IN THE SUPREME COURT OF FLORIDA

PAMELA PERERA, Appellant, v. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.	CASE NUMBER: SC08-1968

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

REPLY BRIEF OF
APPELLANT, PAMELA PERERA

Charles P. Schropp
Florida Bar Number: 206881
Charles M. Schropp
Florida Bar Number: 583227
Schropp Law firm, P.A.
2309 South MacDill Ave., Suite 101
Tampa, Florida 33629
Telephone: (813) 418-3320
Facsimile: (813) 418-3321
E-Mail: chuck@schropplaw.com
charles@schropplaw.com

Dennis G. Diecidue
Florida Bar Number: 114676
The Diecidue Law Firm, P.A.
3630 W. Kennedy Blvd., Suite 200
Tampa, Florida 33609-2802
Telephone: (813) 872-6280
Facsimile: (813) 872-6064
E-Mail: diecidue@verizon.net

Counsel for Appellant, Pamela Perera

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REPLY TO STATEMENT OF THE CASE AND FACTS

USF&G's[1] answer brief accuses Perera of seeking "to change the entire scope of Florida law in a way that will improperly open the proverbial floodgates to an unprecedented wave of bad faith litigation" (AB 1). While the issues in this appeal are of importance, USF&G's attempt to characterize Perera's arguments as throwing open the door to unwarranted bad faith claims is simply wrong.

USF&G's rhetoric appears designed to divert attention from the fact that the underlying issue precipitating the certified questions is straightforward. This issue is whether Estes, when confronted with USF&G's bad faith refusal to meaningfully participate in the settlement of a case whose value significantly exceeded USF&G's policy limits, thereby creating a $1 million "hole" in Estes' coverage, was entitled to utilize the asset represented by its excess coverage to mitigate the consequences of USF&G's bad faith. Estes utilized its excess coverage asset by entering into a settlement brokered by Chubb, Estes' excess carrier, by which Chubb waived the $1 million attachment point of its policy in exchange for an effective reduction in Chubb's coverage for the Perera claim from Chubb's $25 million policy limits to the $3.75 million it paid toward the

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[1] References to Perera's initial brief in this appeal will be designated by the prefix "IB," and to USF&G's answer brief by the prefix "AB." Perera will employ the same designations for the parties and the record as in its initial brief (*see* IB 1). All emphasis in this brief has been added unless otherwise stated.

settlement. To find that Estes did not have this right would in effect be holding that Estes owed USF&G the duty to maintain its excess coverage at full limits for USF&G's benefit in order to ameliorate the consequences of USF&G's bad faith. Neither the USF&G policy, nor any statutory or common law rule, imposes such a duty upon an insured. If Estes did have this right, as Perera contends, Estes was exposed to an excess judgment that satisfied the requirements of Florida law. Furthermore, Estes' obligation to advance USF&G's underlying limits out of its own pocket in order to trigger its excess coverage when USF&G did not pay these limits constitutes "exposure" and "harm" to the insured that supports a bad faith claim against USF&G.

USF&G repeatedly contends that Perera's arguments ignore "factual findings" purportedly made by the Eleventh Circuit, arguing for example:

> The Court should also reject the Assignee's blatant attempts to revisit established facts. The Eleventh Circuit held, **as a factual matter**, that the insured never faced either an excess judgment or any increased risk of uninsured liability due to USF&G's conduct, and that Chubb, at all relevant times, indicated its intent to resolve the case without preconditions or risk to the Insured and in fact did so. *Perera*, 544 F.3d at 1277. *Id.* at 1274-77. (AB 17.)

USF&G ignores the undisputed fact that the order holding that Estes, and hence Perera as Estes' assignee, had no bad faith claim against USF&G because there was no excess judgment was rendered on **summary judgment** (DE 112, pp. 1-2). It is axiomatic that an appellate court reviewing a summary judgment does

not make "factual findings" but is limited to reviewing the legal issues of whether a genuine issue of material fact exists and whether the prevailing party is entitled to judgment as a matter of law. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) ("Appellate courts are reviewing, not fact-finding, courts."). By mischaracterizing the Eleventh Circuit's discussion of the case in its opinion as "factual findings," USF&G is asserting that the Eleventh Circuit panel was ignorant of an elementary legal principle taught in first-year civil procedure. Perera suggests that USF&G takes this position because USF&G has no effective response to Perera's legal arguments, and must therefore try to straightjacket this Court's scope of review by arguing it should not consider Perera's arguments on their merits.[2]

USF&G's characterizations of the Eleventh Circuit's opinion are also overstated and inaccurate. USF&G's first purported "factual finding" is that Estes "never faced ... an excess judgment." The Eleventh Circuit actually said:

> In this case, as the magistrate judge held, there is no excess judgment against the insured, Estes. **Viewed as of the time the settlement agreement was negotiated**, Estes had $25 million in insurance coverage -- $1 million from the Cigna policy; $1 million from the USF&G policy; and $25 million from the Chubb policy, in excess of the other two policies. To constitute an excess judgment, there would have to have been a judgment in excess of $25 million.

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[2] The Eleventh Circuit opinion also explicitly states that its certified questions were not meant to limit this Court's scope of inquiry. *Perera v. USF&G*, 544 F.3d 1271, 1279 (11th Cir. 2008) ("*Perera*"). Even USF&G acknowledges that this Court has the inherent authority to examine the certified questions and restate them as the Court may deem appropriate (AB 1).

> The judgment agreed upon in settlement -- $10 million -- is obviously far less than the extant coverage. Estes therefore faces no liability above its existing policy limits. (*Perera*, at 1275-76.)

The only facts stated in this paragraph, namely that **viewed as of the time the settlement was negotiated** Estes had $25 million in coverage, are mostly correct.[3] Perera's position is that the settlement documents that were executed **following** these negotiations effectively reduced Chubb's available coverage for the Perera claim from $25 million to $3.75 million. While the Eleventh Circuit panel did not accept Perera's legal position, its opinion represented a legal conclusion, not a factual finding. Moreover, it is a legal conclusion as to which the Eleventh Circuit has requested this Court's assistance by certifying the issue of whether Estes faced the excess exposure necessary to support a bad faith claim. In order to answer whether an excess judgment was required, this Court obviously must first determine what constitutes an excess judgment in the context of this case.

Furthermore, there would have been no evidentiary basis for the Eleventh Circuit to have made the finding USF&G tries to attribute to it. The interpretation of settlement documents is governed by the intention of the settling parties. *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980, 986 (Fla. 2008) ("*Toomey*"); *Rosen v. Fla. Ins. Guar. Assn*, 802 So. 2d 291, 295 (Fla. 2001)

[3] The Eleventh Circuit's statement that Estes had $1 million in coverage from Cigna is incorrect, since it is undisputed that the Cigna policy covered only Estes' employees and not Estes itself (*see* AB 3).

("*Rosen*"). Both Chubb's and Estes' representatives testified that the settlement was intended to limit Chubb's liability for the Perera claim to $3.75 million. Catherine Blackman Nelson, who negotiated the settlement on Chubb's behalf, testified to Chubb's understanding that it would pay no more than $3.75 million:

> Q. Was it your understanding at the time the settlement agreement was reached that Chubb would pay no more than $3.75 million?
> A. That was our attempt.
> Q. And you, of course, relied on your attorneys to make sure that the documents memorialized that agreement, correct?
> A. Correct. (DE 48, p. 178.)

David Etheridge, Estes' attorney, also testified that under the settlement "there would be no claim to assert against Chubb" since Estes had not paid the $5 million remaining due on Perera's judgment (DE 51, pp. 158-59). Thus, USF&G is not only arguing that the Eleventh Circuit made factual findings in reviewing a summary judgment, but also findings that would have been patently erroneous.

USF&G's second "factual finding," that Estes never faced "any increased risk of uninsured liability due to USF&G's conduct" (AB 17), was explicitly nothing more than a *sequela* of the Eleventh Circuit's legal conclusion that the settlement documents did not reduce Chubb's coverage for the Perera claim:

> As a factual matter, we agree with USF&G that Estes was never exposed to liability in excess of the limits of its several policies, **because any exposure above USF&G's limits was covered by the Chubb coverage with limits of $25 million**. (*Perera*, at 1277.)

USF&G's third purported "factual finding," that "Chubb, at all relevant times, indicated its intent to resolve the case without preconditions or risk to the Insured and in fact did so" (AB 17), significantly mischaracterizes what the Eleventh Circuit actually said on this subject, which was:

> Also, the record evidence is clear that, at the relevant times, Chubb was committed to settling the case and was not delaying settlement negotiations with the plaintiff's attorney and was not refusing to make the necessary coverage available to settle the case, awaiting the payment of USF&G's $1 million. On the contrary, Chubb was contributing substantial funding for the offers being made to plaintiff's attorney as well as the necessary funding for the final settlement. (*Perera*, at 1277.)

The settlement itself reflects that Chubb was not refusing to settle unless USF&G first paid its policy limits, as it was reached without USF&G's participation. However, USF&G's mischaracterization of this language as a purported "finding" that Chubb had indicated its intent to resolve the case without preconditions or risk to Estes, and in fact did so, is plainly wrong. The record actually demonstrates that Chubb was not willing to waive the $1 million attachment point of its policy unless Estes agreed to a settlement acceptable to Chubb, including the provisions that effectively limited Chubb's coverage for the Perera claim to $3.75 million. Perera's initial brief quoted testimony from Ms. Blackman Nelson that Chubb had considered the option of waiving the attachment point of its excess policy, paying the full settlement amount and pursuing USF&G

directly, and had explicitly decided against this course of action (AB 44-45). Thus, in order to access Chubb's excess coverage for itself, Estes either had to pay USF&G's $1 million limits itself or agree to the settlement terms negotiated by Chubb. Understandably, Estes chose the latter option.

USF&G's accusation that Perera is attempting to relitigate adverse factual findings is particularly ironic since that this is precisely what USF&G does repeatedly throughout its brief. The only binding factual finding in this case is the jury's finding that USF&G acted in bad faith, which has been affirmed by the Eleventh Circuit. Nonetheless, USF&G devotes over a dozen pages of its brief to an incredibly one-sided and "cherry-picked" recounting of the trial evidence.[4] The argument sections of USF&G's brief also contain repeated misstatements of the facts and the record. When facts are not affirmatively misstated, they are routinely presented in the light most favorable to USF&G, exactly the opposite of how the facts must be viewed on an appeal from a summary judgment.

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[4] As just one example, USF&G refers to an alleged meeting between USF&G representatives and Estes' insurance broker on the morning of the mediation, at which the parties supposedly discussed the possibility of some limited settlement contribution by USF&G (AB 5). USF&G fails to mention that Estes' broker, John Witt, denied any such conversation took place (DE 309:152-53, 01/16/08 AM). Since disputed facts are construed most favorably to the verdict, for appellate purposes this conversation never occurred. Yet USF&G presents its version of events as established fact, and fails even to mention the contrary evidence.

REPLY TO CERTIFIED QUESTION NO. 1

Perera has argued that the "excess judgment" required to support a bad faith claim under Florida law is a judgment that exceeds the policy limits of the insurer accused of bad faith, not the combined limits of all insurance. Perera's initial brief cited cases where excess carriers successfully pursued bad faith claims against primary carriers based on judgments that exceeded primary limits but not the combined limits of all coverage. *Ranger Ins. Co. v. Travelers Indemnity Co.*, 398 So. 2d 272 (Fla. 1st DCA 1980) ("*Ranger*"); *United States Fire Ins. Co. v. Morrison Assur. Co.*, 600 So. 2d 1147 (Fla. 1st DCA 1992) ("*Morrison*"); *RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095 (Fla. 4th DCA 1997) ("*RLI*") (AB 19-21). Because USF&G cannot dispute these decisions, it attempts to change the question, arguing that what the Eleventh Circuit meant to ask was whether the insured or its assignee could maintain a bad faith action (AB 19). However, USF&G's attempt to avoid the obvious answer only reinforces Perera's position.

USF&G ignores that the legal theory upon which excess carriers were permitted to pursue bad faith claims against primary carriers in *Ranger*, *Morrison* and *RLI* was equitable subrogation, a doctrine under which the excess carrier "stands in the shoes of the insured" when the excess carrier has paid the liability that is the subject of the bad faith claim. *Morrison*, *supra*, 600 So.2d at 1151. As the *RLI* court summarized it, "when a primary insurer is in bad faith for refusing to

settle, the excess carrier is in essentially the same position as that of an insured." 691 So.2d, at 1096. This means that a cause of action against a primary carrier whose bad faith has resulted in a judgment in excess of its policy limits belongs to the insured; an excess carrier becomes equitably subrogated to the insured's rights only when it has paid the liability that is the subject of the bad faith claim. In this case, the $4 million portion of the judgment that is sought in the bad faith suit against USF&G has not been paid by Chubb, or by anyone else. Accordingly, the cause of action against USF&G for bad faith continued to reside with Estes, the insured, until it was assigned to Perera. USF&G's attempt to evade the case law cited in Perera's opening brief by changing the question must fail.

USF&G's other arguments are equally vacuous. First, USF&G argues that the Eleventh Circuit's supposed "factual finding" that Estes did not suffer an excess judgment was correct because the Stipulation to Settle "expressly recognized that the Insured did not suffer an excess judgment and never will" (AB 21). To the contrary, the Stipulation to Settle expressly provided for the entry of a $10 million judgment against Estes. Although Perera agreed not to execute on the judgment while this bad faith action was in progress, $4 million of this judgment remains outstanding and unsatisfied to this day.

Next, USF&G claims that Perera's position is "devastated" by a footnote in *United States Auto. Assoc. v. Jennings*, 731 So. 2d 1258 (Fla. 1999) ("*Jennings*"),

defining an excess judgment as the "difference between all available insurance coverage and the amount of the verdict recovered by the injured party." This is incorrect. *Jennings* was a discovery decision in a case that involved only a single layer of insurance coverage. It did not purport to address the situation where an insured has purchased both primary and excess coverage, and did not overrule the decisions permitting an excess carrier to sue a primary carrier for bad faith based on a judgment that exceeds the underlying carrier's limits but not excess coverage limits. *Ranger*, *supra*; *Morrison*, *supra*; *RLI*, *supra*. Moreover, since the Chubb policy had an attachment point of $1 million, it was not "available insurance coverage" until USF&G's $1 million underlying limit was paid or Estes agreed to Chubb's terms for waiving the attachment point of Chubb's policy, which terms included the settlement provisions that effectively reduced Chubb's coverage.

USF&G next argues that Estes did not suffer an excess judgment because it still has $21 million in Chubb coverage available to satisfy any liability to Perera it may incur. This point was discussed at length in Perera's initial brief (AB 31-39). Significantly, USF&G does not attempt to answer any of the arguments made by Perera, but rests on the outlandish claim that "nothing in the record supports the argument that Chubb (or any of the parties) intended to reduce Chubb's available policy limits" (AB 23). As previously demonstrated, this statement is patently untrue. To the contrary, the overwhelming evidence is that Estes and Chubb

intended to do just that, reducing Chubb's available coverage for the Perera claim from $25 million to $3.75 million in exchange for a waiver of the $1 million attachment point of the Chubb policy.

USF&G's final argument on this question is the contention that *Fidelity & Cas. Co. of NY v. Cope*, 462 So. 2d 459 (Fla. 1985) ("*Cope*"), and its progeny supposedly defeat Perera's bad faith claim because she Estes not exposed to an excess judgment within the meaning of these decisions. Perera relies on the discussion of this issue in her initial brief, with two observations. First, USF&G grossly mischaracterizes Perera's position, suggesting that Perera argues that *Cope* has been "overruled" or "superseded" (AB 28). Perera actually argues that *Cope* has no application to this case, where the bad faith cause of action has been assigned, and Perera has neither released Estes from liability nor satisfied her judgment against Estes. Second, USF&G states that Perera has not addressed *Macola v. GEICO*, 953 So. 2d 451 (Fla. 2006) ("*Macola*"), while neglecting to mention that this was because USF&G had never before claimed that *Macola* supports its position, which it does not. Initially, one must wonder how USF&G can take comfort in a decision holding that the insurer's tender of full policy limits before an excess judgment was entered did not extinguish a bad faith claim because it did not release the insured from liability. Equally important is *Macola*'s discussion of *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179 (Fla. 1994)

("*Cunningham*"). *Macola* noted that, in *Cunningham*, this Court found that a bad faith claim remained viable even though the parties had entered into a stipulation that, if there were no bad faith, the plaintiff would settle for the policy limits and grant a full release to the insured. This, of course, is directly analogous to the provision in the Stipulation to Settle under which Perera would satisfy the judgment against Estes following the conclusion of the bad faith litigation whether or not a bad faith recovery was made.

REPLY TO CERTIFIED QUESTION NO. 2

Perera has argued that the second certified question should be answered in the affirmative if an answer is needed. Florida law does not require an insured to assume personal liability for a judgment in any amount to maintain a bad faith claim, but authorizes agreements by which the insured consents to a judgment collectible only from the defaulting insurer. *E.g.*, *Coblentz v. American Surety Co. of NY*, 416 F.2d 1059 (5th Cir. 1969) ("*Coblentz*").

However, this certified question need be addressed only if the Eleventh Circuit's legal conclusion that Estes still had $21 million in available insurance coverage under the Chubb policy following the settlement were correct. If the settlement effectively reduced Chubb's coverage for the Perera claim to $3.75 million, then Estes was exposed to liability in excess of its remaining policy limits, and the second certified question is inapplicable to this case.

Perera argued in her initial brief that the failure to honor Chubb's and Estes' intent that Chubb's coverage for the Perera claim would be reduced in exchange for a waiver of Chubb's attachment limits was inconsistent with Florida law, including this Court's decisions in *Toomey* and *Rosen* and district court decisions such as *Auto-Owners v. St. Paul Fire & Marine Ins. Co.*, 547 So. 2d 148 (Fla. 2d DCA 1989) (IB 31-39). USF&G's brief totally fails to respond to these points. Instead, USF&G purports to refute straw arguments that it has created out of whole cloth by mischaracterizing Perera's position. For example, USF&G claims that Perera is arguing "that USF&G is complaining that the Assignee is simply pursuing a bad faith claim that Chubb could have pursued" (AB 40), and uses this claim as a springboard to launch into an extended discussion of an excess carrier's equitable subrogation rights. In fact, Perera made no such argument. Chubb could not have pursued a bad faith claim against USF&G for at least two reasons. First, the settlement agreement negotiated by Chubb specifically allocated the bad faith cause of action to Estes. Second, Chubb did not pay, and was not liable to pay, the $4 million portion of the judgment that is the subject of the bad faith claim.

USF&G's argument that Florida law requires an insured to agree to expose itself to personal liability for the amount of the excess judgment in order to maintain a bad faith claim is meritless. This is nothing short of an effort to distract this court from the fact that *Coblentz*-style agreements, which are recognized by

Florida courts, are typically structured to insulate an insured from individual liability; indeed, that is their very purpose. *Steil v. Florida Physicians' Ins. Reciprocal,* 448 So. 2d 589 (Fla. 2d DCA 1984) (holding that insurer was still liable even though insured had been released through settlement).

In an unpersuasive attempt to distinguish this case from other *Coblentz*-style agreements, USF&G argues that such an agreement cannot exist with respect to a policy that does not include a duty to defend, such as USF&G's policy. This agreement is without merit. An excellent example of a case rebutting USF&G's argument is *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1330 (Fla. 4th DCA 1996) ("*NAVL*"). In *NAVL*, the Fourth District addressed a situation similar to the instant case where the insured had no duty to defend a covered claim. Likening the insured's position to that of a primary carrier because of its defense obligation and the insurer's position to that of excess carriers due to the indemnity-only nature of the policies, the court relied upon a California case, *Diamond Heights Homeowners Ass'n. v. National Am. Ins. Co.*, 227 Cal. App. 3d 563, 277 Cal. Rptr. 906, 914 (Ct. App. 1991), as persuasive authority for the proposition that an insured covered by a policy with no defense obligation may settle a case and bring an action for reimbursement if its insurers unreasonably fail to settle. Moreover, the Fourth District stated that such an action could be brought "regardless of whether there is an excess judgment." 678 So. 2d, at 1333,

indicating that such an action could be brought to recover amounts over policy limits and refuting USF&G's claim that *Coblentz*–style agreements must be constrained by policy limits.

This case follows the *Coblentz* fact pattern of an insured "being left to [its] own resources." USF&G's so-called "reservation of rights" for its indemnity-only policy was in actuality an outright denial of coverage. It is undisputed that, from the outset of Perera's wrongful death case, USF&G took the position that, to the extent the allegations of Perera's wrongful death complaint "were ultimately proven true, there would be no coverage available under the USF&G policy" (DE 296, Pl. Ex 10). On the other hand, if Perera's allegations were ultimately not proven true, Estes would have worker's compensation immunity, and there would have been nothing for USF&G to indemnify. USF&G never changed this coverage position during the pendency of Perera's underlying claim (DE 309; 01/16/08 AM, pp. 111-12). The magistrate judge saw through USF&G's smokescreen on this issue at an early date, concluding that USF&G's supposed reservation of rights was effectively a complete denial of coverage (DE 73, p. 19). Having failed to fulfill its legal duty to Estes, this Court should reject USF&G's attempt to impose a non-existent duty on Estes to protect USF&G from the consequences of its bad faith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 1st day of May, 2009, a true and correct copy of the foregoing Reply Brief of Appellant, Pamela Perera has been furnished via U.S. Mail to:

Jack R. Reiter, Esquire
Adorno & Yoss LLP
2525 Ponce de Leon Blvd., Suite 400
Miami, Florida 33134

Laura A. Foggan, Esquire
Wiley Rein & Fielding, LLC
1776 K Street NW
Washington, D.C. 20006

Mark Hicks, Esquire
Brett C. Powell, Esquire
Hicks, Porter, Ebenfeld & Stein, P.A.
799 Brickell Plaza, 9th Floor
Miami, Florida 33131

George N. Meros, Jr., Esquire
Andy V. Bardos, Esquire
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, Florida 32302

William D. Horgan, Esquire
Quintairos, Prieto, Wood
& Boyer, P.A.
215 South Monroe Street, Suite 510
Tallahassee, Florida 33201

Dennis G. Diecidue
Florida Bar Number: 114676
The Diecidue Law Firm, P.A.
3630 W. Kennedy Blvd., Suite 200
Tampa, Florida 33609-2802
Telephone: (813) 872-6280
Facsimile: (813) 872-6064
E-Mail: diecidue@verizon.net

____
Charles P. Schropp
Florida Bar Number: 206881
Charles M. Schropp
Florida Bar Number: 583227
Schropp Law Firm, P.A.
2309 South MacDill Ave., Suite 101
Tampa, Florida 33629
Telephone: (813) 418-3321
Facsimile: (813) 418-3321
E-Mail: chuck@schropplaw.com
charles@schropplaw.com

Counsel for Appellant, Pamela Perera

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief of Appellant, Pamela Perera is printed in 14-point Times New Roman, Microsoft Word Format, in accordance with Rule 9.210, Fla.R.App.P.

____
Attorney