Electronically Filed 10/07/2013 03:01:37 PM ET

RECEIVED, 10/7/2013 21:38:35, Thomas D. Hall, Clerk, Supreme Court

SUPREME COURT OF FLORIDA

CASE NO.: SC13-1607

ADRIAN FRIDMAN

Petitioner

vs.

SAFECO INSURANCE COMPANY
OF ILLINOIS

Respondent

RESPONDENT'S JURISDICTIONAL BRIEF

On Appeal from the Fifth District Court of Appeal
Case No. 5D12-428

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP
ANTHONY J. RUSSO, ESQ.
Florida Bar No. 508608
EZEQUIEL LUGO, ESQ.
Florida Bar No. 44538
777 S. Harbour Island Blvd., Suite 500
Tampa, FL 33602
Phone: (813) 281-1900

LAW OFFICE OF GLENN G. GOMER

ROBERT E. VAUGHN, JR., ESQ.
Florida Bar No. 494437
600 N. Westshore Blvd., Suite 1001
Tampa, FL 33609
Phone: (813) 286-0068

Attorneys for Safeco Insurance Company of Illinois

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. The decision of the District Court of Appeal, that the denial of a motion for confession of judgment was error, does not expressly and directly conflict with *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991), *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994), or *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000). 4

A. The Fifth District's opinion does not involve the same facts or address "the same question of law" as *Blanchard*, *Imhof*, or *Vest* 4

B. The Fifth District's decision does not alter the conditions precedent to a "bad faith" suit. 5

C. The Fifth District's opinion does not impair Fridman's right to seek the full measure of damages afforded by section 627.727(10) 7

II. This Court should not exercise its discretion to accept this case because the Fifth District reached the correct result 7

CONCLUSION 9

CERTIFICATE OF TYPE SIZE & STYLE 10

TABLE OF CITATIONS

CASES

Allstate Ins. Co. v. Jenkins,
32 So. 3d 163 (Fla. 5th DCA 2010) 8
Aravena v. Miami-Dade Cnty.,
928 So. 2d 1163 (Fla. 2006) 3
Blanchard v. State Farm Mut. Auto. Ins. Co.,
575 So. 2d 1289 (Fla. 1991) ..... passim
Brookins v. Goodson,
640 So. 2d 110 (Fla. 4th DCA 1994) 7
Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.,
945 So. 2d 1216 (Fla. 2006) 6
Godwin v. State,
593 So. 2d 211 (Fla. 1992) 8
Gov't Employees Ins. Co. v. King,
68 So. 3d 267 (Fla. 2d DCA 2011) 8
Imhof v. Nationwide Mut. Ins. Co.,
643 So. 2d 617 (Fla. 1994) ..... passim
King v. Gov't Employees Ins. Co.,
2012 WL 4052271 (M.D. Fla. Sept. 13, 2012) 8
Merkle v. Guardianship of Jacoby,
912 So. 2d 595 (Fla. 2d DCA 2005) 8
Nationwide Mut. Fire Ins. Co. v. Voigt,
971 So. 2d 239 (Fla. 2d DCA 2008) 7
Reaves v. State,
485 So. 2d 829 (Fla. 1986) 7
Safeco Ins. Co. of Ill. v. Fridman,
117 So. 3d 16 (Fla. 5th DCA 2013) ..... passim
Scott v. Progressive Express Ins. Co.,
932 So. 2d 475 (Fla. 4th DCA 2006) 6
State Farm Mut. Auto. Ins. Co. v. Laforet,
658 So. 2d 55 (Fla. 1995) 3, 7
Vest v. Travelers Ins. Co.,
753 So. 2d 1270 (Fla. 2000) 3, 4, 5, 7

STATUTES

section 624.155(1)(b)(1) 1, 5
section 624.155(2)(b) 5
section 627.727 4
section 627.727(10) 2, 7

RULES

Fla. R. App. P. 9.030(a)(2)(A)(iv) 4

CONSTITUTIONAL PROVISIONS

Art. V, § 3(b)(3), Fla. Const. 3

STATEMENT OF THE CASE AND FACTS

Adrian Fridman held an automobile insurance policy issued by Safeco Insurance Company of Illinois ("Safeco"). The Safeco policy included $50,000 in underinsured motorist (UM) coverage. *Safeco Ins. Co. of Ill. v. Fridman*, 117 So. 3d 16, 18 (Fla. 5th DCA 2013). Fridman was injured in an accident with an underinsured driver. *Id.* Fridman made a claim for UM benefits to Safeco. *Id.* Safeco did not, prior to suit, pay the policy limits for Fridman's UM claim. *Id.*

Fridman filed a Civil Remedy Notice of Insurer Violation pursuant to section 624.155(1)(b)(1). 117 So. 3d at 18. In it, Fridman alleged that Safeco had failed to attempt in good faith to settle his UM claim. *Id.* About six months later, Fridman filed a one-count complaint against Safeco seeking UM benefits. *Id.*

Before trial, Safeco tendered a check to Fridman for the $50,000 UM policy limits. *Id.* Safeco also filed a document entitled "confession of judgment," and a "motion for entry of confession of judgment." *Id.* In both filings, Safeco agreed to the entry of a final judgment for Fridman in the amount of $50,000. *Id.*

Fridman's attorney objected to the entry of a confessed judgment. *Id.* According to Fridman, a jury verdict in the UM action would determine the upper limits of Safeco's potential liability in a subsequent statutory insurance "bad faith" action. *Id.*

The trial court denied Safeco's motion because doing otherwise, it said, "would ignore the plain legislative intent of section 627.727(10)." *Id.* The case was tried, and the jury returned a $1 million verdict for Fridman. *Id.* The trial court then entered a final judgment in favor of Fridman in the amount of $50,000, the UM policy limits. *Id.*

On appeal, the Fifth District reversed and remanded. *Id.* The Fifth District explained that, "when Safeco agreed to the entry of a judgment against it in the amount of the policy limits, the issues between the parties, as framed by the pleadings, became moot because the trial court could not provide any further substantive relief to Fridman." *Id.*

The Fifth District also rejected Fridman's argument that entry of a confessed judgment in a UM case would preclude him from pursuing a statutory insurance "bad faith" claim against Safeco. *Id.* The Fifth District noted that a jury verdict in excess of the policy limits is not a precondition to a "bad faith" action. *Id.* And the Fifth District stated that "it was the establishment of the fact that such damages were incurred and not their precise amount that formed the basis for a subsequent bad faith cause of action." *Id.*

SUMMARY OF ARGUMENT

The Fifth District's decision does not conflict with *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991), *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994), *receded from by State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), or *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000). The Fifth District never addressed the legal issues raised in *Blanchard*, *Imhof*, and *Vest*. Instead, the Fifth District decided this case on narrow, well-established grounds of judicial power and the doctrine of mootness. Thus, there is no express and direct conflict on the same question of law, such that there could be conflict jurisdiction. And even assuming conflict jurisdiction existed (which it does not), the Court should not exercise that jurisdiction because the Fifth District's decision was correct.

ARGUMENT

Fridman seeks to establish this Court's jurisdiction to review the Fifth District's opinion alleging the decision "expressly and directly conflicts with [*Blanchard*, *Imhof*, and *Vest*] . . . on the same question of law." Art. V, § 3(b)(3), Fla. Const. Fridman, in other words, must demonstrate the holdings of *Blanchard*, *Imhof*, *Vest*, and *Fridman* are irreconcilable. *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006). Moreover, because this Court's conflict jurisdiction

is discretionary, *see* Fla. R. App. P. 9.030(a)(2)(A)(iv), this Court must decide not only whether conflict exists but, if so, whether to review the case.

I. The decision of the District Court of Appeal, that the denial of a motion for confession of judgment was error, does not expressly and directly conflict with *Blanchard*, *Imhof*, or *Vest*.

A. The Fifth District's opinion does not involve the same facts or address "the same question of law" as *Blanchard*, *Imhof*, or *Vest*.

The central fact of *Fridman* was the insurer's payment of the UM policy limit before the UM trial. The "question of law" was the legal effect of that payment on the UM suit. The Fifth District decided the case on three narrow, well-established, and uncontroversial principles: (1) courts do not exercise their power over a moot case; (2) a case is moot when the court can grant no further relief to the plaintiff; and (3) the most relief a court can grant in a UM case is the UM policy limits. *Fridman*, 117 So. 3d at 19-20. Neither *Blanchard*, *Imhof*, nor *Vest* involved the same facts or addressed the legal question of the mootness doctrine or the scope of relief in a UM case under section 627.727.

In *Blanchard*, the insurer apparently made no tender of its policy proceeds until the policyholder had obtained a jury verdict in excess of the UM limits. 575 So. 2d at 1290. The "question of law" in *Blanchard* was whether a "bad faith" cause of action accrued before the conclusion of the underlying UM cause of action, and therefore had to be pleaded along with the UM case. *Id.*

The insurer, in *Imhof*, apparently, did not pay any or all of what it owed under the UM policy until the entry of an arbitration award. 643 So. 2d at 618, n.5. The "question of law" in *Imhof* was whether a complaint for insurer bad faith must allege there has been a determination of damages, and this Court held that "[n]either *Blanchard* nor section 624.155(2)(b) requires the allegation of a specific amount of damages." 643 So. 2d at 618.

In *Vest*, the insurer withheld its UM policy limits until the policyholder first settled with the tortfeasor. 753 So. 2d at 1272. The trial court and district court agreed that the insurer was contractually entitled to do so, and granted the insurer summary judgment on the policyholder's bad-faith case. *Id.* This Court identified the legal question as whether the policyholder's damages, incurred by reason of a violation of section 624.155(1)(b)(1), are recoverable from the date that the conditions for payment of benefits under the policy have been fulfilled, even if those damages are incurred prior of the determination of liability and the extent of damages. Id. at 1274. These are neither the facts nor the question of law present in *Fridman.* Therefore, there is no express and direct conflict between *Fridman*, on the one hand, and *Blanchard*, *Imhof* or *Vest*, on the other.

B. The Fifth District's decision does not alter the conditions precedent to a "bad faith" suit.

Fridman's argument is premised on his unfounded claim that the Fifth District held "that [the] extent of the[ ] damages owed to Plaintiff were not a

condition precedent to the bad faith claim . . . ." (Pet'r's Br. on Jxn. 6.) Fridman is wrong. The Fifth District made no such statement within the four corners of the majority opinion. Thus, contrary to Fridman's argument, the Fifth District did not "remove" the requirement from *Blanchard*, 575 So. 2d at 1291, that "the extent of the plaintiff's damages" be determined before a "bad faith" cause of action accrues.

Fridman is just another case in the line of cases holding that a trial is not the only way to satisfy the requirement that there be a determination of the extent of damages under *Blanchard*. *E.g., Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1234-35 (Fla. 2006) (arbitration); *Scott v. Progressive Express Ins. Co.*, 932 So. 2d 475, 479 (Fla. 4th DCA 2006) (settlement/confession of judgment). The Fifth District merely noted 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. This statement is consistent with *Imhof*, where this Court explained that "there is no need to allege an award exceeding the policy limits to bring an action for insurer bad faith." 643 So. 2d at 618.

Furthermore, the Fifth District "conclude[d] that a confessed judgment in the amount of the UM policy limits would provide Fridman a sufficient basis to pursue a bad faith claim against Safeco." *Fridman*, 117 So. 3d at 20. This

conclusion is consistent with *Vest*, which stated that an insurer's payment of the policy limits in a UM action "is the functional equivalent of an allegation that there has been a determination of the insured's damages." 753 So. 2d at 1273 (quoting *Brookins v. Goodson*, 640 So. 2d 110, 112-13 (Fla. 4th DCA 1994), *disapproved on other grounds*, *Laforet*, 658 So. 2d at 62).

No conflict with *Blanchard*, *Imhof*, or *Vest* appears within the four corners of the majority opinion in *Fridman*. Thus, this Court should deny review of the Fifth District's decision. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict . . . must appear within the four corners of the majority decision.").

C. The Fifth District's opinion does not impair Fridman's right to seek the full measure of damages afforded by section 627.727(10).

The Fifth District expressly recognized that Fridman could "seek the full measure of damages afforded by [section 627.727(10)] in a subsequent bad faith action." *Fridman*, 117 So. 3d at 21.

II. This Court should not exercise its discretion to accept this case because the Fifth District reached the correct result.

Fridman complains about the potential effect of the Fifth District's decision in a future "bad faith" action, but he is really trying to undo the ruling regarding the mootness of his UM action. In this UM case, Fridman could not recover any damages beyond the UM policy limits. *Nationwide Mut. Fire Ins. Co. v. Voigt*, 971 So. 2d 239, 241-42 (Fla. 2d DCA 2008). Once Safeco paid Fridman the UM

policy limits, there was nothing left for the trial court to adjudicate. Once Safeco paid the UM limit, this UM case became moot because the trial court could not provide any further substantive relief to Fridman. *See Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) ("A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist."); *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) ("The settlement of a case renders it moot. . . . The voluntary payment of a disputed charge has the same effect."). This UM case should have been ended, as Safeco sought, when it moved to confess and enter judgment.

The trial court had no legal basis to convene a trial and adjudicate damages in excess of the UM policy limits. Such excess damages are the subject matter of a separate action that may only be brought pursuant to section 624.155. *See King v. Gov't Employees Ins. Co.*, 2012 WL 4052271, *6 (M.D. Fla. Sept. 13, 2012) ("[I]nsureds must prove their damages in the bad faith action and are not entitled to rely on the underlying verdict as conclusive proof of those damages."); *Allstate Ins. Co. v. Jenkins*, 32 So. 3d 163 (Fla. 5th DCA 2010) ("[T]he bad faith action is more appropriately brought as a separate cause of action."). The trial court had no power to adjudicate any damages beyond the UM policy limits. *Gov't Employees Ins. Co. v. King*, 68 So. 3d 267, 269-70 (Fla. 2d DCA 2011) (en banc). And it

should have granted Safeco's motion and concluded the UM action. Thus, the Fifth District reached the correct result under the mootness doctrine.

CONCLUSION

This Court lacks discretionary jurisdiction to review the decision below because there is no conflict with any of the three cases cited by Fridman. And assuming, *arguendo*, that this Court had discretionary jurisdiction (which it does not), the Court should not exercise that jurisdiction to consider the merits of Fridman's arguments because the Fifth District's decision was correct.

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG LLP

ANTHONY J. RUSSO, ESQ.
Florida Bar No. 508608
EZEQUIEL LUGO, ESQ.
Florida Bar No. 44538
777 S. Harbour Island Blvd., Suite 500
Tampa, FL 33602
Phone: (813) 281-1900
arusso@butlerpappas.com
elugo@butlerpappas.com
-and-
ROBERT E. VAUGHN, ESQUIRE
Florida Bar No.: 494437
Law Office of Glenn G. Gomer
600 N. Westshore Blvd., Suite 1001
Tampa, FL 33609
Phone: (813) 286-0068
robert.vaughn@libertymutual.com
Attorneys for Safeco Insurance Company of Illinois

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing has been furnished by Email to the following on October 7, 2013.

Michael S. Rywant, Esq.
Kerry C. McGuiss, Jr., Esq.
Rywant, Alvarez, Jones, Russo,
& Guyton, P.A.
Post Office Box 3283
Tampa, FL 33602
msrywant@rywantalvarez.com
kmcguinn@rywantalvarez.com

Jeffrey M. Byrd, Esq.
Jeffrey M. Byrd, P.A.
2620 East Robinson Street
Orlando, FL 32803
attorneybyrd@aggressiveattorneys.com
kat@aggressiveattorneys.com

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

ANTHONY RUSSO, ESQ.

CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Brief is 14 point Times New Roman.

ANTHONY RUSSO, ESQ.