Filing # 58815250 E-Filed 07/10/2017 07:56:53 PM

RECEIVED, 07/10/2017 07:58:29 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-85
APP. CASE NO. 4D15-4724
L.T. CASE NO. 50-2013-CA-017284XXXXMB

JAMES M. HARVEY

Petitioner,

vs.

GEICO GENERAL INSURANCE COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER JAMES M. HARVEY

July 10, 2017

STEPHEN A. MARINO, JR., ESQ.
BENJAMIN C. HASSEBROCK, ESQ.
MICHAL MEILER, ESQ.
VER PLOEG & LUMPKIN, P.A.
100 S.E. Second Street, 30th Floor
Miami, Florida 33131-2151
Tel: (305) 577-3996
Fax: (305) 577-3558

MARK A. BOYLE, ESQ.
MOLLY CHAFE BROCKMEYER, ESQ.
MEAGAN R. CYRUS, ESQ.
BOYLE & LEONARD, P.A.
2050 McGregor Blvd.
Fort Myers, FL 33901
Tel: (239) 337-1303
Fax: (239) 337-7674

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE FOURTH DISTRICT ERRED BY APPLYING AN INCORRECT STANDARD OF CARE AND USURPING THE JURY'S EVALUATION OF THE INSURER'S CONDUCT. 3

A. Liability insurers must act with ordinary care and prudence in settling claims against their policyholders. 3

B. An insurer's negligent conduct has always been sufficient to support liability for failure to protect the insureds by settling the claims against them. 5

C. Whether an insurer acted with ordinary care and prudence is a question of fact, based on the totality of the circumstances.......... 8

D. The Fourth District improperly weighed evidence and incorrectly held that GEICO's negligent failure to settle could not support the jury's verdict. 9

II. AN INSURER HAS A FIDUCIARY DUTY TO ITS INSURED TO ATTAIN A RELEASE OF CLAIMS CONCURRENTLY WITH TENDERING THE POLICY LIMITS. 13

A. The insurer's control over an insured's settlement of a claim produces a fiduciary duty to the insured. 14

B. The insurer's control over an insured's defense of a claim, likewise, results in a fiduciary duty to the insured......................... 16

CONCLUSION 20

CERTIFICATE OF COMPLIANCE..21

CERTIFICATE OF SERVICE 22

TABLE OF CITATIONS

Cases

Aetna Cas. & Sur. Co. v. Sullivan,
597 N.E.2d 62 (Mass. App. 1992) 17, 18

Aetna Ins. Co. v. Borrell-Bigby Elec. Co., Inc.,
541 So. 2d 139 (Fla. 2d DCA 1989) 17

Am. Fid. & Cas. Co. v. Greyhound Corp.,
258 F.2d 709 (5th Cir. 1958) 5

Am. Reliance Ins. Co. v. Perez,
712 So. 2d 1211 (1998) 15

Auto Mut. Indem. Co. v. Shaw,
184 So. 852 (Fla. 1938) 3, 5

Berges v. Infinity Ins. Co.,
896 So. 2d 665 (Fla. 2004) .... passim

Boston Old Colony Ins. Co. v. Gutierrez,
386 So. 2d 783 (Fla. 1980) 3, 6, 8, 16

California Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co.,
913 P.2d 505 (Ariz. App. 1st Div. 1996) 17

Campbell v. Gov't Employees Ins. Co.,
306 So. 2d 525 (Fla. 1974) 8, 13

Castillo v. E.I. Du Pont De Nemours & Co.,
854 So. 2d 1264 (Fla. 2003) 13

Corya v. Sanders,
155 So. 3d 1279 (Fla. 4th DCA 2015) 4

Cunningham v. Standard Guar. Ins. Co.,
630 So. 2d 179 (Fla. 1994) 4

DeLaune v. Liberty Mut. Ins. Co.,

314 So. 2d 601 (Fla. 4th DCA 1975) 5

Diperna v. GEICO Gen. Ins. Co.,
2013 WL 6050759 (M.D. Fla. Nov. 15, 2013) 11

GEICO Gen. Ins. Co. v. McDonald,
315 F. App'x 181 (11th Cir. 2008) 5

GEICO Gen. Ins., Co. v. Harvey,
208 So. 3d 9, 10

Gen. Accident Fire & Life Assurance Corp. v. Am. Cas. Co.,
390 So. 2d 761 (Fla. 3d DCA 1980) 16

Godur v. Travelers Indem. Co.,
567 So. 2d 1028 (Fla. 3d DCA 1990) 19

Gohegan v. Am. Vehicle Ins. Co.,
107 So. 3d 433 (Fla. 4th DCA 2012) 10

Gov't Employees Ins. Co. v. Prushansky,
2014 WL 47734 (S.D. Fla. Jan. 7, 2014) 11

Hayas v. GEICO Gen. Ins. Co.,
No. 8:13-CV-1432-T-33AEP, 2014 WL 6883131 (M.D. Fla. Dec. 5, 2014) 9

Hilker v. Western Auto. Ins. Co.,
235 N.W. 413 (Wis. 1931) 7

Jaimes v. GEICO General Ins. Co.,
534 Fed. App'x 860 (11th Cir. 2013) 6, 12

Macola v. Government Employees Ins. Co.,
953 So. 2d 451 (Fla. 2006) 3, 4

Mesa v. Clarendon Nat. Ins. Co.,
799 F.3d 1353 (11th Cir. 2015) 9

Novoa v. GEICO Indem. Co.,
542 Fed. App'x. 794 (11th Cir. 2013) 11

Palafrugell Holdings, Inc. v. Cassel,
825 So. 2d 937 (Fla. 3d DCA 2001) 4

Pareti v. Century Indem. Co.,
536 So. 2d 417 (La. 1988) 19

Parisi v. Avemco Ins. Co.,
No. 8:12-CV-1073-T-23AEP, 2013 WL 12137589 (M.D. Fla. July 26, 2013) ..10

Samply v. Integrity Ins. Co.,
476 So. 2d 79 (Ala. 1985)..17

Shada v. Title and Trust Co. of Florida,
457 So. 2d 553 (Fla. 4th DCA 1984)...15

Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust,
591 So. 2d 174 (Fla. 1992)..8

State Farm Fire & Cas. Co. v. Zebrowski,
706 So. 2d 275 (Fla. 1997)..8

State Farm Mut. Auto. Ins. Co. v. Laforet,
658 So. 2d 55 (Fla. 1995)...4, 11

State Farm v. White,
236 A.2d 269 (1967) 6

Thomas v. Lumbermens Mut. Cas. Co.,
424 So. 2d 36 (Fla. 3d DCA 1983) 6

Tully v. Travelers Ins. Co.,
118 F. Supp. 568 (N.D. Fla. 1954) 5

U.S. Fire Ins. Co. v. Hayden Bonded Storage Co.,
930 So. 2d 686 (Fla. 4th DCA 2006)...16

Wachovia Ins. Servs., Inc. v. Toomey,
994 So. 2d 980 (Fla. 2008)..4

Zurich Am. Ins. Co. v. Frankel Enterprises,
287 Fed. App'x. 775 (11th Cir. 2008) 15

Rules

Fla. R. Civ. P. 1.470 5

Florida Rule of Appellate Procedure 9.210(2) 21

Other Authorities

Fla. Std. Jury Inst. 401.4 5

S. Ashley, Bad Faith Actions: Liability & Damages §2.6 (2d ed. 2013) 7

The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute, 26 U. Mich. J.L. Ref. 1 (1992) 11, 12

INTEREST OF AMICUS CURIAE

The application of insurance contracts and related issues requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a national non-profit 501(c)(3) organization dedicated to promoting and preserving integrity in the insurance system. UP was founded in 1991 to be a voice and information resource for insurance consumers following a large firestorm that swept through the San Francisco Bay Area.

Through its Roadmap to Preparedness program, UP guides consumers on buying insurance and being economically prepared for adverse events. UP's Roadmap to Recovery™ program helps individuals and businesses navigate the insurance claims process and recover fair and timely settlements. UP has been active in Florida since Hurricane Andrew in 1992. UP's Advocacy and Action program works with public officials, other non-profits, faith-based organizations, and a diverse range of entities – including insurance producers, insurance trade associations, business groups, and community foundations – to solve problems related to claims and coverage.

Since UP was founded in 1991, the organization has provided direct access to consumers across the country who have suffered damage to and destruction of their homes and businesses. Because of this, UP is able to provide timely, relevant information to courts considering the duties of insurance companies to act in good faith settling claims.

SUMMARY OF THE ARGUMENT

The Fourth District's decision misstates the standard of care owed by a liability insurer in settling claims against its policyholder, fundamentally altering nearly 80 years of this Court's jurisprudence, creating the requirement of an intentional act before an insurer will be held responsible for exposing its insured to an excess judgment. The Fourth District's characterization of a Florida insurer's duties to its insureds cannot be reconciled with this Court's long-standing precedent establishing a standard of ordinary care for the insurer's settlement conduct.

Moreover, the duty of settlement cannot be discharged by merely tendering monies to a claimant, but instead requires insurers to consummate settlements to protect insureds. Florida courts have readily recognized the unilateral power created by policies of liability, apart from those of indemnity: the insurer's absolute control of both the insured's defense and settlement of any and all claims.

Thus, the Fourth District improperly fashioned this lower standard of care, then usurped the jury's role by evaluating GEICO's conduct, dismissing evidence of GEICO's negligence, and entering judgment as a matter of law. This Court should reverse and reaffirm that an insurer's negligent failure to settle claims against its policyholder is sufficient to sustain liability, and that the totality of circumstances inquiry necessary to determine whether the insurer could and should have settled the claim virtually always presents a question of fact for trial.

ARGUMENT

I. THE FOURTH DISTRICT ERRED BY APPLYING AN INCORRECT STANDARD OF CARE AND USURPING THE JURY'S EVALUATION OF THE INSURER'S CONDUCT.

A. Liability insurers must act with ordinary care and prudence in settling claims against their policyholders.

This Court first recognized a common law action against liability insurers for "bad faith" failure to settle in *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852, 859 (Fla. 1938), adopting a standard of "ordinary care and prudence" to govern an insurer's good faith defense and settlement obligations. Since 1938, every bad faith failure to settle action before this Court has confirmed that liability insurers owe a duty of ordinary care, and its continuing vitality is reflected in this Court's unanimous 2006 opinion:

> [W]hen the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Macola v. Government Employees Ins. Co., 953 So. 2d 451, 455 (Fla. 2006) (quoting *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)). According to this Court, "the essence of a third-party bad faith cause of action is to

remedy a situation in which an insured is exposed to an excess judgment because of the insurer's failure to properly or promptly defend the claim." *Id.* at 458 (quoting *Cunningham v. Standard Guar. Ins. Co.,* 630 So. 2d 179, 181 (Fla. 1994).

Focusing on the insurer's failure to protect its insured, this Court explained that Florida's common law bad faith action is equivalent to a claim for breach of fiduciary duty. Liability insurers, by the terms of their policies, choose to take control of the investigation, defense and settlement of claims against their insureds. They accordingly assume "a fiduciary relationship with their insureds similar to that which exists between an attorney and client." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995). As a fiduciary, the insurer must exercise "the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Macola*, 953 So. 2d at 454-55. No intent is required to prove a breach of fiduciary duty. *See Corya v. Sanders*, 155 So. 3d 1279, 1285 (Fla. 4th DCA 2015); *Palafrugell Holdings, Inc. v. Cassel,* 825 So. 2d 937, 939 n.1 (Fla. 3d DCA 2001); *see e.g. Wachovia Ins. Servs., Inc. v. Toomey,* 994 So. 2d 980, 990 (Fla. 2008).

To this point, Florida's standard jury instruction for a liability insurer's failure to settle is derived from this Court's holdings and reflects this standard of ordinary care: "Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and

honestly toward" its insured and "with due regard for his interests." Fla. Std. Jury Inst. 401.4. This is the statement of law Florida courts must give to a jury in claims alleging an insurer's failure to settle. *See* Fla. R. Civ. P. 1.470. There is no basis for Florida courts to depart from this standard of care.

B. An insurer's negligent conduct has always been sufficient to support liability for failure to protect the insureds by settling the claims against them.

While the failure to settle claim became known as a "bad faith" action, an insurer's duty of ordinary care was always based on a negligence standard. *See, e.g.* Fla. Std. Jury Inst. 401.4; *GEICO Gen. Ins. Co. v. McDonald*, 315 F. App'x 181, 184 (11th Cir. 2008) ("The legal standard governing an insurer's settlement conduct is one of reasonableness."). Since *Shaw*, Florida courts have routinely held that evidence of an insurer's negligent failure to settle can establish bad faith liability:

> In the *Shaw* case it was said that it appeared that an insurer, in the settlement of claims, should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business. This is a negligence principle, and from the recitation of it by the Florida Court we reach the conclusion that it has adopted the rule that in the application of the good faith test consideration may be given to the negligence of the insurer in determining whether it has conducted settlement negotiations in good faith. The doctrine is not a novel one.

Am. Fid. & Cas. Co. v. Greyhound Corp., 258 F.2d 709, 716 (5th Cir. 1958); *see also Tully v. Travelers Ins. Co.*, 118 F. Supp. 568, 571 (N.D. Fla. 1954) ("defendant was negligent to the extent of bad faith in failing and refusing to settle"); *DeLaune*

v. Liberty Mut. Ins. Co., 314 So. 2d 601, 602 (Fla. 4th DCA 1975) ("negligence may be considered by the jury in determining bad faith"); *Thomas v. Lumbermens Mut. Cas. Co.*, 424 So. 2d 36, 38 (Fla. 3d DCA 1983) ("consideration may be given to the negligence of the insurer in determining whether it has breached its duty to negotiate in good faith"); *Boston Old Colony*, 386 So. 2d at 785 ("negligence is relevant to the question of good faith"); *Jaimes v. GEICO General Ins. Co.,* 534 Fed. App'x 860, 866 (11th Cir. 2013)("[the insurer's] purported negligence in handling the underlying claim is not a defense, but rather, is material in determining bad faith.").

The term "bad faith" has always been a misnomer because it implies intentional misconduct. But the insurer's intent has never been an element of Florida's "failure to settle" cause of action. Courts and commentators agree that there is no meaningful distinction between negligence and bad faith in the failure to settle context. *State Farm v. White,* 236 A.2d 269, 273 (1967) ("in a large number of the more recent cases where the two tests of 'good faith' and 'negligence' have tended to coalesce, with many of the courts which have in terms rejected the 'negligence' test agreeing nevertheless, that the insurer's negligence is a relevant

consideration in determining whether or not it exercised the requisite good faith").[1] This is because the question of protecting the interests of the insured never requires a juxtaposition of the insurer's interests against those of the insured, it simply requires an analysis of whether the insurer failed to use due regard for its insureds' interests.

This Court has never required policyholders to prove an insurer's fraudulent, willful, or malicious motive in failing to settle. *E.g.*, *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 682 (Fla. 2004) (upholding bad faith verdict where insurer "'dropped the ball' in its handling of this case"). Insurers have a good faith obligation to settle claims, and liability may be imposed when the failure to act in good faith results from indifference, incompetence, or inattention. An insurer's "bad faith" is routinely measured by the degree and effect of its negligent conduct, and nothing more.

[1] *See also Hilker v. Western Auto. Ins. Co.*, 235 N.W. 413, 414 (Wis. 1931) ("[O]ur consideration of the authorities leads us to believe that what confusion there is on the part of courts is purely tautological, and springs from a none too critical use of terms. Terms which are not strictly convertible or synonymous have been used by different courts to indicate the same thing. Negligence has been used by some courts to mean the same thing that other courts have designated as bad faith. Bad faith, especially, is a term of variable significance and rather broad application."); S. Ashley, Bad Faith Actions: Liability & Damages §2.6 (2d ed. 2013) ("the distinction between the negligence standard and the bad faith standard is more rhetorical than real").

C. Whether an insurer acted with ordinary care and prudence is a question of fact, based on the totality of the circumstances.

The insurer's duty of ordinary care presents a factual inquiry to be evaluated on the totality of the circumstances. *Berges*, 896 So. 2d at 680. This Court has held that "reasonable diligence and ordinary care [are] material in determining bad faith," and they are "considerations of fact—not of law." *Campbell v. Gov't Employees Ins. Co.*, 306 So. 2d 525, 530-31 (Fla. 1974). As a result, "the question of failure to act in good faith with due regard for the interests of the insured is for the jury." *Boston Old Colony*, 386 So. 2d at 785.

This Court has recognized that judgment as a matter of law must be reserved for cases where undisputed facts demonstrate that the insured has no bad faith remedy. *See State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997) (excess judgment required); *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 178 (Fla. 1992) (insurer settled within limits). Courts should not apply the totality of the circumstances analysis to evaluate the insurer's conduct for "bad faith" when reviewing dispositive motions. In failure to settle cases, judgment as a matter of law should be rare and never based on judicial

weighing of an insurer's negligent conduct.[2]

D. The Fourth District improperly weighed evidence and incorrectly held that GEICO's negligent failure to settle could not support the jury's verdict.

The Fourth District usurped the jury's role by weighing GEICO's conduct under the totality of the circumstances analysis, and despite GEICO's apparent negligence in handling settlement communications, granting judgment for GEICO as a matter of law. In reaching this conclusion, the court mischaracterized Florida law to require proof of GEICO's intentional bad faith conduct. *GEICO Gen. Ins., Co. v. Harvey*, 208 So. 3d at 814 ("Under the totality of the circumstances, the evidence must support the allegation that the insurer acted in bad faith—not simply that the insurer was negligent in some regard in handling the insured's claim."). The court supplanted the jury's factual determination of bad faith and improperly absolved GEICO's negligence because it found no evidence that GEICO "acted upon what it consider[ed] to be for its own interest alone" and "put its own interests

---

[2] In recent years, Florida's federal courts have applied the totality of the circumstances standard to reach a judicial determination about the insurer's culpability on summary judgment or directed verdict motions. *E.g.*, *Mesa v. Clarendon Nat. Ins. Co.*, 799 F.3d 1353, 1360 (11th Cir. 2015); *Hayas v. GEICO Gen. Ins. Co.*, No. 8:13-CV-1432-T-33AEP, 2014 WL 6883131, at *7 (M.D. Fla. Dec. 5, 2014). The increasing frequency of these dispositive rulings has created disparity in state and federal jurisprudence on a question of substantive Florida law. This appeal presents the opportunity for a clear and compelling statement that evaluation of the insurer's negligent claims handling conduct presents a question of fact for trial.

before that of the insured." 208 So. 3d at 815. The court plainly believed that evidence of an insurer's bad faith intent or motive is a requirement of Florida's bad faith remedy. *Id.* at 814 ("the essence of a bad faith claim is that the insurer put its own interests before that of the insured").[3]

The Fourth District's ruling must be reversed because it alters the standard of ordinary care consistently applied to an insurer's settlement conduct. Liability insurers serve as fiduciaries when defending their policyholders, and GEICO owed "a fiduciary duty to act in [the insured's] best interest."[4] *Berges*, 896 So. 2d at 677. The Fourth District ignores GEICO's fiduciary obligations requiring only that it avoid acting in its own interest, eliminating liability based on GEICO's ignorance, indifference or incompetence.

Prior to the Fourth District's opinion, no published Florida decision had ever required proof that an insurer "acted solely in its best interest" to sustain a common law action for failing to settle a claim. The Fourth District's ruling emanates from an unpublished Eleventh Circuit decision incorrectly stating the applicable standard

---

[3] The decision under review stands in contrast to the Fourth District's 2012 decision in *Gohegan*, which held that "[a]ny delay in making an offer . . . even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith." *Gohegan v. Am. Vehicle Ins. Co.,* 107 So. 3d 433, 439 (Fla. 4th DCA 2012).

[4] "Insurers owe a fiduciary duty to act in their insureds' best interests, which amounts to a fiduciary obligation to exercise good faith." *Parisi v. Avemco Ins. Co.*, No. 8:12-CV-1073-T-23AEP, 2013 WL 12137589, at *5 (M.D. Fla. July 26, 2013) (citing *Berges*, 896 So. 2d at 677).

of care:

> To fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably. Rather, insurers must refrain from acting solely on the basis of their own interests in settlement.

Novoa v. GEICO Indem. Co., 542 Fed. App'x. 794 (11th Cir. 2013). Respectfully, *Novoa* not only conflicts with this Court's precedent, but it is internally inconsistent; the preceding paragraph acknowledges that good faith "includes a duty to attempt settlement where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." *Id.* at *1.

Novoa's misguided statement that a liability insurer need not act reasonably or prudently appears to be a mistaken reference to this Court's dicta discussing the historical development of third-party bad faith claims in *Laforet*. *Laforet*, 658 So. 2d at 58.[5] The *Laforet* decision contains this quote from an out-of-state law review article: "Consequently, courts began to recognize that insurers 'owed a duty to their insured to refrain from acting solely on the basis of their own interests in settlement.'" *Id.* at 58 (quoting R. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the*

---

[5] Subsequent federal district court decisions have unfortunately perpetuated this incorrect statement of law, failing to reconcile the obvious conflict even when correctly applying the standard of ordinary care. *See*, *e.g.*, *Gov't Employees Ins. Co. v. Prushansky*, 2014 WL 47734, at *11 (S.D. Fla. Jan. 7, 2014); *Diperna v. GEICO Gen. Ins. Co.*, 2013 WL 6050759, at *6 (M.D. Fla. Nov. 15, 2013).

Remedies by Statute, 26 U. Mich. J.L. Ref. 1 (1992)). This Court went on to hold that the relevant inquiry is whether, under the totality of the circumstances, the insurer "acted fairly and honestly toward its insured and with due regard for [the insured's] interest." *Id.* at 63. *Novoa* captured the law review article's dicta, rather than *Laforet*'s holding, producing a fundamentally incorrect statement of the insurer's common law duty of good faith in Florida (where there is no "tort of bad faith").

Neither *Laforet* nor any other decision of this Court has reduced the standard of care to allow an insurer to escape liability where it does not act reasonably or prudently – *i.e.*, negligently. To the contrary, this Court's decision in *Berges* upheld bad faith liability based solely on the insurer's negligence by "focus[ing] on the insurer's fiduciary obligation to its insured." *Id.* at 669. In evaluating whether the insurer failed to "act in the best interests of the insured," this Court found sufficient evidence that the insurer did not do "everything reasonably possible to complete the settlement," citing various examples of insurer's negligence and concluding that the insurer "entirely 'dropped the ball' in its handling of this case." *Id.* at 683.

Guided by *Berges*, other courts have recognized that an insurer's negligent conduct is not a defense to bad faith, but evidence supporting liability that must be weighed by the jury. *Jaimes,* 534 Fed. App'x at 865. Such soundly reasoned decisions cannot be harmonized with the Fourth District's opinion, which

improperly weighed GEICO's conduct, dismissed evidence of negligence in settlement communications, and supplanted the jury's verdict with its own factual determination that the totality of the circumstances did not support bad faith liability.

This Court has admonished that "Appellate courts are hardly at liberty to postulate converse facts as a predicate for substituting evidentiary findings guised as matters of law for a jury's verdict upon facts actually produced at trial." *Campbell,* 306 So. 2d at 530; *see also Castillo v. E.I. Du Pont De Nemours & Co.,* 854 So. 2d 1264, 1277 (Fla. 2003) ("It is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury."). The Fourth District improperly engaged in the "hypothetical assumption of nonexistent facts designed to counter the bad faith failure of the insurer to timely settle the [claimant's] claim within the limits of its coverage." *Id.*

Considering the totality of the circumstances, including evidence of GEICO's negligence, the jury determined that GEICO's conduct violated its good faith duties to use reasonable diligence and ordinary care in defense of its insured. This Court should reverse the Fourth District's ruling, restore the jury's verdict, and reaffirm that it is the jury's role to apply the standard of ordinary care in failure to settle cases.

II. AN INSURER HAS A FIDUCIARY DUTY TO ITS INSURED TO ATTAIN A RELEASE OF CLAIMS CONCURRENTLY WITH TENDERING THE POLICY LIMITS.

From a policyholder perspective, the integrity of the insurance safety net is

paramount. There is, however, a tension between the consumer expectation of insurance—typically marketed to consumers as "good hands"—and the business of insurance, which is fundamentally concerned with profits and solvency. Insurers are able to elevate their interest by controlling the terms of coverage when drafting their policies and determining when and how claims get paid. In modern liability insurance policies, this control is grounded in two independent but related policy provisions: first, the voluntary payment provision disallowing settlement without the insurer's consent; and second, the carrier's right and duty to defend. The law responds to this dynamic by placing obligations on insurers in the form of a duty to consummate settlements and a duty to defend. This Court has, along with an overwhelming majority of jurisdictions, recognized the special judicial handling of liability policies and the duty to settle for almost 100 years. This duty of settlement cannot be discharged by merely tendering monies to a claimant, but instead requires insurers to consummate settlements to protect insureds due to the unilateral power created by policies of liability.

A. The insurer's control over an insured's settlement of a claim produces a fiduciary duty to the insured.

The insurer's control over the claim and settlement process is reflected in the common "Voluntary Payment Provision", which bars the insured from settling claims without the insurer's consent. GEICO's standard policy provided the following:

3. ASSISTANCE AND COOPERATION OF THE INSURED

> . . .
> Only at his own cost will the insured make a payment, assume any obligation or incur any cost other than for first aid to others.

Under most liability policies, as with GEICO's, the insured settles a claim without the consent of the insurer at his or her own peril. In *Am. Reliance Ins. Co. v. Perez*, 712 So. 2d 1211 (1998), the Third District held that the insureds breached the policy when they entered into a settlement without the consent of the insurer. The insureds entered into a *Coblentz* agreement with the claimants after the insurer tendered a defense under a reservation of rights. *Id.* at 1212. The policy contained language stating that "the insured will not except at the insured's own cost, voluntarily make payment, assume obligation or incur expense. . ." *Id.* at 1213. Therefore, the court concluded that settlement without consent of the insurer violated terms of the policy. *Id. See also Zurich Am. Ins. Co. v. Frankel Enterprises*, 287 Fed. App'x. 775, 779 (11th Cir. 2008).[6]

Florida courts have accordingly acknowledged that in exchange for said control, the insurer owes a fiduciary duty to its insured. Notably, as remarked by Justice Anstead in concurrence in *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla.

---

[6] However, suffice to say that settlement of a claim without the insurer's consent must always lead to denial of coverage. These cases illustrate the control wielded by the insurer, but do not support a blanketed statement of same. *See, cf., Shada v. Title and Trust Co. of Florida*, 457 So. 2d 553, 556 (Fla. 4th DCA 1984).

2004):

> [T]he assumption of that absolute control carries with it the obligation to look out for the interests of the insured. Where the insurance company knows that the liability is clear and the damages clearly in excess of the policy limits, that obligation usually requires an insurance company to seize upon any opportunity *to settle* within the policy limits.

Id. at 685–86 (emphasis added).

The insurer's fiduciary duty takes form in good faith and fair dealing toward its insured, as there is an inherent conflict between the insurer and its insured, particularly when liability far exceeds the policy limits, and the insurer has the sole opportunity to settle within policy limits. *See Gen. Accident Fire & Life Assurance Corp. v. Am. Cas. Co.*, 390 So. 2d 761, 765 (Fla. 3d DCA 1980).

B. The insurer's control over an insured's defense of a claim, likewise, results in a fiduciary duty to the insured.

The insurer's duty to defend is distinct from and broader than its duty to indemnity. *U.S. Fire Ins. Co. v. Hayden Bonded Storage Co.*, 930 So. 2d 686, 691 (Fla. 4th DCA 2006). Similarly to the duties garnered from the insurer's control over the settlement, the same arise from the insurer's unilateral control over the defense. *Boston Old Colony*, 386 So. 2d at 785. GEICO's standard policy, in similar fashion to the vast majority of liability policies, authorizes control over its insured's defense, stating in relevant part:

> **LOSSES WE WILL PAY FOR YOU**
>
> . . .

> We will defend any suit for damages payable under the terms of this policy.

From this broad principle, Florida courts have recognized that the duty to defend does not cease when policy limits are paid. *Aetna Ins. Co. v. Borrell-Bigby Elec. Co., Inc.*, 541 So. 2d 139, 140 (Fla. 2d DCA 1989). An insurer is precluded from tendering limits and walking away from the insured's defense. *Id.* at 141. In foreseeing an expensive defense, an insured cannot "truncate its defense obligations by leaping to pay a questionable judgment or claim . . . it must first in good faith establish the validity of such a judgment before paying out its limits and ceasing to defend." *Id.*

Other jurisdictions have similarly found that an insurer's duties to its insured do not end simply with the tendering of policy limits, but rather, through either settlement of the claim against the insured or payment toward a judgment. Settlement further includes the securing of a release of claims against the insured. *Aetna Cas. & Sur. Co. v. Sullivan*, 597 N.E.2d 62, 65 (Mass. App. 1992); *see also California Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 913 P.2d 505, 508 (Ariz. App. 1st Div. 1996) (finding that the insurer did not discharge its duty to defend by paying the limits of the policy without obtaining an effective covenant not to execute against its insured); *Samply v. Integrity Ins. Co.*, 476 So. 2d 79, 83 (Ala. 1985) ("This principle, which we adopt, that an insurer is relieved of its duty to defend only upon exhaustion of its policy limits by settlement or judgment, seems consistent with the

principle contained in the legal literature in this area.”).

In *Sullivan*, the court held that an insurer could not discharge itself from the duty to defend by tendering the full policy limits to the third party claimant when the insurer failed to secure a release of claims against the insured. *Sullivan*, 597 N.E.2d at 65. Under the terms of the policy, the insurer’s “duty to settle or defend ends when we have paid the maximum limits of coverage.” *Id.* at 64. While the insurer argued that its obligations ended once the policy limits were tendered pursuant to this language, the court disagreed, finding a marked difference between settling a claim against the insured and simply tendering payment to a claimant:

> The insurer, having exhausted the policy limits *and* provided a defense, the insured could not reasonably expect more. The situation is different, however, when an insurer seeks to pay the full amount of coverage without a judgment and without obtaining a release of the insured from at least one personal injury claimant.

Id. at 65.

While the issue has not been directly addressed in Florida, this Court in *Berges*, recognized that an insurer’s agreement to tender policy limits within the specified deadline without consummating a settlement did not relieve it of a claim of a bad faith as a matter of law. *Berges*, 896 So. 2d at 676. The Court, rather, found that the insurer’s decision not to settle claims against its insured in favor of simply paying the claimant the policy limits was a question of fact for a jury. *Id.*

Additionally, insurers in Florida have been found in to have satisfied the duty

to defend after having paid policy limits **<u>and obtained a release on behalf of the insured</u>**. *Godur v. Travelers Indem. Co.*, 567 So. 2d 1028, 1030 (Fla. 3d DCA 1990). The Third District in *Godur* based this conclusion regarding the duties of the insurer on *Pareti v. Century Indem. Co.*, 536 So. 2d 417 (La. 1988). The court in *Pareti* expounded upon the principle that the insurer owes the insured a greater duty beyond tendering policy limits, alluding to the potential for bad faith when a release is not secured:

> Further, any payment of the policy limits which does not release the insured from a pending claim (e.g., unilateral tender of policy limits to the court, the claimant or the insured), even if sufficient to terminate the duty to defend under the wording of the policy involved, raises serious questions as to whether the insurer has discharged its policy obligations in good faith.

Id. at 424.

While the insurer in *Pareti* was ultimately found to have acted in good faith as a result of having obtained the release, the court left open the possibility for a breach of an insurer's duties of good faith and fair dealing when the insured would be left exposed after the policy limits are tendered. The logic in *Pareti* furthermore applies to the instant matter. Prohibiting insurers from escaping the duty to defend by simply tendering limits addresses the dichotomy between the insurer's interests and those of the insured. Allowing insurers to curtail their defense expenditures while leaving their insured open to personal liability exposure plainly violates the aforementioned fiduciary duty owed to the insured. Likewise, tendering the limits of

the policy without securing a release of future claims against the insured leaves the insured equally exposed to such claims.

The ordinary, prudent person in handling his own affairs, as contemplated by the *Boston Old Colony* court, would not leave open the feasibility for future liability. GEICO, however, failed to meet this standard. Not only did its disregard for the interests of Harvey leave open said feasibility, but Harvey was in fact found personally liable to the claimant for damages exceeding $8 million.

This control over the claim, both via defense and settlement, placed him at the mercy of the insurer to choose to act pursuant to his interests. Harvey's, like many insureds', expectation was that GEICO's handling of the claim would protect him from further liability exposure. Harvey, however, did not receive the benefit of the bargain—control of the defense and settlement for deference toward his interests as an insured with personal liability at risk. GEICO failed to consummate a settlement to the detriment of its insured, violating its fiduciary duty.

CONCLUSION

For the reasons discussed above, the decision of the Fourth District Court of Appeal should be quashed and remanded for entry of judgment in accordance with the jury verdict.

Date: July 10, 2017

Respectfully Submitted,

VER PLOEG & LUMPKIN, P.A.
100 S.E. Second Street, 30th Floor
Miami, FL 33131
305-577-3996
305-577-3558 *facsimile*

/s/ Benjamin C. Hassebrock
Stephen A. Marino, Jr.
Florida Bar No. 79170
smarino@vpl-law.com
smcgee@vpl-law.com
Benjamin C. Hassebrock
Florida Bar No. 76504
bhassebrock@vpl-law.com
Michal Meiler
Florida Bar No. 86522
mmeiler@vpl-law.com
Co-Counsel for United Policyholders

BOYLE & LEONARD, P.A.
2050 McGregor Blvd.
Fort Myers, FL 33901
239-337-1303
239-337-7674 *facsimile*

/s/ Mark A. Boyle
Mark A. Boyle
Florida Bar No. 5886
mboyle@insurance-counsel.com
Molly Chafe Brockmeyer
Florida Bar No. 105798
mbrockmeyer@insurance-counsel.com
Meagan R. Cyrus
Florida Bar No. 124337
mcyrus@insurance-counsel.com
Co-Counsel for United Policyholders

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210.

/s/ Mark A. Boyle
Mark A. Boyle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2017, a true and correct copy hereof was electronically filed and will be served via email through the E-Filing Portal to:

Philip M. Burlington, Esq.
Bard D. Rockenbach, Esq.
Andrew A. Harris, Esq.
Burlington & Rockenbach, P.A.
444 West Railroad Ave., Suite 350
West Palm Beach, FL 33401
pmb@FLAppellateLaw.com
bdr@FLAppellateLaw.com
aah@FLAppellateLaw.com
kbt@FLAppellateLaw.com

Fred A. Cunningham, Esq.
Gregory M. Yaffa, Esq.
Domnick Cunningham &
Whalen, P.A.
2401 PGA Blvd., Suite 140
Palm Beach Gardens, FL 33410
fred@dcwlaw.com
gyaffa@dcwlaw.com

B. Richard Young, Esq.
Adam A. Duke, Esq.
Cody S. Pflueger, Esq.
Young, Bill, Boles, Palmer &
Duke, P.A.
2 South Biscayne Blvd., Suite 3195
Miami, FL 33131
ryoung@flalawyer.net
aduke@flalawyer.net
cpflueger@flalawyer.net

Kimberly L. Boldt, Esq.
Boldt Law Firm, P.A.
160 W. Camino Real, Suite 262
Boca Raton, FL 33432
eservice@boldtlawfirm.com

Louis K. Rosenbloum, Esq.
Louis K. Rosenbloum, P.A.
4300 Bayou Blvd., Suite 36
Pensacola, FL 32503
lrosenbloum@rosenbloumlaw.com
lourose49@yahoo.com

/s/ Mark A. Boyle
Mark A. Boyle