IN THE SUPREME COURT OF FLORIDA

ALLSTATE INDEMNITY
COMPANY, ALLSTATE
INSURANCE COMPANY and
PAUL COBB,

Petitioners.

CASE NO.: SC-01-893
L.T. CASE NO.: 4D00-2047

vs.

JOAQUIN RUIZ and PAULINA RUIZ,

Respondents.

/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS, ALLSTATE INDEMNITY

COMPANY, ALLSTATE INSURANCE COMPANY and

PAUL COBB'S INITIAL BRIEF ON MERITS

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STATEMENT OF THE CASE AND THE FACTS

Respondents, Joaquin Ruiz and Paulina Ruiz, have brought a first-party bad faith claim against their insurer, Allstate Indemnity Company, under Section 624.155, Florida Statutes; have brought a negligence claim against insurance agent, Paul Cobb; and have brought a vicarious liability claim against Mr. Cobb's employer, Allstate Insurance Company. See Third Amended Complaint (Appendix 1).[1] Respondents' claims arose from an accident which occurred on December 27, 1996 and was reported to Allstate Indemnity Company on December 28, 1996. See Affidavit of Allstate's Records Custodian at paragraph 2 (Appendix 3 at page 2).

A problem was immediately presented by the claim because the accident involved an automobile (1992 Chevrolet Blazer) which was not an insured auto on the date of loss. Because the automobile was not insured, it appeared that there would be no coverage for the claim and it would need to be denied. See Affidavit at paragraph 2 (Appendix 3 at page 2).

The coverage issue was presented because the 1992 Chevrolet Blazer was removed from the policy on April 29, 1996 based on a change form prepared by the insurance agent, Paul Cobb, who was an employee of Allstate Insurance Company. See Affidavit at paragraph 3, and change form attached thereto (Appendix 3 at pages

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1 Citations are to the Appendix filed in the Fourth District Court of Appeal.

2 and 5). Because the automobile was not insured, the claim was denied by letter from Allstate adjuster, Mary Jidy, dated January 17, 1997. See Affidavit at paragraph 4, and Mary Jidy's letter attached thereto (Appendix 3 at pages 2 and 6). Respondents subsequently filed the instant suit. See Affidavit at paragraph 7 (Appendix 3 at page 3).

The instant discovery dispute arises from Respondents' attempt to obtain all documents from the claim files maintained by Allstate Indemnity Company and Allstate Insurance Company. See Respondents' second request for production attached to their motion to compel as exhibit "C" thereto (Appendix 2 at pages 15-17). Petitioners produced documents but raised work product objections to certain documents in the files:

> Defendants object to this Request on the grounds that it is overbroad, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The Request also invades the work product privilege. Kujawa v. Manhattan National Life Insurance Company, 541 So.2d 1168 (Fla. 1989). The Request has no time limitation. Mary Jidy denied coverage on January 17, 1997. Plaintiffs sent a civil remedy notice dated March 19, 1997. Defendants became aware of the instant lawsuit on September 18, 1997 after it was served on Paul Cobb. However, Defendants previously produced all nonprivileged portions of the file prior to September 18, 1997, with bate stamp numbers A037-A093. Defendants previously objected and now renew their objections to the production of privileged documents including the statement of Paul Cobb and the computer

> diary and handwritten notes reflecting mental work product. After suit, Defendants corresponded with undersigned counsel and the attorney-client privilege is asserted as to such correspondence.

See Petitioners' response to second request for production attached to Respondents' motion to compel as exhibit "D" thereto (Appendix 2 at pages 20-21).

After Respondents filed their motion to compel, Petitioners opposed the motion with the affidavit of Allstate's records custodian (Appendix 3) and a memorandum of law (Appendix 4). Attached to Petitioners' memorandum of law was a privilege log. Respondents then filed a supplement to their motion to compel which included an affidavit from their counsel (Appendix 5).

On May 16, 2000, the trial court held a hearing on Respondent's motion to compel. At the hearing, Respondents' counsel limited the request to documents in the claims files dated on or before October 6, 1997. (Appendix 6 at page 4). Subject to that limitation, the trial court ordered that any documents which Petitioners contended were work product be filed for *in camera* inspection. (Appendix 7). On May 23, 2000, Petitioners forwarded such documents, along with a revised privilege log, to the trial court for delivery on May 24, 2000. (Appendix 8). The revised log identified the following:

> Allstate computer diary and screens prepared between December 28, 1996 and October 6, 1997 **(bate stamped**

pages D1-D61)

Internal memorandum between adjuster, Mary Jidy, and her supervisor dated January 7, 1997 **(bate stamped pages D62-D63)**

Letter from Paul Cobb to Allstate claims dated 9/18/97 regarding the complaint served in this lawsuit **(bate stamped page D64)**

Handwritten note evaluating coverage issues **(bate stamped pages D65-D67)**

Internal memo dated 9/19/97 regarding lawsuit **(bate stamped page D68)**

Internal memo dated 9/19/97 regarding investigation of plaintiffs' vehicle **(bate stamped pages D69-D71)**

Letter from Allstate adjuster, Jesus Alvarez to Ford Motor Credit Company dated 9/19/97 **(bate stamped page D72)**

Internal memo dated 9/19/97 regarding investigation of coverage for 1992 Blazer **(bate stamped page D73)**

Internal memos dated 9/23/97 and 9/24/97 regarding evaluation of coverage issues **(bate stamped page D74-76)**

Handwritten note from Ford Motor Credit Company on Jesus Alvarez 9/19/97 letter **(bate stamped page D77)**

Message from Jesus Alvarez dated 10/6/97 to claim support regarding coverage evaluation (with telecopier cover sheet) **(bate stamped pages D78-D79)**

Transcript of statement of Paul Cobb taken January 7, 1997 **(bate stamped pages D80-D83)**

Computer notes 9/30/97 **(bate stamped page D84)**

Computer notes 10/6/97 **(bate stamped page D85)**

Handwritten notes regarding coverage issues **(bate stamped page D86)**

Internal memo dated 9/19/97 regarding investigation of policy **(bate stamped pages D87-D89)**

(Appendix 8 at pages 3-4).

On June 1, 2000, the trial court entered the subject discovery order deciding that the subject documents do not constitute work product. (Appendix 9). The trial court made no factual findings in support of its decision. Id.

On June 11, 2000, Petitioners filed a petition for writ of certiorari in the Fourth District Court of Appeal seeking review of the discovery order. On June 13, 2000, the trial court entered an order staying its discovery order pending resolution of the petition for writ of certiorari (Appendix 10).

The documents which are the subject of this discovery dispute were filed with the Fourth District, which granted leave for Petitioners to file them under seal.

The Fourth District granted the petition for writ of certiorari in part and denied it in part. The Fourth District denied relief as to three categories of documents: (1) a

statement taken of Paul Cobb by an Allstate adjuster on January 7, 1997, (2) computer diaries and entries made from December 28, 1996 through January 10, 1997, and (3) an internal memorandum from an Allstate adjuster to her manager dated January 7, 1997. Allstate Indemnity Co. v. Ruiz, 780 So. 2d 239, 240 (Fla. 4th DCA 2001).

The Fourth District held that these documents were not work product. According to the Fourth District the legal standard for determining when documents are work product is whether the documents were prepared at a time when the probability of litigation is "substantial and imminent." Id. The Fourth District found that Petitioners could not meet this legal standard with respect to the these three categories of documents.

The Fourth District expressly noted a conflict between its decision on the legal standard and decisions of other courts of appeal:

> We recognize that our position conflicts with decisions from other districts finding that statements are privileged and protected as work product when they are taken at a time when it was foreseeable that litigation would arise. *See*, *e.g.*, *Prudential*, 694 So. 2d at 774 [(Fla. 2nd DCA 1997)]; *McRae's Inc. v. Moreland*, 765 So. 2d 196 (Fla. 1st DCA 2000). We nevertheless adhere to our ruling in *Cotton* that work product privilege attaches to documents prepared in contemplation of litigation and not for "mere likelihood of litigation." *Cotton*, 444 So. 2d at 596. Accordingly, we affirm the order insofar as it requires the items detailed above to be produced.

Id. Because of the expressed conflict, Petitioners sought review in this Court which

was granted on September 25, 2001.

ISSUE

Whether The Fourth District's Narrow Interpretation Of The Work Product Doctrine Should Be Reversed Since It Improperly Denies Protection To Documents Prepared In Anticipation Of Litigation In Contravention Of Rule 1.280 Of The Florida Rules Of Civil Procedure As Interpreted By The Majority Of District Courts Of Appeal.

SUMMARY OF THE ARGUMENT

Rule 1.280(b)(3) provides work product protection to documents prepared in anticipation of litigation. Contrary to the Fourth District's approach, there is no requirement that the probability of litigation be "imminent and substantial."

The Rule applies equally to all litigants, whether plaintiff or defendant, individual or corporation. The Fourth District adopted a different rule in this case because Allstate Indemnity Company was sued for bad faith. This Court has previously rejected a request to adopt a different rule in cases in which insurers are sued for bad faith. Kujawa v. Manhattan National Life Insurance Co., 541 So. 2d 1168 (Fla. 1989). The Fourth District should have followed Kujawa in this case. Moreover, a different rule would not be appropriate in this case which involves three different defendants sued for various claims beyond the bad faith claim asserted against Allstate Indemnity Company.

The Fourth District's approach conflicts with the approach of all other district courts of appeal to have addressed the issue. The majority approach provides work product protection when there is a possibility of litigation or when litigation is foreseeable. The majority approach promotes timely and thorough investigations of incidents which may later give rise to litigation. The Fourth District's approach penalizes the timely investigation of incidents and encourages parties to delay

investigation until the magical moment when litigation becomes "imminent and substantial."

The Fourth District's approach also distorts the balancing of interests which exists under the Rule. The Rule provides qualified protection to work product. Discovery of factual work product can be obtained if the showings of "need" and "undue hardship" are made. Thus, if this Court adopts the majority approach, there is no prejudice to litigants seeking discovery, as those in need of work product can still obtain it under the provisions of the Rule.

ARGUMENT

This Court Should Reverse The Fourth District's Narrow Interpretation Of The Work Product Doctrine And Find The Subject Documents Protected From Discovery.

In its analysis of the discovery issue, the Fourth District began with the statement that "an insurer's claim and litigation files constitute work product and are protected from production" but the work product analysis "differs however when an insurance company is sued for bad faith." Ruiz, 780 So. 2d at 240. This statement is legally incorrect based on precedent from this Court, and is factually inapposite under the circumstances in this case.

First, the Fourth District's statement conflicts with Kujawa v. Manhattan National

Life Insurance Co., 541 So. 2d 1168 (Fla. 1989). In Kujawa, this Court clearly held that insurers in first-party bad faith claims can assert the work product doctrine to the same extent as any other litigant:

> We have considered the arguments of the parties and amicus curiae and are persuaded that the district court was correct in concluding that an adversarial, not a fiduciary, relationship existed between the parties and that the legislature in creating the bad faith cause of action [Section 624.155] did not evince an intent to abolish the attorney-client privilege and work product immunity.

541 So. 2d at 1169. Subsequent to Kujawa, the Fourth District has recognized that an insurer can assert the work product doctrine in response to discovery in a bad faith case. E.g. State Farm Mutual Automobile Insurance Co. v. LaForet, 591 So. 2d 1143 (Fla. 4th DCA 1992). Thus, the fact that *one* of the parties in this case is sued for bad faith does not reduce the work product protection provided by the Rules of Civil Procedure.

Second, the Fourth District's statement fails to reflect that this case does not merely involve a bad faith claim against Allstate Indemnity Company. Instead, this case involves claims of professional malpractice against Paul Cobb and respondeat superior liability against his employer, Allstate Insurance Company. These parties have the same work product protection as any other litigant in the State of Florida. For example, the claim file of Allstate Insurance Company should not lose its

protection because another defendant is sued for bad faith.[2]

Florida Rule of Civil Procedure 1.280(b)(3) applies to all litigants and provides qualified protection to documents and materials "prepared in anticipation of litigation." Contrary to the Fourth District's narrow interpretation, the Rule has no requirement that the anticipated litigation be "imminent" or that the possibility of litigation be "substantial."

As required by Rule 1.280(b)(3), the subject documents were prepared in anticipation of litigation. In this case, litigation was reasonably and accurately anticipated since this was not a routine claim which would be adjusted and paid. Instead, a coverage issue was identified as soon as the claim was reported because the accident involved a vehicle which was not covered by the insurance policy. This was not a typical claim. There is no coverage issue in the vast majority of claims. In fact, most claims are settled without any dispute. When a dispute does arise in the course of a claim, it typically involves the situation where the claim is adjusted and the parties disagree as to the amount of policy benefits to which the insured is entitled. In this

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[2] Any work product which Respondents obtain could be used against any of the three defendants. Thus, the statement taken of Paul Cobb could be used against him on the professional malpractice claim even though the statement was produced by Allstate in response to discovery regarding the bad faith claim. If the malpractice claim were sued upon alone, Respondents could not overcome the work product protection afforded this statement. E.g. Hornsby v. Crocker and Co., 620 So. 2d 262 (Fla. 4th DCA 1993); Dade County School Board v. Soler, 534 So. 2d 884 (Fla. 3rd DCA 1988). Respondents should not be allowed to make an end-run around the law and obtain the statement in this case.

atypical claim, litigation was foreseeable because of the coverage issue.

Florida courts, with the sole exception of the Fourth District, have adopted a common sense approach and recognized work product protection when documents have been prepared while litigation was reasonably foreseeable. This approach is demonstrated by decisions from the Second and First District Courts of Appeal. E.g. Prudential Ins. Co. of Am. v. Fla. Dep't. of Ins., 694 So. 2d 772 (Fla. 2nd DCA 1997); McRae's Inc. v. Moreland, 765 So. 2d 196 (Fla. 1st DCA 2000). No other district has required that the documents be prepared in anticipation of litigation which is "substantial and imminent." See also Beverly Enterprises-Florida, Inc. v. Olvera, 734 So. 2d 589 (Fla. 5th DCA 1999)(Fifth District found documents protected because they "were prepared in anticipation of possible litigation").

In Prudential, the Second District followed its earlier precedent and held that "even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim." 694 So. 2d at 774. In its earlier cases, the Second District had specifically held that "it is not necessary that the documents be prepared for imminent or ongoing litigation." Waste Management, Inc. v. Florida Power & Light Co., 571 So. 2d 507, 509 (Fla. 2nd DCA 1990). In Waste Management, the Second District acknowledged that its

interpretation of the law was in conflict with the Fourth District's approach.

Similarly, in McRae's, the First District protected statements because "at the time the statements were taken, it was foreseeable that litigation could arise." 765 So. 2d at 197. See also Wal-Mart Stores, Inc. v. Ballasso, 26 Fla. L. Weekly D1734 (Fla. 1st DCA July 17, 2001) (in finding work product protection, First District held that files were prepared in anticipation of litigation "because it was foreseeable that litigation might ensue from the incident").

The approach demonstrated by the First and Second Districts is more consistent with precedent from this Court. In fact, the Second District had noted that a trial judge following the Fourth District's approach would be acting "contrary to the dictates of the supreme court [in Seaboard Air Line Railroad v. Timmons, 61 So. 2d 426 (Fla. 1952)] and this court as well as other district courts of appeal." Florida Cypress Gardens, Inc. v. Murphy, 471 So. 2d 203, 204 (Fla. 2nd DCA 1985).

The Fourth District's requirement that the probability of litigation be "substantial and imminent" is not based on the language of the Rule or any precedent from this Court. Instead, it is based on the Fourth District's earlier precedent in Cotton States Mutual Insurance Co. v. Turtle Reef Associates, Inc., 444 So. 2d 595 (Fla. 4th DCA 1984). In Cotton States, the Fourth District noted that "mere likelihood of litigation does not satisfy this [work product] qualification." 444 So. 2d at 596. The

Fourth District did not cite any Florida authority for that proposition, and completely ignored its earlier, contrary authority in Sligar v. Tucker, 267 So. 2d 54 (Fla. 4th DCA), review denied, 271 So. 2d 146 (Fla. 1972). In Sligar, the Fourth District found certain documents protected when they "concerned an event which foreseeably could be (and in fact subsequently was) made the basis of a claim." 267 So. 2d at 55. The documents were claim forms "processed routinely by the several department heads or staff of the hospital in any situation where it appeared to them that there might be possible action or liability." Id.

When Respondents made their claim for insurance benefits in this case, there was no fiduciary relationship between them and Allstate. Instead, the relationship was that of debtor and creditor. Baxter v. Royal Indemnity Co., 258 So. 2d 652, 657 (Fla. 1st DCA 1973), certiorari discharged, 317 So. 2d 725 (Fla. 1975). Under Florida law, Respondents had the legal right to promptly initiate suit on the insurance claim if Allstate failed or refused to settle the claim to their satisfaction. Id. Thus, Allstate faced the threat of litigation once it was notified of this insurance claim. The threat was exacerbated and immediate in this case because the coverage issue made it clear from the outset that the claim would not be settled to Respondents' satisfaction. In fact, the coverage issue caused Respondents' claim to be denied.

The threat of litigation in this case was more real and immediate than in many other cases in which work product protection has been recognized. For example, in Miami Transit Co. v. Hurns, 46 So. 2d 390 (Fla. 1950), this Court granted protection to certain statements obtained from passengers on a bus at the time of a collision. The lawsuit was not brought until almost two years after the accident. Id. at 391. This Court rejected arguments that the statements could be discovered because they were "secured before suit was instituted while plaintiff was ill and unconscious from the accident, and prior to any defense preparation." Id.

The Fourth District's requirement that the probability of litigation be "substantial and imminent" is inconsistent with Hurns. In Hurns, the litigation was not "imminent" since it was filed almost two years after the accident.

In City of Sarasota v. Colbert, 97 So. 2d 872 (Fla. 2nd DCA 1957), the trial court allowed production of investigation materials prepared after the accident and before plaintiff filed a notice of claim as required by city charter. Id. at 873. The Second District reversed, holding that the materials were work product even though they were prepared prior to the notice of claim. Id. at 874. The Second District did not want to penalize the diligence of the city in promptly investigating a potential claim even before the notice of claim had been filed. Id.

The Fourth District's narrow definition of work product improperly penalizes

parties who begin investigations immediately after incidents which might give rise to litigation. There is no justification for a rule which would cause parties to forego or delay investigation out of fear that their investigation would be discoverable because it was begun too early. This Court should adopt a rule which encourages timely investigations of incidents. Florida Cypress Gardens, Inc. v. Murphy, 471 So. 2d 203, 204 (Fla. 2nd DCA 1985)("Our system of advocacy and dispute settlement by trial mandates that each side should be able to use its sources of investigation without fear of having to disclose it all to its opponents"). The approach adopted by the majority of districts promotes the timeliness and thoroughness of such investigations by allowing work product protection when litigation is possible or foreseeable.

Finally, this Court should adopt the rule which provides a broader, rather than a limited or narrow, definition of work product. Florida courts have consistently recognized the need to protect investigation materials since their disclosure may cause irreparable harm to the party. E.g. Allstate Insurance Co. v. Langston, 655 So. 2d 91 (Fla. 1995)(applying "cat out of the bag" analogy to the discovery of work product material which may reasonably cause material injury of irreparable nature so as to justify certiorari review of orders compelling such discovery); Snyder v. Value Rent-A-Car, 736 So. 2d 780 (Fla. 4th DCA 1999)(certiorari lies to

review trial court orders compelling production of discovery claimed to be work product as this would present the potential of a departure from the essential requirements of law which would cause material harm for which there is no adequate remedy at law).

If a broader definition is adopted, there would be no prejudice to parties seeking discovery of investigation materials since work product protection is qualified. Except in the case of opinion work product, parties seeking discovery could still obtain investigation materials if they made the showings of “need” and “undue hardship” required by Rule 1.280(b)(3). The Rule already balances the rights of the litigants and allows discovery when it is truly necessary in a particular case. A narrowing of the definition of work product distorts the balance and, therefore, should be rejected.

CONCLUSION

The Fourth District's interpretation of the work product doctrine conflicts with the majority approach as reflected in decisions from the First, Second and Fifth Districts. The Fourth District's approach narrowly applies the doctrine and denies protection to materials which were prepared in anticipation of litigation, which is all that is required to be shown under Rule 1.280(b)(3). The Fourth District's approach engrafts additional requirements on the Rule which penalize litigants who seek to perform timely investigations of incidents. The Rule already provides sufficient protection to parties seeking discovery of investigation materials. This Court should reject the narrow interpretation and reverse the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this brief has been furnished by United States Mail to Henry A. Seiden, Esquire, P.O. Box 3067, Salem, MA 01970, and Philip D. Parrish, 9130 S. Dadeland Blvd., Suite 1705, 2 Datran Center, Miami, FL 33156, this _____ day of November, 2001.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14-point font.

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