IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1968

L.T. No. 06-10925

PAMELA PERERA,

Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellee.

ON DISCRETIONARY REVIEW FROM AN OPINION OF
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FLORIDA INSURANCE COUNCIL IN SUPPORT OF APPELLEE

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, the Florida Insurance Council, is the largest non-profit insurance trade association in Florida. The Council represents more than 200 companies, associate members and subscriber members. Member companies of the Florida Insurance Council write more than $20.6 billion in annual premium volume in Florida covering all lines of insurance.

The issue before the Court concerns the continuing viability of the case law holding that an insured must suffer excess liability before the insured or its assignee may bring a bad faith claim against its insurer. The continued viability of this law is of great importance to the Florida Insurance Council and its members, who will be significantly affected should this Court deviate from this long-established jurisprudence.

ARGUMENT

I. PLAINTIFFS' ATTEMPT TO CREATE ADDITIONAL PRIMARY COVERAGE IS A LEGAL FICTION THAT IS NOT AND SHOULD NOT BE RECOGNIZED UNDER FLORIDA LAW.

As will be shown, the claimant (Perera) has attempted to create a new category of bad faith that has never been recognized in Florida. Because Perera attempts for the first time to create bad faith where there was never any potential exposure to the insured – a hallmark of bad faith – this Court should reject Perera's attempt to fundamentally expand bad faith law.

Florida law recognizes four ways in which potential bad faith excess liability is created as a result of third-party claims against an insured: (1) excess judgments, (2) "*Coblentz*" agreements, (3) "*Cunningham*" agreements, and (4) where an excess carrier settles a claim in excess of the primary policy on behalf of the insured because of a primary carrier's bad faith refusal to settle.[1]

In the first setting, an insurer is liable in bad faith to its insured or to the plaintiff for its failure to timely settle a claim against an insured where there was an opportunity to do so, and this failure results in a judgment against the insured in excess of the policy limits. *See Thompson v. Commercial Union Ins. Co. of N.Y.*, 250 So. 2d 259 (Fla. 1971); § 624.155(1)(b), Fla. Stat. With a *Coblenz* agreement,

[1] Although the Florida Statutes provide an additional ground for bad faith arising out of unfair claims practices, this type of liability is not relevant to this case. *See* § 627.155(1)(a), Fla. Stat.

an insured who is denied coverage and/or a defense under its policy protects itself by consenting to an adverse judgment in excess of its policy limits that is collectable against its insurer. *See Shook v. Allstate*, 498 So. 2d 498 (Fla. 4th DCA 1986); *Capital Assurance Co., Inc. v. Margolis*, 726 So. 2d 376, 377 n.1 (Fla. 3d DCA 1999).

A *Cunningham* agreement is where the carrier contracts with the claimant to try the bad faith issues first, and in doing so protects its insured from any potential exposure to an excess judgment. *See Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179 (Fla. 1994). And in the fourth setting, an excess carrier facing a potential excess judgment may settle the claim in excess of the primary policy on behalf of the insured and assert a bad faith action against the primary carrier for its refusal to settle for less than the settlement ultimately reached. *See RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095 (Fla. 4th DCA 1997).

Here, the claimant (Perera) has attempted to create a fifth category of bad faith that differs from the four recognized methods in a fundamental and critical respect. Unlike the four common law and statutory methods of imposing bad faith liability, here there is and always was a complete lack of any potential exposure to the insured for the claims. The insured was never forced to protect itself from personal liability for Perera's claims in excess of its self-insured retentions. In attempting to establish bad faith, the claimant ignores the fact that the insured was

always protected in this instance by a sizable ($25,000,000) excess policy, on which the excess carrier was contractually obligated to pay.

The claimant incorrectly attempts to equate this situation to those where an excess insurer stands in the shoes of an insured and is thus entitled to assert a bad faith claim against a primary carrier for improperly failing to settle a claim for its own policy limits and thus resulting in exposure to the excess carrier. (I.B. pp. 19-20). *See*, *e.g.*, *United States Fire Ins. Co. v. Morrison Assurance Co.*, 600 So. 2d 1147 (Fla. 1st DCA 1992); *Ranger Ins. Co. v. Travelers Indem. Co.*, 389 So. 2d 272 (Fla. 1st DCA 1980); *RLI Ins. Co.*, 691 So. 2d 1095. Such an action only exists where the excess carrier can establish that it either paid or offered to contribute a specific sum for which settlement could have been made, or was ready, willing and able to contribute, and that this plus the primary policy would have produced a settlement at a figure less than what the excess carrier was ultimately required to pay. *Ranger*, 389 So. 2d at 277; *Phoenix Ins. Co. v. Florida Farm Bureau Mut. Ins. Co.*, 558 So. 2d 1048, 1050 (Fla. 2d DCA 1990).

The fiction created by the claimant in this instance simply does not apply to this case. Chubb, the excess carrier, always had the right to settle the claims on behalf of the insured and then attempt to recover any or all portions of those sums from USF&G. The insured does not "stand in the shoes" of the excess carrier, with the excess carrier's rights falling back to the insured. To the contrary, an insured

purchases excess coverage ***to substitute the excess carrier for itself*** and let the excess insurer assume the risk that a claim will arise with damages in excess of the primary insurance. *See Ranger*, 389 So. 2d at 275 ("If the insured purchases excess coverage, he in effect substitutes an excess insurer for himself.") (*quoting Cont'l Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862, 864 (Minn. 1976). In fact, the Eleventh Circuit expressly noted that "Perera has not argued that she is entitled to assert any rights of Chubb, by virtue of subrogation or otherwise…" *Perera v. United States Fid. & Guar. Co.*, 544 F.3d 1271, 1277 n.2 (11th Cir. 2008).[2]

It is clear that the claimant's effort to create a new brand of bad faith is nothing more than an attempt to circumvent her risk that continued litigation would not result in her desired judgment. In other words, Perera attempts to obtain a windfall. There is simply no public policy that would be furthered by sanctioning this procedure.

In short, Perera's attempt to purportedly "recover" an amount on behalf of an excess insurer that was never paid by that insurer is not based on any recognized Florida jurisprudence or dictated by public policy. The insured will never be exposed to personal liability for Perera's claims. Perera has created a pure legal

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[2]Although USF&G repeatedly contends in its brief that Chubb has not been released by the insured, this has no legal bearing as to these issues given the claimant's complete release of Chubb and agreement to accept the proceeds of the lawsuit against USF&G, if any, as a complete satisfaction of her judgment.

fiction in an attempt to recover funds in excess of the value of her claim. This Court should decline to fundamentally alter the law of bad faith by holding for the first time that an insured's action for bad faith can follow where the insured was never exposed to personal liability (in excess of the self-insured retentions).[3]

II. FLORIDA LAW DOES NOT OTHERWISE RECOGNIZE THIRD-PARTY BAD FAITH CAUSES OF ACTION IN THE ABSENCE OF EXCESS EXPOSURE OR LIABILITY.

As stated above and as set forth by USF&G in its brief, Florida law does not recognize a cause of action for bad faith in the absence of the insured's exposure to

[3] The Florida Insurance Counsel has been unable to find case law from other jurisdictions extending bad faith law to situations like this where there is no potential exposure to the insured or additional liability to an excess carrier. In fact, courts throughout the nation are in accord with Florida law in holding that a claimant cannot bring a bad faith action when the insured is not exposed to excess liability. *See*, *e.g.*, *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 901-02 (Wyo. 1997) ("[W]e decline to extend a cause of action for bad faith for failure of the insurer to initially settle a claim which is followed by a judgment or settlement within policy limits."); *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. 1994) (explaining that, where insurer commits bad faith failure to settle, "[t]he insured's damages in such a care are limited to the amount of any judgment in excess of policy limits."); *Amoco Oil Co. v. Reliance Ins. Co.*, 1998 WL 187336 (W.D. Mo. 1998) (Missouri law) (holding that a judgment or settlement in excess of policy limits was a prerequisite to maintaining a bad faith refusal to settle claim by the insured); *A.W. Huss Co. v. Cont'l Cas. Co.*, 560 F. Supp. 513 (E.D. Wis. 1983) (Wisconsin law) ("The insurer must be allowed room to maneuver. If its maneuverings cross the line into bad faith, the insured will have a claim if it is harmed by an excess judgment. However, if the insurer manages to obtain a settlement which prevents an excess judgment, no legally cognizable damage has occurred."). *See also Catholic Relief Ins. Co. of Am. v. Liquor Liability Joint Underwriting Ass'n of Mass.*, 1997 WL 781448 (Mass. Super. Ct. 1997) (holding that excess insurer could not bring claim against primary insurer for bad faith

or liability for damages in excess of its insurance coverage. This law should not be extended.

It has long been established that a bad faith cause of action is properly brought where an insurer's failure to settle a claim against its insured for policy limits results in liability in excess of policy limits, which could have been avoided had the insurer entered into a settlement. *See Allstate Ins. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). As this Court explained in *Ruiz*:

> Third-party bad faith actions arose in response to the argument that there was a practice in the insurance industry of rejecting without sufficient investigation or consideration claims presented by third parties against an insured, ***thereby exposing the insured individual to judgments exceeding the coverage limits of the policy while the insurer remained protected by a policy limit***. . . . With no actionable remedy, insureds in this state and elsewhere were left personally responsible for the excess judgment amount. This concern gave life to the concept that insurance companies had an obligation of good faith and fair dealing.

Id. at 1125 (emphasis supplied [hereinafter "e.s."]).

Accordingly, it is well established that "when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured." *Boston Old Colony v. Gutierrez*, 386 So. 2d 783, 785

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where primary insurer committed bad faith in settlement practice but the insured settled the claim within primary policy limits).

(Fla. 1980). It is the insurer's duty to act in a manner that protects, where possible, the insured from exposure to an excess liability. *See Ruiz*, 899 So. 2d at 1125; *see also Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 672 (Fla. 2005) ("certainly the purpose of an insurer's obligation to act in good faith is to protect an insured from an excess verdict").

It is the failure of the insurer to adequately protect its insured, with resulting damages to that insured in the form of the insured's liability for damages above the policy limits, that gives rise to a bad faith cause of action. *See Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 456 (Fla. 2007) (noting that earlier decisional law permitting a third party to assert a bad faith action directly against an insurer was not meant to extend the insurer's duty of good faith to the third party: "The basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits.").

Thus, the essence of a bad faith cause of action is that the insurer's conduct exposed the insured to a liability in excess of policy limits. *See*, *e.g.*, *Gulf Indus., Inc. v. Nair*, 953 So. 2d 590, 595 n. 3 (Fla. 4th DCA 2007) ("***The question of bad faith arises when a verdict is rendered in excess of the insured's policy limits***. If the insurer of the tortfeasor had an opportunity to settle within the policy limits under circumstances in which it, exercising reasonable care and good faith to its

insured, should have settled, the insured tortfeasor has a cause of action for bad faith."), *citing Campbell v. Gov't Employees Ins. Co.*, 306 So. 2d 525, 528-31 (Fla. 1975) (e.s.).

Indeed, this Court has repeatedly stated that the prerequisite to a bad faith cause of action is injury to the insured in the form of personal exposure to damages in excess of the insurance coverage provided. *See Cunningham*, *supra*; *Fid. & Cas. Co. of N.Y. v. Cope*, 462 So. 2d 459 (Fla. 1985) (third party could not maintain action for bad faith refusal to settle where excess judgment had been satisfied and cause of action had not been assigned prior to satisfaction); *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997) (holding that third party cannot maintain statutory bad faith action against an insured in the absence of an excess liability); *Shuster v. S. Broward Hosp. Dist. Physician's Prof'l Liab. Ins. Trust*, 591 So. 2d 174 (Fla. 1992) (insured who is not exposed to an excess liability may not assert a bad faith claim to recover other damages suffered as a result of insurer's settlement with a third party); *Rosen v. Fla. Ins. Guar. Assoc.*, 802 So. 2d 291 (Fla. 2001) ("[T]he essence of a bad faith cause of action is to remedy a situation in which an insured is exposed to an excess judgment because of the insurer's failure to properly or promptly defend the claim.").

In *Cope*, this Court likewise held:

> The essence of a 'bad faith' insurance suit (whether it is brought by the insured or by the injured party standing in his place), is that the

> insurer breached its duty to its insured by failing to properly or promptly defend the claim (which may encompass its failure to make a good faith offer of settlement within the policy limits) - ***all of which results in the insured being exposed to an excess judgment***.

Cope, 462 So. 2d at 460, *quoting Kelly v. Williams*, 411 So. 2d 902, 904 (Fla. 5th DCA 1982) (e.s.). Thus, where "the insured could not be exposed to any loss or damage from the alleged bad faith of the insurer, no cause of action for bad faith remained for anyone." *Cope*, 462 So. 2d at 460.

In *Cope*, the plaintiff had filed a wrongful death action against the insured and after a jury trial obtained an excess judgment. The plaintiff then entered into a settlement with another one of the defendant's insurers, executed a full release of the insured, and brought a bad faith action against the remaining insurer. This Court explained that, because the plaintiff had executed a full release and satisfaction of judgment for the insured, the insured was not exposed to personal liability for any excess judgment. The plaintiff could not, therefore, maintain a bad faith cause of action against the insurer:

> An essential ingredient to any cause of action is damages. In this case [the insured] originally suffered a judgment in excess of his policy. Before this action was filed, however, the judgment was satisfied. Upon its being satisfied [the insured] no longer had a cause of action; if he did not, then [plaintiff] did not. [Plaintiff's] action was not separate and distinct from, but was derivative of [the insured's].

Id. at 461. As this Court made clear, no bad faith cause of action exists where there is no exposure to damages in excess of policy limits.

In *Cunningham*, 630 So. 2d 179, the plaintiffs brought a personal injury action against the insured and added a claim against the insurer alleging a breach of good faith in refusing to settle. *Id*. The insurer and plaintiffs then stipulated to try the bad faith portion of the claim before the underlying negligence action. *Id*. The appellate court vacated the ensuing judgment for the plaintiff on the ground that the court did not have jurisdiction over the bad faith claim in the absence of an allegation that the plaintiff had obtained an excess judgment against the insureds. *Id*. In finding that jurisdiction existed and reversing, this Court observed that an excess judgment (or something analogous to one) is an element of a bad faith claim:

> ***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***. *See Blanchard v. State Farm Mut. Auto. Ins.*, 575 So. 2d 1289 (Fla. 1991) (announcing analogous rule to that of a first-party bad-faith claim). However, even if a complaint were filed asserting a bad-faith claim against a liability insurance company without alleging the existence of a judgment against the insured in excess of the policy limits, the most that could be said would be that the complaint failed to state a cause of action. While the complaint in the instant case did not allege an excess judgment, the stipulation between the parties dispensed with the necessity of that requirement. The stipulation was the functional equivalent of an excess judgment for purposes of satisfying the principle of *Cope*.

Id. at 181-82 (e.s.). Thus, although this Court recognized that the parties could stipulate to the existence of excess damages, it noted that in the absence of a stipulation, excess liability is required to maintain a bad faith suit.

As these cases recognize, an insured or a party standing in its shoes cannot demonstrate harm caused by the supposedly improper conduct of an insurer in the absence of excess liability. *See United Servs. Auto. Assoc. v. Jennings*, 731 So. 2d 1258, 1260 (Fla. 1999) ("In *Cunningham*, we simply approved a procedure in which the parties could avoid the time and expense of going through a trial to obtain a final judgment. In following that procedure, the parties agree and the courts recognize that ***a stipulated final judgment*** has the same force and effect as a final judgment reached through the usual judicial labor of a trial when the parties agree that it shall.") (e.s.).

Similarly, in *Zebrowski*, 706 So. 2d 275, this Court affirmed the principle that an excess liability is a prerequisite to maintaining a bad faith action. The plaintiffs in *Zebrowski* had filed a personal injury action against the insured, and also asserted a count against their liability insurer for its refusal to settle the plaintiffs' claims. The trial court stayed the bad faith claim pending the outcome of the trial on the personal injury claim. *Id.* at 275. After obtaining a judgment against the insured ***within the limits of the policy***, the plaintiffs resumed their bad faith action against the insured. *Id*. The trial court granted summary judgment in favor of the insurer on the grounds that the plaintiffs could not maintain a bad faith cause of action where they had failed to obtain a judgment in excess of policy limits, and the Fourth District Court of Appeal reversed. *Id*.

On review, this Court quashed the appellate court's order and reinstated the summary judgment in favor of the insurer. *Id*. at 277. As this Court explained, plaintiffs had no cause of action in bad faith because "the cause of action is predicated on the failure of the insurer to act 'fairly and honestly to its insured and with due regard for his interests.' The duty runs only to the insured. ***Therefore, in the absence of an excess judgment, a third party cannot demonstrate that the insurer breached a duty toward its insured*.**" *Id*. (e.s.).

Finally, this same principle was articulated by this Court in *Shuster*, 591 So. 2d at 176. In *Shuster*, a physician's insurer settled three medical negligence suits against the physician, all within policy limits. The physician sued his carrier on the basis that these settlements were reached without due regard for his interests, and that the settlements caused him personal damages arising out of his alleged inability to obtain malpractice insurance and damage to reputation.

In approving the trial court's dismissal of the physician's complaint with prejudice, this Court once again explained that no bad faith cause of action could be maintained against an insurer where no excess verdict had been obtained and there was no personal liability in excess of policy limits. This Court explained, "in cases in which the insurance contract or policy provides that the insurer may 'make such investigation and such settlement of any claim or suit as it deems expedient' ***a cause of action for breach of a good faith duty owing to the insured will not lie***

for failure to defend or investigate a claim when the insurer has settled the claim for an amount within the limits of the insurance policy." *Id.* at 178 (e.s.).

Thus, consistent with the other decisions of this Court discussed above, this Court in *Shuster* refused to allow the plaintiff in a bad faith cause of action to maintain his suit where he had not incurred personal liability beyond the limits of his insurance policy. *See also McLeod v. Cont'l Ins. Co.*, 591 So. 2d 621, 625 (Fla. 1992) ("Third party actions do not allow for the recovery of the excess judgment in cases in which the insured is not damaged by the excess liability."), *superseded by statute on other grounds*; *Kelly*, 411 So. 2d at 904 ("The essence of a "bad faith" insurance suit . . . is that the insurer breached a duty to its insured by failing to properly or promptly defend the claim . . . which results in the insured being exposed to an excess judgment."); *Bland v. Cage*, 931 So. 2d 931 (Fla. 4th DCA 2006) (recognizing that no bad faith action may be maintained absent an exposure to damages in excess of policy limits).

Perera seeks to avoid the great weight of authority which demonstrates that Florida law requires that the insured be exposed to liability in excess of policy limits in order to maintain a bad faith cause of action, suggesting an alternate form of excess liability might suffice. In making this argument, Perera totally ignores the requirement that the insured suffer damages as a result of the insurer's actions.

Finally, Perera mistakenly relies upon the cases discussed above involving an excess carrier's right to pursue a bad faith action against a primary carrier that fails to exercise good faith. *See Ranger Ins. Co.*, 389 So. 2d 272; *Morrison*, 600 So. 2d 1147; *RLI Ins. Co.*, 691 So. 2d 1095. In citing these cases in support of the proposition that a primary insurer can be held liable for bad faith to its insured or its subrogee despite the fact that the insured never incurred personal liability, Perera fails to recognize that these cases speak to the same principle of law articulated by *Cope*, *Cunningham*, *Macola*, *Rosen*, and *Shuster*: in order to maintain a claim for bad faith, it must be shown that either the insured or its excess carrier, standing in the insured's shoes, suffered liability which it would not have incurred had the insurer acted in good faith.

Because this Court and the Florida appellate courts have long recognized that a third-party bad faith claim must be predicated upon either the insured's exposure to liability in excess of policy limits or its subrogee's exposure to undue liability, no bad faith claims can arise based on the facts presented by the Eleventh Circuit.

CONCLUSION

WHEREFORE, based upon the above cited facts and authorities, Amicus Curiae Florida Insurance Council respectfully requests that this Court answer questions certified by the Eleventh Circuit in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this **23rd** day of **March, 2009**, to: Charles P. Schropp, Esq., Charles M. Schropp, Esq., Schropp Law Firm, P.A., *Counsel for Appellant Perera*, 2309 S. Macdill Avenue, Suite 101, Tampa, FL 33629-5918, Tel: (813) 418-3320, Fax: (813) 418-3321; Jack R. Reiter, Esq., Jordan S. Kosches, Esq., Adorno & Yoss, LLP, *Counsel for Appellee U.S. Fidelity*, 2525 Ponce de Leon Blvd., Suite 400, Coral Gables, FL 33134-6044, Tel: (305) 460-1000, Fax: (305) 460-1422; and George N. Meros, Jr., Esq., Gray Robinson, P.A., *Counsel for*

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CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements. It is typed in Times New Roman 14 point, proportionately spaced type.

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