IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-2150

DCA CASE NO.: 4D04-606

Florida Bar No.: 353167

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

v.

HARVEY D. BENNETT, as the Personal Representative of the Estate of SANDRA L. BENNETT,

Respondent.
_____/

BRIEF AND APPENDIX OF PETITIONER ON JURISDICTION

(Conflict Certiorari)

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STATEMENT OF THE CASE AND FACTS

Petitioner, Liberty Mutual, sought certiorari review before the Fourth District Court of Appeal of an order requiring production of portions of its claims file, in this statutory bad faith action, based on its position that it is protected by the work product privilege. (A.1). The trial court adopted the Special Master's recommendation that Liberty Mutual did not begin to treat the claim as one for bad faith until it forwarded the file to a lawyer to defend the bad faith claim, citing Allstate Indemnity Co. v. Ruiz, 780 So. 2d 239 (Fla. 4th DCA), rev. granted, 796 So. 2d 535 (Fla. 2001). The trial court required the production of the file predating that event. (A.1).

The Fourth District rejected Liberty Mutual's argument that the work product privilege should have attached five months earlier when counsel for claimant informed Liberty Mutual that if it did not settle within the policy limits, a lawsuit would be filed which would include a claim for bad faith. (A.1). The Fourth District denied the petition upon application of its decision in Ruiz and concluded that the trial court's finding that bad faith litigation did not become substantial and imminent until Liberty Mutual forwarded its file to counsel to defend the bad faith claim is not a departure from the essential requirements of law. (A.1).

The Fourth District noted that in Ruiz, the court relied on their earlier decision in Cotton States Mutual Insurance Company v. Turtle Reef Associates, Inc., 444 So. 2d 595 (Fla. 4th DCA 1985), explaining:

> In Cotton, we considered federal decisions as persuasive authority because Florida's rule of civil procedure pertaining to work product privilege is substantially similar to the federal rule. See Fed. R.Civ.P. 26(b)(3). See also Carver v. Allstate Ins. Co., 94 F.R.D. 131 (S.D. Ga. 1982). According to Carver, the key inquiry is whether the probability of litigation is "substantial and imminent." 94 F.R.D. at 134.
>
> We recognize that our position conflicts with decisions from other districts finding that statements are privileged and protected as work product when they were taken at a time when it was foreseeable that litigation would arise. See e.g. Prudential, 694 So.2d at 774; 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 the documents prepared in contemplation of litigation and not for "mere likelihood of litigation". Cotton, 444 So. 2d at 596.

Ruiz, 780 So. 2d at 241. (A.1).

The foregoing demonstrates the Fourth District expressly acknowledges that their position conflicts with decisions from other districts finding that statements are privileged and protected as work product when they were taken at a time when it was "foreseeable that litigation would arise." See *e.g.* Prudential Ins. Co. of Am. v. Fla. Dep't. of Ins., 694 So. 2d 772, 774 (Fla. 2d DCA 1997); McRae's v. Moreland 765

So. 2d 196 (Fla. 1st DCA 2000).

Judge Klein, in his specially concurring opinion in this case, states that he agrees with the majority because the court is bound by Ruiz, however, he questions the correctness of Cotton States Mutual Insurance Co. v. Turtle Reef Associates, Inc., 444 So. 2d 595 (Fla. 4th DCA 1991), which the court followed in Ruiz. (A.2). Judge Klein notes that Cotton States conflicts with decisions of the Fourth's sister courts which have held that "statements are privileged and protected as work product when they were taken at a time when it was foreseeable that litigation would arise" (A.2) citing Ruiz, 780 So. 2d at 241. Judge Klein further states that the view the Fourth adopted from Carver v. Allstate Insurance Co., 94 F.R.D. 131 (S.D. Ga. 1982), that the probability of litigation must be "substantial and imminent," was rejected by the Fifth Circuit Court of Appeals in United States v. Davis, 636 F. 2d 1028, 1040 (5th Cir. Tex. 1981). (A.2).

Judge Klein concluded that he believes Davis is correct, "but somehow this court, starting with Cotton States got off track" and further stated:

> I am not suggesting that we recede from Cotton States and Ruiz because the Florida Supreme Court has granted review in Ruiz, and heard oral argument on March 5, 2002. The conflict should accordingly be resolved soon. Liberty Mutual can seek review of our decision which is based on Ruiz.

(A.2).

SUMMARY OF ARGUMENT

The Fourth District's opinion expressly notes conflict with decisions from other districts finding that statements are privileged and protected as work product when they were taken at a time when it was reasonable and foreseeable that litigation would arise. See e.g., Prudential, 694 So.2d at 774; McRae's Inc. v. Moreland, 765 So. 2d 196 (Fla. 1st DCA 2000). Because the Fourth District's decision expressly and directly conflicts with decisions from other district courts of appeal on the same question of law, this court has jurisdiction. This court has already exercised its jurisdiction to review the Fourth District's opinion in Allstate Indemnity Co. v. Ruiz, 780 So. 2d 239 (Fla. 4th DCA), rev granted, 796 So. 2d 535 (Fla. 2001), which addresses the identical issue raised in this case. This Court heard oral argument in Ruiz on March 5, 2002.

ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE THE FOURTH DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH PRUDENTIAL INS. CO. OF AM. V. FLA. DEP'T. OF INS., 694 So. 2d 772 (Fla. 2d DCA 1997) AND MCRAE'S INC. V. MORELAND, 765 So. 2d 196 (Fla. 1ST DCA 2000).

The Fourth District denied work product protection to certain documents in

Liberty Mutual's claim file upon application of the standard set forth in Allstate Indemnity Co. v. Ruiz, 780 So.2d 239 (Fla. 4th DCA), rev granted, 796 So. 2d 535 (Fla. 2001), concluding that the bad faith litigation did not become substantial and imminent until Liberty Mutual forwarded its file to counsel to defend the bad faith claim. (A.1). However, on this point of law, the Fourth District expressly acknowledged conflict with decisions from other districts which hold that statements are privileged and protected as work product when they were taken at a time when it was foreseeable that litigation would arise. (A.1) citing Prudential Insurance Co. of Am. v. Fla. Dep't. of Insurance, 694 So. 2d 772 (Fla. 2d DCA 1997); McRae's Inc. v. Moreland, 765 So. 2d 196 (Fla. 1st DCA 2000). Because of the conflict expressed in the Fourth District's decision in this case, this Court has jurisdiction to review this case.

The express and direct conflict of the Fourth District Court of Appeal's decision in this case with the decisions of the First and Second District Court of Appeal is obvious. For example, in Prudential, the Second District followed its earlier precedent and held that 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." See: Waste Management,

Inc. v. Florida Power & Light Co., 571 So. 2d 507, 509 (Fla. 2nd DCA 1990). In Waste Management, the Second District acknowledged its interpretation of the law is in conflict with the Fourth District's approach in Cotton States. Even earlier, the Second District had noted that a trial judge following Cotton States would be acting "contrary to the dictates of the supreme court [Seaboard Air Line Railroad v. Timmons, 61 So. 2d 426 (Fla. 1952)] and this court as well as other district courts of appeal." See: Florida Cypress Gardens, Inc. v. Murphy, 471 So. 2d 203, 204 (Fla. 2nd DCA 1985).

Similarly, in McRae's, the other case which the Fourth District notes conflicts with the decision in this case, 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. Like the Second District in Waste Management, the First District in McRae's acknowledged that its interpretation of the law is in conflict with the Fourth District's approach in Cotton States. Id.

The Fourth District's narrow interpretation of the work product doctrine conflicts with the approach of every other district in the state of Florida. 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 the instant decision, the Fourth District took an approach contrary to other districts and chose to follow its prior decision in Allstate Indemnity Company v. Ruiz, 780 So. 2d 239 (Fla. 4th DCA), rev granted, 796 So. 2d 535 (Fla. 2001), where the court followed its earlier decision 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, choosing instead to follow federal decisions. It is interesting to note that in following federal precedent, the Fourth District in Cotton States ignored its earlier 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. In Sligar, 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.

As noted by Judge Klein in his specially concurring opinion in this case, the view the Fourth has adopted from Carver v. Allstate Co., 94 F.R.D. 131 (S.D.Ga.

1982), that the probability of litigation must be "substantial and imminent" was rejected by the Fifth Circuit Court of Appeal in United States v. Davis, 636 F. 2d 1028, 1040 (5th Cir. Tex. 1981). (A.2.). Judge Klein states that he believes Davis is correct but somehow the Fourth District, starting with Cotton States got off track. (A.2). Judge Klein states that he is not suggesting that the Fourth District recede from Cotton States and Ruiz, because the Florida Supreme Court has granted review in Ruiz and heard oral argument on March 5, 2002, and the conflict accordingly should be resolved soon. (A.2). Therefore, Judge Klein notes Liberty Mutual can seek review of the Fourth District's decision which is based on Ruiz. (A.2).

CONCLUSION

Petitioner respectfully submits that this Court should exercise its jurisdiction to review this case particularly in light of the fact this Court has already granted review in Ruiz, which addresses the identical issue presented in this case and heard oral argument in that case on March 5, 2002. An express and direct conflict exists between the Fourth District's decision and decisions from the First and Second Districts on the same point of law. For these reasons, Petitioner respectfully urges this Honorable Court to accept jurisdiction and to review the merits of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Counsel for Plaintiff: **Clark Smith, Esquire and Michael Davis, Esquire,** Paxton & Smith, P.A., 1615 Forum Place, Suite 500, West Palm Beach, FL 33401; and to Co-Counsel for Plaintiff: **Richard M. Benrubi, Esquire,** Liggio, Benrubi & Williams, 1615 Forum Place, Suite 3-B, West Palm Beach, FL 33401, this _____ day of _____, 2004.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing was prepared in accordance with the rule requiring Times New Roman 14 point or Courier New 12 point.

_____
Janis Brustares Keyser

APPENDIX

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