IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC06-2508

PETER R. GENOVESE, M.D.,

Petitioner,

-vs-

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

On Appeal from the Fourth District Court of Appeals

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PREFACE

The following designations will be used:

"Appendix" refers to the Appendix to the Petition for Writ of Certiorari from the Fourth District Court of Appeal

The symbol "R" refers to the Index to the Record-on-Appeal in the Florida Supreme Court.

ARGUMENT

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?

Respondent has devoted the vast majority of its lengthy Answer Brief to a question no one has asked; whether this Court's decision in Allstate Indemnity Co. v. Ruiz, 899 So.2d 1121 (Fla. 2005), is binding precedent which controls the outcome of this case. Clearly, Ruiz did not involve an attorney-client privilege question, so the holding is limited to work product. However, the reasoning used by this Court in Ruiz is another matter. The reasoning in Ruiz applies directly to the attorney-client privilege and compels the conclusion that there is no attorney-client privilege in a first party bad faith suit.

Respondent also expended a great deal of effort, and employed some questionable references to "facts" contained in a transcript from another appeal in a different court, to prove that it is not guilty of bad faith. Provident's protestations that the bad faith claim against it was created by Petitioner, and that it is a victim, is not relevant to the question of discovery. It is apparently included in an attempt to persuade this Court that discovery should not be allowed because Provident is innocent. The lengthy discussion of guilt or innocence in the Answer Brief warrants

no further discussion or consideration.

In Ruiz, this Court was clear:

> Today, however, we reconsider the wisdom of our decision in Kujawa [v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla.1989)] and a fresh look at such decision convinces us that any distinction between first- and third-party bad faith actions with regard to discovery purposes is unjustified and without support under section 624.155 and creates an overly formalistic distinction between substantively identical claims. As we have previously acknowledged in [State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 58 (Fla.1995)] and other decisions, section 624.155 very clearly provides first-party claimants, upon compliance with statutory requirements, the identical opportunity to pursue bad faith claims against insurers as has been the situation in connection with third-party claims for decades at common law. The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims. Thus, there is no basis to apply different discovery rules to the substantively identical causes of action.

Provident and its Amici simply ignore that statement, and avoid the issue. Simply put, attorney-client communications of the insurer are discoverable in a third party bad faith action and, based on the Ruiz statement, they are also discoverable in a statutory first party bad faith action as well.

The analysis presented by Provident in the Answer Brief reaches its conclusion by focusing on only part of the Ruiz opinion. By focusing on this Court's discussion of the "need" a litigant has for discovery and its role in destroying the work product

privilege, Provident improperly limits the applicability of the reasoning in Ruiz. Provident has ignored the foundation of the Ruiz opinion, which is the fiduciary relationship between the insurer and the insured. In the final analysis, this Court's decision in Ruiz was based on the fiduciary duty owed to the insured and created by §624.155, Fla. Stat., not on the "need" analysis applicable to all work product privilege claims. Indeed, if this Court had based the decision on the general work product privilege exception of undue hardship and need, then there would have been no need to go through the bad faith analysis at all. The Court could have just found that the insured proved need and the inability to obtain the substantial equivalent of the information without undue hardship. The fact that this Court went through the bad faith analysis is an indication that something more is involved.[1]

[1] In the Answer Brief, Provident has argued that "Ruiz can be best understood as a blanket finding of need for non-privileged claim file materials in first party bad faith cases, so that no plaintiff in such a case is required to make an independent showing of 'undue hardship' in order to obtain the insurer's claim file 'work product' documents" (AB p. 27). This argument is a mix of two independent concepts and, therefore, flawed. The standard for obtaining work product materials requires a showing of (1) "need" and (2) that the materials cannot be obtained from some other source without "undue hardship." Fla. R. Civ. P. 1.280(b)(3). It is impossible to have a blanket "finding of need" relieve the insured from the second requirement of showing that the substantial equivalent cannot be obtained by other means without undue hardship. They are separate and independent requirements. A blanket finding of "need," which Provident claims was found in Ruiz, would still leave the insured with a requirement to show that the materials cannot be obtained through another source without undue hardship.

The "something more" that destroys all privileges is the fiduciary duty owed by the insurer to the insured. This is the key point which has been overlooked by Provident. This Court's decision in Ruiz represented a fundamental re-analysis of the relationship between an insurer and its insured in a first party claim. This Court wrote that the inconsistent discovery rules between first and third party bad faith claims resulted from a:

> …misdescription of the nature of the parties' relationship in first-party actions as being totally adversarial, an outdated pre-statutory analysis, as opposed to applying the responsibilities that have traditionally flowed in the third-party context, which are now codified for first-party actions. The Legislature has mandated that insurance companies act in good faith and deal fairly with insureds regardless of the nature of the claim presented, whether it be a first-party claim or one arising from a claim against an insured by a third party. Allstate Indem. Co. v. Ruiz, 899 So.2d 1121, 1127 (Fla. 2005).

This Court recognized that by accepting the District Court's analysis in Kujawa, it also accepted the "notion" that the relationship between an insurer and its insured in a first party concept was adversarial. The decision in Ruiz corrected that presumption, and recognized that the relationship between an insurer and an insured is fiduciary in nature. Out of that recognition, this Court concluded that there is no work product privilege to claim. The discussion of need for the materials in Ruiz was secondary. This Court explained that there was no legal justification to deny an insured access to necessary information. Ruiz at 1128. This Court did not hold that the insured was

entitled to discover the documents because the insured needed the documents. It held that the insured was entitled to the information because of the fiduciary duty owed to the insured, and that there is no legal basis to deny discovery since the file materials were necessary. It was merely a finding that the claim file material was relevant and important to the insured.

Existence of a Fiduciary Duty Means There is No Attorney-Client Privilege

The net result of the reasoning in Ruiz is that there is no attorney-client privilege which can prevent the insured from discovery of the insurer's file materials. Because of the fiduciary duty which runs between the insurer and the insured, the insured is entitled to obtain the documentation. Stated simply, a first party bad faith case is a claim that the insurer unlawfully denied the claim or resorted to bad faith tactics to force the insured to accept a lower amount of money than he or she was due. Many times, the violation of the fiduciary duty occurs during litigation between the insured and the insurer, and involves the use of an attorney by the insurer to carry out the bad faith act. In other words, the insurer has used an attorney to commit bad faith and violate its fiduciary duty to the insured, and is now attempting to use the attorney-client privilege to keep the breach of fiduciary duty secret.

This Court should reject the invitation to limit an insured's ability to discover the breach of fiduciary duties against him. There is no logical or legal reason to allow

an insurer to breach its fiduciary duty to the insured and then allow the insurer to conceal the evidence of that breach using the attorney-client privilege. It would represent an expansion of the attorney-client privilege.

One Amicus, FDLA, has argued that its members will have to stop representing insurance companies if there is no attorney-client privilege, and proceeds to muddy the analysis by equating the fiduciary duty the attorney owes to the insurer with the fiduciary duty the insurer owes to the insured. It ends the calculation with the conclusion that the attorney would then owe a duty to the insured. It is an argument designed to reach an absurd result in an attempt to persuade this Court to abandon the fiduciary duty of good faith and fair dealing which the legislature created.

Nothing in this Court's analysis in Ruiz creates a fiduciary obligation between the insurer's attorney and the insured; it only recognizes a fiduciary duty between the insurer and the insured. The attorneys retained by the insurance company are still part of a privileged relationship until a judgment is entered in the coverage litigation in favor of the insured. The attorney retained by the insurer to give it advice will still have a full and frank discussion of the facts.

If the attorney provides an opinion that there is coverage for the claim, but the insurer instructs the attorney to nevertheless continue to deny coverage and litigate the claim to increase the economic pressure on the insured, then the communication is evidence of the insurer's breach of its fiduciary obligation to the insured. FDLA's

argument that its members would be prevented from giving advice because it might be discovered in a later bad faith claim ignores the fiduciary duty the attorney owes to the client (the insurer) and focuses on the relationship the insurer has with the insured.

The decisions cited by FDLA do not support its position. The decision in State v. Kaufman, 584 S.E.2d 480 (W. Va. 2003), is understandable because the West Virginia Supreme Court did not recognize a fiduciary relationship between the insurer and the insured as this Court did in Ruiz. See Kaufman at 489 (emphasis added) ("where the interests of an insured and his or her insurance company are in conflict with regard to a claim for underinsured motorist coverage and the insurance company is represented by counsel, the bringing of a related first party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege…"). Similarly, the decision in Hutchinson v. Farm Family Ins. Co., 867 A.2d 11 (Conn. 2005), is cited by FDLA even though the Connecticut court based its analysis on the adversarial nature of the relationship between the insurer and the insured. In fact, the Connecticut Supreme Court relied on this Court's now-rejected "adversarial nature of the relationship" analysis in Kujawa v. Manhattan National Life Ins. Co., 541 So.2d 1168 (Fla. 1989), for its conclusion. Since this Court no longer recognizes that analysis, the decision in Hutchinson is of no relevance to this discussion.

In Spiniello Companies v. Hartford Fire Ins. Co., 2008 WL 2775643, 5 (D.N.J. 2008), the Federal District Court judge found no controlling New Jersey law on the issue of whether the attorney-client privilege was available to an insurer in a first party bad faith case, and was therefore forced to predict how the New Jersey Supreme Court would rule if faced with the issue. The court decided that the Supreme Court would not adopt the rule and prevent disclosure. The decision is not persuasive in its analysis because it is based on a prediction of what the law might be based on little information. The plethora of other District Court decisions referred to by FDLA do not warrant discussion. In turn, each one is based on the decision to not recognize an abrogation of the attorney-client privilege because it would be too easy for an insured to simply allege bad faith and thereby open discovery into privileged matters.

FDLA's citation of Aetna Cas. & Surety Co. v. Superior Court, 153 Cal. App. 3d 467 (Cal. App. 1984), is especially inappropriate. There, the underlying claim was still pending when the bad faith discovery was requested. In addition, the primary error by the trial court in that case was ordering production before conducting an in camera review of the documents. The decision does not reject the production of documents after the conclusion of the underlying case. A more recent decision from California rejects the interpretation of Aetna Casualty to prohibit any production of attorney-client privileged materials as being contrary to California law. See 2,022 Ranch, L.L.C. v. Superior Court, 7 Cal.Rptr.3d 197 (Cal. 4th App. Dist. 2003) (holding

that there is no attorney-client privilege for attorney's activities of claims investigation and adjusting).

References to decisions from foreign jurisdictions is problematic because of the unique nature of Florida bad faith law. Many other jurisdictions do not have the type of broad legislative rights afforded Florida residents. Many jurisdictions recognize an adversarial relationship between insureds and insurers in a first party context. FDLA has failed to take into account any of these differences, and has simply picked decisions which conclude as it would like this Court to conclude, without regard to whether that conclusion would be consistent with Florida law.

For its part, State Farm Mutual Automobile Insurance Company, as Amicus, has taken a different approach, and questioned why insurers should have less legal rights to a confidential relationship with an attorney than murderers, terrorists, rapists or child molesters (Amicus Brief p. 1). Obviously, State Farm has failed to appreciate the relationship it has with its insured and the timing of the attorney's advice. Unlike murders and terrorists, an insurance company is placed in a fiduciary relationship with the insured because of the contract and §624.155, Fla. Stat. Terrorists and murderers do not have a fiduciary duty of good faith and fair dealing with their victims.

Perhaps more importantly, State Farm has failed to appreciate that murderers and terrorists do not have the right to engage an attorney <u>to assist in the commission of the murder or terrorist act</u>. They have the right to an attorney <u>after the crime has been</u>

committed. Similarly, there is no doubt that an insurer has the right to engage an attorney, and maintain a confidential relationship with that attorney, after the insurer has been sued for bad faith. By contrast, and similar to any criminal, an insurer cannot retain the services of an attorney to help commit the crime. Petitioner in this case only seeks to obtain discovery of the documents which relate to the act of bad faith as those acts are reflected and described in communications with attorneys retained while the bad faith is being performed and insofar as those documents are relevant to the bad faith acts. After the underlying judgment is entered, the insurer has every right to defend itself in the bad faith suit. The crime/fraud exception to the attorney-client privilege prevents people from using the attorney-client privilege to achieve nefarious ends.

Although State Farm has claimed that Petitioner "admits" the crime/fraud exception does not apply here, that is clearly not the case. In the Initial Brief, Petitioner stated that the activities are not a crime or a fraud, but nevertheless argued that the breach of a fiduciary duty is also sufficient to qualify for that same exceptional treatment. As discussed in Judge Farmer's special concurrence below, the insurer and its attorneys have a duty to disclose information because of the fiduciary duty the insurer owes to the insured.

In Ginsburg v. Pachter, 893 So.2d 586, 588 (Fla. 4th DCA 2004), the court denied a petition for certiorari because it could not conclude the trial court departed

from the essential requirements of the law when it compelled disclosure of attorney-client privileged materials based on the crime/fraud exception to §90.502, Fla. Stat., and plaintiff's allegations of breach of fiduciary duty. The claim did not involve a crime or outright fraud. Similarly, in Niles v. Mallardi, 828 So.2d 1076 (Fla. 4th DCA 2002), the court noted that the defendant had already been found guilty of breaching her fiduciary duties as the personal representative of an estate and that such a breach qualified under the crime/fraud exception of the attorney-client privilege. In First Union Nat. Bank v. Turney, 824 So.2d 172, 189 (Fla. 1st DCA 2001), the First District held that the crime/fraud exception applied to force disclosure of communications with an attorney for a bank, where the bank breached its fiduciary duty to the beneficiary of a trust when it sought a release from the beneficiary without disclosing all of the pertinent facts.

There is no other way to enforce the rights an insured has in the fiduciary relationship. It is not necessary to recognize a new exception to §90.502, Fla. Stat., nor will application of an exception violate the separation of powers doctrine. The legislature has already created an exception which is applicable to a breach of fiduciary duty by the insurer. Provident simply wants the right to violate its fiduciary obligations and leave the insured with no way to discover the evidence of the breach. It is not enough to say, as Provident has, that bad faith is judged from an objective standpoint, so the external signs of bad faith are all that is needed. In this case, for

example, Genovese will present evidence that the termination of benefits was a form of economic warfare, while Provident will present evidence and argue that it was simply a legal requirement brought about by the court's ruling. Genovese may not be able to prove his claim with that limited evidence. However, if there is evidence of a communication between the adjuster and the attorney instructing the attorney to "Make sure he knows we mean business," then that would easily persuade the jury that it was, indeed, economic coercion and a breach of fiduciary duty.

The conclusion reached by Provident and the Amici is one which contradicts the duty an insurer has to its insured. An insurer owes a duty of good faith and fair dealing to its insured, and there is no legal basis to allow an insurer to retain an attorney for the purpose of breaching that obligation and then keep secret its communications with the attorney. The insurer works for the insured, and the attorney works for the insurer. If their insurer has breached its statutory duty, then the law should provide no shelter.

CONCLUSION

For the reasons stated above, this Court should answer the certified question in the affirmative and remand this matter to the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to JOHN E. MEAGHER, ESQ. and JOHN T. KOLINSKI, ESQ., 201 S. Biscayne Blvd., Ste. 1200, Miami, FL 33602; TRACY R. GUNN, ESQ., 777 S. Harbour Island Blvd., Ste. 770, Tampa, FL 33602; and GARY C. ROSEN, ESQ., P.O. Box 9057, Ft. Lauderdale, FL 33310, by mail, on May 26, 2009.

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CERTIFICATE OF COMPLIANCE

Petitioner hereby certifies that the type size and style of the Reply Brief of Petitioner on the Merits is Times New Roman 14pt.

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