturned McLeod by making excess judgments recoverable. Allstate Indemnity Co. v. Ruiz, 899 So.2d 1121, 1128 n.2 (Fla. 2005); Time Ins. Co. v. Burger, 712 So.2d 389, 392 (Fla. 1998); see also Laforet, 658 So.2d at 61 (referring to §627.727(10)'s measure of damages as "the entire amount of the excess judgment.").

There are three reasons why the term "excess judgment" as applied to the UM context must refer to the excess portion of the verdict returned in the underlying case by an insured against the insurer. First, this Court defined "excess judgment" to mean exactly that in McLeod. The McLeod opinion notes that the damages sought by McLeod were "the $200,000 shortfall between all available insurance coverage and the amount of the verdict in the wrongful death action." Id. at 623. Because the legislature enacted Section 627.727(10) with the specific purpose of overturning McLeod, it had to mean "excess judgment" in the same sense that McLeod used the term, i.e., the shortfall between the available insurance coverage and the verdict in the underlying action.

Second, the term "excess judgment" is borrowed from third-party bad faith, where it refers to the judgment entered in the underlying tort action. By enacting Section 627.727(10), the Legislature eliminated the distinction created by McLeod between the damages available in first-party cases and those available in third-party cases. See Ruiz, 899 So.2d at 1128, n.2. Thus, the "excess judgment" the legislature contemplated must be determined by the jury's verdict in the underlying action, just as it is in third-party cases.

Third, it is not uncommon for a plaintiff to sue the uninsured tortfeasor and UM insurer in the same lawsuit. If the case proceeds to trial against both defendants, a judgment will be entered against the tortfeasor for the entire amount of the verdict (after reductions for comparative fault or setoffs). This process explains how McLeod settled on the term "excess judgment" in referring to the portion of the verdict in excess of the policy limits. See McLeod, 591 So.2d at 624 ("the insurers bad faith in refusing to settle a first-party action leads to an excess judgment in favor of the insured and against the third-party..."). Significantly, the measure of damages provided by Section 627.727(10) must be the same whether or not the tortfeasor is joined as a defendant, because there is no logical reason to vary the meaning of Section 627.727(10) depending on whether the tortfeasor is a party. In either instance, the judgment against the insurer will be limited to the policy limit. When the UM insurer is the sole defendant (as in this case), the

"excess judgment" refers to a judgment that would have been entered against the tortfeasor if a defendant.

Additionally it is well-established that a plaintiff must obtain a determination of the tortfeasor's liability and the extent of the plaintiff's damages before a cause of action for bad faith will accrue. Blanchard v. State Farm Mutual Automobile Ins. Co., 575 So.2d 1289, 1291 (Fla. 1991). Blanchard would not have imposed this requirement unless it meant for the determination of damages to be binding in the bad-faith case. It would be pointless to require a plaintiff to obtain a determination of damages only to have it discarded as meaningless in the bad-faith case. In light of the foregoing precedents, the erroneous analysis by the majority in Fridman, is manifest. There was no confession of judgment which terminated the trial court's judicial labors. Given Safeco's denial of Fridman's claims (including the failure to respond to the CRN), a jury properly determined the full measure of his damages in addition to liability for the accident, what the accident caused and the permanency of Fridman's injuries.

B. The Fifth District erred in concluding the confession of judgment would provide the Plaintiff a sufficient basis to pursue a bad faith claim.

The Fifth District's opinion concluded that once Safeco confessed judgment in the amount of its policy limits, the case was resolved and the amount of Fridman's damages was a moot issue. That is wrong. The amount of Fridman's

damages was properly submitted to a jury even though the judgment against Safeco had to be limited to its policy limits. That is because a jury verdict was necessary to determine the issues of fault, causation, and permanency in addition to the full amount of the damages. Resolution of these issues would in turn provide the amount Safeco would be liable for in the event it denied Fridman's claim in bad faith.

It has been long established that there are the two conditions precedent to filing a first-party bad faith claim: (1) the establishment of liability and (2) a determination as to the full extent of Plaintiff's damages. See Vest v. Travelers Ins. Company, 753 So.2d 1270 (Fla. 2000), Imhof v. Nationwide Mutual Ins. Co., 643 So.2d 617 (Fla. 1994), and Blanchard, supra at 1289. 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). 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.

In direct conflict with this Court's precedent, the Fifth District's opinion in this case held that "an insured is *not* required to obtain a jury verdict in excess of the applicable UM coverage as a condition precedent to bringing a first party bad faith action against the insurer." Fridman, 117 So. 3d at 20 (emphasis added). As established in Vest, "the payment of policy limits by the insurer... is the functional equivalent of an allegation that there has been a determination the insured's damages." Vest, 753 So.2d at 1273. But the Fifth District opinion takes it one step further, erroneously holding that "a confessed judgment in the amount of the UM policy limits would provide the Appellant a sufficient basis to pursue a bad faith claim against Safeco." Fridman, 117 So.3d at 20. The confession of judgment only satisfied the first prong of the two-part test. As provided in Vest, the payment of policy limits only "satisfies the purpose for the allegation – to show that the insured had ***a valid claim***." Vest, 753 So.2d at 1273-1274 (emphasis added). In the present case, the payment of policy proceeds by Safeco only established Safeco's acceptance of the validity of the claim; i.e. that there was liability on the part of the underinsured tortfeasor for damages in excess of the limits contained with said tortfeasor's policy of insurance which gave rise to the entitlement to benefits under the policy of insurance Safeco provided to the Appellant. More concisely, Safeco

confessed that all the conditions precedent for payment of the contractual policy benefits had been met. Nothing in Vest explicitly states or implies the establishment of the extent of damages is thereby moot.

Within its opinion, the Fifth District opined that the trial court erred in allowing the trial to proceed in an effort to establish damages because the issue of damages had been rendered moot by Safeco's confession of judgment. Fridman, 117 So.3d at 20-21. This is a misapplication of Florida law. A case is only moot when there are no justiciable issues remaining to be determined and that all actual controversies have "ceased to exist." Godwin v. State, 592 So.2d 211, 212 (Fla. 1992); Fonte v. State, Dept. of Environmental Regulation, 634 So2d 663 (Fla. 2nd DCA 1994); Soud v. Kendale, Inc., 788 So2d 1051 (Fla. 1st DCA 2001); and Mazer v. Orange County, 811 So2d 857 (Fla. 5th DCA 2002). As Blanchard requires, Fridman still had to establish the extent of his damages. Blanchard, 575 So.2d at 1291.

To determine the extent of damages, one must define its outer limits. Within his complaint, Fridman alleged that his damages were in excess of $15,000.00 and Safeco admitted to same through its confession of judgment. Fridman, 117 So.3d at 23. This established the lower limits of Fridman's claim for damages. Safeco, and by virtue of its opinion, the Fifth District Court of Appeal, erroneously apply the policy limits as the upper threshold of his damages. Fridman further alleged that he

was "entitled to recover damages... in accordance with the provisions of §627.727, Florida Statutes..." another allegation Safeco admitted in both its Answer and its confession of judgment. Id. This section of the Florida Statutes allows for the recovery of damages in excess of policy limits. 627.727(10), Fla. Stat. (2007). Additionally, prior to filing suit, Fridman filed a Civil Remedy Notice of Insurer Violations in accordance with §624.155(3)(a), Florida Statutes. Safeco neither responded to nor attempted to cure the Civil Remedy Notice by settling the claim within the 60-day period, creating an automatic, statutory presumption of bad faith. Oak Casualty Insurance Co. v. Travelers Indemnity Co, 778 So.2d 483, 483-484 (*citing* Imhof, 643 So.2d at 619 and Talat Enterprises Inc. v. Aetna Cas. & Sur. Co, 753 So.2d 1278, 1282 (Fla. 2000)). Finally, during Safeco's motion to continue the initial trial date, Fridman argued to the trial court that he planned to file a bad faith action against Safeco once the Blanchard prongs had been established. Fridman, 117 So.3d at 23. As Judge Sawaya noted in his dissenting opinion, "There is no way that Safeco can argue, and indeed it does not argue, that it was not put on notice prior to the UM suit being filed of Fridman's bad faith claim. Id. (Sawaya, J., dissenting).

The Fifth District's majority opinion concluded that Fridman could not try the amount of his damages because he had not included a claim for bad faith in his complaint against Safeco. But as Judge Sawaya noted in his dissent, that was

proper. Until the Blanchard prongs had been satisfied, the bad faith claim would have been abated or dismissed without prejudice as unripe. Had Fridman included a count for bad faith, it would have been dismissed or abated, as more fully set forth below. Id. at 23-24; (*citing* Allstate Indem. Co. v. Ruiz, 899 So.2d 1121 (Fla.2005); State Farm Mut. Auto. Ins. Co. v. Tranchese, 49 So.3d 809 (Fla. 4th DCA 2010); and Gen. Star Indem. Co. v. Atl. Hospitality of Fla., LLC, 93 So.3d 501 (Fla. 3d DCA 2012)). 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. See, e.g., Vest; Imhof; Laforet; Blanchard. Therefore, Fridman placed Safeco on notice of the forthcoming bad faith claim on every possible occasion but did not -and could not - include such a claim in his initial complaint (beyond the inclusion of §627.727, Florida Statutes within the general allegations). To do otherwise would have been proscribed by Florida law. Fridman, 117 So.3d at 24 (Sawaya, J., dissenting). In short, Fridman had to establish the extent of his damages before his claim against Safeco for bad faith would become ripe. Blanchard, 575 So.2d at 1291.

Consequently, there were collateral issues established by Blanchard which were conjoined with, entirely dependent on, and subservient to the damages portion of the underlying UM claim which were not resolved by Safeco's confession of judgment. "An otherwise moot case will not be dismissed if

collateral legal consequences that affect the rights of a party flow from the issues to be determined." Godwin v. State, 592 So.2d at 212. What happens to the jury's determination of liability, causation and permanency in favor of Fridman? R. 637-639. Will these issues be relitigated in the bad faith case? Fridman can find no decisional or statutory precedent for relitigating these issues in the bad faith case.

As Judge Sawaya pointed out in his dissent, the result required by the Fifth District's majority opinion is unjust and inefficient.

> A collateral legal consequence of the UM proceedings is that the confessed judgment in the amount of the policy limits, which has been foisted upon Fridman against his will by Safeco in an attempt to deprive Fridman of his right to a jury trial, is not a determination of the extent of the insured's damages...now Fridman will have to try the damages all over again in the bad faith action and face the procedural hurdles of dismissal or abatement of the bad faith issues until the full extent of the damages is once again determined.

Fridman, 117 So.3d at 29 (Sawaya, J., dissenting). The confession of judgment was essentially employed by Safeco as a means to estop Fridman to determine the full measure of damages as required by Blanchard. It is "clearly evident from the entire record in this case...the very reason Safeco confessed judgment when it did [was] to prevent a trial and a resulting excess judgment that would be used in the bad faith trial it knew Appellant was going to file." Id. at 24. The focus in first party bad faith actions is whether the insurer's failure to promptly settle constitutes bad faith. Imhof v. Nationwide Mt. Ins. Co., 643 So2d 617 (Fla. 1994). Safeco's

conduct (and its endorsement by the Fifth District) frustrates the statutory cure encouraged by Fla. Stat. §624.155.

Estoppel by judgment "requires that the matter sought to be interposed as a bar must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment." Pennsylvania Ins. Co. v. Miami Nat. Bank, 241 So.2d 861, 863 (Fla. 3d DCA 1970). See also Sager v. Hous. Comm'n of Anne Arundel Cnty., 855 F. Supp. 2d 524, 553 (D. Md. 2012) (*citing* United Book Press, Inc. v. Md. Composition Co., 141 Md.App. 460, 477 (2001) (quoting Restatement (Second) of Judgments §27, Comment (e))) (confessed judgment will not support collateral estoppel because typically it means none of the issues were actually litigated). "An issue is not…actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial…" Restatement (Second) of Judgments §27 (1982). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." Arizona v. California, 530 U.S. 392, 414 (2000) (*citing* Restatement (Second) of Judgments §27 (1982)). "Confessed judgments may have res judicata effect (i.e., claim preclusion), although they often will not support collateral estoppel, or issue preclusion, because typically '[i]n the case of a judgment entered by confession ... [as] none of the issues is [sic] actually litigated.'" Sager v. Hous. Comm'n of Anne Arundel Cnty, 855 F. Supp. 2d 524,

553 (D. Md. 2012) (*citing* United Book Press, Inc. v. Md. Composition Co, 141 Md.App. 460, 477 (2001) (quoting Restatement (Second) of Judgments §27, Comment (e))). "...[I]f there is any doubt as to whether a litigant has had his day in court, such doubt must be resolved in favor of the full consideration of the substantive issues of the litigation and against the rigid application of any principle that would defeat the ends of justice." Hittel v. Rosenhagen, 492 So.2d 1086, 1089-90 (Fla. 4th DCA 1986) (*citing* Seaboard Coast Line Railroad v. Industrial Contracting Co., 260 So.2d 860, 865 (Fla. 4th DCA 1972).

C. The Fifth District erred in requiring Fridman to include a count for bad faith, because such a count would have been dismissed or abated.

The Fifth District's opinion suggests that in order to litigate the full amount of his damages, Fridman would have had to plead a bad faith claim in his complaint to recover benefits under the policy. But that pleading is disfavored by Florida law.

As set forth above, it is established Florida law that a first-party bad faith claim does not accrue until there has been a final determination of both liability and damages in an underlying coverage claim. State Farm Mut. Auto. Ins. Co. v. O'Hearn, 975 So.2d 633 (Fla. 2d DCA 2008). See, e.g., Vest v. Travelers Ins. Co., 753 So.2d 1270 (Fla. 2000); Imhof v. Nationwide Mut. Ins. Co., 643 So.2d 617 (Fla. 1994); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55 (Fla. 1995);

Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla. 1991).

"When a plaintiff does not and cannot allege that there has been a final determination of both the insurer's liability and the amount of damages owed by the insurer, the plaintiff's bad faith claim is premature and should be either dismissed without prejudice or abated." O'Hearn, 975 So.2d at 635-636. See Landmark Am. Ins. Co. v. Studio Imports, Ltd, 76 So.3d 963, 963 (Fla. 4th DCA 2011); Lime Bay Condo. Inc. v. State Farm Fla. Ins. Co, 94 So.3d 698, 699 (Fla. 4th DCA 2012); State Farm Mut. Auto. Ins. Co. v. Tranchese, 49 So.3d 809, 810 (Fla. 4th DCA 2010); *and* GEICO General Ins. Co. v. Pruitt, 122 So.3d 484, 486 (Fla. 3d DCA 2013).

As correctly asserted by Judge Sawaya in his dissent, had Fridman "included a count for bad faith, it would have been dismissed or abated." Fridman, 117 So.3d at 23. He noted that Fridman "could not have included a count for bad faith in the complaint, as the majority seems to require, because the courts have repeatedly held that the bad faith action must be instituted after the full extent of the insured's damages have been determined in the UM litigation." Id. By moving to amend the complaint once the cause of action accrued, Fridman "filed the bad faith claim the only way he properly could..." Fridman, 117 So.3d at at 24.

The majority of the Fifth District acknowledged that Fridman "had appropriately not included a bad faith count in his complaint." Fridman, 117 So.3d

at 19. Nevertheless, the Fifth District effectively refused to recognize that Fridman had a bad faith claim, even though he had filed a Civil Remedy Notice pursuant to section 624.155, Florida Statutes, "because that claim was not included in the complaint." Fridman, 117 So.3d at 24.

The consequence of the Fifth District's decision is as follows: Fridman properly did not include a claim for bad faith in his complaint because it would be dismissed or abated. He now has no bad faith claim to assert because the required excess verdict has been ordered null and void. This contradictory result, because he did not plead a bad faith count for the trial court to dismiss or abate, not only flies in the face of logic and reason, but is contrary to established Florida jurisprudence.

Fridman would submit to this Court that Florida case law does not hold that in order to preserve a cause of action, a party must plead counts that may never ripen. Fridman was unable to find a single Florida case requiring parties to plead causes of action that they know may never accrue, and will be summarily dismissed or abated as premature, in order to preserve the right to *properly* plead them once the claim matures.

D. The procedure endorsed by the Fifth District results in multiple trials wasting judicial and litigation resources

This Court's prior rulings clearly established a bifurcated approach to first-party bad faith. The purpose of the initial phase is to establish if there is a duty for the carrier to pay a valid claim and to determine the full extent of damages arising from the claim. This "duty" and "determination" includes fault, comparative fault, causation and permanency. The second phase is to determine whether or not the insurer acted in bad faith by "[failing] to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for the insured's interest." Fla. Standard Jury Instr. 404.4 (Civil).

The Fifth District Court of Appeal's opinion contemplates instead a "trifurcated approach" to first-party bad faith. The first phase would determine if there is a contract for benefits, if all conditions precedent to the payment of said benefits had occurred and the damages up to the policy limits. In this proceeding, the insured would have to present evidence of damages to establish jurisdiction and to obtain the full amount of the policy benefits available to him. The second phase would once again litigate the insured's damages, this time to determine the damages in excess of the insurance contract's policy limits. Once established, there

would be a third and separate trial to establish whether the insurer acted in bad faith.

Though the Fifth District opined that Fridman "can seek the full measure of damages afforded by this subsection in a subsequent bad faith action," Fridman, 117 So.3d at 21, discovery rules and decisional authority require the damages portion of an underlying case and the subsequent bad faith claim be bifurcated.

> In a bad faith suit against an insurance company for failure to settle within the policy limits, a plaintiff may obtain discovery of the insurer's complete original claim file, including work product and privileged matters. However, if the suit is simply to establish a right of recovery, the plaintiff cannot compel disclosure of privileged matters... Where, as in this case, the issue of coverage is combined with the issue of bad faith, the same result should follow... This situation is analogous to a 'first party' claim for coverage. Until the right of coverage is first established, a plaintiff claiming to be an insured cannot compel disclosure of the insurer's work product and privileged matters in its claims file. Otherwise, the discovery rule established by the courts in these cases could be circumvented by simply combining the two causes of action.

Allstate Ins. Co. v. Swanson, 506 So.2d 497, 498 (Fla. 5th DCA 1987) (*citing* Stone v. Travelers Ins. Co., 326 So.2d 241 (Fla. 3d DCA 1976); Allstate Ins. Co. v. Shupack, 335 So.2d 620 (Fla. 3d DCA 1976) (until merits of respondent's claim for uninsured motorist benefits are determined, it is error to produce insurer's file); GEICO v. Rodriguez, 960 So.2d 794 (Fla. 3d DCA 2007); and XL Specialty Ins. Co. v. Skystream, Inc., 988 So.2d 96 (Fla. 3d DCA 2008) (under the logic of Imhof and Blanchard, it is prejudicial to allow the injection of issues of bad faith into a

coverage case, and to allow expanded bad faith discovery, before the underlying claim for damages under the insurance policy has been determined).

The proper procedure for handling first-party bad faith actions arising from uninsured motorist claims is the one the trial court followed in this case and approved Judge Sawaya in his dissent. That approach conserves judicial resources and eliminates the possibility of inconsistent verdicts on the issue of the insured's damages based on the same evidence.

Requiring two trials on the amount of the insured's damages as the Fifth District's majority opinion espouses is a waste of resources. In terms of judicial resources, obviously "a single trial generally tends to lessen the delay, expense and inconvenience to all concerned..." Maris Distrib. Co. v. Anheuser-Busch, Inc., 710 So.2d 1022, 1024 (Fla. 1st DCA 1998) (quoting Vander Car v. Pitts, 166 So. 2d 837, 839 (Fla. 2d DCA 1964)). As one commentator has noted, "justice requires that an action should be administered with the least expense and vexation to the parties." Florida Rule of Civil Procedure 1.200(b), Author's Comments--1967.

Safeco's argument suggests that in first-party bad faith cases arising from uninsured motorist claims, the jury in the UM trial should determine the insured's damages caused by the accident up to the policy limits, and then, if the damages exceed the UM policy limits, a second, separate jury should determine the insured's full measure of damages caused by the accident again based on the same

evidence heard by the first jury. This procedure burdens the judicial system twice with essentially the same case. This duplication of efforts is not only wasteful, it is entirely unnecessary to protect Safeco's due process rights under the facts of this case. After these two trials, Safeco's methodology would require a third trial to determine the insurance carrier's responsibility for bad faith.

Duplicative trials not only overtax the judicial system, they also unfairly increase litigation costs. For example, under Safeco's two-trial approach to determining damages, the expert physician witnesses on both sides would be required to make two court appearances at considerable added expense to the parties and inconvenience to the physicians. Also, the insurer under the two-trial approach would undoubtedly seek additional discovery during the interval between the first and second trials, adding even more litigation expense. Courts should endeavor to reduce litigation costs, not increase them.

The Fifth District's decision encourages protracted litigation wherein an insurance carrier can "draw out" a lawsuit on the policy by forcing the insured to develop expert testimony and other evidence on damages only to "pull the rug out on the eve of trial" and make the insured relitigate damages in a separate suit.

Further, the two-trial procedure to determine the insured's damages advanced by Safeco creates the possibility, if not probability, of inconsistent results. For example, the jury in the UM contract benefits trial could assess an

insured's damages at $1,000,000 while a second jury in the "full measure of damages" trial could assess the insured's damages at $500,000 based on the same evidence. This possibility of two juries returning markedly inconsistent verdicts based on the same evidence is an outcome our courts should attempt to avoid. As one court noted, "[i]nconsistent results based on the same evidence are a rather embarrassing state of affairs for any self-respecting judicial system, so it is not surprising that there are procedural rules to avoid just such an embarrassment." Goyette v. Country Villa Serv. Corp, 2008 WL 2461433, at *2 (Cal. Ct. App. 2008).

As suggested by Goyette, our courts and legislature have devised procedural and substantive mechanisms to avoid inconsistent results. For example, courts frequently consolidate actions pursuant to Florida Rule of Civil Procedure 1.270(a) to avoid inconsistent results. See e.g. Maharaj v. Grossman, 619 So.2d 399, 400-01 (Fla. 4th DCA 1993) (granting certiorari and ordering three cases arising from the same accident consolidated to avoid the possibility of inconsistent verdicts to promote judicial economy). Similarly, in deciding whether to sever an action for separate trials pursuant to Florida Rule of Civil Procedure 1.270(b), courts consider the possibility of inconsistent verdicts. See Travelers Express, Inc. v. Acosta, 397 So.2d 733, 737 (Fla. 3d DCA 1981) ("Where the probability of inconsistent verdicts increases, the countervailing considerations of "convenience" or

"prejudice" are reduced to a point where the trial court should exercise its discretion in favor of trying the actions together.").

As another example, courts often transfer venue of actions to avoid inconsistent results. See, e.g., Resolution Trust Corp. v. Diaz, 578 So.2d 40, 41 (Fla. 4th DCA 1991) ("Consequently, we cannot say that the trial court abused its discretion by transferring venue in the interest of justice to avoid piecemeal litigation and the possibility of inconsistent results."). The doctrines of res judicata, collateral estoppel and law of the case are similarly intended to avoid inconsistent results and duplicative or piecemeal litigation. See Klak v. Eagles Reserve Homeowners' Ass'n. Inc., 862 So.2d 947, 951 (Fla. 2d DCA 2004) ("Both doctrines [res judicata and law of the case] are based on considerations of judicial economy and are aimed at preventing undue expense and vexation to litigants as well as avoiding inconsistent results."); Lorf v. Indiana Ins. Co., 426 So.2d 1225, 1226 (Fla. 4th DCA 1983) ("We view this case as controlled by the doctrine of collateral estoppel and the inconsistent verdicts highlight the exact result which the doctrine is designed to avoid."). Additionally, the requirement to exhaust administrative remedies serves the same objective. See Palm Lake Partners II, LLC v. C & C Powerline, Inc., 38 So.3d 844, 853 (Fla. 1st DCA 2010).

As stated above, this Court held that an actual determination of the extent of Fridman's damages is a condition precedent to the filing of a bad faith claim.

Blanchard, 575 So. 2d at 1291. 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... [to avoid] the splitting of causes of action." Vest, 753 So.2d at 1276. Based upon the Fifth District's ruling, Fridman is technically in a "Catch-22"[1] situation. He has no excess damages and therefore cannot pursue a bad faith claim. The Court has established a procedure in which the amount of the insured's damages must be determined in the underlying litigation, at which point an excess verdict becomes a necessary condition precedent to a bad faith claim. Changing that procedure now would mean that plaintiffs could have no recourse under the court's precedence to pursue a bad faith claim if the insurer did as Safeco did here—confess judgment at the last minute in the amount of the policy limits. Therefore, it is not only that the full extent of damages is a prerequisite to the existence of a bad faith claim, there is also a substantial interest in judicial economy that the extent of damages are determined prior to the filing of a bad faith claim. "...[I]n the interest of the State every

[1] "There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane, he had to fly them. If he flew them, he was crazy and didn't have to; but if he didn't want to, he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle." Joseph Heller, **Catch-22** (Dell Publishing 1962) (1980).

justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered for the same cause by interminable litigation." Gordon v. Gordon, 59 So.2d 40, 44 (Fla. 1952).

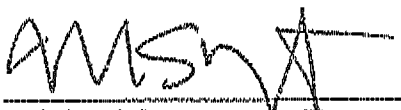
CONCLUSION

Judge Sawaya was correct. Fridman would respectfully request this Court reverse the decision of the Fifth District Court of Appeal. By doing so, this Court should establish the relevance of the jury's verdict as establishing the damages required by Blanchard, Vest and Imhof. The trial court was correct in retaining jurisdiction and allowing a post-verdict amendment. This Court should remand this litigation for reinstatement of the original judgment entered by the trial court wherein Safeco will be provided the opportunity to defend its claims handling in the bad faith action to be filed by Fridman.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by **e-Service** this 9th day of June, 2014, 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, Esq.**, AttorneyByrd@aggressiveattorneys.com, 2620 E. Robinson Street, Orlando, FL 32803; **Robert E. Vaughn, Jr., Esq.**, 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, Esq.**,maddge.penton@libertymutual.com, 300 S Orange Ave, Ste 1275, Orlando, FL 32801; **Mark A. Risi, Esq.**, mrisi@risilaw.com, The Law Office of Mark A. Risi, 2699 Lee Road, Suite 101, Winter Park, FL 32789.

Respectfully submitted,



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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.

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