IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC06-2508
Lower Tribunal No.: 4D06-421

PETER R. GENOVESE, M.D.

Petitioner,
vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent. /

AMICUS CURIAE BRIEF OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF RESPONDENT, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

State Farm Mutual Automobile Insurance Company issues insurance policies in Florida. Petitioner in this case requests this Court to hold that insurers are stripped of their right to assert attorney-client privilege with regard to confidential communications with their attorneys concerning the handling of and litigation over contractual disputes that arise when the insureds later file an action accusing the insurers of bad faith. Thus, the Court's decision in this case will determine whether insurers will retain their right to confidentially consult legal counsel with regard to their rights and responsibilities under the law and their insurance contracts so as to better ensure compliance with the law when such contractual disputes arise. The issue in this case is of vital interest to this amicus curiae-insurer who conducts substantial business in Florida.

SUMMARY OF ARGUMENT

Petitioner, Plaintiff below, Peter R. Genovese, M.D. ("Plaintiff"), asks this Court to single out insurance companies and strip them of the right to confer confidentially with an attorney and protect such communications under attorney-client privilege based on nothing more than the filing of an action under § 624.155 alleging the insurer acted in bad faith.[1] A right guaranteed terrorists, murders, rapists, child molesters, criminals of all sorts, and defrauders of the public, the Plaintiff would have this Court deny to an insurer based on nothing more than an allegation of bad faith. This, the Court should not and cannot do.

Insurers, like any other persons or entities, are statutorily entitled to assert attorney-client privilege to prevent disclosure of confidential communications between them and their attorneys in the rendition of legal services, subject only to the exceptions adopted by the legislature. § 90.502, Fla. Stat. The separation of powers doctrine and rules of statutory construction preclude this Court from engrafting a new exception on the statute for insurers accused of bad faith.

The public policies that support recognition of attorney-client privilege also should preclude this Court from adopting such an exception to the privilege. Such an exception would discourage insurers from consulting attorneys on questionable

[1] As used herein, the term "bad faith" means an insurer "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interests." § 624.155(1)(b)1, Fla. Stat.

or disputed claims, resulting in insurers being unsure of their legal rights and duties under the law and their insurance contracts. This will lead to potential denial of meritorious claims, payment of unwarranted or fraudulent claims, unnecessary litigation, increase in overall legal expenses, disruption of insurers' ability to defend contractual litigation, disservice to the public interest and substantial inefficiencies in the legal system.

Plaintiff has presented no valid bases for singling out insurers accused of bad faith for losing the right to attorney-client privilege. Plaintiff's flawed arguments ignore the distinctions between attorney-client relationships in third-party and first-party claims and the resultant distinction in application of the privilege, misapply work product analysis to attorney-client privilege, and erroneously assert no attorney-client privilege exists for a fiduciary.

ARGUMENT

In Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005), this Court held that work product protection of claim file material is not available to an insurer who is sued under § 624.155. In doing so, the Court receded in part from its decision in Kujawa v. Manhattan Nat'l Life Ins. Co., 541 So. 2d 1168 (Fla. 1989), in which this Court had held that § 624.155 did not abrogate an insurer's right to claim work product protection or attorney-client privilege. As held by the district court below, this Court's decision in Ruiz was limited to work product and did not

address attorney-client privilege.[2] Provident Life & Accident Ins. Co. v. Genovese, 943 So. 2d 321 (Fla. 4th DCA 2006). Accord West Bend Mut. Ins. Co. v. Higgins, 34 Fla. L. Weekly D653 (Fla. 5th DCA March 27, 2009); Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 466 (Fla. 2d DCA 2007); Liberty Mut. Fire Ins. Co. v. Bennett, 939 So. 2d 113, 114 (Fla. 4th DCA 2006); XL Specialty Ins. Co. v. Aircraft Holdings, LLC, 929 So. 2d 578, 582-84 (Fla. 1st DCA 2006). See also Ruiz, 899 So. 2d at 1132 (Wells, J., concurring in part and dissenting in part). Nevertheless, the district court certified the following question to this Court:

> DOES THE FLORIDA SUPREME COURT'S HOLDING IN ALLSTATE INDEMNITY CO. V. RUIZ, 899 SO. 2D 1121 (FLA. 2005), RELATING TO DISCOVERY OF WORK PRODUCT IN FIRST-PARTY BAD FAITH ACTIONS BROUGHT PURSUANT TO SECTION 624.155, FLORIDA STATUTES, ALSO APPLY TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS IN THE SAME CIRCUMSTANCES?

Genovese, 943 So. 2d at 323. For the reasons discussed below, this Court should answer the question in the negative.

[2] Plaintiff admits that Ruiz did not involve attorney-client privilege, yet he suggests that Ruiz's reasoning was not limited to work product and the Court implicitly overruled its holding in Kujawa regarding attorney-client privilege as well as the work product doctrine. However, it is well-settled that this Court does not overrule itself by implication. F.B. v. State, 852 So. 2d 226, 228-29 (Fla. 2003); Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). Moreover, since attorney-client privilege was not at issue in Ruiz, any statement implicating attorney-client privilege should be viewed as dicta. State v. Dodd, 419 So. 2d 333, 335 n. 2 (Fla. 1982).

I. THE SEPARATION OF POWERS DOCTRINE AND RULES OF STATUTORY CONSTRUCTION PRECLUDE THIS COURT FROM CREATING AN EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE FOR INSURERS ACCUSED OF BAD FAITH.

In § 90.502, Florida Statutes, the legislature provided all "clients," including insurers, the privilege to prevent disclosure of confidential communications with lawyers made in the course of rendition of legal services.[3] The legislature also adopted five specific exceptions to this privilege. § 90.502(4). The legislature did not adopt an exception for insurers accused of bad faith. Thus, under the separation of powers doctrine, Fla. Const. art. II, § 3, this Court should not and cannot adopt such an exception. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984)(in refusing to limit the application of a statutory privilege, this Court held it was "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms" because to do so "would be an abrogation of legislative power"); West Bend (if there is to be a "first-party-bad-faith-brought-under-section-624.155-exception" to attorney client privilege, the legislature would have to create it).

Nothing in § 624.155 evinces a legislative intent to eliminate the privilege for an insurer accused of bad faith under that statute. Indeed, there is no mention

[3] Plaintiff's argument about insurers using attorneys to adjust claims to hide evidence is irrelevant to the legal issue presented in the certified question. It is already established law that if an attorney is acting in a business as opposed to legal adviser capacity the privilege does not apply because the communications are not made in the course of rendition of legal services. Such a factual issue should be addressed by a trial court through an in camera review of the evidence and should have no bearing on the question certified to this Court.

whatsoever in § 624.155 of discovery or attorney-client privilege. And there is nothing unavoidably inconsistent about subjecting an insurer to an action under that section while allowing the insurer the privilege afforded by § 90.502. See XL Specialty Ins. Co., 929 So. 2d at 584-87. See also Town of Indian River Shores v. Richey, 348 So. 2d 1 (Fla. 1977)(repeal of statute by implication will be found only where irreconcilable conflict exists); Hollar v. International Bankers Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1991)(statutes should be harmonized with existing law, which the legislature is presumed to know; to alter established law, statute must show that intention in unequivocal terms).[4]

Moreover, the legislature has had 16 years to supersede this Court's holding in Kujawa that § 624.155 does not eliminate attorney-client privilege applicable to communications between insurers and their attorneys with regard to claims by

[4] Plaintiff cites cases for the proposition that an insurer's litigation conduct is admissible in a bad faith case and argues that, therefore, the insurer's attorney-client communications related to that litigation must be discoverable. First, the cases suggesting litigation conduct is admissible did not involve assertion or discussion of the absolute litigation privilege that undoubtedly would call for a different holding. See Echevarria, McCalla, Raymer, Barret & Frappier v. Cole, 950 So. 2d 380, 380-81 (Fla. 2007); Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994). Moreover, even if conduct occurring in litigation were admissible, such would not require invasion of the attorney-client privilege (as it did not in the cases cited by Plaintiff). See Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. 4th DCA 1990); T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520 (11th Cir. 1985). Plaintiff's argument is simply a non-sequitur. See West Bend (proof of a bad faith claim does not depend on disclosure of attorney-client communications, and even if it did, it would not justify eliminating the privilege).

insureds under the insurance contract or for bad faith. The legislature has not done so, although it has amended § 624.155 at least three times since the Kujawa decision, including once to "rebuke" and supersede this Court's decision in McLeod v. Continental Ins. Co., 591 So. 2d 621, 625 (Fla. 1992). See Ruiz, 899 So. 2d at 1128 n.2. Thus, it should be presumed that the legislature has adopted this Court's construction of the statute in Kujawa on attorney-client privilege. See Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 917 (Fla. 2001).

II. PUBLIC POLICY CONSIDERATIONS SHOULD PRECLUDE THIS COURT FROM CREATING AN EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE FOR INSURERS ACCUSED OF BAD FAITH.

A. The Attorney-Client Privilege And Public Policy.

Attorney-client privilege is the oldest and most sacred of privileges for confidential communications known to the common law. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). See Horning-Keating v. State, 777 So. 2d 438, 445 (Fla. 5th DCA 2001); West Bend. This common law privilege was codified by the Florida legislature in 1976 in section 90.502. This privilege inures to corporations as well as individuals. See Upjohn; Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994); § 90.502(1)(b).

Attorney-client privilege promotes the administration of justice by encouraging clients to lay the facts fully before their counsel in order to receive accurate legal advice that will assist them in complying with the law. See Owen v.

State, 773 So. 2d 510, 514 (Fla. 2000); Brookings v. State, 495 So. 2d 135, 139 (Fla. 1986). As summarized by the United States Supreme Court:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn, 449 U.S. at 389. Accord West Bend; American Tobacco Co. v. State, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997). The importance of attorney-client privilege is emphasized by the ethical rules adopted by this Court requiring confidentiality of client communications. See R. Regulating Fla. Bar 4-1.6 and Comment; Horning-Keating, 777 So. 2d at 445.

Although critics of the privilege argue that it hinders the "search for the truth," this argument fails to account for the countervailing benefits associated with the privilege. The Florida legislature and judiciary have recognized the balancing involved in these matters and have consistently decided in favor of protecting the privilege. See Deason, 632 So. 2d at 1383 (discovery facilitates the truth-finding process, and although this process constitutes the core of any litigation, it must be tempered by the established interest in the free flow of information between attorney and client); § 90.502 (codifying attorney-client privilege and subjecting it to only certain specified exceptions); R. Regulating Fla. Bar 4-1.6 (requiring attorneys to maintain client communications confidential, subject to certain

specified exceptions). Thus, based on the well-established public policies, courts have recognized that attorney-client privilege is "deemed worthy of maximum legal protection," see West Bend; American Tobacco, 697 So. 2d at 1252, and it has been "protected assiduously" for centuries. See First Union National Bank v. Turney, 824 So. 2d 172, 185 (Fla. 1st DCA 2002).

To be sure, attorney-client privilege has its limitations and does not apply where it would disserve the policies it supports. Thus, the common law developed the "crime-fraud exception" to assure that the privilege does not extend to communications made for the purpose of committing a crime or fraud. United States v. Zolin, 491 U.S. 554, 562-63 (1989). The Florida legislature has codified this exception. § 90.502(4)(a).

This exception, however, does not apply even where it is shown the client was involved in a crime or fraud - it must be established that the attorney-client communication itself was made with the intent of furthering a crime or fraud. Horning-Keating, 777 So. 2d at 446. See also Turney, 824 So. 2d at 187. Due to the importance of attorney-client privilege and the policies it furthers, the mere allegation of crime or fraud is insufficient to overcome the privilege. See Robichaud v. Kennedy, 711 So. 2d 186, 188 (Fla. 2d DCA 1998)(to permit disclosure of attorney-client communications based upon a mere assertion of fraud would virtually eliminate the attorney-client privilege). Rather, courts have

required a particularized showing by evidence following specific procedures guaranteed to protect the privilege and the due process rights of the party claiming it. See Turney, 824 So. 2d at 183-84. See also Zolin, 491 U.S. at 570-75; American Tobacco, 697 So. 2d at 1255-56; Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne Developers, Inc., 873 So. 2d 339 (Fla. 3d DCA 2003). Allowing discovery of attorney-client communications without providing these safeguards or on the mere allegation of crime or fraud denies the client due process. Horning-Keating, 777 So. 2d at 446.

Plaintiff admits that this exception does not apply here, nor could it. Under Florida law, bad faith does not need to rise to the level of fraud and even simple negligence can be considered on the question. See Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), and cases cited. But the safeguards imposed on discovery of attorney-client communications under the crime-fraud exception stand in stark contrast to the rule Plaintiff requests this Court to adopt - allowing discovery of an insurer's attorney-client communications based on the mere filing of a suit alleging bad faith (something less than fraud) even if the communications were not intended to further the alleged bad faith.

B. The Public Policies Supporting Attorney-Client Privilege Applies To Insurers Accused of Bad Faith.

Insurers have always enjoyed the right of attorney-client privilege as to communications with attorneys on not only issues concerning compliance with

laws while conducting business in Florida and defense of bad faith claims, but also issues concerning coverage, claims handling, and litigation over coverage and claims made by their insureds. See United Servs. Auto. Ass'n v. Jennings, 731 So. 2d 1258, 1260 (Fla. 1999); Kujawa, 541 So. 2d at 1169. As a number of courts around the country have held in rejecting the argument that such privileged communications can be discovered in a bad faith case:

> [A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. A contrary rule would have a chilling effect on an insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege - to facilitate the uninhibited flow of information between a lawyer and client so as to lead to an accurate ascertainment and enforcement of rights.

Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal.App.3d 467, 200 Cal.Rptr. 471, 475 (1984). See also Hartford Fin. Serv. Group, Inc. v. Lake County Park & Rec. Bd., 717 N.E.2d 1232, 1236 (Ind.App. 1999)(insurer's retention of legal counsel to interpret the policy, investigate the details surrounding the damage, and to determine whether the insurance company is bound for all or some of the damage, is a classic example of a client seeking legal advice from an attorney).

Plaintiff asks this Court to hold that an insurer loses attorney-client privilege with regard to a first-party insurance claim upon the filing of a bad faith action. Of course, such a holding would be contrary to centuries of law that holds that any

wrongdoer - terrorists, murderers, rapists, child molesters, criminals of any sort, defrauders - have a right to communicate confidentially with an attorney and assert attorney-client privilege to those communications. Even those who consult with an attorney for the purpose of carrying out a crime or fraud are given greater rights than an insurer merely accused of bad faith under the rule Plaintiff seeks to have this Court adopt.

Perhaps most importantly, an exception to attorney-client privilege for insurers accused of bad faith would violate the policies that underlie the privilege. Such a rule would discourage insurers from consulting with counsel to determine their rights and duties and ensure compliance with the law. It would foster lack of candor between insurers and their attorneys and discourage full and frank disclosure of facts in those cases in which insurers do consult them. This would lead to lack of accurate legal advice, inefficiencies in the legal system, and harm to the public interest: it would eliminate the potential early resolution of disputed or questionable issues, encourage litigation with little chance of success, and increase unnecessary legal expenses or unjust settlements, ultimately, leading to increased premiums to all policyholders and adverse impacts on the justice system. Based on the policies that support attorney-client privilege, this Court should reject the "bad faith allegation exception" Plaintiff advocates, as other courts have done. See West Bend (it would not be prudent to create an environment in which an insurer is

unable to engage in candid discussions with its counsel about the legal justification for its conduct). See also Spiniello Companies v. Hartford Fire Ins. Co., 2008 WL 2775643 (D. N.J. July 14, 2008); Hartford v. Lake County; Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133 (Del.Sup.Ct. 1997); Dixie Mill Supply Co., Inc. v. Continental Cas. Co., 168 F.R.D. 554 (E.D. La. 1996); Palmer v. Farmers Ins. Exchange, 861 P.2d 895 (Mont. 1993); Aetna v. Superior Court.[5]

C. Plaintiff Presents No Legitimate Basis For Singling Out Insurers Accused Of Bad Faith For Eliminating Their Right to Attorney-Client Privilege.

Rather than present a legitimate basis for the proposed "bad faith allegation exception," Plaintiff suggests that the issue has already been decided in cases involving third-party bad faith claims and that public policy (derived entirely from inapplicable language in this Court's Ruiz opinion) requires that there be consistent discovery for all bad faith claimants. Plaintiff ignores the significant distinction that exists in attorney-client relationships involved in first-party and third-party claims. Cf. Macola v. Government Employees Ins. Co., 953 So. 2d 451, 457 (Fla. 2006)(distinction between first-party and third-party claims can be "critical").

[5] The opinions of those courts that have ruled to the contrary represent a distinct "minority view best not to be adopted," West Bend, and are bereft of any analysis whatsoever to support the result. See, e.g., Silva v. Fire Ins. Exchange, 112 F.R.D. 699 (D.Mont. 1986); Boone v. Vanliner Ins. Co., 91 Ohio St.3d 209, 774 N.E.2d 154 (2001). United Serv. Auto. Ass'n v. Werley, 526 P.2d 28 (Alaska 1974), cited by Plaintiff, actually applies the crime-fraud exception. Its finding that bad faith is equivalent to fraud is contrary to Florida law as discussed below, and, in any event, it required the showing necessary for the crime-fraud exception.

Plaintiff also ignores the inapplicability of the work product analysis in Ruiz to attorney-client privilege. Finally, Plaintiff also erroneously posits that § 624.155 creates a fiduciary relationship between the parties during a first-party claim and that such precludes the insurer from asserting a privilege.

1. Attorney-client relationships and resultant privileges differ in third-party and first-party claims.

Although in third-party bad faith cases courts have held that the insured can discover attorney-client communications between the insured's attorney and the insured's liability insurer, this is because the attorney is retained by the insurer to represent the insured in defense of the third-party claim - making the insured a client in the attorney-client relationship. As a client in the relationship, the insured is entitled to discover communications between its attorney and its insurance carrier concerning the defense of the claim. See Liberty Mut. Fire Ins. Co. v. Kaufman, 885 So. 2d 905, 908-09 (Fla. 3d DCA 2004); Koken v. American Serv. Mut. Ins. Co., 330 So. 2d 805, 806 (Fla. 3d DCA 1976). See also § 90.502(4)(c), (e), Fla. Stat.; R. Regulating Fla. Bar 4-1.7(e), 4-1.8(j). As the Kaufman court held, however, the insured bringing a third-party bad faith action cannot obtain attorney-client communications between the insurer and its in-house counsel, who was never acting as a lawyer for the insured. 885 So. 2d at 909.

Although this Court has held that an insurer owes a "good faith" duty only to its insured, see State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275, 277 (Fla.

1998); Fid. & Cas. Co. of New York v. Cope, 462 So. 2d 459, 460-61 (Fla. 1985); see also State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995); McLeod v. Continental Ins. Co., 591 So. 2d 621, 625 (Fla. 1992), it has also held that a third-party claimant can bring a third-party bad faith action directly against an insurer. See Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971). Such a claim, however, is entirely derivative of the insured's claim and, therefore, the third-party claimant stands in the shoes of the insured in pursuing the bad faith claim. See Zebrowski, 706 So. 2d at 277; Laforet, 658 So. 2d at 58; McLeod, 591 So. 2d at 625; Cope, 462 So. 2d at 460-61. Thus, as explained in Boston Old Colony Ins. Co. v. Gutierrez, 325 So. 2d 416, 417 (Fla. 3d DCA 1976), the same analysis that allows the insured to discover communications between its attorney and its insurer also allows the third-party claimant, standing in the shoes of the insured, to discover the same information. Accord Dunn v. National Security Fire & Cas. Co., 631 So. 2d 1103, 1109 (Fla. 5th DCA 1993); Continental Cas. Co. v. Aqua Jet Filter Systems, Inc., 620 So. 2d 1141, (Fla. 3d DCA 1993); Stone v. Travelers Ins. Co., 326 So. 2d 241 (Fla. 3d DCA 1976).[6]

The attorney-client relationships involved in a first-party claim on the

[6] Although not directly part of the certified question, State Farm suggests that even this analysis is incorrect and should be revisited. See Progressive v. Scoma, 975 So. 2d at 464-65 (holding, in third-party bad faith actions brought by third parties, an insurer's and its insured's attorney-client communications with counsel representing both of them is not discoverable absent waiver of the privilege by the insured or the insured's assignment of the bad faith claim to the third party).

insurance contract are completely different. In a first-party claim, the insurer does not retain an attorney for the insured. No fiduciary relationship exists between the insurer and the insured when the insured makes a claim for benefits under the contract; rather, the parties are in the position of two parties to a contract who disagree on what is owed. See Time Ins. Co. v. Burger, 712 So. 2d 389, 391 (Fla. 1998)("the relationship between the parties in a dispute over the insurance contract is that of debtor and creditor"). Any attorney the insurer retains, whether to provide legal advice concerning coverage or to defend it in litigation against its insured, is acting solely as an attorney for the insurer and has no attorney-client relationship with the insured – an adverse party. As such, an insured bringing a first-party bad faith action has no right to discover privileged attorney-client communications between the insurer and the insurer's attorney with regard to the underlying claim. See Kujawa, 541 So. 2d at 1169.[7]

Based on language from this Court's Ruiz opinion, Plaintiff argues that all bad faith claimants should be provided identical discovery rights. Plaintiff suggests

[7] The only case in which a Florida court has held to the contrary is Fid. & Cas. Ins. Co. v. Taylor, 525 So. 2d 908 (Fla. 3d DCA 1987). The Third District's analysis in that case, however, is flawed because it relied on third-party claim cases without recognizing the distinction between the attorney-client relationships involved. And its analysis was simply (and wrongly) that, because work product protection to claim file material can generally be overcome in a bad faith case because the claim file is "virtually the only source of information" on the claim handling, "attorney-client privilege is likewise commonly rendered inapplicable" - a nonsequitur, as discussed below. Thus, Taylor, as it concerns attorney-client communications, is simply wrong - as this Court held in Kujawa, 541 So. 2d at 1169.

the Fourth District's holding in this case gives greater discovery rights to third party claimants than to insureds. Plaintiff's argument is flawed again because it fails to acknowledge the distinction between attorney-client relationships that exist in first-party and third-party claims. As discussed, there is no distinction in discovery rights between third-party claimants and insureds as to discovery in third-party bad faith cases. But see supra n.6. Likewise in first-party bad faith cases, privileged attorney-client communications between the insurer and its attorney concerning the underlying contract claim are not discoverable by anyone.

2. The work-product analysis in Ruiz is inapplicable to attorney-client privilege.

In holding that a plaintiff in a first-party bad faith case could obtain "claim file type material" (including what traditionally would be protected as work product), this Court in Ruiz posited that "the claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim . . . [and is] the very information that is necessary to evaluate the allegations of bad faith." 899 So. 2d at 1128-29 (citing Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725, 734 (1983), for the proposition that "[t]he claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming"). These are appropriate considerations for discovery of material protected by the work

product doctrine. See Fla.R.Civ.P. 1.280(b)(3) (work product can be discovered "upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

But relevancy and need are inappropriate considerations with regard to discovery of material protected by attorney-client privilege. The fact that privileged evidence is relevant and the party seeking it has a substantial need for it is not an "exception" to attorney-client (or any other) privilege (absent a statutory exception for same). See Holly, 450 So. 2d at 220 ("[i]nevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful, or even essential, to their causes," but the court must assume that the legislature balanced this potential detriment against the benefits of the privilege and found the latter to be of greater weight); West Bend (work product may be susceptible to disclosure based on considerations of need and relevance in bad faith case; attorney-client privilege is not); Coates v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504 (Fla. 2d DCA 2006)(even where application of the attorney-client privilege "would deny [discovering parties] access to information vital to their defense," privilege must be upheld); Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A., 715 So. 2d 1021 (Fla. 4th DCA 1998)(relevance of documents protected by attorney-client privilege does not

override the privilege); Shafnaker v. Clayton, 680 So. 2d 1109 (Fla. 1st DCA 1996)(even documents that are "vital" to a party's case are not discoverable if protected by the attorney-client privilege); Long v. Murphy, 663 So. 2d 1370 (Fla. 5th DCA 1995)(claims of fraud and misrepresentation during negotiations do not waive attorney-client privilege for communications with attorneys during the negotiations, even though the information would be relevant to the claims). See also Garbacik v. Wal-Mart Transportation, LLC, 932 So. 2d 500 (Fla. 5th DCA 2006)(if invasion of a privilege were allowed because the privileged material could be relevant and used against the other party, courts might just as well ignore the privilege); Choice Restaurant Acquisition Ltd. v. Whitely, Inc., 816 So. 2d 1165 (Fla. 4th DCA 2002)("a court cannot justify finding waiver of the privilege merely because the information is needed by the opposing party").

As held in the foregoing (and numerous other) cases, the fact that a party can establish that privileged attorney-client materials are relevant, and even vital to that party's case, does not create an exception to attorney-client privilege. Absent a waiver by the party holding the privilege, such as by affirmatively putting the communications at issue,[8] or the existence of some other exception specified in

[8] If the insurer affirmatively asserts an "advice of counsel" defense to a bad faith claim, a waiver of attorney-client privilege will occur. But an insured cannot waive an insurer's attorney-client privilege by simply bringing a bad faith action, and the insurer's defense of that action and denial that it acted in bad faith does not waive the privilege. For a waiver to occur under the "at issue" doctrine, "the proponent of

§ 90.502, such communications remain privileged and undiscoverable. Accordingly, the Ruiz analysis concerning the discovery of work product material, has no application to discovery of privileged material.

3. There is no "fiduciary" exception to attorney-client privilege.

Plaintiff argues an exception to attorney-client privilege in first-party bad faith cases is required because the legislature, in § 624.155, created a "fiduciary" relationship between the insurer and the insured in a first-party claim context. Even if, contrary to decades of Florida precedents,[9] § 624.155 were construed to create a "fiduciary relationship" between insurers and insureds during a first-party claim, such would not give rise to an exception to attorney-client privilege. Even a person serving in a fiduciary capacity has the right to confer confidentially with an attorney. A beneficiary of the fiduciary relationship has no right to discover those attorney-client communications even if it alleges (or proves) that there was a breach of fiduciary duty between the fiduciary and the beneficiary - absent waiver

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a privilege must make a claim or raise a defense based upon the privileged matter and the proponent must necessarily use the privileged information in order to establish its claim or defense." See Coates, 940 So. 2d at 510 and cases cited.

[9] Although the legislature has imposed a "good faith" duty on insurers handling first-party claims, this does not equate to a common law fiduciary duty, which this Court has repeatedly held does not exist in first-party claims given the inherent divergent interests of insureds and insurers in that context. See Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1282-83 (Fla. 2000); Burger, 712 So. 2d at 391; State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 59 (Fla. 1995). See also § 624.155(8), Fla. Stat. ("This section shall not be construed to create a common-law cause of action.").

or some other exception, i.e., the crime-fraud exception, specified in § 90.502. See Turney, 824 So. 2d at 185-86; First Union National Bank v. Whitener, 715 So. 2d 979 (Fla. 5th DCA 1998); Barnett Banks Trust Co. v. Compson, 629 So. 2d 849 (Fla. 2d DCA 1993). See also Niles v. Mallardi, 828 So. 2d 1076 (Fla. 4th DCA 2002). See generally § 90.502.[10] Thus, section 624.155's imposition of a good faith duty, even if fiduciary, on insurers does not eliminate the insurer's privilege to communications with its attorney concerning the handling of a first-party claim.

CONCLUSION

Based on the foregoing discussions and authorities, this Court should answer the certified question in the negative.

Respectfully submitted,

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[10] Contrary to the suggestion in Plaintiff's brief, discovery of communications between the insured's attorney and the insurer in a third-party bad faith case is not based on the fiduciary relationship between the insured and the insurer but on the attorney-client relationship between the insured and the attorney.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 9th day of April 2009, to the following:

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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