No. 15-11283

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CATHERINE S. CADLE,

Appellant,

v.

GEICO GENERAL INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT, CATHERINE S. CADLE, FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1 of the United States Court of Appeals for the Eleventh Circuit, United Policyholders, Amicus Curiae herein, state that it is a non-profit 501(c) (3) organization, tax-exempt, Corporation organized under the laws of the State of California and funded by donations and grants.

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STATEMENT IDENTIFYING AMICUS, ITS INTEREST IN CASE, AND SOURCE OF AUTHORITY OF AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c) (3) organization founded in 1991 that is an information resource and a voice for insurance consumers in Florida and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has been active in Florida since Hurricane Andrew in 1992. We work with the Insurance Commissioner Kevin McCarty and the Office of Insurance Regulation, other non-profits, and individual home and business owners. We are involved in projects related to property insurance availability, depopulating Citizens, promoting disaster preparedness, mitigation, educating and assisting consumers in navigating claims.

State insurance regulators, academics and journalists throughout the U.S. routinely seek United Policyholders' input on insurance and legal matters. We have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

United Policyholders assists courts as *amicus curiae* in appellate proceedings throughout the United States. UP has appeared as *amicus curiae* in many cases in Florida and this Court, including: Lemy v. Direct General Finance Com. (Case No. 12-14794-FF, U.S. Court of Appeals, 11th Circuit, Florida, 2014); Amelia Island Company v. Amerisure Ins. Co. (Case No. 10-10960G, U.S. Court of Appeals, 11th Circuit, Florida, 2010); Sebo v. American Home Assurance Co. (Case No. SC14-897, Florida Supreme Court, 2014); Washington National Insurance Corp. v. Sydelle Ruderman, et al. (Case No. SC12-323, Florida Supreme Court, 2012); and Amado Trinidad v. Florida Peninsula Ins. Co. (Case No. SC11-1643, Florida Supreme Court, 2012). Of particular note, UP recently appeared as *amicus curiae* regarding a failure to settle case in Raffone v. First American Title Ins. Co., (Case No. 1D14-4791/2004-CA-78, Supreme Court of Louisiana, 2015), in which it successfully helped policyholders. It should be noted that no party to this case has contributed directly or indirectly to the preparation of this brief.

In the instant case, United Policyholders seeks to appear as amicus curiae to address certain issues and questions before the Court that are of significance well

beyond the application of law to the specific facts of this litigation. Most importantly, United Policyholders serves this brief to reiterate Florida's long-standing standard of bad-faith law—in particular that such issue is a question of fact.

United Policyholders requests that this Honorable Court reverse the District Court's judgment and restore the jury's verdict.

STATEMENT OF ISSUES

The issue in the instant appeal is whether the District Court erred in granting GEICO's Judgment as a Matter of Law despite the jury's verdict and Florida's standard on bad faith as a question of fact. Additionally, the District Court erred in its application of Fla. Stat. §627.727(7). United Policyholders respectfully requests this Honorable Court reverse the District Court's judgment and restore the jury's verdict.

SUMMARY OF ARGUMENT

Under Florida law, whether a liability insurer has failed to settle in good faith when it could and should have settled a claim is determined under the totality of the circumstances standard, with each case determined on its own facts. Ordinarily, the question of failure to act in good faith with due regard for the interests of the insured is for the jury.

The Florida Supreme Court has made clear that, under most circumstances, the question of whether or not an insurer failed to meet its obligations under §624.155, Fla. Stat. is a question of fact. Notwithstanding the Florida Supreme Court's clear commands in this regard, policyholders are seeing an alarming trend in federal courts summarily deciding the issue of good faith and settlement. Whatever the merits of resolving certain cases on summary judgment or judgment as a matter of law, there is no support in any Florida cases for such application, in cases like the instant one, where the insurer makes a conscious decision to not offer the full policy limits. In circumstances such as those found in the instant case, where insurers volitionally chose not to offer their policy limits, such questions necessarily create an issue of fact precluding summary judgment in bad faith cases. Even the limited trend in federal courts allowing summary judgment is limited to circumstances where the insurer--either prior to receiving a demand or contemporaneously within the receipt of the demand--offer their full policy limits in

close proximity of the accident and/or demand. The instant case does not fall within this limited paradigm. The District Court in this instant case recognized as much in its orders on competing summary judgments. This Court is in the unique position to reiterate that Florida law requires that resolution of statutory duty of good faith and settlement claims is a question for the fact-finder, and not the courts, under virtually all circumstances.

In regard to the duty of good faith and settlement, the jury must also view an insurer's conduct in the totality of circumstances. The District Court in this case only focused on one factor, not the totality, finding that the absence of a medical opinion showing a permanent injury in the insurer's file *ipso facto* absolved them of bad faith. This Court should reject this rigid and talismanic view of failure to settle a case that the District Court has set forth.

A jury must be permitted to weigh the question of a threshold injury in determining whether the insurer should have settled the claim. To allow otherwise departs and disregards Florida's long held standard on the duty of statutory good faith and would have a profound effect on the rights of policyholders.

ARGUMENT

I. The District Court Erred in Granting GEICO's Judgment as a Matter of Law because Bad Faith is a Question of Fact in Florida.

A. The Duty to Settle in Good Faith is a Question for the Jury Under Florida Law.

Florida, by statute, has imposed a good faith duty to settle. While the term "bad faith" is often used in the context of claim evaluation, insurers owe the duty to act in good faith and settlement. Traditionally, Florida's bad faith in the insurance context arose in third-party situations when an insurer breached its contractual duty of good faith by exposing its insured to a judgment exceeding the policy limits and was recognized as early as 1938 in common law. See generally Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980), see also State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995) *citing* Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938). There was, however, no first-party action by an insured for bad faith in Florida at common law. Laforet, 658 So. 2d at 58-59. It was not until 1982 that the Florida Legislature created a first-party bad faith cause of action by an insured against the insured's carrier. See § 624.155, Fla. Stat. (Supp.1982). Thus, by virtue of that statute, Florida law extended the duty of an insurer to act in good faith to those types of actions. Laforet, 658 So. 2d at 59.

Moreover, the Florida Supreme Court in State Farm Mut. Auto. Ins. Co. v. Laforet, set forth the standard in first-party bad faith action. Specifically, the court

extended the duty of an insurer to act in good faith in first-party bad faith circumstances. Id. at 59. Indeed, the Florida Supreme Court declared that this standard would also apply to third-party bad faith actions. Id. at 63. Thus, the same obligations of good faith that existed for insurers dealing with their insureds in the third-party context were extended by statute to the first-party context. QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 546 (Fla. 2012) *citing* Macola v. Govt't Emps. Ins. Co., 953 So. 2d 451, 456 (Fla. 2006). More importantly, federal courts have accepted such standard in bad faith actions to the first-party context. See Jones v. Continental Ins. Co., 920 F.2d 847, 849 (11th Cir. 1991).

However, the totality of the circumstances is a fact-driven inquiry and resolution thereof is rarely possible as a matter of law. See Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000) ("Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder."); see also Kearney., 664 F.Supp. 2d at 1242. More importantly, the determination of whether an insurer has satisfied this standard is *one for the jury*. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 785 (Fla.1980). (emphasis added); Kearney, 664 F.Supp. 2d at 1242-43 (M.D. Fla. 2009) ("the jury must evaluate whether the insurer acted in good faith").

The question of a failure to act in good faith with due regard for the interests of the insured is left to the discretion of the finder of fact. King v. Gov't Employees Ins. Co., Case No. 8:10-CV-977, 2012 WL 4052271, at *4 (M.D. Fla. Sept. 13, 2012). Considerations of reasonable diligence and ordinary care, and traditional issues of fact are material. Menchise v. Liberty Mutual Ins. Co., 932 So. 2d 1130, 1133 (2d DCA 2006). In Thomas v. Lumbermens Mutual Cas. Co., 424 So. 2d 36 (Fla. 3d DCA 1982), the Third District Court of Appeal noted that "each [bad faith] case is to be determined on its own facts, and the question of the insurer's failure to act in good faith with due regard for the interest of the insured is *for the jury*." Id. at 38 (emphasis added).

As one the leading insurance treaties in the nation noted, "In reviewing a judgment, an appellate court cannot substitute its judgment for that of the jury merely because the higher court would have decided or viewed disputed questions of material fact differently than the trier of fact did." 14 Couch on Ins. § 203:6 (3r ed. 2014) (*citing* Badillo v. Mid Century Ins. Co., 121 P.3d 1080, 1088 (Okla. 2005) ("Where competent evidence was presented at trial to support reasonable findings as to those material fact questions relating to the claim in suit and no reversible error is otherwise shown, an appellate court must affirm a judgment based on a jury verdict, not second-guess such judgment or the jury verdict upon which it is based."). Therefore, the question of whether an insurer has complied with its duty of good

faith and settlement is generally a question for the jury, and that is precisely the case here.

The District Court effectively failed to follow Florida's law on the failure to settle when it granted GEICO's Motion for Judgment as a Matter of Law. This case's procedural history illuminates why an insurer's bad faith is a question for the jury. In particular, CADLE filed a Motion for Summary Judgment, asserting that GEICO failed to settled CADLE's claim when it could and should have done so. See [Doc. 68]. In denying CADLE's Motion for Summary Judgment, the District Court concluded that the question of an insurer's bad faith is generally a question for the jury, stating:

> Plaintiff claims that GEICO failed to settle her claim for the $75,000.00 policy limit when it could and should have done so. However, the totality of the circumstances is a fact-driven inquiry and resolution thereof is rarely possible as a matter of law. See Vest v. Travelers Ins. Co., 753 So.2d 1270, 1275 (Fla. 2000) ("Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder."). Rather, the question of an insurer's bad faith is generally a question for the jury, and that is the case here.

[Doc. 92, p. 5]. It is clear by the Court's own order and ruling, that a determination as to whether GEICO failed to settle the case is a question for the jury. In fact, such a determination was left to a jury in the case where the jury did determine that GEICO failed to settle. [Doc. 137]. However, the District Court reversed the verdict and entered a judgment in favor of GEICO as a matter of law -- despite the issue

being a matter of fact. Whether GEICO's actions constituted bad faith is a question for the jury. Dellavecchia v. GEICO Gen. Ins. Co., Case No. 8:09-CV-2175, 2011 WL 53029, at *2 (M.D. Fla. Jan. 7, 2011) *citing* John J. Jerue Truck Broker, Inc. v. Ins. Co. of N. Am., 646 So. 2d 780, 783 (Fla. 2d DCA 1994) ("When there are disputed issues of material fact relating to these circumstances, then the court must submit the claim to the jury for resolution.").

Rather, a judgment as a matter of law under Rule 50 is only proper when a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may "direct the entry of judgment as a matter of law." Fed. R. Civ. P. 50. However, Florida courts have addressed this issue. In Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 13 (Fla. 3d DCA. 1991), the question presented was whether evidence that the claimant made no specific monetary demand, and subsequently rejected the insurer's tender of the policy limits, entitled the insurer to a judgment as a matter of law without consideration of other circumstances. The appellate court held that those facts are only two of a number of circumstances to be weighed by the fact-finder, and reversed the judgment as a matter of law. Id. Similarly, in this case, a jury found for CADLE based upon all the evidence presented and made a factual determination that GEICO failed to settle

the case. For a court to reverse a judgment and thus make a factual determination is contrary to Florida law.

B. Federal Trend of Deciding Failure to Settle Cases Summarily

Whether an insurer failed to settle a case, and thus acted in bad faith, is a question for the jury and thus rarely appropriate to be decided summarily by the court. However, there are instances where summary judgment is appropriate based on "technical grounds." Specifically, first-party bad faith is impermissible unless it meets the requirements of Florida's bad faith statute – in particular, an insured must provide notice to the insurer and allow an opportunity to cure before the insured can bring an action. See Laforet, 658 So. 2d at 58-59; Fla. Stat. § 624.155. Thus, courts summarily deciding whether an insurer's conduct consisted bad faith is not permitted under Florida law.

Regrettably, there is a growing trend in failure to settle actions where the federal courts are alarmingly deciding cases on grounds other than procedural matters and without the benefit of jury. See Barnard v. Geico Gen. Ins. Co., No. 5:10-CV-213, 2011 WL 2039560, at *4 (N.D. Fla. May 25, 2011) aff'd, 448 F. App'x 940 (11th Cir. 2011); Shin Crest PTE, Ltd v. AIU Ins. Co., 605 F. Supp. 2d 1234, 1243 (M.D. Fla. 2009) aff'd sub nom. Shin Crest PTE, Ltd. v. AIU Ins. Co., 368 F. App'x 14 (11th Cir. 2010); Davidson v. Government Employees Ins. Co., 2010 WL 4342084 (M.D. Fla. 2010); Kincaid v. Allstate Prop. & Cas. Ins. Co., No. 13-14030,

2014 WL 2048281, at *9 (S.D. Fla. Jan. 3, 2014) aff'd sub nom. Kincaid v. Allstate Ins. Co., 573 F. App'x 858 (11th Cir. 2014).

Importantly, federal courts have relied on Justice Wells of the Florida Supreme Court's dissent in deciding bad faith as a matter of law. See Shin, 605 F. Supp. 2d at 1243) (citing the dissent: "I do not believe that it is acceptable for the Court to merely say that bad faith is a jury question. It is the Court's responsibility to have logical, objective standards for bad faith and not to avoid setting definitive standards by declaring bad faith to be a jury question."). Not only have some courts relied upon this dissent, which is not the law under Florida, but have used such language to justify determining bad faith summarily.

However, some federal courts have stated that resolution of a the duty of statutory good faith and settlement "is rarely possible as a matter of law." Batchelor v. Geico Cas. Co., Case No. 6:11-CV-1071, 2014 WL 7224619, at *9 (M.D. Fla. Dec. 17, 2014); King v. Gov't Emps. Ins. Co., Case No. 8:10–cv–977, 2012 WL 4052271, at *4 (M.D. Fla. Sept.13, 2012) (denying GEICO's motion for summary judgment on bad faith "because a reasonable jury could find that, under the totality of the circumstances" GEICO's failure to investigate could amount to bad faith.); Dellavecchia v. Geico Gen. Inc. Co., Case No. 8:09–cv–2175, 2011 WL 53029, at *2 (M.D. Fla. Jan.7, 2011) (same); Kearney v. Auto–Owners Ins. Co., 664 F.Supp.2d 1234, 1243 (M.D. Fla.2009) (same); see also Vest, 753 So.2d at 1275 ("Good-faith

or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder."). Because the issues concerning an insurer's claims handling decisions are "for the jury," Courts grant motions for summary judgment concerning "bad faith" in rare circumstances. Batchelor, *citing* Thomas v. Lumbermens Mut. Cas. Co., 424 So.2d 36, 38 (Fla. 3d DCA 1982); Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004) ("[W]here material issues of fact which would support a jury finding of bad faith remain in dispute, summary judgment is improper."). In fact, the court in the Batchelor case (which also involved the same insurer in the instant case) found that resolution of a statutory good faith claim and settlement could not be decided on summary judgment and that "such rare circumstances plainly are not presented by this action." Batchelor, at *9. The federal courts should follow the lead as set forth in Batchelor in resolution of statutory good faith claim – mainly that whether an insurer failed to settle a case is a question of law and not a matter of law. This Court is in the unique position to clarify and reiterate that Florida law requires that resolution of statutory good faith claims belong to the fact-finder.

II. The District Court Erred in Granting GEICO's Judgment as a Matter of Law because Permanent Injury Need Not be Proven at the Time of Settlement Demand.

A. Florida Statutes, § 624.155, is the Appropriate Standard.

The District Court erred in granting GEICO's Judgment as a Matter of Law because permanent injury need not be proven at the time of settlement demand. Florida Statutes, §627.727(7) provides that a UM insurer is not liable for noneconomic damages unless its insured suffers a certain threshold injury. When an insured sues her UM insurer to recover benefits, this statute requires the insured to prove a threshold injury as a prerequisite to recovering non-economic damages. See Fla. Std. Jury Instr. 501.3.

However, §627.727(7) is not the rigid rule in statutory first-party good faith and settlement actions. As stated above, §624.155(1)(b)(1), controls and establishes the standard for determining when a UM insurer must settle a claim without forcing its insured to sue for damages. Because breach of an insurer's duty is determined on the totality of the circumstances liability, non-economic damages under §627.727(7) is just one factor of many for an insurer to consider when evaluating settlement but it is not solely determinative. Florida law has made it clear that multiple factors are taken into account when determining whether an insurer breached its duty of good faith by failing to settle when it could and should have done so. Berges, 896 So. 2d at 680.

Rather, the District Court has bypassed Florida's "totality of the circumstances" standard by granting GEICO's Judgment as a Matter of Law based on one non-controlling fact. Most importantly, a jury in this case returned a verdict

against GEICO where it weighed all factors and the totality of the circumstances. To revert to §627.727(7) solely as the determining factor in statutory first party bad faith action is contrary to Florida law. If such a judgment is allowed to stand, this new law could have far reaching implications across the state of Florida and federal courts.

B. Wiggins Correctly Sets Forth Florida Law in this Case.

The District Court erred in departing from Wiggins v. Allstate Prop. & Cas. Ins. Co., Case No. 13-cv-23354, 2015 WL 1401967, at *6 (S.D. Fla. Mar. 2, 2015). In Wiggins, the plaintiff was injured when an underinsured motorist (UM) struck him. Id. at *1. After the accident, the plaintiff was examined multiple times where he complained of injuries. Id. Eventually, the plaintiff exhausted his PIP limits under the policy and sent a letter to Allstate (plaintiff was an insured under Allstate) regarding his UM claim. Id. Enclosed with the letter was a copy of a demand letter the plaintiff had sent to State Farm, the UM's insurer, seeking the limits is of the policy, as well as the plaintiff's medical records. Id. Allstate's adjustor evaluation of the plaintiff's claim concluded that there was no indication of permanency of injury but stated his claim fell within the limits of the UM's insurer State Farm's policy. Id. at 2. State Farm tendered its limits. Id.

Later, the plaintiff settled with State Farm and demanded Allstate's UM policy limits and enclosed copies of his MRI's film showing a tear in his medial

meniscus of his knee and the recommendation for surgery. Id. After three weeks, the plaintiff filed a Civil Remedy Notice of Violation against Allstate for failing to attempt to settle his claim in good faith. Id. Allstate independently reviewed the plaintiff's records and found no tear and rejected the recommendation of surgery. Id. at 3. The plaintiff filed suit against Allstate and during the litigation, Allstate had the plaintiff's records evaluated by another physician which did show a tear in the medial meniscus. Id. at *3. Allstate offered the policy limits in a proposal of settlement. Id. Eventually, the case proceeded to trial and the parties agreed that the meniscus tear was a permanent injury and stipulated to past medical expenses. Id. The plaintiff was awarded past noneconomic damages, future noneconomic damages, and the limits of Allstate's UM coverage. Id.

After the conclusion of the trial, the plaintiff filed a statutory first-party bad faith action against Allstate, and alleged that it acted in bad faith when it refused to tender the UM limits despite the medical evidence of a meniscal tear. Id. at *4. Allstate argued that it could not have wrongfully refused to settle because, at the time of the settlement demand, the insured had not produced "an explicit determination that [he] had suffered a permanent injury." Id. at *6. The court refused to impose such a requirement on the insured because the proper inquiry under §624.155(1)(b)(1) is whether a jury could determine that the insurer's liability was reasonably clear such that it should have settled the claim. Id. at *7. Rather, the court

held that, because plaintiff provided medical records showing his meniscus tear and surgical recommendation, this evidence created a genuine issue of material fact regarding whether Allstate should have settled the claim. Id.

Wiggins comports with this long-standing Florida law by permitting a jury to weigh the question of a threshold injury in determining whether the insurer should have settled the claim. To allow otherwise departs and disregards Florida's long held standard on bad faith and would have a profound effect on the rights of policyholders. Other courts have rejected insurer's attempts to impose a "mechanical standard" regarding failure to settle cases. Snowden ex rel. Estate of Snowden v. Lumbermens Mut. Cas. Co., 358 F. Supp. 2d 1125, 1129 (N.D. Fla. 2003). As such, CADLE should not have required that it prove permanent injury under §627.727(7) at the time of her settlement demand. Rather, under Florida's "totality of circumstances" standard, evidence of CADLE's proof of permanent injury under §627.727(7) at the time of her settlement demand is merely a factor to be considered.

CONCLUSION

Based on the foregoing, United Policyholders respectfully requests this Honorable Court reverse the District Court's judgment and restore the jury's verdict.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☑ This Brief contains 3,612 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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☑ This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 8 in Times New Roman size 14 font.

By: /s/ Mark A. Boyle
Mark A. Boyle
Molly A. Chafe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by Federal Express Overnight and electronic mail to B. RICHARD YOUNG, ESQ., JORDAN M. THOMPSON, ESQ., AND MEGAN ALEXANDER, ESQ. (Counsel for GEICO GENERAL INSURANCE COMPANY), Young, Bill, Roumbos & Boles, P.A., P.O. Drawer 1070, Pensacola, FL 32591-1070, ryoung@flalawyer.net; jthompson@flalawyer.net; malexander@flalawyer.net, and STEPHEN A. MARINO, JR., ESQ. and DANYA J. PINCAVAGE, ESQ. (Counsel for CATHERINE S. CADLE), Ver Ploeg & Lumpkin, P.A., 100 S.E. Second Street, 30th Floor, Miami, FL 33131, smarino@vpl-law.com; dpincavage@vpl-law.com; on this 16th day of June, 2015.

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