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 REPLY BRIEF ON MERITS

DAVID B. SHELTON, ESQUIRE

Florida Bar No. 0710539

RUMBERGER, KIRK & CALDWELL

A Professional Association

P.O. Box 1873

Orlando, FL 32802-1873

(407) 839-4511

(407) 841-2133 (fax)

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

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 Respondents' position, the Rule does not require an insurer to formally deny a claim before it can claim work product protection. This Court should not adopt Respondents' position and engraft additional requirements onto the Rule, creating a different standard for insurers. The Rule should be applied, as written, to all litigants including insurers.

This Court has repeatedly found that insurers and insureds in positions similar to Allstate and Respondents do not have a fiduciary relationship. There is no reason for this Court to reconsider this long line of precedent. Because there is no fiduciary relationship between the parties, there is no reason for this Court to adopt a special work product standard in this case.

The Court should apply the Rule's "in anticipation of litigation" standard as found by the majority of 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.

ARGUMENT

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

Contrary to Respondents' contention, Answer Brief ("AB") at 11, the Fourth District's decision in this case conflicts with Kujawa v. Manhattan National Life Insurance Co., 541 So. 2d 1168 (Fla. 1989). Whereas Respondents seek a special work product standard in this case because Allstate Indemnity Company has been sued for bad faith, this Court in Kujawa clearly held that insurers in first-party bad faith claims are to be treated no differently than any other litigant in Florida. Insurers are entitled to claim work product protection, as can any other litigant, when a document was prepared in anticipation of litigation. That is the standard of Rule 1.280(b)(3) of the Florida Rules of Civil Procedure. There is no justification for having the Rule apply differently to different classes of litigants. This Court chose not to adopt different classifications in Kujawa and should refuse to reconsider the issue in this case.

This Court should reject Respondents' request to recede from Kujawa. AB at 35. There is no reason to do so, and no Florida court has ever expressed a desire to have such a change in the law. Florida courts have applied and followed Kujawa, even the Fourth District in other cases. State Farm Mutual Automobile Insurance Co. v. LaForet, 591 So. 2d 1143 (Fla. 4th DCA 1992).

Moreover, a reconsideration of Kujawa is beyond the scope of this Court's

review in this case. Jurisdiction exists here because the Fourth District's narrow construction of the Rule's "in anticipation of litigation" standard conflicts with the approach of all other district courts to have addressed it. While the Fourth District here required the litigation to be "imminent and substantial," Allstate Indemnity Co. v. Ruiz, 780 So. 2d 239, 240 (Fla. 4th DCA 2001), the other districts have required only that the litigation be foreseeable. 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). The approach of the other districts appears to involve a re-statement of the Rule's standard, as "foreseeable" can be equated to "anticipated." The Fourth District's approach adds requirements to the Rule which is written in clear language. Nowhere in their brief do Respondents ever contend that the Rule is in any way ambiguous. Thus, the Rule should be applied as written, without any additional requirements.

Respondents further argue that a special rule should be adopted in classes of cases where insurers are sued for first-party bad faith, because the first-party insurer allegedly owes a "fiduciary obligation" to its insured. AB at 14. There is no such fiduciary duty owed to an insured regarding first-party insurance coverage. This Court, on numerous occasions, has recognized that there is no fiduciary relationship between the insurer and insured regarding first-party insurance. This was clearly recognized in Kujawa, where this Court described the relationship as adversarial as opposed to fiduciary. 541 So. 2d

at 1169.[1]

This Court again refused to recognize a fiduciary relationship in the first-party insurance context in State Farm Mutual Automobile Insurance Co. v. Laforet, 658 So. 2d 55 (Fla. 1995). That case involved a bad faith claim under the uninsured motorist provisions of an automobile insurance policy. This Court explained that a fiduciary relationship exists in third-party insurance because the insurer defends the insured which provides the insurer with the power to settle and foreclose an insured's exposure or refuse to settle and leave the insured exposed. Id. at 58. This Court recognized that "the relationship in a first-party bad faith

[1] Amicus, United Policyholders, argues that the Court should recognize a fiduciary relationship because Florida's statutes now recognize a duty of good faith. A duty of good faith does not equate with a fiduciary duty as this Court has consistently explained. Further, the fact that Allstate trains its adjusters to be honest and deal with the highest degree of integrity, Amicus Brief at 18, does not create a fiduciary duty.

action is the very antithesis of that established in third-party actions." Id. at 59.

In the first party insurance context, as with the collision coverage involved in this case, the insurer has no duty to defend the insured. The insured has suffered damage to his property, in this case his car, for which he seeks policy benefits. If the insurer refuses to pay, or delays, the insured can sue to recover policy benefits. In this respect, the parties stand in the legal relationship of a 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).

Respondents ask the Court to revisit Laforet. AB at 15. This request should be rejected not only because it goes beyond the scope of the review in this case, but also because it would require the reconsideration of a concept which is well-established in Florida common law, see Baxter, and which has been consistently applied and recognized subsequent to the passage of Florida's Civil Remedy Statute, Section 624.155, Florida Statutes, which created the first-party bad faith claim in 1982. See Kujawa and Laforet. See also Time Insurance Co. v. Burger, 712 So. 2d 389, 391 (Fla. 1998)("unlike the fiduciary relationship existent in a third-party claim, the relationship between the parties in a dispute over the insurance

contract is that of debtor and creditor"). There is no reason to revisit this concept which is legally sound and crystallized in our jurisprudence.

In support of their request for a special standard in first-party insurance claims, Respondents argue that denial of first-party insurance benefits can result in damage to the insured. AB at 15. This argument may well have convinced the Legislature as to the necessity for passage of the Civil Remedy Statute, but it is completely irrelevant to the issue in this case. The consideration of whether an insured has been damaged, or has a valid bad faith claim, is inapposite to the determination of what standard is to be used to determine the application of the work product doctrine.

Respondents boldly argue that first-party insurers deserve lesser protection from the work product doctrine than all other litigants. AB at 16. Since the civil rules apply equally to all litigants, a first party insurer deserves the same protection. Consistent with the Rule it must show that the document was prepared in anticipation of litigation. If this showing can be made, protection should be provided regardless of the nature of the party seeking protection. There should not be a different standard for plaintiffs versus defendants, or for one type of defendant versus another.

The claims in this case are not limited to a bad faith claim against Allstate Indemnity Company. See Third Amended Complaint (Appendix 1). Respondents recognize that there are also claims of professional negligence against their insurance agent, Paul Cobb. AB at 17. One of the documents which is the subject of this discovery dispute is a statement Allstate took of Paul Cobb. Allegations are made that Mr. Cobb mishandled the insurance transaction and failed to follow Respondents' instructions in adding a vehicle to the policy. Allstate is Mr. Cobb's employer and has a responsibility to indemnify him. (Appendix 12 at pages 5, 7). One concern that has been consistently raised both below and before this Court is that the statement, if discovered for purposes of the bad faith claim against Allstate Indemnity Company, could be used against Mr. Cobb for purposes of the malpractice claim against him.

Respondents seek to dismiss these concerns by suggesting that the malpractice claim against Mr. Cobb may be premature. AB at 17. Respondents cite Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061 (Fla. 2001), in which this Court held that the malpractice claim against the insurance agent does not accrue until resolution of the insured's suit against the insurer to establish whether coverage exists. It is unclear whether Blumberg has any application here since Allstate has already paid

the disputed insurance benefits to the Respondents. (Appendix 1 at page 5). In any event, Blumberg does not resolve the legitimate discovery concern in this case: regardless of whether the malpractice claim against Mr. Cobb will be litigated now or at some later point, his statement would be out of the bag and would be available to be used against him if Respondents obtain it now in discovery on the bad faith claim against Allstate Indemnity Company.

Since this case does not solely involve bad faith claims against a first-party insurer, Respondents' request for a special rule applicable to first-party insurers is inappropriate and should be rejected. The existence of the multiple claims against multiple defendants in this case highlights the importance of having one standard applicable to all parties in all types of cases. That one standard is provided by Rule 1.280(b)(3).

Although they recognize that the work product doctrine is designed to safeguard the adversarial system, Respondents contend that the doctrine should be given a narrow construction. AB at 19. Because the doctrine has a legitimate and important purpose, Respondents' approach should be rejected. 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"). Although litigants have certain rights to discovery, such rights are not without limitation. E.g. Fla. Civ. P. Rule 1.280(b)(1)(discovery must be relevant to subject matter of the pending action); Sections 90.502-506, Florida Statues (recognizing various privileges). In addition, to the extent any discovery rights need to be protected in any given case, the Rule provides a method by which a litigant can make a showing of need and undue hardship and thereby discover documents which are otherwise protected as work product. In this respect, Respondents concerns about shielding documents from discovery (AB at 28) are not well taken. The Rule already balances the competing interests.

Respondents, joined by Amicus, United Policyholders, suggest generally that insureds in first-party bad faith claims have a critical need for discovery of the claim file (AB at 23, Amicus at 26-32) and, specifically, that they have a need for discovery of the documents in this case. AB at 28. Respondents include argument regarding Mr. Cobb's statement and deposition which are not supported by the record. AB at 28. Despite Respondents' unsupported assertion, Mr. Cobb did not fail to recall significant details during his deposition. Instead, Mr. Cobb testified

specifically regarding his meeting with Mrs. Ruiz and that she requested one vehicle be removed from the policy and replaced with another. (Appendix 11 at pages 2-3). Because there is no record support for Respondents' argument, it should be stricken or ignored. In any event, the general protestations of need by Respondents and Amicus are irrelevant to this appeal. Whether Respondents have a need for these documents, or whether insureds in general have a need for the claim file, is irrelevant to the legal issue which this Court will decide regarding the standard for determining when work product immunity attaches in the first place.[2]

Respondents principally argue that the documents which are the subject of this appeal are not work product because they were prepared in the "regular course of business." AB at 20. Respondents contend that it is "routine" for insurers to evaluate the merits of insurance claims. AB at 21. Respondents miss the point of this case and Petitioners' arguments on appeal. Respondents' insurance claim was neither regular nor routine. As the record clearly shows, their claim was irregular and unique because they sought collision coverage for a vehicle which had been

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[2] The Fourth District necessarily resolved the question of Respondents' need adverse to them when it denied discovery of certain documents. Respondents did not seek review of such ruling in this Court, nor can they show that such ruling conflicts with a decision of any other district court so as to provide this Court with jurisdiction. In any event, such ruling is a factual rather than a legal ruling.

removed from the policy. Their claim was irregular and unique because they allege that the insurance agent, Mr. Cobb, committed malpractice by removing a car from the policy and replacing it with another when he should have instead added a car so that two cars would be insured on the policy. Because issues were immediately recognized regarding existence of coverage and proper or improper removal of vehicles, this was never a regular or routine claim.

Because the policy records reflected only one insured vehicle – which was not the one involved in the accident – there was a coverage problem on this loss from the moment it was reported. This is not a situation where there was initially coverage for a loss which was later denied based on some fact which was developed in the insurer's investigation. Thus, this case is materially different from most cases where work product is analyzed. In arson cases, for example, the insured has coverage for the dwelling or property which was burned and benefits would be paid except the insurer learns of facts during its investigation which support a suspicion of arson. In the arson cases, the courts seek to identify the moment when the claim changed form a routine one, i.e. a fire to covered property, to one that might result in litigation based on evidence of arson. E.g. Carver v. Allstate Insurance Co., 94 F.R.D. 131, 135 (S.D. Ga. 1982) (court recognized that work product immunity

applied to documents prepared after Allstate had indications that the fire was the result of arson). There is no need to search for such a magical moment in this case, because the question of coverage was present from the beginning based on the undisputed fact that the damaged vehicle was not listed as an insured vehicle on the policy.

In essence, Allstate's investigation in this matter was not directed to an insurance claim but rather to a claim of alleged malpractice by its agent. Respondents could not make a claim under the policy, since the terms of the policy clearly did not extend coverage to the vehicle involved in the accident. Respondents were essentially making a claim that the policy should be reformed to cover the vehicle based on the agent's alleged malpractice. Thus, this was not the handling of a routine insurance claim.

A further example may help demonstrate that this matter does not present the ordinary claim. In a routine collision claim, the insurer will investigate the facts of the loss, the extent of damage to the vehicle and the cost of repair. The insurer either has the vehicle repaired or offers a specific amount to reimburse for repairs. Concerns over litigation are typically an "inchoate possibility" unless and until a

dispute arises over the repairs to be completed or the amount to be reimbursed. The insurer may not anticipate litigation during its initial investigation conducted prior to its offer of specific repairs or specific reimbursement amounts. In that case, the insurer may not be able to make a factual showing that it anticipated litigation prior to the dispute developing with its insured.

This case does not involve a situation where Allstate evaluated the damage to Respondents' vehicle, offered an amount to pay for repairs, and such amount was rejected thus creating a dispute from which litigation was anticipated. Instead, the dispute from which litigation was anticipated here was present the moment the claim was reported because the damaged vehicle was not listed on the insurance policy. (Appendix 3 at page 2).

Respondents discuss multiple approaches which have been adopted by the federal courts in analyzing work product. Respondents acknowledge an approach which they label the broad protection approach. AB at 25. Respondents criticize this approach because it allows work product protection to exist whenever a document is prepared in anticipation of litigation regardless of whether that is the sole or even primary motivation for the preparation of the document. AB at 25. Regardless of

the label attached to this approach, does it not correspond to the plain, unambiguous language of the Rule? The Rule requires only a showing of anticipation of litigation; it does not impose as an additional requirement that litigation be the sole or primary motivation.

Petitioners urge this Court to simply apply the standard existing in the Rule. This will necessarily involve an inquiry in every case as to whether litigation was anticipated at the time the document was prepared. That showing exists in this case because of the coverage problem existing when this claim was reported.

Respondents raise unsubstantiated concerns that insurers will argue that they anticipate litigation in every claim. Respondents do not make such a broad argument here, and doubt that insurers ever can or will attempt to do so. Instead, in this case, Respondents argue that this is a unique case, based on unique coverage problems resulting from the removal of the vehicle from the policy. Work product protection should attach to the documents prepared early in this claim because of its unique coverage circumstances.

Respondents urge this Court to adopt an approach which is based primarily on when the insurer denies the claim. This approach lacks a textual foundation in Rule 1.280(b)(3). Moreover, it creates a fiction that an insurer cannot anticipate litigation until it formally denies an insurance claim. Such fiction is generally unsupportable and inconsistent with the facts in this case. Further, this approach creates a higher standard for insurers than all other litigants. There is no reason to treat insurers disparately and require them to take such a formal position when no other litigant is required to do so before it enjoys work product immunity. See, e.g. 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 and 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."); City of Sarasota v. Colbert, 97 So. 2d 872 (Fla. 2nd DCA 1957)(the Second District denied production of investigation materials prepared after the accident and before plaintiff filed a notice of claim as required by city charter; 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).

Finally, Respondents' approach penalizes insurers for conducting investigations before the formal denial of a claim. Under this approach an insurer might be forced to formally deny a suspicious claim before it completes its investigation in order to ensure that work product protection will exist for such investigation. This is not a desirable result for insurance companies or for consumers. Consumers are benefited when decisions are made on their insurance claims based on reasonable investigations. As for insurers, a premature denial may become the basis of a bad faith claim. AB at 34-35. There is no legitimate justification for placing insurers between the discovery rock and the hard place of bad faith litigation. Thus, this approach should be rejected.

CONCLUSION

This Court should reject the narrow interpretation of Rule 1.280(b)(3) adopted by the Fourth District, should adopt the majority approach as reflected in decisions from the First, Second and Fifth Districts, and should 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 January, 2002.

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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DAVID B. SHELTON
Florida Bar No. 0710539
RUMBERGER, KIRK & CALDWELL
A Professional Association
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 839-4511
Telecopier: (407) 841-2133
Attorneys for Petitioners

641367