Supreme Court of Florida

CASE NO. SC05-1021

MICHELLE MACOLA and INGE QUIGLEY,

Movants/Appellants,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CORRECTED INITIAL BRIEF OF MOVANT/APPELLANT INGE QUIGLEY

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STATEMENT OF THE CASE AND OF THE FACTS

A. Introduction:

This is a proceeding for discretionary consideration of questions of Florida law certified as controlling by the United States Court of Appeals for the Eleventh Circuit in the consolidated appeals of *Macola & Quigley v. Government Employees Insurance Co.,* No. 04-10436, 2005 U.S. App. LEXIS 10355 (11th Cir. June 6, 2005). A copy of the Eleventh Circuit's decision containing those certified questions is filed herewith as Exhibit A to Quigley's Appendix.

The Appellant/Movant[1] Quigley was insured by a policy of automobile liability insurance issued by the Appellee, Government Employees Insurance Company ("GEICO"). App. A. at 2. The other Appellant/Movant Macola was the Plaintiff in a state court lawsuit seeking damages against Quigley. *Id*. This action arises out of consolidated third-party[2] bad faith actions brought by Quigley and

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[1] Quigley and Macola were Appellants in the Eleventh Circuit. Fla. R. App. P. 9.150(d) provides in part as follows: "The brief of the party designated by the federal court as the moving party shall be served within 20 days of filing of the certificate." The Eleventh Circuit overlooked the need to identify the "moving party, so the parties by mutual agreement have agreed that Quigley and Macola are to be considered the moving parties.

[2] "[T]here are "fundamental differences" between first- and third-party actions." *McLeod v. Continental Ins. Co.,* 591 So. 2d 621, 624 (Fla. 1992). "A

Macola against GEICO, arising out of GEICO's failure to timely tender payment of a settlement demand within its policy limits ($300,000 personal injury and $100,000 property damage), leading to an excess judgment in Macola's favor against Quigley following a jury trial for more than $1.5 million. App. A at 6.

In the bad faith case at the trial court level the U.S. District Court for the Middle District of Florida entered summary judgment in GEICO's favor. R.180. The basis of that summary judgment was the trial court's conclusion that GEICO timely "cured" its bad faith by tendering the $300,000 bodily injury liability limits within sixty days of Quigley's service of a Civil Remedies Notice ("CRN") pursuant to § 624.155, Fla. Stat. See R.180[3] at 12-13.

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first-party action is one in which the insured is also the injured party who is to receive the benefits under the policy. In contrast, a third-party action is one in which a third-party injured, not the insured, is entitled to the benefits under the policy as the result of the insured's tortious conduct." *Id.* at 623, n.3. "In a third-party action, damages . . . would include the amount of a judgment in excess of policy limits because the insured is exposed to additional liability for the excess amount." *Id.* at 624.

[3] Citations to the federal court's record refer to the document number on the docket, followed by the page number within the cited document. The citation R.180 at12-13 refers to pages 12-13 of the district court's order granting GEICO's motion for summary judgment as to both Plaintiffs, filed on January 6, 2004.

B. Eleventh Circuit's Statement of the Case and Facts:

The following factual and procedural recitation is taken verbatim[4] from the Eleventh Circuit's opinion containing the certified questions now before this Court in this case, a copy of which is included in the Appendix to this brief:

"On May 18, 1999, Quigley negligently caused a car wreck in which Macola was injured. At the time of the accident, Quigley was insured under a policy issued by GEICO with a bodily injury liability limit of $ 300,000 and a property damage liability limit of $ 100,000. The day after the accident, Quigley's wife notified GEICO of the accident and of the fact that Quigley and Macola had suffered serious injuries. GEICO assigned Dale Junco to manage the claim."

"On May 24, 1999, GEICO received a fax notifying it that Macola had retained an attorney, Michael Roe, and requesting Quigley's insurance information. Junco mailed the requested information to Roe on June 7, 1999."

"On September 2, 1999, Junco talked to Roe, who told her that Macola had already undergone multiple surgeries, would require more, and was still out of work. Roe promised to send Junco whatever medical information he had in the

hopes of entering a settlement negotiation. He also told Junco that he believed this was a 'policy limits' case."

"On October 19, 1999, Roe sent GEICO a settlement offer seeking payment of the full personal injury policy limit as well as numerous items of property damages totaling $ 1,377.81. The letter included a traffic crash report and numerous medical records, and it stated that the settlement offer would expire in 21 days. In order to comply with its terms, the letter stated GEICO would have to tender the requested sums at Roe's office and provide a copy of Quigley's insurance policy and an affidavit stating that no other insurance coverage was available."

"On November 8, 1999, within the 21 day period laid out in the settlement offer, GEICO tendered the $ 300,000 bodily injury policy [limits] at Roe's office. In addition to the $ 300,000, GEICO sent a note requesting further clarification of the property damage claims as well as a release that was explicitly inapplicable to any claims for property damage. Roe did not respond for 120 days despite

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[4]Although quotations of this length traditionally are single-spaced and indented, such conventions are ignored here to reduce the readers' eye strain. Footnotes within the quoted material are by the Eleventh Circuit.

GEICO's repeated attempts to contact him during that time. He also never deposited the $300,000 draft that GEICO tendered."

"On February 15, 2000, Macola returned GEICO's $300,000 check (along with a letter rejecting GEICO's 'counteroffer' of November 8) and filed suit against Quigley in Florida state court. In that suit, Macola asserted a claim for personal injuries, but no claim for property damages.[5] Prior to filing an answer in that case, Quigley offered to pay all of Macola's claimed property damages and tendered payment in the amount of $ 1,377.81. Macola rejected that tender and proceeded with the underlying litigation."[6]

"In July 2000, five months after Macola filed the underlying action against Quigley and two years before the entry of judgment, Quigley, through her personal counsel ("Cardillo"), served GEICO with a statutory CRN. Therein, she alleged

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[5] "Because Macola failed to assert a claim for property damages in the underlying action, the district court deemed this claim waived; we agree."

[6] "After Quigley filed her answer but prior to the entry of judgment against her, GEICO filed a declaratory judgment action asking the Florida trial court to declare that Macola's claims had been settled. On January 5, 2002, the trial court granted Macola's motion for summary judgment in GEICO's declaratory judgment action, and the Second District Court of Appeal affirmed. See *GEICO General Ins. Co. v. Macola*, 816 So. 2d 618 (2002).

that GEICO violated §624.155(1)(b)(1), Florida Statutes (2004), by failing to settle with Macola for the policy limits when it had the opportunity to do so. Under that statute, 'no action shall lie' if the violator cures its bad faith by paying 'the damages' or correcting 'the circumstances giving rise to the violation' within 60 days of receiving the CRN. See Fla. Stat. § 624.155(3)(d); *Talat Enterprises., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1281-84 (Fla. 2000)."

"On August 25, 2000, within 60 days of the CRN, GEICO sent Cardillo a check for $300,000, the limit of Quigley's personal injury policy. Cardillo acknowledged receipt of the check but never deposited it. GEICO did not tender a check for the property damages that Macola claimed in the original settlement negotiations (but abandoned in the underlying action)."

"On July 9, 2002, the trial court entered a final judgment against Quigley in the amount of $1,541,941.61. On August 23, 2002, Macola filed a common law bad faith suit against GEICO. Macola's suit alleged that GEICO breached its duty of good faith to Quigley by failing to settle with Macola when the opportunity arose, by failing to timely inform Quigley of Macola's settlement offer, and by failing to timely advise Quigley of the likelihood of an excess judgment and how to avoid it. GEICO removed Macola's suit to federal court and filed an answer denying liability."

"On June 27, 2003, Quigley filed a separate common law bad faith action against GEICO in federal district court. Because this suit was based on the same underlying facts as Macola's, the district court consolidated the two cases. As its fifth affirmative defense to Macola and Quigley's claims, GEICO argued that it had cured any bad faith by tendering the personal injury policy limits to Quigley within the 60 day post-CRN cure period provided for in §624.155."

"On December 15, 2003, both Macola and Quigley filed motions for partial summary judgment alleging that GEICO's cure theory was legally insufficient. That same day, GEICO filed a consolidated motion for summary judgment against Macola and Quigley, citing its cure theory as legally controlling. The district court denied Macola and Quigley's motions for partial summary judgment and granted GEICO's motion for summary judgment based on the cure theory."

C. Post-Judgment Proceedings:

Following entry of summary judgment in favor of GEICO, Quigley and Macola filed appeals to the United States Court of Appeals for the Eleventh Circuit. The parties filed briefs and participated in oral argument on December 17, 2004. Following oral argument, and before rendition of the Eleventh Circuit's order certifying the present questions to this court, the Eleventh Circuit issued an order remanding the case to the district court to determine whether there was

sufficient evidence of bad faith to make meaningful answers to the contemplated certified questions. *See* App. B. The parties briefed the bad faith issue before the district court, much as they would on a motion for summary judgment on that ground.[7] The district court entered an order determining that there was sufficient evidence of bad faith to create genuine issue as to that aspect of Quigley's and Macola's claim. App. C. That order was transmitted to the Eleventh Circuit.

Thereafter, the Eleventh Circuit issued the decision containing the certified questions involved in this case. App. A.

CERTIFIED QUESTIONS

I. 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?

II. IF SO, DOES SUCH A CURE OF THE STATUTORY BAD FAITH CLAIM CONSTITUTE A FULL SATISFACTION

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[7] GEICO's motion for summary judgment which led to the district court's original final judgment on the "cure" issue also raised the ground that there was, as a matter of law, no bad faith in its handling of the Macola claim. R.143 at 3; R.144 at 2-5.The district court had directed the parties only to brief the statutory "cure" issue, which led to the judgment in GEICO's favor and (at least temporarily) mooting the question of whether bad faith could be proven. R.161.

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?

SUMMARY OF THE ARGUMENT

This Court should answer the first certified question in the negative because the cure provision applicable to statutory bad faith claims under section 624.155(3)(c) is inapplicable to an unripe action for common law third-party bad faith which exposes the insured under a liability policy to a judgment in excess of the policy limits. Instead, that cure provision applies only to first-party, statutory bad faith claims for the amount of damages which can readily be ascertained at the time of serving the Civil Remedy Notice and must be paid to constitute a cure.

The cure provision under the statute did not supplant the elements of a common law bad faith claim—nor the conditions for bringing such a claim—because the statute expressly reflects that the remedies provided thereunder are in addition to those provided by the common law. Quigley's submission of the CRN could not constitute any sort of election of remedies, because, under Florida law, alternative and inconsistent remedies may be prosecuted through trial and to

verdict. Only upon the entry of judgment must a party elect one of two mutually-unavailable remedies.

The cure provision applicable to a statutory bad faith claim cannot apply to an inchoate third-party bad faith claim prior to trial of the claimant's damages case against the insured, because such a third-party bad faith claim does not ripen into justiciability until there has been an excess judgment entered against the insured. At the time of the service of the CRN in this case, the excess judgment against Quigley was still many months hence. There were no damages which could be measured and paid pursuant to the cure provision to discharge GEICO's obligation. Payment of the policy limits would not constitute payment of "the damages" described in the cure provision. The chance to settle with Macola for the policy limits already had expired and could not be renewed by Quigley sending GEICO the CRN.

In the alternative, even if GEICO could have taken some action to exonerate itself from liability for bad faith upon receipt of the CRN, such action could not have been payment of the as-yet-undetermined damages flowing from that bad faith. Instead, any such cure would have had to "correct" the "circumstances giving rise to the violation" by negotiating an agreement with Macola to protect the insured from being liable for an excess judgment. No such correction was

effectuated in this case, so the cure provision—even if theoretically applicable—was not satisfied.

This Court should never reach certified question number two because it should answer question number one in the negative. However, even if the Court answers the first certified question affirmatively, it should answer "no" to question number two. If, in a third-party bad faith case there is some remedy under section 624.155 which is not otherwise available under the common law, and even if that remedy is foreclosed by tender of the policy limits as was done here, such a tender will not preclude recovery of the excess judgment under the third-party bad faith case under the common law.

ARGUMENT

I.

THIS COURT SHOULD ANSWER THE FIRST QUESTION IN THE NEGATIVE BECAUSE PAYMENT OF THE POLICY LIMITS UNDER §624.155 DOES NOT CONSTITUTE A CURE TO AN UNRIPE THIRD-PARTY BAD FAITH CLAIM

A. Introduction:

This Court should answer the first certified question in the negative and provide the Eleventh Circuit with authority to reverse the summary judgment in favor of GEICO because an affirmative answer would lead to an utterly absurd result; one so nonsensical that the Florida Legislature never could have intended it. This Court should soundly disapprove of the federal district court's erroneous conclusion that—after a liability insurer has (in bad faith[8]) spurned an opportunity to settle a serious case within its limits—the law would provide yet another opportunity for that insurer to unilaterally absolve itself from responsibility for its bad faith, to the detriment of its helpless insured.

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[8] In this case the question of whether GEICO acted in bad faith by failing to settle Macola's claims within its policy limits is not just a hypothetical possibility. The district court already has found that there is sufficient evidence of GEICO's bad faith to constitute a jury issue.

Section 624.155 was not intended to provide an escape mechanism whereby a liability insurer, who has ***in bad faith*** exposed its insured to an excess judgment, can immunize itself from the consequences of that "third party" bad faith by belatedly paying to its insured (not to the injured claimant), the personal injury policy limits.

The cure provision under section 624.155 applies only to the statutory ("first party") bad faith cause of action, which did not exist prior to enactment of that statute. That cure provision can have no applicability to a common law claim for bad faith based upon the insurer's exposure of its insured to an excess judgment. Where the CRN is served before the excess judgment has been rendered against the insured, the amount of damages which would constitute a "cure" of bad faith cannot be determined. Mere payment of the policy limits is not a "cure."

B. Other Courts' Decisions on the Statutory Cure:

There are three categories of cases dealing with the cure provision under section 624.155, representatives of all three categories are cited in the district court's decision which led to this appeal. One of those categories of cases is the first-party bad faith claim, such as a suit by an insured against his or her insurance company for property and casualty insurance benefits, uninsured/underinsured

motorists insurance benefits, and other forms of coverage other than liability insurance. Second is the category of cases like the district court's decision, which involve third-party bad faith actions in which the courts have allowed a liability insurer use the "cure" provision to side-step its responsibility to protect its insured against an excess judgment after failing to settle within the liability limits. Third is the category which Quigley urges this Court to join and approve: holding that a liability insurer cannot use the cure provision to avoid third-party bad faith liability for an excess judgment.

The cases in the second category largely rely upon broad language from cases in the first category to support the application of the "cure" provision to third-party bad faith claims. Quigley submits that it is useful to make note of what category a given case falls within, in order to better gauge the applicability of the reasoning of the decision in that case to the facts present here.

Occupying the third category is the case which Quigley submits is the most persuasive and well-reasoned decision on the question whether a liability insurer's payment of policy limits following receipt of a CRN can cure its common law (third-party) bad faith failure to settle: the Third District Court of Appeal's decision in *Hollar v. International Bankers Ins. Co.*, 572 So. 2d 937 (Fla. 3d DCA 1990). That was a case like the present one in which the insured was exposed to

personal liability in a serious tort case in which damages were in excess of their policy limits. The insurers attempted to cure their bad faith within sixty days after service of the civil remedy notice by tendering their policy limits. The trial court granted summary judgment for the insurers on the plaintiff's bad faith case and the Third District reversed that summary judgment, holding in pertinent part as follows:

> Section 624.155 changes neither the case law obligation of good faith nor the measure of the damages due an 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 . . . . Thus, it provides a cumulative and supplemental remedy.
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> * * *
>
> Following the analysis as stated above, we conclude that when the legislature employed the term "damages" in section 624.155(2)(d), it necessarily contemplated the same elements of damages that are viable and extant under the decisional law of the supreme court. Consequently, under the statutory formulation established by section 624.155, a tender of policy limits will not ordinarily satisfy the insured's full claim of damage for a bad-faith claim.

572 So. 2d at 939-40.

The district court judge in this case, like some other judges in Category 2 cases attempting to wrestle with this challenging and still-developing area of law,

was understandably confused by overbroad language from Category 1 cases involving very distinguishable claims for first-party bad faith, which cause of action was not recognized under Florida common law. One such Category 1 case cited by Judge Lazarra in his order granting GEICO's motion is *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278 (Fla. 2000). That was a first-party claim for insurance benefits by the insured under a policy covering fire damage to the insured property. In *Talat*, this Court answered a certified question from the Eleventh Circuit which pertained only to first-party (statutory) bad faith claims, and not to third-party (common law) bad faith claims. The certified question was as follows:

> If an insured suffered extra-contractual damages prior to giving its insurer written notice of a bad faith violation and the insurer paid all contractual damages, but none of the extra-contractual damages, within sixty days after the written notice was filed, has the insurer paid "the damages" or corrected "the circumstances giving rise to the violation," as those terms are contemplated by Florida Statute §624.155(2)(d), thereby precluding the insured's first-party bad faith action to recover the extra contractual damages[?]

Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co., 217 F.3d 1318, 1319 (11th Cir. 2000).

While this Court in *Talat* answered the certified question in the affirmative, it was careful to note in its decision that the nature of the claim asserted by the insured there was a ***first-party*** bad faith claim which did not exist prior to enactment of section 624.155. This Court noted that part of the basis for its opinion that the insured could not recover consequential damages if the insurer paid its contractual damages within the cure period was because "[f]or [first party claims] there is no remedy without the statute." 753 So. 2d at 1283. There is and was a common law remedy for third-party bad faith when a liability insurer's failure to settle within the policy limits exposes its insurer to an excess verdict and judgment. Therefore, the policy reasons underlying a cure period for first-party bad faith claims are not implicated in a common law bad faith case.

The district court in the order under review also relied upon an earlier Category 2 decision from the Fifth District Court of Appeal: *Clauss v. Fortune Ins. Co.*, 523 So. 2d 1177 (Fla. 5th DCA 1988). The *Clauss* decision should not have been viewed as authority for the district court's holding that a liability insurer may insulate itself from liability for an excess verdict by payment of the policy limits within the sixty-day CRN period. To begin with, the mention of the effect of the CRN was dicta. Unlike the present case (where the trial court already has found sufficient evidence of bad faith to create a jury issue), the summary judgment in

favor of the liability insurer Fortune was affirmed because there was, as a matter of law, no bad faith. *Id.* at 1178 ("there were insufficient allegations of unreasonable and bad faith conduct on the part of Fortune"). The effect of the "cure" provision under section 624.155 was addressed as a secondary matter following that holding that there was no bad faith, and the Fifth District provided nothing in the way of legal analysis on the "cure" issue.[9] As noted by the Third District in the *Hollar* decision, "in *Clauss*, unlike the instant case, no award in excess of policy limits was sought by the insured." 572 So. 2d at 939.

A case cited by the district court which did involve a third party bad faith is Judge Ryskamp's unpublished decision in *Francois v. Illinois Nat'l Ins. Co.*, No. 01-8070-cv-Ryskamp (S.D. Fla. Mar. 28, 2002)[10], which held that the insurer's tender of the full policy limits within the sixty-day cure period satisfied the

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[9] The statutory "cure" issue is dealt with in such a cursory fashion in *Clauss* that it seems possible the parties did not litigate the inapplicability of such a "cure" to third-party bad faith cases. The *Clauss* court's remark that "[t]he trial court properly determined that the tender of the policy limits satisfied the requirement in section 624.155(2)"could indicate that the only "cure" issue litigated was the sufficiency of the tender, not the applicability of the "cure" provision itself.

[10] A copy of the district court's *Francois* decision was filed in the record below. R.171; R.173. The district court's decision in *Francois* was affirmed without opinion by the Eleventh Circuit's decision in case number 02-12499

plaintiff's full claim of damages and cured the insurer's bad faith. The district court's decision in *Francois* was flawed because it erroneously assumed that—by serving a civil remedy notice under section 624.155—the plaintiff could not pursue a common law bad faith claim. On page six of the district court's slip opinion in *Francois*, the court incorrectly notes: "If bad faith is pursued under Section 624.155, it may not also be pursued under the common law." App. E. at 6.

The Eleventh Circuit's affirmance of the *Francois* summary judgment cannot be construed as even persuasive authority for the proposition that the cure provision applies to actions of common law excess judgment bad faith. Aside from the general lack of precedential value of an unpublished decision (especially one rendered without any opinion), there is another even stronger reason why the affirmance of *Francois* is of no precedential value in deciding the certified questions at bar.

In addition to the district court's (erroneous) resolution of the shared legal issue with this case—the applicability of the cure provision to a common law bad faith action—the summary judgment in *Francois* was largely based upon the evidence that the insurer's conduct was ***not in bad faith***! The first ground set forth

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rendered on September 19, 2002. Those two decisions are included in the Appendix hereto.

in the district court's decision in *Francois* was INIC's argument that it was "entitled to summary judgment because (1) the undisputed facts exhibit that INIC did not act in bad faith." *See* App. E. at 3. Judge Ryskamp in rendering a summary judgment for INIC in *Francois* expressly found that there was no bad faith because "INIC sent their reservation of rights letter . . . , INIC resolved the coverage issue promptly . . . , the coverage issue in play in this case was substantive . . . , INIC was diligent in handling of the claim . . . , [and] INIC made reasonable efforts to settle the claim." *See* App. E. at 9-10.

The Eleventh Circuit's affirmance of that decision cannot be read to agree that the cure provision of 624.155 applies to third-party bad faith claims.[11] That affirmance could well have been based wholly on its agreement that there was no bad faith, without ever reaching the issue concerning the applicability of the cure provision. The *Francois* decision should not have been considered as authority by the district court in this case, and certainly should not be even slightly persuasive to this Court.

The district court in this case also relied upon the Florida Fifth District Court of Appeal in *Lane v. Westfield Ins. Co.*, 862 So. 2d 775 (Fla. 5th DCA 2003). *See*

R.184. Unlike the present case, however, the *Lane* case was not a common law bad faith claim involving the risk of exposure of the insured to an excess judgment, but a first-party claim involving the insured's windstorm loss which had not been timely processed by the insurer.

Unlike a first-party claim involving property damage to the insured's property, medical expenses due under a health policy, or other forms of liquidated damages, in the third-party bad faith situation, there are no damages to the insured until an excess judgment has been rendered. Therefore, if there is to be any cure of insurers common law bad faith, the cure must be for the insurer to correct the "circumstances giving rise to the violation."

C. Serving the CRN Does Not Constitute An Election of Remedies:

The limitation upon obtaining a ***judgment*** only under one remedy under Florida law is not a limitation on the claims which may be asserted, filed, and even tried to a verdict. A party may prosecute alternative—and even mutually inconsistent—remedies to a verdict. "An election between inconsistent remedies need only be made before the entry of judgment." *Innovative Material Systems, Inc., v. Santa Rosa Utilities, Inc.*, 721 So. 2d 1233, 1233 (Fla. 1st DCA 1988).

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[11] The Eleventh Circuit did not regard its own decision as authority for the

Thus, the submission of the civil remedy notice which referenced the statutory claim did not constitute any sort of election of remedies. "There is nothing in the statute which indicates an intent to limit an existing common-law remedy." *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 266 (Fla. 5th DCA 1987).

Evidence that the legislature did not intend to alter or supersede the common law remedy for third party bad faith is contained in subsection (7) of section 624.155 (1999).[12] That subsection 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 the statutory remedy*** but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action.

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questions certified in this case.

[12] Subsection (7) was renumbered as subsection (8) by amendment of June 12, 2003. *See* Ch. 2003-148, section 2, Laws of Florida.

Ch. 90-119, section 30, Laws of Florida. (Emphasis added.) This Court should reject the suggestion that Quigley conceded the applicability of the notice-and-cure provision of the statute by serving the Civil Remedy Notice in the first place.

D. There Was No "Cure" of the Inchoate Bad Faith Claim:

Even assuming for the sake of argument that the cure provision under section 624.155 could be applicable to some third-party bad faith claims brought under the common law, GEICO's post-CRN tender of the personal injury policy limits here did not constitute a cure under the statute. The certified question must be answered in the negative because its tender of the bodily injury policy limits of $300,000 after Quigley had served the Civil Remedy Notice was legally insufficient as a defense to GEICO's bad faith. Section 624.155(3)(d) 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***." (Emphasis added).

In order to "correct" the "circumstances giving rise to the violation" where an insurer exposes its insured to an excess verdict, such as the $1.5 million verdict ultimately rendered against Quigley in favor of Ms. Macola, the insurer would have to negotiate a settlement with the injured plaintiff within the sixty-day period. Thus, GEICO's tender could not have extinguished the claim for third party bad faith, even if section 624.155 is facially applicable to third party bad faith claims.

At the time of its tender of $300,000 in September 2000, there were no "damages" for third party bad faith, as there had not yet been any excess judgment rendered against Quigley in favor of Macola. As noted by the district court in the decision in this case, this Court's decision in *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997) "had the effect of codifying *Thompson* and *Cope*."[13] The *Zebrowski* decision squarely held that §624.155 did not serve to create a new accelerated form of third party bad faith claim which could be brought prior to an excess verdict being rendered against the insured. Instead, that third party bad faith cause of action accrues after such an excess verdict has been rendered.

This is not a case like *Cunningham v. Standard Guaranty Ins. Co.*, 630 So. 2d 179 (Fla. 1994), where the parties had stipulated that they would try the issue of bad faith prior to entry of an excess verdict against the insured. Absent such a stipulation "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." 630 So. 2d at 181.

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[13] See *Thompson v. Commercial Union Ins. Co.*, 250 So. 2d 259 (Fla. 1971); *Fidelity & Cas. Co. v. Cope*, 462 So. 459 (Fla. 1985).

At the time of the post-CRN tender by GEICO, there had been no excess verdict rendered against Quigley in favor of Macola. Therefore, there were no "damages" recoverable for the third-party bad faith element of the excess verdict damages, so that tender could not have been in satisfaction of an amount not yet due under the policy.

The next reason that GEICO's tender of the $300,000 bodily injury policy limits following receipt of the Civil Remedy Notice could not have constituted a cure of Quigley's claim for third party bad faith is that the tender of the $300,000 amount did not correct—and could not have corrected—the "circumstances of the violation." Those "circumstances" were GEICO's act of exposing Quigley to an excess judgment. Once GEICO failed to exercise good faith in settling Ms. Macola's claim, thereby exposing Quigley to a judgment in excess of the $300,000 policy limits, payment of those policy limits no longer could cure the effects of GEICO's bad faith within the meaning of §624.155, Fla. Stat. The $300,000 would have been "the damages" had GEICO in good faith accepted Ms. Macola's initial offer to settle for those limits (disregarding for the moment the issue of the property damage claim), but once that opportunity was lost by GEICO, it could not regain it by tendering those limits months later. That would be the classic example of "too little, too late."

Even assuming that such a cure would be possible in a third party bad faith situation, that tender was insufficient to cure GEICO's bad faith. This Court should follow the Third District's decision in *Hollar*, rather than the reasoning of the

Southern District in *Francois.* The first certified question should be answered in the negative.

II.

IF THIS COURT SHOULD REACH CERTIFIED QUESTION NUMBER TWO, IT SHOULD BE ANSWERED IN THE NEGATIVE AS WELL

This Court should never reach certified question number two, because that question was posed conditionally, requiring an affirmative question to the first certified question before the second question becomes relevant. This Court should not reach question number two because its answer to the first question should be "no." However, in the event that this Court should reach the second question, it too should be answered in the negative.

The Appellant Quigley confesses some logical difficulty with the proposition that an affirmative answer to certified question number one might not be totally dispositive of question number two. If this Court should affirmatively respond to the first question and hold that a timely tender of the policy limits constitutes a "cure" of "***any*** bad faith under § 624.155," then it would seem illogical that there could be doubt that "such a cure of the statutory bad faith claim constitute[d] 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," as phrased in the second certified question.

Quigley assumes for the sake of this discussion that the certified questions imply that some relief exists under section 624.155 for Quigley's third-party bad faith claim which would not otherwise exist under the common law.[14] Such a reading of the certified questions renders it conceivable that the tender of the policy limits could "cure" the insurer's statutory bad faith—and any particular remedies available only pursuant to that statute—without necessarily barring the common law bad faith claim to recover the excess judgment over and above the policy limits. Perhaps such a reading of the certified questions provides this Court with a middle ground upon which to provide some relief to a liability insurer who takes advantage of the "cure" provision, but without allowing such an insufficient "cure" to visciate the essence of a third-party bad faith claim: recovering the excess judgment from the liability insurer whose bad faith failure to settle with the tortfeasor led to that judgment in excess of the policy limits.

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[14] Attorney's fees are recoverable under the statute, whereas attorney's fees are not ordinarily recoverable by a successful third-party claimant suing the insured's liability carrier as an assignee of the insured's common law bad faith claim.

This Court should answer the second question in the negative and hold that—whether or not a liability carrier is afforded any relief in a third-party bad faith case by the "cure" provision—such relief does not include barring recovery of the difference between the policy limits and the excess judgments.

CONCLUSION

WHEREFORE, GEICO's payment of the policy limits being insufficient to constitute a cure to the unripe third-party bad faith claim that thereafter ripened into an excess judgment of more than $1.5 million, this Court should answer the certified questions in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing were served by U.S. Mail upon counsel for Appellee, B. Richard Young and Stephen D. Gill, Young Bill Rombous & Fugett, P.A., 226 Palafox Place, Suite 700, Pensacola, Florida 32501; Ray Haas and Rebecca Townsend, Haas Dutton Blackburn Lewis & Longley, P.A., 1901 North 13th Street, Tampa, Florida 33606, and Counsel for Appellant Macola, Dale Swope, Angela Rodante, and Shea Moxon, Swope Rodante, P.A., 1234 East Fifth Avenue, Tampa, Florida 33605; Counsel for Appellant Quigley, Lefferts Mabie III, P.O. Box 499, Tampa, Florida 33601; on this 26th day of July, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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