IN THE SUPREME COURT OF FLORIDA
Supreme Court Building, 500 South Duval Street
Tallahassee, Florida 23299-1925

LIBERTY MUTUAL FIRE INSURANCE CO.

Appellant/Petitioner,

v.

HARVEY D. BENNETT,

Appellee/Respondent.
_____/

Case No.: SC04-2150
4th DCA Case No.: 4D04-606

On Petition For Conflict Certiorari To The District Court of Appeal, Fourth District

BRIEF ON JURISDICTION OF RESPONDENT, HARVEY D. BENNETT

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STATEMENT OF THE CASE AND FACTS

For the purpose of the jurisdictional issue in this Brief, the Respondent will accept the Statement of the Case and of the Facts set forth in the Brief of the Petitioner.

SUMMARY OF ARGUMENT

The decision of the District Court in this case and the decisions of the First and Second District Courts in the *McRae's* and *Prudential* cases respectively are not in conflict. Both this case and the decisions from the First and Second District apply the same purposive test to determine whether a document is protected by the work product immunity of Fla.R.Civ.P. 1.280(b)(3). In this case and the other Fourth District decisions the documents which were sought, and to which the claim of privilege was extended, were items from a liability insurer's claim file. In the decisions from the Fourth District and the cases upon which they ultimately relied -- the Federal Court's *Carver* decision -- the purposive test was applied to a body of documents the purpose for which evolved over the period of time that the documents contained in it were generated. The rule formulation of "significant and imminent" prospect of litigation was the test to discern the transition point within the preparation of the body of documents when those which were generated as part of the function of claim adjusting were to be distinguished from those generated

for purpose of litigation preparation. The *McRae's* and *Prudential* cases, did not concern documents in a claim file; each involved a body of documents prepared from the outset for litigation purposes. Thus these cases did not confront the need to determine the transition point in an evolving process of documentary preparation.

ARGUMENT

REVIEW JURISDICTION IS LACKING IN THIS CASE BECAUSE THE DECISION HEREIN IS NOT IN CONFLICT WITH THE DECISION IN *PRUDENTIAL* AND *MCRAE'S*

The Petitioner argues that the decision of the District Court of Appeal, Fourth District, in the present action conflicts with decisions of the First and Second Districts, in the cases of *McRae's Inc. v. Moreland*, 765 So.2d 196 (Fla. 1st DCA 2000) and *Prudential Ins. Co. of Am. v. Fla. Dept. of Ins.*, 694 So.2d 772 (Fla. 2d DCA 1997). A careful analysis of these decisions, the decision in the present case and the decisions of the Fourth District in two predecessor cases upon which that Court relied - - *Cotton States Mutual Insurance Company v. Turtle Reef Associates, Inc.*, 444 So.2d 595 (Fla. 4th DCA 1984) and *Allstate Indemnity Company v. Ruiz*, 780 So.2d 239 (Fla. 4th DCA 2001) - - reveals that the perceived conflict is apparent rather than real and that, understood in view of the theory underlying the work product rule, the decisions are easily reconciled since the two

groups of cases address different factual situations.

As the Committee Notes to the 1972 and 1988 Amendments make clear, Fla.R.Civ.P. 1.280 (b) (3) was derived directly from Fed.R.Civ.P.26 (b) (3). The Florida Rule provides:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and **prepared in anticipation of litigation or for trial** by or for another party or by or for that party's attorney, consultant, surety, indemnitor, insurer or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without due hardship to obtain the substantial equivalent of the materials by other means. (emphasis added)

Discoverability in the absence of a showing of due hardship thus turns upon the issue of whether the documents were "prepared in anticipation of litigation or for trial". If so prepared, then the documents would not be discoverable (absent the showing of undue hardship); if not, then the documents would be discoverable. Resolution of the issue in each of the cases discussed herein therefore hinges upon by the meaning ascribed to the term "prepared in anticipation of litigation".

As the Federal Courts have long recognized, there is more to this term than the mere fact that a document was prepared at a point in time when litigation was a foreseeable event (as contended in this case by the Petitioner). The phrase

"prepared in anticipation" includes a purposive element: the document must have been prepared in some way **for** litigation and not simply as part of a party's normal business operation. See *8 Wright & Miller, Federal Practice & Procedure* 2d Section 2024 ("Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.) [1] Addressing the purposive issue within the context of the documents created in the course of adjusting an insurance claim in the case of *Carver v. Allstate Insurance Co.*, 94 F.R.D. 131 (S.D. Ga. 1982) the Federal District Court noted that such documents may be prepared for concurrent

[1] The difficulty of applying the purposive or causation element in the case of potentially dual or concurrent purpose documents has led to several varying elaborations on this rule by the Federal Courts: *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981), *cert. denied* 454 U.S. 862 (1981) and its progeny look to the "primary motivating purpose" behind the creation of the document as contrasted with a secondary purpose for its creation; *United States v. Adlmon*, 134 F.3d 1194 (2d Cir. 1998) and a number of recent cases reject the primary/secondary distinction for a test borrowing, at least in part, the language of *Wright & Miller* and look to whether it can fairly be said that the document was prepared or obtained because of litigation. It may be noted that a significant number of cases involving an issue of concurrent purpose documents also involve insurance cases. The decision in *Carver v. Allstate Insurance Co.*, 94 F.R.D. 131

purposes and found that there came a point in the insurance company's evolving treatment of its claim when the insurer's focus shifted from mere claims evaluation to a strong anticipation of litigation. [2] The Court found that the documents prepared beyond the point where the focus shift occurred were prepared for litigation purposes rather than for the insurer's ordinary business of adjusting claims.

In *Cotton States*, the Fourth District rejected the contention that the limited privilege provided for in Rule 1.280 extended to a document simply because it was prepared in the mere likelihood of litigation. The Court noted that documents contained within a claim file may be prepared either in the normal course of business or for the purpose of litigation or litigation preparation. It looked to the analysis in *Carver* to provide a guide in distinguishing which items in an insurer's claim file might have been generated for the purpose of litigation preparation and which were prepared in the ordinary course of the claims adjusting process, adopting *Carver's* holding that a delineation in purpose could be discerned at the point where the focus of the insurer's undertaking shifted as the probability of

(S.D. Ga.), discussed *infra*, also utilizes the test language found in the *Wright & Miller* treatise, id. at 134.

[2] *Carver* notes - - as have many Federal decisions - - that production of documents from an insurer's claim file presents a unique composite of facts within the context of Rule 26 - - and, by analogy, Rule 1.280 - - privilege issues. *Carver* thus addressed the manner in which the purposive element in the term "prepared in

litigation became "substantial and imminent".

In *Ruiz*, the Fourth District reaffirmed its decision in *Cotton States* in finding that documents contained in a claim file prepared during the ordinary course of business were not privileged, while documents actually prepared in anticipation of litigation were privileged, 780 So.2d at 241. *Ruiz*, like *Cotton States*, noted that the documents were likely to be prepared in anticipation of litigation when the probability of that litigation became substantial and imminent.

Ruiz, like the opinion in the present case indicated that its position seemed to conflict with the decision in *Prudential* and *McRae's*. A careful examination of the latter two decisions, however, suggests that the Courts of the First, Second and Fourth Districts are applying the same basic rule of decision but to different factual situations.

In *McRae's* - - a case not involving an insurer's claim file and the attendant complexity in discerning a dividing line between documents prepared in the course of the adjusting function and documents prepared for litigation purposes - - the Court noted that litigation was foreseeable at the time that an employer took statements from its employees following a "peeping Tom" incident involving one of its employees and a customer using its dressing room. The First District,

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anticipation of litigation" applies specifically in the insurance claim file situation.

however, did not rest its decision that the documents were privileged upon the mere fact that litigation was "foreseeable" at the time the documents were prepared (as the Fourth District in *Ruiz* appeared to have understood that decision to hold). While noting that the statements were taken when litigation was "foreseeable", the Court also found that affidavits established that the statements were taken "in preparation for litigation". Thus the Court looked not only to the temporal element (prepared when litigation was foreseeable) but also to the purposive element (prepared in preparation **for** litigation). Although *Ruiz* seems to understand *McRae's* as only focusing on the element of foreseeability, a closer reading shows that *McRae* - - like *Carver, Cotton States* and *Ruiz* - - relies also on the purposive element holding the documents to be privileged. [3]

In *Prudential*, the petitioner - - a life insurance company - - became aware that some of its sales agents might have been guilty of churning. Responding to accusations contained in lawsuits and customer complaints, and in contemplation of further litigation, it assigned to its legal staff the responsibility for overseeing responses to those complaints. Prudential's objection to production of those

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In this, it was followed by *Cotton States*.

[3] An extended discussion of the two elements – the temporal and purposive or causative is found in *Harper v. Auto-Owners Insurance Company,* 138 F.R.D. 655, 659-664 (S.D. Indiana 1991). The importance of the purposive element is

documents was upheld. Here too, it is clear from the Court's recitation of the facts that the documents sought were ones which had been created **for the purpose** of preparing for anticipated litigation. Like the documents in *McRae's*, those in *Prudential* were generated solely for purposes of litigation and were not prepared in the ordinary course of Prudential's business. In both of these cases the company had generated documents in answer to a potential litigation crisis. Their factual situation is quite different from that in the three Fourth District cases where documents were created in the course of the general claims handling process, and application of the work product privilege required a delineation between those documents in the files generated in the ordinary course of business and those created for the purpose of preparing for anticipated litigation. All of these cases, however, recognize that the requirements of Fla.R.Civ.P. 1.280 (b) (3) are met not simply by reason of the fact that a document was created at a point in time when litigation was expected. Each of the decisions implicitly or explicitly recognizes the purposive factor is an essential element in determining whether the document was created "in anticipation of litigation". Because the present cause and the other Fourth District cases involved the problem of discerning from a class of documents (an insurance claim file) where the line of separation existed between those

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recognized in this Court's decision in *Southern Bell Telephone and Telegraph Co.*

documents prepared in the normal business of claim's adjusting and those prepared for the purpose of litigation, they had to address an issue not present in *Prudential* and *McRae's* and it is in addressing that issue that the formulation ("substantial and imminent") is applied, which this Petitioner suggests produces a conflicting holding of law.

Cotton States, *Ruiz* and the present case follow *Carver* in recognizing that documents contained in an insurance carrier's claim file may have been generated in response to an evolving function undertaken by those preparing them. Generally, the documents in such a file are prepared in the ordinary course of the claim's adjusting business of the carrier. As *Carver* notes, however, the focus of that function will sometimes transition from claim's adjusting to the preparation for anticipated litigation. *Carver* at 134. *Carver* and the cases from the Fourth District attempt to determine the purposive element behind a document's preparation in such an evolving or transitioning situation. They identify a transition point beyond which documents may be fairly categorized as having been prepared "in contemplation of litigation" to be where the likelihood of litigation became substantial and imminent. In both *Prudential* and *McRae's* the documents appear to have been generated in the course of processes which focused on

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v. Deason, 632 So.2d 1377, 1385-6 (Fla. 1994).

litigation preparation from the beginning. Neither of these cases involved a situation which required the Court to discern a transition point in an evolving process where the original function of claims adjusting transitioned into litigation preparation. Thus neither case required the application of the "substantial and imminent" formulation in resolving the issue of privilege.

Both groups of cases therefore apply the same principle or rule that only documents prepared for the purpose of anticipated litigation are potentially within the ambit of the Rule 1.280 work product privilege. In one group, the focus of the function in which all of the documents were generated did not change, and the application of the principle was straight forward. In the other group, the focus of the function for which the documents were generated evolved and it was necessary to further determine the transition point. Hence the application of the "substantial and imminent" test. Because each group addresses a different situation, the application of the rule is not in conflict, but merely adapted to the circumstances.

CONCLUSION

For the reasons set forth herein, the Respondent, Harvey D. Bennett, as Personal Representative of the Estate of Sandra L. Bennett, submits that the decision in the present action is not in conflict with the decision in the cases of *Prudential* and *McRae's* as contended by the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 6th day of December, 2004, to:

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CERTIFICATE OF COMPLIANCE TYPE SIZE AND STYLE

I HEREBY CERTIFY that the Font type size and style of Times New Roman, 14 Point was used in this Brief in compliance with Florida Rules of Appellate Procedure.

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