IN THE SUPREME COURT OF FLORIDA

MICHELLE MACOLA and INGE QUIGLEY,
Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Appellee.
_____/

Case No.: SC05-1021

L.T. No.: 04-10436

APPELLANT MICHELLE MACOLA'S INITIAL BRIEF ON THE MERITS

Proceeding to Review Questions Certified from the United States Court of Appeals for the Eleventh Circuit

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STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding to review two certified questions from the United States Court of Appeals for the Eleventh Circuit pursuant to Rule 9.150, Florida Rules of Appellate Procedure. The Appellants, Michelle Macola and Inge Quigley, each brought an action against the Appellee, Government Employees Insurance Company (hereafter "GEICO"), asserting a common-law cause of action for third-party bad faith. Both actions were consolidated in the United States District Court for the Middle District of Florida, which subsequently a granted summary judgment in favor of GEICO disposing of the Appellants' claims. The Appellants appealed from that summary judgment to the United States Court of Appeals for the Eleventh Circuit, and it is from that appeal that the Court of Appeals has certified two questions for resolution by this Court. Macola v. Gov't Employees Ins. Co., 410 F.3d 1359, 1365 (11th Cir. 2005).

The Clerk of the United States District Court for the Middle District of Florida has not provided the parties with an index to the record on appeal. Herein, a citation to the record will use the District Court's docket number for the pleading, paper, order, or transcript cited, which will be indicated by the abbreviation "Dkt." followed by the docket number. Exhibits attached to pleadings, motions, or transcripts will be indicated by docket number, the abbreviation "Exh.," and the letter used to identify the exhibit.

A. Statement of Facts.

On May 18, 1999, Ms. Quigley's now deceased husband, Frances Quigley, caused an automobile collision by attempting a left turn in front of an oncoming vehicle driven by the Appellant Michelle Macola. (Dkt. 137, p. 3; Dkt. 145, p. 2; Dkt. 147, Exh. E, pp. 1, 6). Both Mr. Quigley and Ms. Macola sustained injuries and were taken to a hospital. (Dkt. 147, Exh. E, p. 1).

Mr. Quigley was insured under a policy issued by GEICO with bodily injury liability limits of $300,000.00 per person / $300,000.00 per occurrence and a property damage limit of $100,000.00 per occurrence. (Dkt. 137, p. 3; Dkt. 145, p. 2). GEICO received notice of the accident the day after it occurred. (Dkt. 147, Exh. E, p. 1). On that day Mr. Quigley's wife, the Appellant Inge Quigley, contacted GEICO and provided information about Mr. Quigley's injuries. Mrs. Quigley told GEICO that Ms. Macola's injuries were even worse than Mr. Quigley's. (Dkt. 147, Exh. E, p. 2). GEICO assigned Dale Junco as adjuster of the claim. (Dkt. 153, p. 6).

Ms. Macola retained Michael A. Roe, Esq. to represent her in connection with the accident. (Dkt. 141, pp. 13 – 14). On May 24, 1999, Mr. Roe's office faxed GEICO a letter of representation which included a statutory request for insurance information, including a copy of Mr. Quigley's insurance policy. (Dkt.

147, Exh. E, p. 4; Dkt. 141, Defendant's Exh. 1).

For the next two and a half months, Ms. Junco concentrated her efforts on investigating whether Ms. Macola may have been speeding at the time of the accident. (Dkt. 147, Exh. E, pp. 4, 6, 7 –9, 11 - 15). The investigation ultimately established that Ms. Macola had not been speeding and that Mr. Quigley clearly did not have enough room to make his left turn safely. (Dkt. 147, Exh. E, p. 15).

More than three and a half months after the accident, Ms. Junco still had obtained none of Ms. Macola's medical records and had not requested a release to obtain them. (Dkt. 147, Exh. E, p. 16). Ms. Junco did call Mr. Roe on September 2, 1999. Mr. Roe told her that Ms. Macola had multiple surgeries and would require more, and that she was still out of work. (Dkt. 147, Exh. E, pp. 16 – 17). He said he would send what medical records he had to see if they could enter into a negotiation, and that the case was worth the policy limits. (Dkt. 147, Exh. E, p. 17). Later that month, Mr. Roe told Ms. Junco he was preparing a partial package of medical records to send her and that it was a policy limits case. (Dkt. 147, Exh. E, p. 18). October 15, 1999 was the first time Ms. Junco asked Mr. Roe for an authorization to obtain Ms. Macola's medical records. (Dkt. 147, Exh. E, p. 20). She sent Mr. Roe a medical records authorization a few days later, and he returned it to her signed within two days. (Dkt. 147, Exh. E, p. 20).

On October 19, 1999, Mr. Roe faxed and mailed a letter to Ms. Junco which made a settlement offer. (Dkt. 141, Defendant's Exh. 7). The letter described how the accident had occurred and proceeded to summarize the injuries Ms. Macola had suffered as well the numerous surgeries she had undergone to treat them. Her hospital bills totaled $179,368.03. (Dkt. 141, Defendant's Exh. 7, pp. 1 – 5). The traffic crash report and a stack of medical records were enclosed with the letter. The letter also claimed an outstanding property damage loss of $1,377.81. (Dkt. 141, Defendant's Exh. 7, p. 6).

Under the heading "SETTLEMENT OFFER," Mr. Roe's letter stated that Ms. Macola was willing to accept Mr. Quigley's bodily injury policy limit of $300,000.00 plus the $1,377.81 for property damage in full settlement. In order to accept the offer, Ms. Junco would have to arrange for Mr. Roe to receive a tender of these full sums in his office within twenty-one days. Within that time GEICO would also have to provide Mr. Roe with a copy of Mr. Quigley's insurance policy and an affidavit establishing that there was no other insurance coverage available to Mr. Quigley and that no other person was derivatively liable for Mr. Quigley's negligence. (Dkt. 141, Defendant's Exh. 7, pp. 6 – 7).

On November 8, 2003, the day before the deadline for Mr. Roe's settlement offer, Ms. Junco wrote back promising to have the $300,000.00 of bodily injury coverage delivered to Mr. Roe that day, but disputing the amount he had demanded

for property damage. Ms. Junco also professed not to understand who was supposed to sign the affidavit affirming that there was no other coverage. (Dkt. 141, Defendant's Exh. 9). Later that day, a field representative of GEICO delivered a draft for $300,000.00 and a release to Mr. Roe's office. (Dkt. 141, p. 52; Dkt. 156, p. 37). The representative had added the notation "This is not a release of property damage" to the release. (Dkt. 156, p. 37).

November 9, 1999 was the twenty-first day following Mr. Roe's settlement demand letter. By this date, Mr. Roe had not received from GEICO any payment for Ms. Macola's property damage, a copy of Mr. Quigley's policy, or an affidavit that there was no additional coverage or derivatively liable parties. (Dkt. 141, pp. 67 – 68, 88 – 89, 91, 109 and Defendant's Exh. 9; Dkt. 153, p. 205).

The first time Ms. Junco made any effort to notify the Quigleys about Ms. Macola's settlement offer was on November 10, 1999, after the offer had expired. (Dkt. 147, Exh. E, p. 25; Dkt. 153, pp. 199 – 200). There is a dispute between the testimony of Ms. Junco and Ms. Quigley as to what was said during this conversation. Ms. Junco claims that she explained all of the terms of Mr. Roe's settlement offer to Ms. Quigley, and that Ms. Quigley replied that she was unable to contribute any funds towards settlement. (Dkt. 147, Exh. E, p. 25; Dkt. 153, pp. 201 – 202). Ms. Quigley has testified that Ms. Junco did not explain all the terms of the settlement offer, inform her that the Quigleys could personally pay some or

all the claim for property damage to settle the case, or otherwise explain any steps that could have been taken to avoid an excess judgment. (Dkt. 148, pp. 34 - 35, 82 - 83, 95 - 96, 116 – 119).

Ms. Junco called Mr. Roe's office and left messages requesting that he call her on five occasions from November 9, 1999 through January 3, 2000. He did not return her calls. (Dkt. 147, Exh. E, pp. 24 – 27).

On February 15, 2000, Mr. Roe sent the $300,000.00 draft back to GEICO, together with a cover letter rejecting the counteroffer Ms. Junco had made in her letter of November 8, 1999. (Dkt. 141, Defendant's Exh. 12). That day, Ms. Macola filed suit against Mr. Quigley in the Circuit Court of the Thirteenth Judicial Circuit of Florida. The suit asserted a claim for damages for Ms. Macola's personal injuries, but not for her property damage. (Dkt. 137, p. 3; Dkt. 145, p. 2). GEICO assigned counsel to defend Mr. Quigley. (Dkt. 137, p. 3; Dkt. 145, p. 2). While this litigation was pending, Mr. Quigley passed away and the Appellant Inge Quigley, as the personal representative of his estate, was substituted as the defendant. (Dkt. 137, p. 4; Dkt. 145, p. 3).

GEICO filed a declaratory judgment action against Ms. Macola in the same state Circuit Court, seeking a declaration that Ms. Macola's tort claims had been settled. On January 5, 2001, the Circuit Court granted summary judgment for Ms. Macola. (Dkt. 138, Exh. A). The Second District Court of Appeal of Florida

affirmed the summary judgment without an opinion in GEICO General Ins. Co. v. Macola, 816 So.2d 618 (Table) (Fla. 2nd DCA 2002). (Dkt. 138, Exh. B).

Paul T. Cardillo, Esq. represented Mrs. Quigley as personal counsel during the tort litigation. (Dkt. 176, p. 2). In July of 2000, Mr. Cardillo submitted a statutory Civil Remedy Notice of Insurer Violation to the Treasurer of the State of Florida, Department of Insurance. (Dkt. 137, pp. 3- 4; Dkt. 145, p. 2; Dkt. 147, Exh. M; Dkt. 176, p. 2). This notice alleged, "GEICO failed to settle with the injured party for policy limits when they had the opportunity to do so." (Dkt. 147, Exh. M). Within sixty days after the notice was filed, GEICO sent Mr. Cardillo a check for $300,000.00. (Dkt. 137, p. 4; Dkt. 145, p. 2; Dkt. 147, Exh. N; Dkt. 176, p. 2). The check was never deposited or cashed. (Dkt. 176, p. 2).

Ms. Macola's tort case proceeded to trial. On July 8, 2002, a final judgment was entered against Mr. Quigley's estate in the amount of $1,541,941.61 with interest. (Dkt. 137, p. 4; Dkt. 145, p. 3; Dkt. 147, Exh. P). On August 12, 2003, another final judgment was entered against the Quigley estate awarding Ms. Macola attorney's fees of $212,500.00 with interest. (Dkt. 137, pp. 4 – 5; Dkt. 145, p. 3; Dkt. 147, Exh. R).

B. Proceedings in the Federal Courts.

In August of 2002, Appellant Michelle Macola filed a complaint in the Circuit Court of the Thirteenth Judicial Circuit asserting a cause of action for third-

party bad faith against GEICO under the common law of Florida. (Dkt. 3). The complaint alleged that GEICO breached its common-law duty of good faith to its insured, Francis Quigley, by failing to settle Ms. Macola's claim against Mr. Quigley within the policy limits when it could have and should have done so, failing to communicate to Mr. Quigley with complete candor and honesty, failing to timely advise Mr. Quigley of the likelihood of an excess verdict against him and of any steps he could have taken to avoid an excess verdict, and failing to communicate all settlement opportunities to Mr. Quigley within a reasonable time after they were made. (Dkt. 3, pp. 3 – 4). GEICO removed the suit to the United States District Court for the Middle District of Florida (Dkt. 1, 2) and filed an answer denying liability. (Dkt. 8).

On June 27, 2003, Appellant Inge Quigley, as personal representative of the estate of Francis E. Quigley, filed suit against GEICO in the District Court for the Middle District of Florida, asserting a claim for third-party bad faith under the common law of Florida. Ms. Quigley's complaint was based on the same facts as those underlying Ms. Macola's complaint. (Dkt. 94, Exh. A). The District Court consolidated the two actions. (Dkt. 103). GEICO filed its answer and affirmative defenses to Ms. Quigley's complaint on September 3, 2003. (Dkt. 106).

As its fifth affirmative defense, GEICO alleged that any alleged acts of bad faith had been cured pursuant to section 624.155, Florida Statutes (2001), because

Mr. Quigley had served a Civil Remedy Notice of Insurer Violation alleging that GEICO had committed bad faith and within sixty days of that notice GEICO had paid what it claimed to be "all contractual damages due." (Dkt. 106, pp. 5 – 6; Dkt. 109, pp. 5 – 6; Dkt. 115, pp. 4 - 5). Based on this affirmative defense, GEICO filed two separate motions for judgment on the pleadings against the Appellants. (Dkt. 136, 142). GEICO also filed a motion for final summary judgment against both Appellants, in which GEICO argued that it had not committed bad faith as a matter of law and that it was entitled to summary judgment based on its fifth affirmative defense. (Dkt. 143).

The trial court entered an order ruling that GEICO's motions for judgment on the pleadings would be denied, but the arguments raised in those motions would be considered in connection with GEICO's motion for summary judgment. (Dkt. 161). Subsequently, the trial court directed the Appellants to respond only to that portion of GEICO's summary judgment motion regarding Quigley's filing of the civil remedy notice. (Dkt. 193, pp. 45, 47, 49, 65). The Appellants subsequently filed written responses to GEICO's motion as to that issue. (Dkt. 174, 178).

On January 6, 2004, the trial entered an order granting GEICO's motion for summary judgment based on GEICO's fifth affirmative defense. (Appendix A; Dkt. 180). The order held that when Ms. Quigley filed the civil remedy notice she thereby made an election of remedies in favor of the statutory remedy for bad faith,

as a result of which both plaintiffs were estopped from pursuing a common-law action for bad faith. (Appendix A, p. 11; Dkt. 180, p. 11). Alternatively, the trial court held that Mr. Quigley had obtained full satisfaction of his claim for bad faith against GEICO by invoking the statutory curative process, and that, as a result, neither plaintiff could pursue the common-law remedy for bad faith. (Appendix A, pp. 11 – 12; Dkt. 180, pp. 11 – 12). The trial court's order did not address GEICO's argument that it had not committed bad faith as a matter of law. Judgment was entered for GEICO against the Appellants. (Dkt. 181).

Both Appellants timely appealed to the United States Court of Appeals for the Eleventh Circuit. (Dkt. 185, 189, 191). After briefing was completed and oral argument held, the Court of Appeals remanded jurisdiction to the trial court for the limited purpose of determining whether there were any material issues of fact with respect to whether GEICO had committed bad faith. (Appendix C; Dkt. 200). After each party filed a memorandum as to that issue (Dkt. 206, 208, 210[1], 213), the trial court entered an order finding that there were genuine issues of fact with respect to bad faith, and therefore the question of bad faith could not be resolved on summary judgment. (Appendix D; Dkt. 215). Jurisdiction then returned to the Court of Appeals.

[1] Instead of a memorandum, GEICO filed a second motion for summary judgment. (Dkt. 210). The trial court entered an order ruling that the motion would be denied as unnecessary and construed as a memorandum. (Dkt. 211).

The Court of Appeals issued its opinion certifying two questions to this Court on June 6, 2005. Macola v. Government Employees Ins. Co., 410 F.3d 1359 (11th Cir. 2005). The opinion holds that the trial court erred in ruling that Quigley's filing of a civil remedy noticed constituted an election of remedies. 410 F.3d at 1364. It then certifies the following two questions to this Court:

> (1) IN THE CONTEXT OF A THIRD PARTY BAD FAITH CLAIM WHERE THERE IS A POSSIBILITY OF AN EXCESS JUDGMENT, DOES AN INSURER "CURE" ANY BAD FAITH UNDER § 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS AFTER THE INITIATION OF A LAWSUIT AGAINST ITS INSURED BUT BEFORE THE ENTRY OF AN EXCESS JUDGMENT?
>
> (2) IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF THE JUDGMENT SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?

410 F.3d at 1365.

SUMMARY OF THE ARGUMENT

The Court should answer the first certified question in the negative. When a statutory civil remedy notice has been served alleging that an insurer has committed bad faith, the cure provision of section 624.155(3)(d), Florida Statutes (2004) requires the insurer within sixty days to either pay the damages or correct the circumstances giving rise to the violation. In the third-party context, an insurer

does not pay the damages or correct the circumstances amounting to bad faith by tendering a check for only the policy limits to its insured without settling the underlying claim.

The main element of damages in third-party bad faith is the excess judgment entered against the insured. Therefore, in order to satisfy the cure requirement of section 624.155(3)(d) in the third-party context, the insurer must pay the excess amount of any judgment entered against the insured if one has been entered, or, when no excess judgment has yet been entered, correct the circumstances giving rise to the bad faith claim by settling the underlying claim against the insured. For the insurer to merely send a check for its policy limits to its insured, without settling the underlying claim, does nothing to protect the insured from the entry of an excess judgment, and so does not correct the circumstances amounting to bad faith.

The Court should also answer the second certified question in the negative. For an insurer to tender a check for its policy limits to its insured in response to a civil remedy notice does not satisfy any excess judgment that is entered against the insured, because an excess judgment is by definition greater than the policy limits.

Also, the insurer's tender of its policy limits in response to a civil remedy notice does not constitute a full satisfaction of the damages available in a common-law claim for third-party bad faith. A party who pursues or attempts to invoke one

type of remedy does not thereby obtain full satisfaction of the claim if there is another, consistent remedy that provides for the recovery of additional amounts or elements of damages. Even if it can be said that the insured has made some type of recovery under the statutory remedy for bad faith when the insurer has tendered the policy limits in response to a civil remedy notice (although the insured in this case never cashed or deposited the check), such a recovery would not cover any of the damages recoverable in a common-law bad faith action. These damages consist primarily of the excess judgment, which by definition is in excess of the policy limits. Therefore, the tender of the policy limits does not satisfy a common-law claim for third-party bad faith.

Additionally, the cure provision of section 624.155(3)(d) should not be construed in such a manner that a cure under the statute would act as a bar to any common-law remedy for third-party bad faith as well as the statutory remedy. Such a construction has no support in Florida case law or in the language of the statute, and would be contrary to well established principles of statutory construction.

ARGUMENT

FIRST CERTIFIED QUESTION: GEICO'S TENDER OF THE POLICY LIMITS IN RESPONSE TO THE CIVIL REMEDY NOTICE WAS NOT AN ADEQUATE CURE OF ANY BAD FAITH FOR THE PURPOSES OF SECTION 624.155(3)(D), FLORIDA STATUTES (2003)

The first question certified by the Court of Appeals is:

> (1) IN THE CONTEXT OF A THIRD PARTY BAD FAITH CLAIM WHERE THERE IS A POSSIBILITY OF AN EXCESS JUDGMENT, DOES AN INSURER "CURE" ANY BAD FAITH UNDER § 624.155 WHEN, IN RESPONSE TO A CIVIL REMEDY NOTICE, IT TIMELY TENDERS THE POLICY LIMITS AFTER THE INITIATION OF A LAWSUIT AGAINST ITS INSURED BUT BEFORE THE ENTRY OF AN EXCESS JUDGMENT?

Macola, 420 F.3d at 1365. The Court should answer this question in the negative, because in the third-party context a tender of only the policy limits is not sufficient to pay the damages caused by a bad faith failure to settle a claim against the insured or to cure the circumstances that gave rise to a bad faith failure to settle. To properly cure a bad faith failure to settle in the third-party context, the insurer must either pay the amount of any judgment entered against its insured in excess of the policy limits, or, when no excess judgment has yet been entered, settle the claim against the insured so as to prevent the entry of an excess judgment.

A. Standard of Review.

Because the first certified question is phrased as a pure question of law, the

standard of review is *de novo*. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003). Also, the *de novo* standard applies because the first certified question requires only a legal determination based on undisputed facts.[2] State v. Florida, 894 So. 2d 941, 945 (Fla. 2005). The *de novo* standard is appropriate also because the first certified question is essentially a question of statutory construction. Bellsouth Communications, Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003).

B. History of Bad Faith Law in Florida.

Florida courts have recognized the cause of action for third-party bad faith under the common law of the state since as early as 1938. Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1125 (Fla. 2005), *citing* Auto Mut. Indem. Co. v. Shaw, 184 So. 852 (1938); Berges v. Infinity Ins. Co., 896 So. 2d 665, 83 (Fla. 2005). It was created in response to a concern that there was a practice in the insurance industry of rejecting claims brought by third parties against the insured without sufficient investigation or consideration, with the result that the insured was left exposed to a judgment exceeding the coverage limits of the policy while the insurer remained protected by the policy limits. Ruiz, 899 So. 2d at 1125.

[2] Although there are disputed issues of fact that are material to the ultimate question of whether GEICO actually committed bad faith, as the trial court determined in its order on limited remand from the Court of Appeals (Dkt. 215), there is no dispute with regard to the facts that are material to the Court's resolution of the two certified questions.

Under a contract of liability insurance, the insurer takes on the obligation of defending claims against its insured, and the insured depends on the acts of insurer to defend him. State Farm Mutual Auto. Ins. Co. v. LaForet, 658 So.2d 55, 58 (Fla. 1995). The contract requires the insured to relinquish control over settlement and the conduct of the defense to the insurer. Berges, 896 So. 2d at 682 - 83. The insurer may either settle a claim and foreclose the insured's exposure, or fail to settle and leave the insured exposed to liability exceeding the policy limits. Laforet, 658 So. 2d at 58.

Therefore, Florida courts began to recognize that, in exchange for the insured's surrender of control over the defense and settlement of the claim, the insurer owes the insured a fiduciary duty to act in good faith in the investigation, handling, and settling of claims brought against the insured. Ruiz, 899 So. 2d at 1125; Berges, 896 So. 2d at 682 – 83; LaForet, 658 So. 2d at 58. This duty of good faith requires 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, to advise the insured of any steps he might take to avoid an excess judgment, and to settle, if possible, for an amount within the policy limits when a reasonably prudent person faced with paying the entire recovery would do so. Boston Old Colony Insurance Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980).

When the insurer breaches its duty of good faith, resulting in the entry of an excess judgment against the insured, then the insurer may be held liable for the entire amount of the judgment including the excess above the policy limits. Berges, 896 So. 2d at 684. This type of claim is known as third-party bad faith. LaForet, 658 So. 2d at 58. Florida courts permit the injured third party to bring suit directly against the insurer as a third-party beneficiary of the insurance contract. Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971).

Although Florida courts have recognized the cause of action for third-party bad faith since as early as 1938, they refused to create a corresponding cause of action at common law for *first*-party bad faith. Ruiz, 899 So. 2d at 1125 – 26; LaForet, 658 So. 2d at 58 - 59; Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), *cert. dismissed*, 317 So.2d 724 (Fla. 1975). First-party bad faith differs from third-party bad faith in that the insured is also the injured party who is entitled to receive the policy benefits. See LaForet, 658 So. 2d at 59.

In 1982, the Florida Legislature enacted section 624.155, Florida Statutes (1983), to provide a statutory remedy for first party bad faith. Ruiz, 899 So. 2d at 126; Talat Enter., Inc. v. Aetna Cas. and Sur. Co., 753 So.2d 1278, 1281 (Fla. 2000); LaForet, 658 So. 2d at 59. The statute also supports an action for third-party bad faith. See § 624.155(1)(b)1 Fla. Stat. (2004); LaForet, 658 So. 2d at 62. In effect, the only remedy available for first-party bad faith is the statutory action

provided by section 624.155, but a claim of third-party bad faith may be brought under the common law or under the statute. Section 624.155(8), Florida Statutes (2003) provides:

> The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies.

See also Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So. 2d 1103, 1105 – 06 (Fla. 5th DCA 1993) (holding that plaintiff's complaint alleging a claim of third-party bad faith was sufficiently general to allow him to proceed under either section 624.155 or the common law).

C. Statutory Notice-and-Cure Procedure.

The basis for the trial court's grant of summary judgment in favor of GEICO is a procedural requirement that applies to statutory actions brought under Section 624.155. The relevant language is found in paragraphs (a) and (d) of subsection (3)[3] of the statute. Paragraph (3)(a) states, "As a condition precedent to bringing an action under this section, the department and the insurer must have been given

[3] The District Court's order cites to subsection (2) of section 624.155 (Dkt. 180, p. 7), which was renumbered as subsection (3) by an amendment effective July 1, 2003. Ch. 2003-149, §§ 2, 10, Laws of Fla.

60 days' written notice of the violation." The phrase "under this section" makes clear that this procedure only applies to statutory actions.

Paragraph (3)(d) of the statute provides, "No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected." The trial court ruled that GEICO cured the damages pursuant to this paragraph by sending Mr. Cardillo a check for the policy limits within sixty days after he filed a notice of insurer violation. (Dkt. 180). Although Ms. Macola's and Ms. Quigley's complaints against GEICO were based entirely on the common law rather than section 624.155 (Dkt. 3; Dkt. 94, Exh. A; Dkt. 115), the trial court ruled that GEICO's satisfaction of the cure provision of section 624.155(3)(d) eliminated the Appellants' common-law claims of third-party bad faith as well as any possible statutory claims. (Dkt. 180).

D. Merits: GEICO's Tender of the Policy Limits Was Not a Sufficient Cure Under Section 624.155(3)(d).

The first certified question asks whether an insurer's tender of only the policy limits within sixty days of the service of a statutory civil remedy notice, but prior to the entry of any excess judgment against the insured, constitutes a sufficient cure within the meaning of section 624.155(3)(d) in the context of a claim for third-party bad faith. This Court should answer in the negative. The plain language of section 624.155(3)(d) requires an insurer to either pay the

damages or correct the circumstances that give rise to the violation alleged in the civil remedy notice. In the third-party context, this means the insurer must pay the amount of any excess judgment against the insured if one has been entered, or effectuate a settlement of the injured third party's claim if no excess judgment has yet been entered.

In a claim for third-party bad faith, the primary element of damages is the amount of the judgment entered against the insured in excess of the policy limits. See Swamy v. Caduceus Self Ins. Fund, Inc., 648 So. 2d 758, 759 (Fla. 1st DCA 1994) (holding that the excess judgment constitutes the extent of the provable damages in most bad faith cases); Dunn, 631 So. 2d at 1106 (same). The insured's personal liability in excess of the policy limits is an essential element of the bad faith claim. Without this excess liability, there would be no claim for third-party bad faith. State Farm Fire & Cas. Co. v. Zebrowksi, 706 So. 2d 275, 277 (Fla. 1997); see also Fid. & Cas. Co. of New York v. Cope, 462 So. 2d 459, 460 – 61 (Fla. 1985) (holding that an injured third party may not maintain an action for third-party bad faith after having executed a release and satisfaction of judgment in favor of the insured, absent a prior assignment); Kelly v. Williams, 411 So. 2d 902, 904 – 905 (Fla. 5th DCA 1982) (holding that injured third party could not maintain a suit for third-party bad faith after executing a stipulation and a satisfaction of judgment that protected the insured from any excess liability).

Because the damages in a third-party bad faith claim consist, first and foremost, of the excess judgment entered against the insured, in order for the insurer to have "paid the damages" within the meaning of section 624.155(3)(d), it must pay the amount of the excess judgment, if one has been entered. When the civil remedy notice is served before any excess judgment has been entered against the insured, as in this case, and no excess judgment is entered during the sixty-day period, then the amount of the damages has not been liquidated. Therefore, the insurer will not be able to simply write a check for the amount of the judgment exceeding the policy limits.

However, section 624.155(3)(d) provides two alternative methods by which an insurer may cure bad any faith that it may have committed: to pay the damages, or to correct the circumstances giving rise to the violation. It is self-evident that the common purpose of these two options is to require the insurer to put the insured in the same position as if no bad faith had been committed. Therefore, if the insurer cannot pay the damages because they are indeterminate, then it must correct the circumstances giving rise to the violation. In the third-party context, this requires the insurer to settle the claim against the insured, in order to prevent any excess judgment from being entered in the first place. In some cases, this will require the insurer to pay more than the policy limits. Talat Enter., Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1282 (Fla. 2000), *quoting* Talat Enter., Inc. v.

Aetna Cas. & Sur. Co., 952 F. Supp. 773, 778 (M.D. Fla. 1996) (holding, "To cure an alleged violation and to avoid a civil action, an insurer must pay the claim (sometimes in excess of the policy limits) before the sixty days expire.").

In granting summary judgment for GEICO, the trial court partly relied on two opinions from this Court, Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000) and Talat. (Appendix A, p. 8; Dkt. 180, p. 8). In Talat, this Court held that, in the context of a claim of first-party bad faith, the insurer need pay only the amount owed under the policy within the sixty-day cure period to satisfy the cure provision of section 624.155(2)(d) Fla. Stat. (1993) (which has since been renumbered as 624.155(3)(d)). Talat, 753 So. 2d at 1282 – 84. Vest, another first-party case, simply paraphrased Talat's holding in *obiter dicta*. 753 So. 2d at 1275, *citing* Talat. Talat and Vest are distinguishable because they were first-party cases. The reasoning underlying the Court's decision in Talat does not apply in a third-party case.

One crucial difference between third-party bad faith and first-party bad faith is that in the third-party context the insurer's commission of bad faith results in the exposure of the insured to an excess judgment, but in the first-party context the insurer's bad faith refusal to settle does not result in any excess liability that injures the insured. McLeod v. Continental Ins. Co., 591 So. 2d 621, 626 (Fla. 1992) *superseded by statute as stated in* Time Ins. Co. v. Burger, 712 So.2d 389, 392

(Fla. 1998). In McLeod, this Court held that the damages recoverable in a suit for first-party bad faith are only those amounts that are the natural, proximate, probable, or direct consequence of the insurer's bad faith, and rejected the argument that these damages are fixed at the amount of the excess judgment. The Court's opinion explains,

> We agree with the district court that there are "fundamental differences" between first- and third-party actions. In a third-party action, damages based on the above definitions [of compensatory damages] would include the amount of a judgment in excess of the policy limits because the insured is exposed to additional liability for the excess amount. Such is not the case in a first-party action, because the insured is not injured by the excess judgment amount. To allow recovery of the excess judgment in first-party cases would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause. . . .

591 So. 2d at 624. McLeod further explains that although the insurer's failure to settle a first-party claim may lead to the entry of an excess judgment in favor of the insured, representing the amount of the insured's damages, it is the tortfeasor, not the insurer, who caused those damages. Id.

In response to McLeod, in 1992 the Florida Legislature amended the uninsured motorist statute, section 627.727, Florida Statutes, to provide that in an action for an insurer's bad faith refusal to pay uninsured motorist benefits, the insured could recover his entire loss as damages including the amount in excess of the policy limits. See § 627.727(10) Fla. Stat. (2004); State Farm Mutual Auto. Ins. Co. v. LaForet, 658 So.2d 55, 56 – 57 (Fla. 1995). However, this amendment

does not affect the reasoning of McLeod that a first-party insurer's commission of bad faith does not cause the insured to suffer an excess judgment. In LaForet, the Court held that the amendment to section 627.727 could not be applied retroactively because it created a punitive sanction against the insurer rather than a remedial measure. LaForet thus reaffirms that there is no causal relationship between a first party insurer's acts of bad faith and the entry of an excess judgment. Furthermore, the amendment only affected McLeod in the context of bad faith actions against uninsured motorist carriers. Time Ins. Co., 712 So. 2d at 392.

The point that a first-party insurer's bad faith refusal to settle does not cause the insured to suffer an excess judgment explains why an insurer's tender of only the policy limits constitutes a sufficient cure under section 624.155(3)(d) in first-party cases but not in third-party cases. Furthermore, the analysis underlying this Court's decision in Talat is unique to first-party cases in a number of respects. One factor that influenced the Court's decision is that section 624.155 is in derogation of the common law to the extent that it allows a cause of action for first-party bad faith, which was not recognized at common law. Talat, 753 So. 2d 1283. Therefore, in determining what constitutes a sufficient cure in first-party cases, the Court followed the principle that statutes in derogation of the common law must be strictly construed. Id.. This principle favors a construction of section

624.155 that is more restrictive of the statutory remedy for first-party bad faith. On the other hand, the statute is *not* in derogation of the common law to the extent that it permits an action for third-party bad faith, because third party bad faith is actionable under the common law. Therefore, the principle of strict construction of statutes in derogation of the common law requires a construction of section 624.155 that is *least* restrictive of the remedy for third-party bad faith.

Also, the Court's opinion in Talat states:

> It naturally follows that for there to be a "cure," what had to be "cured" is the non-payment of the contractual amount due the insured. In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled.

753 So. 2d at 1283. This language cannot apply to third-party cases, because in the third-party context the insurance benefits are not payable to the insured. What the insurer owes to the insured in the third-party context is not a check for the contractual benefits, but rather a fiduciary duty to act in good faith in the investigation, handling, and settling of claims against the insured. Berges, 896 So. 2d at 683.

The Talat opinion also states,

> For Talat there is no remedy without the statute. Pursuant to the statute, there is no remedy until the notice is sent by the insured and the insurer has the opportunity to "cure" the violation. If the insurer pays the damages during the cure period, then there is no remedy. For this to comport with logic and common sense, this has to mean that

> extra-contractual damages that can be recovered solely by reason of this civil remedy statute cannot be recovered when the remedy itself does not ripen if the insurer pays what is owed on the insurance policy during the cure period.

753 So. 2d at 1283 – 84. This language is further indication that Talat only applies to first party cases, because only in the first-party context is there no remedy for bad faith without the statute. Third party bad faith may be prosecuted under the common law or under the statute. § 624.155(8); Dunn, 631 So. 2d at 1106.

This Court has never addressed whether the insurer's tender of its policy limits constitutes a sufficient cure under section 624.155(3)(d) in the third-party context. Two district courts have addressed the issue but reached conflicting results. Hollar v. Int'l Bankers Inc. Co., 572 So. 2d 937 (Fla. 3d DCA 1991); Clauss v. Fortune Ins. Co., 523 So. 2d 1177, 1179 (Fla. 5th DCA 1988).

In Hollar, an excess judgment had been entered against Carol and Edwin Hollar for injuries sustained by a third party in an auto accident. The Hollars filed a civil remedy notice alleging that their insurers, while knowing that the Hollars' liability was clear and that the damages would exceed the policy limits, had in bad faith failed to accept an offer from the injured party to settle her claim within the policy limits. Within sixty days, the insurers tendered their policy limits to the Hollars.

Subsequently, in the Hollars' suit against their insurers for bad faith, the trial court entered summary judgment for the insurers on the ground that the insurers'

tender of their policy limits satisfied the cure provision of section 624.155. The Third District reversed. It held,

> Section 624.155 changes neither the case law obligation of good faith nor the measure of the damages due the insured once bad faith is proven. Rather than changing the decisional law, section 624.155 simply expands the cause of action to first-party claims . . . and adds a procedural first step that requires insureds to notify the insurer of a bad faith claim. . . .
>
> . . . .
>
> In the instant case, insurers' self-serving reading of the term "damages" as being confined to policy limits is an illogical interpretation, a radical departure from the decisional law, and, further, an explanation in no way consistent with the legislature's stated desire for insurers to act in good faith towards their insureds. . . . Damages, as both the clear wording of the statute and past Florida case law establish, must be all damages resulting from an insurer's bad-faith actions.

572 So. 2d at 939 – 40. For these reasons, the Third District held that a tender of the policy limits will not ordinarily satisfy the insured's full claim of damages for third-party bad faith. 572 So. 2d at 940. Because the insurers had never tendered the amount of the excess judgment against the Hollars, the Third District held that the cure provision of section 624.155 was not satisfied.

In Clauss, on the other hand, the Fifth District held that a liability insurer satisfied the cure provision of section 624.155 by tendering the policy limits to an injured third party, Kevin Clauss, one day after Clauss had sent notice to the insurer and to the Department of Insurance that he would be bringing suit against

the insurer for bad faith failure to settle. The opinion in Clauss, however, contains no analysis or discussion explaining why the Fifth District deemed the policy limits to be a sufficient cure in the third-party context. 523 So. 2d at 1179. Also, as noted in the opinion of the Court of Appeals, see Macola, 410 F.3d at 1363, the primary holding of Clauss was that the insurer was entitled to summary judgment because the allegations against the insurer were insufficient to establish that it had acted in bad faith. 523 So. 2d at 1178. Therefore, the Clauss holding regarding the statutory cure was not essential to the Fifth District's decision. For these reasons, Clauss is not as persuasive as Hollar.

The trial court's order granting summary judgment for GEICO cites to an unpublished decision of the United States District Court for the Southern District of Florida, Francois v. Illinois Nat'l Ins. Co., No. 01-8070-CV-RYSKAMP (S.D. Fla. Mar. 28, 2002) (Appendix F). Francois granted summary judgment for an insurer in a third-party bad faith action on the ground that the insurer's tender of its policy limits within sixty days after the filing of a civil remedy notice constituted a sufficient cure under section 624.155. Slip op. at 5 – 7; Appendix F, pp. 5 - 7. The court, citing to Talat, rejected the plaintiffs' argument that under Hollar, the insurer was required to tender the entire amount of damages they had suffered including the amount of the excess judgment. Slip op. at 7; Appendix F, p. 7. However, the opinion in Francois fails to recognize that Talat was a first-party case and that its

reasoning only applies to claims of first-party bad faith. Furthermore, the result in Francois, like Clauss, was also based on an alternate ruling that the insurer was entitled to summary judgment because it had not acted in bad faith. As the Court of Appeals' opinion in this case observes, "Given its status as an alternative holding in an unpublished district court opinion, *Francois* is of little persuasive value in this case." Macola, 410 F.3d at 1363.

For the foregoing reasons, the Court should answer the first certified question in the negative. When there is a strong likelihood that an excess judgment will be entered against the insured in the underlying tort litigation, and the insurer has already missed an opportunity to settle the claim within the policy limits under circumstances in which a jury may find bad faith, then the insurer should not be permitted to escape all potential liability for bad faith just by sending a check for the policy limits to its insured. The law of third-party bad faith was designed to protect insureds who have paid their premiums and fulfilled their obligations under the policy. Berges, 896 So. 2d 682. For the insurer to merely send a check for the policy limits to the insured without settling the claim affords no protection at all.

However, it will not be necessary for the Court to address the first certified question if it answers the second certified question in the negative. Ms. Macola's and Ms. Quigley's complaints against GEICO are based entirely on the common law, not section 624.155. (Dkt. 3; Dkt. 94, Exh. A; Dkt. 115). Whether an

insurer's satisfaction of the cure requirements of section 624.155(3)(d) bars the brining of a common-law claim action for third-party bad faith is the subject of the second certified question. If the Court answers that question in the negative, then it need not address whether a tender of the policy limits is a sufficient cure under section 624.155(3)(d) in the third-party context.

> SECOND CERTIFIED QUESTION: GEICO'S TENDER OF THE POLICY LIMITS IN RESPONSE TO THE CIVIL REMEDY NOTICE DID NOT CONSTITUTE A FULL SATISFACTION OF THE EXCESS JUDGMENT OR OF THE APPELLANTS' DAMAGES

The second certified question is, if it is assumed that GEICO's tender of the policy limits in response to Quigley's civil remedy notice was a sufficient cure for the purposes of section 624.155(3)(d),

> DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION OF THE JUDGMENT SUCH THAT THE INSURED AND DERIVATIVE INJURED THIRD PARTIES ARE BARRED FROM BRINGING A COMMON LAW BAD FAITH CLAIM TO RECOVER THE DIFFERENCE BETWEEN THE POLICY LIMITS AND THE EXCESS JUDGMENT?

Macola v. Gov't Employees Ins. Co., 410 F.3d 1359, 1365 (11th Cir. 2005). The Court should answer this question in the negative, because the policy limits that GEICO tendered in response to the civil remedy notice were less than the judgments that were entered against the Quigley estate in the underlying litigation. Therefore, the policy limits were inadequate to satisfy the excess judgments that

were entered against Quigley and also inadequate to satisfy the damages for Quigley's' common-law claim for third-party bad faith.

The standard of review is *de novo* because the certified question is a pure question of law, D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003), and because it requires only a legal determination based on undisputed facts. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005).

A. GEICO's Attempted Cure Did Not Satisfy the Excess Judgment Against the Quigley Estate.

If the second certified question is construed literally, the answer is plainly no. The question asks whether a cure of the statutory bad faith claim "constitute[s] a full satisfaction of the judgment." The judgment to which it is referring is identified in the first certified question as "an excess judgment." By definition, a tender of the policy limits cannot satisfy an excess judgment.

In this case, two judgments were entered against the Quigley estate in the underlying tort litigation: one for $1,541,941.61, and another for $212,500.00. (Dkt. 145, p. 3). The first of these judgments is alone well in excess of the $300,000.00 policy limits that GEICO tendered in response to the civil remedy notice. Thus, the tender of the policy limits was not sufficient to satisfy the excess judgments that entered against the Quigley estate in the underlying litigation.

B. GEICO's Attempted Cure Did Not Constitute Full Satisfaction of the Damages Resulting from Bad Faith.

Based on the context in which the Court of Appeals has asked the second certified question, it appears that what it is really asking is, assuming that GEICO met the cure requirements of section 624.155(3)(d), did that cure also constitute a satisfaction of the Appellants' common-law claim for third-party bad faith? If this is what the Court of Appeals intended to ask, then the answer should still be no.

In granting summary judgment for GEICO, the trial judge ruled that Quigley's service of the civil remedy notice constituted an election of remedies that bars either Appellant from bringing a common-law action for bad faith. (Appendix A, p. 11; Dkt. 180, p. 11). The Court of Appeals has correctly held that this ruling was error because, under Florida law, the doctrine of election of remedies is applicable only when the remedies in question are coexistent and inconsistent. Macola, 410 F.3d at 1364, *citing* Barbe v. Villenueve, 505 So. 2d 1331, 1332 (Fla. 1985). Remedies are inconsistent only if the allegations of fact necessary to support one remedy are substantially inconsistent with those that are necessary to support the other remedy. Barbe, 505 So. 2d at 1333. Because the allegations of fact necessary to support a statutory cause of action for third-party bad faith are substantially similar to those necessary to support a common-law action, the Court of Appeals held that the two remedies are not inconsistent, and that the trial court therefore erred in ruling that Quigley's civil remedy notice

constituted an election of remedies. 410 F.3d at 1364.

However, the trial court also held,

> Alternatively, assuming the statutory causes of action and the common law cause of action are consistent remedies such that the doctrine of election of remedies does not apply, see Barbe . . . 505 So. 2d [at] 1332 – 33 . . ., Mr. Quigley satisfied his claim against Defendant for bad faith by invoking the statutory curative process such that he no longer has a common law remedy. See American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 122 – 23, 47 So. 942, 944 (Fla. 1908) (observing that "[a]ll consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of one claim by one remedy puts an end to the other remedies.")

(Appendix A, pp 11 – 12; Dkt. 180, pp. 11 – 12). It appears that the Court of Appeals' intent in asking the second certified question is to determine whether this ruling is correct. If so, this Court's answer to the question should be in the negative.

Although no Florida appellate court has addressed this issue in the context of a cause of action for third-party bad faith, there is ample Florida caselaw that has considered the doctrine of satisfaction of damages in other situations. The doctrine holds that when two remedies are consistent, then an injured party may pursue either or both remedies until it has received full satisfaction for its injuries. An early statement of the rule is found in American Process Co. v. Florida White Pressed Brick Co., 47 So. 942 (Fla. 1908):

> Where the law affords several distinct, but not inconsistent, remedies for the enforcement of a right, the mere election or choice to

> pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies. . . . If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies.

Id. at 944. The Fourth District Court of Appeal has phrased the rule as follows:

> [I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his injuries.

Security and Investment Corp. of the Palm Beaches v. Droege, 529 So. 2d 799, 802 (Fla. 4th DCA 1988). A review of appellate decisions that have applied this rule to concrete situations shows that the pursuit of one remedy does not act as a bar to the subsequent pursuit of another, consistent remedy which provides for the recovery of additional damages that were not recovered under the first remedy.

In Security and Investment Corp., an assignee of a construction mortgage, Security, filed an action against Mr. and Mrs. Droege to foreclose on the mortgage. The Droeges cross-claimed against two builders, Sziics and Christiansen, for breach of a contract to construct a home on the mortgaged property. The Droeges recovered a judgment against Christiansen for $49,705.90. Christiansen settled for $25,000.00 while that judgment was on appeal. The trial judge then cancelled the mortgage because the note was not funded. Security appealed from the cancellation of the mortgage. It argued that the Droeges had made an election of

remedies when they recovered $25,000 in settlement from Christiansen, which waived or estopped them from asserting the defense of lack of consideration for the mortgage. The Fourth District rejected this argument. It held that the doctrine of election of remedies did not apply because the remedy of canceling a mortgage because of a failure of consideration or funding is not inconsistent with asserting a claim of breach of contract against a contractor for failure to build. Therefore, no estoppel or waiver would apply until the Droeges' injuries were satisfied in full.

The Fourth District further held that the Droeges had not received full satisfaction for their injuries by receiving $25,000 in settlement from Christiansen, because their total damages exceeded that amount. The Droeges had spent $70,705.90 on the building project, and it would cost approximately $77,000 more to complete it. The damages that they were entitled to recover as a result of Sziics' breach totaled $31,705.90, which was in addition to the $49.705.90 in cash outlays that was the basis of the judgment against Christiansen. Accordingly, the Fourth District held, "Receipt of $25,000 in cash from Christiansen in no way 'satisfied' the damages suffered by the Droeges at the hands of Sziics." 529 So. 2d at 803.

In Board of Public Instruction for Bay County v. Mathis, 181 So. 147 (Fla. 1938), the Board of Instruction for Bay County filed a complaint seeking to impose a trust upon the proceeds of a life insurance policy covering C. C. Mathis, a former school superintendent. The Board alleged that Mathis had misappropriated

$28,438.86 of the Board's funds while he was superintendent, and that he used $20,000 of that money to pay premiums on the policy. The Board, therefore, sought a lien on the policy in that amount. Previously, in another action, the Board had recovered a judgment for $3000 from a surety who had issued bonds to Mathis totaling $3000 which Mathis had filed as security when he assumed the duties of superintendent. The circuit court held that this prior action constituted an election of remedies, and therefore dismissed the Board's action to impose a trust on the insurance proceeds. This Court reversed the dismissal. It held that the election of remedies doctrine did not apply because the two remedies were not inconsistent, and, furthermore, that the Board had not obtained full satisfaction for its injuries because its recovery of $3000 from the surety still left a large sum of its losses unpaid. 181 So. at 149.

In Londono v. Turkey Creek, Inc., 609 So. 2d 14, 16 - 18 (Fla. 1992), this Court held that a private party may maintain a suit for malicious prosecution after having elected to tax costs as a prevailing party in the underlying action, in order to seek damages that were not available or not considered in the underlying action. In that case, a development company, Turkey Creek, Inc., had successfully defended a suit that had been brought against it by a group of homeowners and had recovered costs as the prevailing party in that action. Turkey Creek subsequently sued the homeowners for malicious prosecution. Its complaint sought over four

million dollars in compensatory damages plus punitive damages, interest, and costs. This Court held that Turkey Creek was not barred from seeking these damages in its malicious prosecution action because they were different from and in addition to the costs that it had recovered in the underlying action. Similarly, in Tackett Plastics, Inc. v. Bowsmith, 614 So. 2d 30 (Fla. 2d DCA 1993), the Second District Court of Appeal held that a plaintiff is not barred from bringing suit for malicious prosecution after having elected to tax costs in an underlying criminal prosecution that he defended successfully.

These authorities demonstrate that a recovery made under one remedy is not a full satisfaction of rights that bars the pursuit of another, consistent remedy under which an additional amount of damages or different elements of damages are recoverable for the same injury. Although there may not be a double recovery of actual damages, see Alvarez v. Striegel, 471 So. 2d 1356, 1358 (Fla. 3d DCA 1985), no double recovery will occur if the latter remedy only seeks elements of damages that were not recoverable under the former remedy. See Londono, 609 So. 2d at 17. When the two remedies provide compensation for the same element of damages, but in differing amounts, then a double recovery is prevented by offsetting the amount recovered under one remedy against the amount awarded pursuant to the other remedy. See Alvarez, 417 So. 2d at 1358. However, a claimant is not stuck with whatever amount she may recover under the first remedy

that she attempts to pursue if there is another, consistent remedy under which more damages are available.

In this case, all that Appellant Quigley received as a result of filing the civil remedy notice was a check from GEICO for the policy limits of $300,000. She did not realize any value from the check, because it was never cashed or deposited. (Dkt. 176, p. 2). Even if she had done so, the policy limits of $300,000 were far less than the damages recoverable in a common-law action for third-party bad faith and did not include any of those damages. In a third-party bad faith action, the main element of damages is the excess amount of the judgment entered against the insured in the underlying tort litigation. McLeod v. Continental Ins. Co., 591 So. 2d 621, 623, 624 (Fla. 1992); Swamy v. Caduceus Self Ins. Fund, Inc., 648 So. 2d 758, 759 (Fla. 1st DCA 1994); Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So. 2d 1103, 1106 (Fla. 5th DCA 1994). In this case, the excess amount of the two judgments entered against the Quigley estate is $1,454,441.61[4] plus any interest that has accrued on that amount. Not only is this amount greater than the policy limits, but by definition the policy limits are excluded from the calculation of this amount.

Therefore, even if GEICO's tender of the policy limits could be construed as a remedy that Ms. Quigley recovered by filing the civil remedy notice

[4] This is the sum of the two judgments, $1,541,941.61 plus $212,500.00, minus the policy limits of $300,000.00.

(notwithstanding that she never cashed or deposited the check), that remedy did not include the damages that Ms. Quigley would be entitled to recover in a common law action for third-party bad faith, most significantly the excess judgment amount of $1,454,441.61. Pursuant to Londono and Tackett Plastics, Inc., Ms. Quigley should be allowed to bring a common-law action for third-party bad faith to seek a judgment for the damages that she did not recover as a result of filing her civil remedy notice. Ms. Macola is entitled to pursue the same cause of action under Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971).

Thus, an insurer's tender of a check for the policy limits in response to a statutory civil remedy notice does not constitute a full satisfaction of an insured's common-law claim for third-party bad faith. Therefore, such a tender should not bar the insured or any injured third parties from bringing a common law bad faith claim to recover the difference between the policy limits and an excess judgment entered against the insured.

Additionally, when GEICO tendered its policy limits in response to the civil remedy notice, Ms. Quigley's common-law claim for third-party bad faith had not yet accrued. An essential element of a third-party bad faith claim is the entry of a judgment against the insured in an amount exceeding the policy limits. Fid. & Cas. Co. of New York v. Cope, 462 So. 2d 459, 461 (Fla. 1985); see also Campbell v. Standard Guar. Ins. Co., 630 So. 2d 179, 181 (Fla. 1994) (holding, "Under ordinary

circumstances, a third party must obtain a judgment against the insured in excess of the policy limits before prosecuting a bad-faith claim against the insured's liability carrier."). In this case, when GEICO tendered the policy limits to Ms. Quigley's counsel in response to the civil remedy notice, there had not yet been any excess judgment entered against the Quigley estate and so the common-law remedy for bad faith had not fully accrued. Undersigned counsel has not found any legal authority holding that a claimant's attempt to invoke one remedy can result in the full satisfaction of her damages recoverable under another remedy that had not yet ripened and for which the amount of damages recoverable could not yet be determined.

C. The Trial Court's Ruling Erroneously Extends the Cure Provision of Section 624.155(3)(d) to Common-Law Actions.

Not only does the trial court's ruling conflict with the above-cited authorities regarding what constitutes a full satisfaction of a party's damages, but it also has the practical effect of extending the "cure" provision of section 624.155(3)(d) to common-law bad faith actions. Under the trial court's reasoning, if a civil remedy notice has been filed under section 624.155(3)(a), then the insurer's tender of its policy limits within 60 days will automatically eliminate any future common-law action for bad faith as well as any statutory action. Although the trial court phrased its ruling in terms of the legal doctrines of election of remedies and

satisfaction of claims, the direct, practical consequence of the trial court's ruling, if approved by this Court, would be to make the cure provision of 624.155(3)(d) effective against common law claims for third-party bad faith, as a matter of law, regardless of the amount of any excess judgment or any other circumstances of the case. In effect, the trial court construed the statutory cure provision to act as an automatic bar to a common-law action for bad faith. That construction has no basis in section 624.155 or Florida case law, and is contrary to well established principles of statutory construction.

In Florida, statutes in derogation of the common law must be strictly construed. See Carlile v. Game and Fresh Water Fish Comm'n, 354 So.2d 362, 364 (Fla. 1977). A court shall presume that a statute was not intended to make any alteration to the common law except as is clearly and plainly specified in the statute. See Time Ins. Co. v. Burger, 712 So.2d 389, 393 (Fla. 1998); Carlile, 354 So. 2d at 364. Any statute designed to change the common law must speak in clear and unequivocal terms. See Time Ins. Co., 712 So. 2d at 393, *citing* Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co., 498 So. 2d 984 (Fla. 1st DCA 1986); Carlile, 354 So. 2d at 364. Therefore, section 624.155 may not impair the common law remedy for bad faith except as is clearly and explicitly stated in the statute.

The notice-and-cure provisions of section 624.155(3) state, in relevant part,

> (3)(a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. . . .
>
> . . . .
>
> (d) No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

Under the plain language of paragraph (3)(a), the giving of notice is only a precondition for "an action under this section," i.e., a statutory action. Thus, the presuit notice requirement of the statute does not apply to common law actions. Compare Isasi v. American Colonial Ins. Co., 863 So. 2d 1240 (Fla. 4th DCA 2003) (holding that plaintiff was not required to file a civil remedy notice under section 624.155 as a precondition to bringing suit to recover interest on unearned premiums, where the suit was brought under the common law rather than under section 624.155). Under the principle of strict construction of statutes in derogation of the common law, the entire pre-suit, notice-and-cure procedure prescribed by subjection (3) of section 624.155 should be construed as applying only to actions brought under that statute. Accordingly, wherein the cure provision of paragraph (3)(d) states, "No action shall lie if . . . the damages are paid or the circumstances giving rise to the violation are corrected," "no action" should be construed as referring back to paragraph (3)(a)'s reference to "an action under this section." See Forsythe v. Longboat Key Beach Erosion Control District, 604 So.

2d 452, 455 (Fla. 1992) (holding that courts must construe related statutory provisions in harmony with one another).

No Florida appellate court has ever held that an insurer's tender of its policy limits in response to a statutory civil remedy notice has the effect of satisfying, eliminating, or barring a common-law cause of action for third-party bad faith. Each time a Florida appellate court has held that a cause of action for bad faith was barred by the cure provisions of section 624.155 because the insurer had paid its policy limits prior to or within 60 days after the service of a civil remedy notice, it held only that a statutory cause of action was barred, not a common-law action. E.g., Talat Enter., Inc. v. Aetna Cas. and Sur. Co., 753 So.2d 1278 (Fla. 2000); Galante v. USAA Cas. Ins. Co., 895 So. 2d 1189, 1191 (Fla. 4th DCA 2005); Lane v. Westfield Ins. Co., 862 So. 2d 774, 779 (Fla. 5th DCA 2004); Rodante v. Fidelity Nat'l Ins. Co., 725 So.2d 1151, 1152 (Fla. 2d DCA 1998); Clauss v. Fortune Ins. Co., 523 So. 2d 1177, 1179 (Fla. 5th DCA 1988).

Granted, Clauss did hold that an injured party had no cause of action for third-party bad faith against a liability insurer, Fortune Insurance Company, under either the common-law remedy or the statutory remedy. However, the reason why Fifth District held that there was no common-law remedy available had nothing to do with the statutory notice-and-cure provisions of section 624.155. The opinion in Clauss addressed the common-law remedy and statutory remedy separately, and

disposed of each one on different grounds. First, the Fifth District held that there was no common-law remedy available because the factual allegations against Fortune were insufficient to show that it had committed bad faith. Next, it examined section 624.155 and held that Fortune satisfied the cure provision by tendering the policy limits within sixty days after Clauss had sent notice of his intent to file suit for bad faith. It wrote, "The timely tender of the policy limits corrected any possible allegations of bad faith; hence, Fortune was not liable for the excess judgment *under section 624.155*." 523 So.2d at 1179 (emphasis added).

Thus, Clauss held that there was no liability under the common law because the facts did not establish bad faith, and that there was no statutory liability for bad faith because Fortune had satisfied the statutory notice and cure provision. Clauss did *not* hold, however, that the common-law remedy was barred as a result of Fortune's satisfaction of the statutory notice-and-cure provision.

Furthermore, any such holding would be contrary to subsection (8) of section 624.155, Florida Statutes (2004), which states in relevant part,

> (8) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies.

Under this language, the only circumstance in which a plaintiff's invocation or pursuit of the statutory remedy for bad faith can result in eliminating the common-

law remedy is when the plaintiff has obtained a judgment under the statutory remedy.

According to the principle of statutory construction, *expressio unius est exclusio alterius* (or *inclusio unius est exclusion alterius*), the mention of one thing implies the exclusion of another. Maggio v. Florida Dep't of Labor and Employment Sec., 899 So. 2d 1074, 1080 (Fla. 2005); Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997); Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). More specifically, "when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay, 700 So. 2d at 1221. Because section 624.155(8) specifically identifies the entry of judgment under the statutory remedy for bad faith as the one circumstance that bars the pursuit of the common-law remedy, it is implied that the pursuit of the statutory remedy does not eliminate or bar the common law remedy at any point prior to entry of judgment.

This construction is also required by the principle that statutes in derogation of the common law must be strictly construed. Time Ins. Co., 712 So. 2d at 393; Carlile, 354 So. 2d at 364. Section 624.155 may not impair the common law remedy for bad faith except as is clearly and explicitly stated in the statute. Subsection (8) is clear and explicit that the common-law remedy remains available

unless and until a judgment is entered under the statutory remedy.

In this case, neither Ms. Quigley nor Ms. Macola has ever obtained a judgment against GEICO under the statutory remedy for bad faith. Therefore, under 624.155(8), as construed according to principles of *expressio unius* and of strict construction of statutes in derogation of the common law, Ms. Quigley's and Ms. Macola's common-law actions for bad faith are not barred.

Page 12 of the District Court's order granting summary judgment states,

> To accept Plaintiffs' construction of the statute would render these notice and cure provisions meaningless within the context of a third party bad faith claim because an insurance company, having complied with these safe harbor provisions, would nonetheless continue to be exposed to a storm of bad faith litigation. This Court cannot conceive that the Florida legislature ever intended such an absurd result.

(Appendix A, p. 12; Dkt. 180, p. 12). This reasoning fails to consider that it has never been necessary to file a civil remedy notice under the statute as a precondition to bringing a common-law action for third-party bad faith. In the third-party context, plaintiffs have always had the option to simply file suit under the common law without ever serving a civil remedy notice. Therefore, the safe-harbor provisions of section 624.155(3) could not have been intended to reduce or limit the amount of litigation of third-party bad faith cases, because they are entirely ineffective for that purpose. Instead, the safe harbor provisions of the statute only limit *first*-party bad faith litigation. They do so because an action for first-party bad faith may only be brought pursuant to the statute. See Time Ins.

Co., 712 So. at 391; State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 58 – 59 (Fla. 1995).

A plausible reason why the Legislature would have drafted a notice-and-cure procedure for section 624.155 that is only effective at limiting the amount of first-party bad faith litigation is because the first-party action was newly created by the statute. See Time Ins. Co., 712 So. 2d at 391; LaForet, 658 So. 2d at 58 – 59. The Legislature may have been concerned about the potential increase in litigation that could result from creating a new cause of action, so it included the notice-and-cure provisions in the statute to prevent the unnecessary filing of first-party bad faith suits in those cases that could be resolved pre-suit by the insurer's compliance with section 624.155(3)(d).

As to third-party actions, on the other hand, it has been recognized that the intent behind the statute was not to limit any existing common-law remedy. Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 266 (Fla. 5th DCA 1987). This was confirmed in 1990 when the Legislature added former subsection (7) to section 624.155, since renumbered as 624.155(8), which is explicit that the statute does not preempt any remedy available at common law. Ch. 90-119, §30, Laws of Fla. Thus, the trial court was incorrect in reasoning that the legislative purpose behind the notice-and-cure provisions of section 624.155 was to prevent

the filing of common-law actions for third-party bad faith as well as statutory actions.

The trial court's order of January 22, 2004 (Appendix B; Dkt. 184) quotes the following language from Lane v. Westfield Ins. Co., 862 So.2d 774, 779 (Fla. 5th DCA 2003) as further support for its grant of summary judgment:

> [t]he purpose of the civil remedy notice is to give the insurer one last chance to settle a claim with its insured and avoid unnecessary bad faith litigation – not to give the insured a right of action to proceed against the insurer even after the insured's claim has been paid or resolved.

Lane is inapposite because it involved only a statutory, first-party bad faith claim. In Lane, the insured had made claims under a business policy for damage caused to his office by a lightning strike and for additional damage caused by a windstorm. These are first-party claims. Additionally, the quoted language can only apply in the first-party context, because it refers to the insurer settling a claim with its insured, as opposed to settling the claim of an injured third party.

D. Conclusion as to Second Certified Question.

GEICO's tender of its policy limits in response to Ms. Quigley's civil remedy notice did not constitute a full satisfaction of the excess judgment entered in the underlying litigation. Nor did it constitute a full satisfaction of the damages available for Ms. Quigley's and Ms. Macola's common-law claims for third-party

bad faith. Furthermore, the cure provision of section 624.155(3)(d) should not be construed in a manner that extends its scope so as to act as a bar to common-law prosecutions for third-party bad faith. For these reasons, the Court should answer the second question certified by the United States Court of Appeals in the negative.

CONCLUSION

For the reasons argued herein, this Court should answer both questions certified by the United States Court of Appeals in the negative. However, a negative answer as to either question will render the other question moot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail on B. Richard Young and Stephen D. Gill, 226 Palafox Place, Suite 700, Pensacola, Florida 32501; Raymond A. Haas, 1901 N. 13th Street, Tampa, FL 33605; Paul T. Cardillo, 209 W. Verne Street, Tampa, FL 33606; Lefferts L. Mabie, III, P.O. Box 499, Tampa, FL 33601; Roy D. Wasson, Gables Tower, Suite 450, 1320 S. Dixie Highway, Miami, FL 33146-2911; Philip M. Burlington, 2001 Palm Beach Lakes Blvd., Suite 205, West Palm Beach, FL 33409-6516; and Janis Brustares Keyser, 400 Australian Ave. South, 5th Floor, West Palm Beach, FL 33401, on this ___ day of July, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used herein is fourteen-point Times New Roman.

Respectfully Submitted,

_____

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