

ORAL ARGUMENT — 10/6/99
98-1053
PRUDENTIAL V. FINANCIAL REVIEW SVCS.

MCCONN: Prudential submit to this court that it has 3 separate and independent grounds upon which it can and must reverse and render the CA's decision below, which reversed and remanded the directed verdict in favor of Prudential on respondent and FRS, the plaintiffs, tortious interference claim against Prudential, which is now the only cause of action remaining alive in this case.

The first, is that Prudential established its affirmative defense of justification against the tortious interference claim; two, that plaintiff FRS failed to present legally sufficient evidence to support causation, a component element of this tortious interference claim; and 3), that FRS as an agent has no tortious interference claim under these facts.

O'NEILL: Do you envision any scenario where denial of benefits actually incident to the denial can constitute tortious interference, or are you sort of arguing absolute privilege type _____?

MCCONN: The way you framed your question incident to the investigation analysis and subsequent denial of their claim, I cannot. There would be no conduct within that context that would allow a contractor on late charge, lost hospital charges to claim tortious interference.

O'NEILL: So it would be carte blanche? They could do really anything they wanted to do: disparage, liable, whatever they wanted to, it could never come under the auspices of tortious interference?

MCCONN: I do not think that they could lie. But I think that for tortious claim or any claim by an agent, third-party contractor, such as FRS, it would have to be outside of the context of reviewing, analyzing and subsequently denying the claim.

O'NEILL: When you say, you don't think they could lie, isn't that a fact issue that - aren't they saying that Prudential did in fact lie and therefore, that's the exception you're talking about?

MCCONN: No. I don't think that they are. Anything that Prudential did and anything in this evidence is in connection with denying the claim, communicating, asking for additional information, and Prudential exercising its right and duty to deny the claim and to find out about the claim.

O'NEILL: Well you've already communicated false information. I think you just said that you couldn't lie, that that would be an exception. So if an issue were that you're communicating false information, you would say that there could be a tortious interference claim?

MCCONN: False information, anything that is outside the province of investigating and handling a claim.

GONZALES: Handling is pretty wrong by itself.

MCCONN: It is. I don't think there's any evidence in this case that Prudential was ever doing anything other than handling the claim, and the first ground upon which FRS claimed tortious interference was the denial of the claim. In every other kind of conduct or communications that FRS pled and tried to prove to sustain tortious interference was directly derivative of denying that claim, the communications that they had in connection with it, the extra material that they asked for and the questions they raised about the validity of the claim.

HANKINSON: As I heard in answer to your question to Judge O'Neill it sounds like you're agreeing with the CA. You've already won on the question of there can be tortious interference in connection with the actual denial of the claim or the decision-making process associated with what Prudential was going to do with these new rulings. You've already won that point and no one's challenging you on that.

MCCONN: Correct.

HANKINSON: What the CA's left open was the question of communications. And as I understand it, you all were relying on your right under the insurance contract to communicate with the insureds and the assignees of the insured's rights under the contracts as well as your statutory authorization to communicate with these folks in saying that that gave you the right to communicate. What the CA said, as I understand it was that, as you said, You can't lie. That doesn't mean you can say anything that you want and rain all over someone and damage their reputation and interfere with their contract. Now I hear you - and you've just said to Judge O'Neill, You can't lie and do those things.

GONZALES: There are limits.

HANKINSON: My question is, are there limits? You've already won on the denial of the claim aspect of the tortious interference. We're over in another area in terms of your communication process, aren't we?

McCONN: If we're talking about the justification defense in this context, I think that the justification defense on the *Texas Beef Cattle* is an absolute affirmative defense that as a matter of law that the tortious interference claim cannot be held in light of any of our motivations, what we thought about the other side, and there...

HANKINSON: Your legal justification, as I understand it from your briefs that you're relying upon with respect to the claims that are still alive are relating to what you say is your right to

communicate?

MCCONN: Ask questions, ask for additional information, yes.

HANKINSON: With the insured and with the assignees, right?

MCCONN: Yes.

HANKINSON: Not how you actually decide or dispose of the particular claim. So we're over in the communication area. And is it your view that that right to communicate gives you the right, legally justifies Prudential to do anything it wants in connection with those communications with impunity?

MCCONN: Yes it is based within the context of handling this claim. Because if not under these circumstances you are allowing an agent or a third-party to have a claim for insurer of bad faith in the context of tortious interference.

HANKINSON: Could Prudential be liable for business disparagement or liable for slander in connection with these communications under a different theory?

MCCONN: Not if it's for the conduct pled by the plaintiff in this case.

O'NEILL: You confined it to as long as it's in connection with the claim investigation process. Wasn't there evidence that Prudential was denying other claims that were outside the FRS auspices to have a sort of..

MCCONN: The only evidence in that regard was Wanda Morris in the hospital billing dept. who said, It was hearsay to her, that she thought that there had been something pending. All she heard was that there were some pending claims. She had no direct knowledge of it.

O'NEILL: Would you agree that if there were evidence, and there may not be, but if there were evidence such as that, would that take it out of the claim's handling process?

MCCONN: Not if it was being pended in connection with an audit, which the testimony in this case was is a common occurrence.

O'NEILL: I'm talking about - I thought there was testimony there were other claims not related to FRS, not in connection with this audit, that Prudential was holding up to put pressure on the hospital vis a vis FRS. If there is no such evidence tell me, but if there is any evidence, would that take it out of just the claims handling process that you're urging as the parameters of your justification?

MCCONN: First of all, there is no such evidence. The last word on it was Mike Lewis the president of FRS's own memo to the hospital, that he had checked into it and found that there were no other non FRS claims pending. But secondly, to the extent that that situation arose about some kind of pend on other bills in connection with the audit, which was in connection with the submission of these late charge, lost charge claims, I would say that it is within the context of the claims handling process.

O'NEILL: There was a directed verdict at the close of the plaintiff's case. How does that affect the fact that - I mean don't you need to put on some evidence for your justification defense?

MCCONN: Not at all. Because justification defense is based on a pure matter of law, which is the first strand of the *Texas v. Cattle* defense, which is if a defendant is in the conduct complained of is exercising something he has a legal right to do, which in this case Prudential not only have a right to do, but a legal statutory duty to do, that establishes the affirmative defense and there is no fact testimony that's needed.

O'NEILL: You're saying he established it through the plaintiff's case?

MCCONN: And as well as bringing it up in the summary judgment prior to the case and in the arguments that were part of the motion for directed verdict.

ABBOTT: You want us to say that as long as what your client was doing was handling the claim, then you're justified in your conduct?

MCCONN: As long as we were exercising our legal right and duty which is the same thing that you just said.

ABBOTT: And what I'm curious about is, in looking at all the various ways in which an insurance company may handle a claim to decide whether or not to pay it or deny it, what you're asking us to do is to look at those facts and say, As a matter of law those facts constitute nothing more than the claim's handling process?

MCCONN: I think that that's part and partial of what the TC had to do and which in turn you would have to do in finding that we were exercising our legal right.

ABBOTT: Here's where I am going with this. What kind of way can we write an opinion that says (kind of a black and white legal principle standard), that as long as you do X and only X, then your conduct is confined to the claim's handling process? How can we set a black and white standard that you can't go beyond?

MCCONN: I think probably it's going to have to be a case-by-case situation whether or

not the defendant in a tortious interference case was exercising its right as was done in *Texas Beef Cattle* which seemed to be a lot more difficult facts below. And as this court followed the *Texas Beef Cattle* decision a few months after in the *Calvillo* decision, they affirmed the summary judgment for the defendant below even though there was evidence clearly in the record of personal acrimony of the defendant against the plaintiff.

HANKINSON: Is an allegation that Prudential was starting false rumors about FRS that were intended to reach HSA protected by your claim's handling use?

MCCONN: I think the CA has already in its decision decided that there was no evidence to support that claim....

HANKINSON: If there were evidence, does that fall within your category of claims handling for which Prudential can act without having ever to worry about being liable of consequences of its actions?

MCCONN: I think that one could easily find depending on the circumstances as starting false rumors would be outside of the claim's process. Communications that go on that somebody forms a belief about FRS about that are within the claims process is one thing.

HANKINSON: What about harassing HCA representatives with sham audits and unreasonable bad faith demands and pressure tactics?

MCCONN: That is the characterization that's been...

HANKINSON: I understand. I'm just asking you. I'm not asking you to concede that that's what's in the record. I'm just asking you that on certain kinds of conducts so that we can test what limits you're putting on this claims handling process justification. Does that fall within or outside your justification?

MCCONN: I think it's within the justification. And more than that, it's something for the insured himself to complain about if he's got a first-party bad faith claim.

HANKINSON: What if I'm an employee of HCA, and I'm the person who's charged with dealing with an insurance company in terms of the hospital receiving its rights as assignee. And I'm a real bulldog about it. I'm going to really make that insurance company toll the mark.

MCCONN; You're with the hospital?

HANKINSON: I'm with the hospital. I'm an employee of the hospital. And you all don't like it because I'm pushing hard to try to make you pay things, following up on things, doing whatever. And you start using pressure tactics on my employer telling them, I'm stealing from the hospital, I'm

a really bad person, whatever to get me off of that. It's all in connection with you criticizing my handling of it. It's not true. Are you liable under any theory?

MCCONN: When response to pressure by the hospital?

HANKINSON: I lose my job. You've put pressure on the hospital about the way I'm doing my end of it. It's tied into the handling of the claims that we've presented to you. I lose my job. Do I just have to walk away, and you can say, Gosh we were handling our rights with respect to the claims handling process.

MCCONN: So the plaintiff is a hospital employee who's complaining about the way that Prudential handled its claims handling process?

HANKINSON: I put a lot of pressure on Prudential to make you all follow-up. I find mistakes. I do all kinds of things. The result is, you all have to pay more money. And you start putting pressure on my employer telling them false things about me, so that perhaps they will put somebody else in my position that won't look as closely.

MCCONN: If it's communication outside of the nature of the claim and what they are claiming, and questions, and documentation for that, there's an argument that that's outside of the claims _____ process. That's not what we had here.

GONZALES: I want to make sure I understand your test. What you're saying is, you have certain statutory and contractual rights to communicate here?

MCCONN: Duties.

GONZALES: There may be some communication that may be outside of that, and so someone has to determine whether or not what occurred here is outside of that. Isn't that right?

MCCONN: Outside of the claims process?

GONZALES: Whether or not you're within your statutory or contractual duty to communicate, and isn't that what the CA said?

MCCONN: The CA said, that the reason that it thought the justification defense didn't apply is because a fact finder had to determine Prudential's good faith. And that is directly contrary to your holdings in *Texas Beef Cattle* and *Calvillo*.

HANKINSON: I thought it went under the second-prong of *Texas Cattle* which does have a good faith component in it. Didn't the CA do that? It just didn't buy your argument that in the first instance there was justification as a matter of law?

MCCONN: The CA would only do that if there's not a justification as a matter of law, because Prudential was exercising its right to administer this claim. Its duty to do so. You're saying, if you went to the second-prong?

HANKINSON: There's a good faith component to that isn't there?

MCCONN: There is.

HANKINSON: And that's what the CA was referring to when it talked about good faith. And in fact, the CA even mentioned that it wasn't going to do an end run around the absence of a good faith cause of action by a third-party against an insured?

MCCONN: It did admit that it should not do that.

ENOCH: If FRS's complaint is that you denied a claim because you said this was a double payment, you were being double billed in other words, and FRS said, Well that's disparaging me because you are indicating I'm committing a fraud by sending out a second bill that you've already paid. You would say, that would be under the first prong of the *Beef Cattle* case because that is justification. You were responsible for paying the bill, you have every right to tell them I've already paid for this bill.

MCCONN: And the duty to communicate why you're not doing it.

ENOCH: You say that that is the first prong - justification. You don't have to have good faith for it. You can say that even if you just dislike FRS, that's within your prerogative. If on the other hand you contact the hospital and you say, I think FRS people are defrauding the hospital by making bogus claims or asserting that they've recovered certain claims and charging hospital, but it has nothing to do with the particular bills you've been seeking out. You would say, Well if you were going to defend that that would have to be under the second-prong. You would have to show that you at least had a good faith belief that you had the right to communicate that to the hospital if that's outside - it didn't deal with any bills you received. You just said, I learned that they were doing something else out there and they are working for the hospital. I need to tell the hospital about it. That would be under a second-prong where you would have to have a good faith belief that you had the right to do that?

MCCONN: That you were in the context of administering this claim. And in any event, the evidence is clear that the hospital came to its conclusions, which it did, through its own devices.

HANKINSON: Would you please go to your third point, which is, putting aside justification as a matter of law, there can be no tortious interference when there is an alleged interference with an agent's contract with its principal. Just summarize what the basis for your argument is and what the main law you rely upon.

MCCONN: It's this court's holding in *Holloway v. Skinner* and *Morgan Stanley* cases. I will state to begin with that there was not an agent. There was a plaintiff in all of those cases. But both of those decisions of this court supported two holdings pretty established in Texas law, that it reaffirmed them. That 1) a promisee to a contract cannot sue a promisor for tortious interference on facts that are nothing more than essentially a breach of that same contract. That was *Holloway*. The *Morgan Stanley* case stated that, when there is a dispute between a party, in this case like Prudential, and an agent like FRS on a matter that is of interest to the principal, in this case the hospitals, and the hospitals are not complaining, then neither can the agent. Now FRS responds to that by saying, that what it is complaining about is not the alleged breach of the insurance contract to which Prudential was a party and the hospital was the assignee. But they cannot legitimately be heard to say that, because their very first claim about what this tortious interference claim is about, is a refusal to pay the claims and all the other conduct that they complain about directly followed from that.

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RESPONDENT

MILLER: The kind of conflict we see here where a bill payor, a benefit provider, finds itself in conflict over a bill for medical care is of course happening thousands of times this very morning in our state. And there can be third-parties adversely affected by how people conduct themselves within the boundaries of that conflict.

This case happens to involve a contract billing service and an insurance company. But the next case may not. The next case where the question is raised, Are there legal standards that prescribe conduct that the bill payors cannot engage in without being held legally liable? That's coming up. It's starting to come up already in Florida, Arkansas and the 7th circuit. What happens when the insurance company instead of just not paying the bill starts saying knowingly false things to other people about the source of the bill? The source of the bill doesn't have to be little ole FRS. It could be your family doctor. For that matter, I guess it could be a lawyer wherever we have legal insurance. It could be anybody. And if they start deliberately saying knowingly false things to third-parties calculated to hurt (it could be a physician's relationship with his patient)...

ENOCH: You're saying the third-parties, people who are strangers to the insuring agreement, or who do you identify as the third-party?

MILLER: Whoever it is who's business or contractual relationship with the billing source is affected.

ENOCH: In the facts of this case, we have a patient who has an insurance policy that agrees to reimburse the patient for the patient's medical expenses to a certain period. The patient goes to a hospital and assigns that right to that reimbursement to the hospital, the hospital through that assignment direct bills to Prudential, the hospital then hires its own agent to come in and represent

it in collecting those bills. In this three-way transaction are any of those, the third-party you are referring to?

MILLER: If the source of the bill loses a relationship with somebody else as a consequence of what the bill payor does, then they become the third-party to the destruction of the relationship.

ENOCH: Your comment was, a communication to a third party, by the false communication to a third--party, and I'm just trying to identify who you understood to be the third-party?

MILLER: In this case, the hospital. But in the next case it may be a patient.

ENOCH: In your view, the hospital is a third-party in this series of transactions. It's a third-party to its agents' communication with the insurance company?

MILLER: And the insurance company's communications back, which is really what the case is about, what the insurance company did, not so much what we did.

ENOCH: And your evidence focuses on the false communication was made to the hospital and that's your identification of the third-party?

MILLER: They went to our customer and did things calculated to harm the customer's relationship with us, our relationship with it. In fulfillment of what we were expressly told is that would like to see us put out of business. That's in the record.

GONZALES: Did they have the contractual or statutory right to do that? If they did, could they go ahead - they could communicate to your customer and try to harm you?

MILLER: They have a right I concede to communicate with their insureds. They have a duty to investigate claims. Sure. But if they are investigating the claim and this causes them to drive down the highway to get to the hospital, and on the way there in the course of investigating the claim, they run over somebody's child, they are not immuned. They may have been a discharging a duty that they owed to their insured by traveling to the hospital.

BAKER: But isn't the point under that analogy that whatever the cause of action is that exist is not a tortious interference claim, it's a negligence claim by the third-party that was harmed?

MILLER: If what they do is negligence, then the claim is negligence. If what they do at the same time that they are handling the bills, what has been argued here this morning is as long as it has some connection with handling the bills, if what they do is murder, then it's murder.

Hankinson: Why didn't you sue them for libel?

MILLER: I suppose I might have, but some of the things they did were not libel. For example: I would have to disagree with my colleague at the Bar here, who said that the only evidence with regard to holding up payment of other bills, unrelated to us, was that Ms. Morris heard about it. That's not true. Ms. Morris testified that she was the one that followed up on it to find out what was going on. And Mr. Michael Johnston, the attorney who at one time represented both the hospital and FRS, also inquired into the matter and gave direct testimony at trial how he learned about it. That's not claim's handling. They may say here today that that's part of the process of dealing with the bills, but please, that can't be. To say, I've got a problem with FRS's late charge bills, I'm going to slow-pay you on \$100,000 bills unrelated to all this, and when the hospital calls to find out why, what's holding up these bills, they finger us.

HANKINSON: Mr. McCONN has directed our attention to an issue in the case regarding whether there should be a cause of action for tortious interference when the contract is alleged to be interfered with is between an agent and a principal. We do have an agent/principal relationship here, is that correct?

MILLER: None of the cases he cited are cases of that sort. When you start trying to diagram the position of the parties in the cases it gets kind of complicated from case-to-case. I tried to do that in my brief. I think he concedes I'm right about one thing. None of those cases was the plaintiff the agent. It's really a parlay of other principles.

HANKINSON: Aren't there ramifications though for recognizing tortious interference in the context of a relationship between a principal and an agent that should be of concern?

MILLER: If you're a lawyer, the quintessential agent, and you don't want your client relationships tortiously interfered with by others then, yes, you should be concerned about this case. If your an employee and therefore an agent of a principal, and your concerned about somebody spoiling your relationship with your employer then, yes, you should be concerned about this case.

HANKINSON: Is it of any import that the two contracts at issue here, the set of insurance contracts that Prudential had with its insureds assigned to the hospital, then the separate contract between FRS and HCA are in some way connected? They flow from each other. Obviously FRS would not be here collecting bills or whatever but for the original insurance contracts Prudential had with the insureds. Is that of any import in this analysis?

MILLER: Prudential was not just a direct insurer of some of these patients. For some of them, it was simply rendering an administrative service for somebody else to handle the process of the claims. In those cases, which are numerous, Prudential has no contract with these insureds. They are just somebody they are administering bills for.

HANKINSON: What about the circumstances involving the contracts that Prudential did have with their insureds that then came under review as a result of FRS's contract with HCA?

MILLER: Strictly speaking, that's not what happened. The question was whether Prudential would permit the FRS bills to be put through for routine processing and payment. Some patients may not have met their deductible. Some items may not have been covered under their plan. That stage was never gotten to. The record abundantly shows that for these hospitals and every other hospital on earth, Prudential never pays, at least not knowingly, a dime on any FRS bill. It doesn't matter what the bill is for. It doesn't matter what hospital it is from. What the terms of the individual contracts to the individual patients may be, doesn't matter. Prudential pays no FRS bills ever.

ENOCH: They don't owe FRS anything. They owe the hospital something maybe. And the hospital hired FRS as its agent to collect those bills. And your complaint is that Prudential went to the hospital and told them, their agent, They are not going to pay these bills, and they have no interest in doing business with this agent, and on top of that, the agent is lying, and the hospital fires the agents. And that is tortious interference with the agent's contract with the hospital?

MILLER: The non-payment of the bills is not in this case for 2 reasons really, 1) the decision of the CA which we have elected not to challenge; and 2) the non-payment of the bills is what they did everywhere on earth. We don't lose all of our customers. We lost the one set of customers that was targeted by all this other behavior, the behavior that they now urge should be immuned. Listen to the way Mr. McConn has presented. He's not talking about the defense of justification. He's talking about an absolute immunity covering what you do.

ENOCH: They told the hospital they weren't going to pay bills that FRS was dealing with, and they told the hospital that FRS was lying. And so the hospital fired the agent it had hired to collect these bills. And you say that Prudential by having gone to its contracting party to complain about the way the contracting party was farming this out, complaining about the person to whom they had formed it out...

MILLER: Prudential is not a contracting party with the hospital. They are contracting party with the patients.

ENOCH: By assignment they permit the assignment to the hospital. Then is it critical to your argument that the hospital is not a contracting party with Prudential?

MILLER: I don't think it is critical to my argument. But of course, I'm sensitive to it because it's embedded in your question and I want to be able to answer your question.

ENOCH: In your view it is tortious interference with the agent's contract from the principal if the principal's contracting party complains about the agent?

MILLER: It depends on the individual case. It depends on what their behavior is. It depends upon what it is calculated to do.

ENOCH: The behavior is, you're not going to pay any bills that are submitted by the agent and they are telling the hospital that the agent is a liar. That's the issue.

MILLER: I could imagine a case where that would do it if they deliberately and falsely said they are lying. Picture yourself as the doctor who is accused of billing for not medically necessary items. It sounds like bland language until it's directed at you. That makes people's blood boil that a doctor is rigging up his bills.

HECHT: Regarding tortious interference if you concede that if they say, We're not going to pay any bills that come through your agent, that's not tortious interference?

MILLER: In this case, the law of this case, my claim for tortious interference cannot rest on that.

HECHT: How is saying, We're not going to pay the bills because he's a sleaze-bag or for whatever reason, any different?

MILLER: Because accusing us of being a sleaze-bag is calculated to cause our contacting party to fire us.

HECHT: Not getting the money might cause them to fire you.

MILLER: It didn't.

HECHT: If they say, Well we're never going to get our money, maybe we ought to get somebody else to process these claims.

MILLER: They got millions of dollars because mostly the other carriers pay our bills. A few of them sometimes audit it, but after the audits they pay the bill. The distinction is not that Prudential didn't pay the bill. Prudential doesn't pay the bills of the other hospitals. They haven't fired us. Prudential didn't pay the bills here. Nothing bad happened. What happened was, the usual rise and fall of patient complaints when the mailings go out rose and never fell again. It just continued on.

OWEN: Prudential had the right to communicate with their patients didn't they?

MILLER: Yes.

OWEN: And under some of our holdings, they may have liability under the first-party

bad faith insurance law if they continue to communicate.

MILLER: Over and over again?

OWEN: Yes, under some of our holdings, isn't that correct?

MILLER: Without limitations as to the number or content?

OWEN: As long as the claim is open, we've _____ at least that you have to keep the lines of communication open.

MILLER: I don't believe just continually pricking the patients with communications that says nothing new whatsoever, after you've already met what ever statutory obligations you were under just to keep the patients angry at a hospital meets that. And on this point let me say, although their brief asserts that these communications they sent to the patients, their brief says that they were done within these certain statutory timeframes because they had to and so forth, and I'm telling you there is no evidence of that. So far as you can tell from this record it all started when they started gathering up a box of our bills, long after they had been sent, long after they had sent their memo internally that's in evidence and said, Don't pay these bills. Just period - don't pay them. And they had made a final decision not to ever pay our bills long before this controversy came around.

What they didn't do was write the patients the letter timely that they needed to do to say, We're not paying this bill. Instead they went on this whole other campaign. That's what the case is about. It's not about, We sent somebody a letter that said, We're not paying the bill. That happens everyday.

O'NEILL: Let's say the facts show that they in bad faith denied the claim. Absolutely bad faith motivated by all bad intentions. And we have held that there is no third-party action for bad faith denial of claims. How do we bootstrap the tortious interference argument, how do we reconcile that with our case law that says there can't be a third-party action for bad faith, because arguably the same factors are going to apply to both? How do you differentiate between them?

MILLER: You don't bootstrap I respectfully submit. What you do is treat different cases differently, and like cases alike. And what's different about this case from the ordinary, We didn't pay the bill, is all these other forms of behavior they engaged in. They come out, they audit the bills, they know that there is medical records supporting each item on the bill, then they go meet face to face with the hospital administrator...

O'NEILL: But all that would support a bad faith claim. There's no question about it. The hospital or patient could bring a bad faith claim for denial of benefits and we have said that a third-- party can't sue for bad faith denial of benefits to the insurer.

MILLER: And I'm not.

O'NEILL: Are we just rewording the cause of action because we do have evidence of bad faith and it seems like that's what we would be allowing here? In other words, there is a certain blending of the two, and how would we draw a bright line test to differentiate between what constitutes tortious interference and what is a third-party trying to collect on a bad faith denial of claims?

MILLER: The denial of the claim in good faith or bad faith is not what the CA's opinion would allow to be tried. They sustained the lower court's ruling on one of the five grounds of interference that we alleged. So we never have to be worried about nonpayment of the claim, whether it's done in bad faith or good faith or any faith, carelessly or deliberately, we don't have to worry about that ever from the law of this case becoming grounds for tortious interference.

O'NEILL: What you're suing to recover is the amount of that claim.

MILLER: Absolutely not. The damages evidence at trial reflected the true fact that Prudential never pays our bills. We're not suing for that money. What we lost was the contract that allowed us to bill people generally, not just Prudential, and they pay our bills. Not any more at these hospitals though, because we've lost that contractual relationship.

O'NEILL: So your distinction then would be that you're not suing --- I think that your opposing counsel is saying that because you are suing to recover the benefits, what you're trying to do is bootstrap a bad faith claim. But you're saying you're not suing to recover those amounts, you're suing for damages related to losing business out of other accounts, and that will be the distinction?

MILLER: Yes, that's one. Absolutely. In other words, when you try to calculate what our revenue was before and after we got fired, our revenue before we're fired is not \$1 from Prudential. They don't pay our bills.

HECHT: If they deny the payment with a bad reason, that's tortious interference?

MILLER: Not a bad reason. A reason as part of the course in conduct that meets the high standards of the tort of interference. That is, a deliberate, intentional, wilful act calculated to interfere with our relationship with the customer. If it was just routine claim's handling where they get a bill and they pay it or not and they send something out explaining why, that would be the end of it. That's not what happened here.

OWEN: What if the hospitals had created a new department (claims auditoris) and they did exactly what your client did and Prudential complained and they said, We don't like those folks, we don't want you going two-years out there after we thought the bill was closed, we are not going to pay these bills and the hospital said, Well I'm going to give up, and they fire all of these people.

Do they have a cause of action against Prudential?

MILLER: If all Prudential did was simply not pay the bill, then no.

OWEN: If Prudential said, these people were double-dipping, these people are charging for things that aren't reasonably medically necessary, and we're going to write our patients about it and tell them that.

MILLER: And as long as you keep hiring these people, we're not going to pay some other bills over here, big ones. If you add all of that up, that constellation of behavior...

OWEN: We want you to do away with that department and stop billing us.

MILLER: Yeah. And if it causes somebody that had just finished offering our principal, Mr. _____ a job, to turn right around and fire the whole company.

JUDGE: I understood Mr. McConn to say that there was absolutely no evidence that they had held up other bills

MILLER: He is deeply mistaken in that regard. Wanda Morris and Mike Johnston testified that they did. The CA recited it in its opinion. And the record references are in my brief. They did. They positively did and she called and found out and they said, Well it's because of the FRS situation. And these are not FRS bills. It was terrible. Nobody should treat people that way.

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REBUTTAL

MCCONN: I would submit to the court that there is no evidence that Prudential sent continued letters. Every letter that Prudential sent on this record was in response to a late charge claim to a particular insured. There is also no evidence on this record that Prudential never paid an FRS bill. They paid many FRS bills.

HANKINSON: Would you respond to your opponent's argument about the damages and the effect on your position that there should be no tortious interference with a contract between a principal and an agent? He identified the fact that the damages were not that Prudential didn't pay these claims, but that they lost their contract with HCA, which meant they lost their income as a result of all of these other relationships that the hospital had with other insurance companies and so on.

MCCONN: It's still based on...

HANKINSON: It sounds like we're getting outside that two contract dichotomy you were

talking about.

MCCONN: I could only say that I disagree because it all arises out of the claim that not paying the bills and everything they did in connection therewith.

HANKINSON: What if the damages flow from something else other than Prudential's refusal or failure or decision not to pay claims? What if there are other damages totally unrelated to anything that is related to a Prudential insurance contract, does that make a difference?

MCCONN: It could. In this case it arose out of - the hospitals themselves decided that they didn't want the problems that this FRS billings produced inherently.

HANKINSON: But what difference would that make in your legal analysis?

MCCONN: In this particular case, because of the setting of an insurance claim. Just that very setting to allow that in this case to make a difference is doing nothing more than letting every breach of contract where there's a commission involved be a tortious interference claim. It's also letting a bad faith insurer claim be a tortious interference claim.

HANKINSON: As I understood what we just heard about damages, the point was I'm not claiming that Prudential didn't pay claims and therefore, I didn't get my commission. I'm claiming that as a result of Prudential's contract, I lost my contract with the hospital, which would have allowed me to earn commissions based on collecting for all of these other insurance carriers unrelated to Prudential. How does that fit with your analysis and does it take it outside this bad faith claims handling context that you've been talking about?

MCCONN: If we can get back to the propositions in *Holloway* and *Morgan Stanley*, that it all arose out of that, and the hospital, the principal, was not complaining about it so why can the agent.

If I heard Mr. Miller right, he questioned Prudential's right or duty to communicate with the hospital as opposed to just the insureds as if the hospital is some kind of stranger to the FRS contract. Of course it was not. It was the assignee who had the right to the proceeds if they were otherwise payable. I think the most telling evidence about justifications and causation in this case is the very nature of FRS's business. It sends out hospital bills a year or two after the _____ been paid claiming that they were lost or somehow not collected in the first place. It inherently raises questions. FRS's brief has a heading "Foreseeable Problems" where they say they try to address it by spreading out the bills for the questions and complaint calls that they are going to get from patients and doctors. Most of them don't even send their copy to the insured, which is required under the policy, so that they can keep the level of discontent down. And FRS cannot come before this or any court and say that what Prudential did in questioning those bills was not justified, and moreover, and as importantly, can't say that the exact reasons that the only

evidence in this record about why the people who made the decisions to terminate FRS was not because of Prudential. It was because of the patient and in addition to not making its right to charge things...

O'NEILL: But doesn't that call upon us to weigh the evidence to make that call? Isn't that disputed? You're asking us to find that as a matter of law.

MCCONN: I think I'm trying to underscore why the justification defense applies to something like this, as well as their arguments on causation are not ____ founded because they are admitting that their business is inherently questionable what they do. It raises problems that underscore the justification defense as well as arguments on lack of causation.