FLORIDA SUPREME COURT

CASE NO. SC17-85

JAMES M. HARVEY

Plaintiff/Petitioner,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S ANSWER BRIEF TO PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

In this Answer Brief, Respondent, GEICO GENERAL INSURANCE COMPANY, shall be referred to as "GEICO," and Petitioner, JAMES HARVEY, shall be referred to as "Harvey." Tracey Potts, as Personal Representative of the Estate of John Potts, will be referred to as "the Claimant" or "the Estate."

References to the record on appeal will be designated as "[R. *page number*]." References to the transcript of the trial proceedings in the lower court will be designated as "[T. *page number*]." References to the Fourth District's opinion under review, as filed with the Appendix to Initial Brief on Merits, will be designated as "[A. *page number*]." References to Harvey's Initial Brief on the Merits will be designated as "[I.B. *page number*]."

STATEMENT OF THE CASE

The present appeal stems from a third-party bad faith claim filed by Harvey against GEICO, wherein Harvey alleges that GEICO acted in bad faith by failing to settle the claim the Estate brought against Harvey. Specifically, Harvey alleges that GEICO failed to settle the Estate's wrongful death claim against Harvey when it could and should have done so and that GEICO's failure resulted in an excess judgment entered against Harvey. [R. 18-37]. GEICO maintains that it acted in accordance with its good faith claim handling duties as set forth by this Court's decision in *Boston Old Colony v. Gutierrez*, 386 So. 2d 783 (Fla. 1980).

In addition to the bad faith claim, Harvey also brought a legal malpractice action against his personal counsel, Patrick Geraghty, Esq. ("Attorney Geraghty"). On March 23, 2015, the lower court entered an Order dismissing Attorney Geraghty from the instant action after Harvey and Attorney Geraghty entered into a settlement agreement of the legal malpractice claim.

A jury trial of Harvey's bad faith action against GEICO commenced on October 19, 2015. At trial, GEICO moved for directed verdict on the basis that Harvey failed to present sufficient evidence to prove his claim of bad faith, which was denied by the trial court. [T.1304]. On October 23, 2015, the jury returned a verdict in favor of Harvey, finding that GEICO acted in bad faith by failing to settle the Estate's claim against Harvey. [R. 3056]. On November 2, 2015, GEICO

moved for a judgment in accordance with its motion for directed verdict/motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, which was also denied by the trial court. [R. 3089-99]. The trial court entered a final judgment on the jury's verdict on December 10, 2015. [R. 3256-57].

Thereafter, GEICO appealed the judgment to the Fourth District Court of Appeal. On January 4, 2017, the Fourth District rendered an opinion finding that the trial court erred in denying the insurer's motion for directed verdict and reversed. [A. 1]. Specifically, the Fourth District found that the evidence taken in a light most favorable to Harvey, showed that GEICO satisfied its obligations as announced in *Boston Old Colony* as a matter of law. [A. 1-6]. As the Fourth District found that the trial court erred in denying GEICO's motion for directed verdict, the Fourth District did not address the issues raised in GEICO's motion for new trial. [*Id*.].

STATEMENT OF THE TESTIMONY AND EVIDENCE

The present action arises out of an automobile accident that occurred on August 8, 2006, between Harvey, and non-party John Potts, resulting in the death of Mr. Potts. [R.18-37]. At the time of the accident, GEICO insured Harvey under an automobile liability insurance policy, providing bodily injury liability coverage in the amount of $100,000 per person and $300,000 per accident. [R. 3961].

On the afternoon of August 8, 2006, Suzanne Harvey reported the fatal accident to GEICO. [R. 3843]. Immediately thereafter, GEICO assigned the matter to GEICO Claims Adjuster Fran Korkus ("adjuster Korkus"), who commenced the investigation by obtaining Harvey's recorded statement. [R. 3844-45].

On August 9, 2006, the day following the accident, GEICO Claims Adjuster Daniel Anthony ("adjuster Anthony") contacted Harvey and advised him of his policy limits and of the potential for personal excess exposure. [T.1061, 1065; R. 3845].

On the morning of Friday, August 11, 2006, adjuster Korkus updated Harvey on the status of the claim and of GEICO's attempts to contact the Potts family. [R.3847]. Thereafter, adjuster Korkus mailed Harvey a letter, which reiterated the information that adjuster Anthony had verbally communicated to Harvey. Said correspondence advised Harvey of his policy limits; advised of the possibility that the claim could exceed the policy limits, in which case he would be personally liable for the excess; and, informed him of his right to retain independent counsel to protect his interests in excess of the policy limits. [T.1064-65; R. 3950]. Harvey testified that he received adjuster Korkus's letter, and in response thereto, made the decision to retain personal counsel, Attorney Geraghty. [T.1017, 1019-20].

Balancing the need to reach the Potts family in an effort to attempt settlement with the family's need for privacy at such a difficult time, adjuster Korkus penned a letter to the Potts family in lieu of telephone contact, with a copy to Harvey. [R. 3953]. Therein, adjuster Korkus offered her condolences to the Potts family and requested they contact her to discuss the matter at their convenience. [*Id*.]. Harvey received a copy of Korkus's correspondence to the Potts family. [T. 1064].

On the following Monday, August 14, 2006, Vivian Tejeda ("Tejeda"), paralegal to Sean Domnick, Esq. ("Attorney Domnick"), contacted GEICO and informed adjuster Korkus that Attorney Domnick would be representing the Estate and that a letter of representation would be forthcoming. [R. 3848]. Tejeda testified that during her conversation with adjuster Korkus, she requested a statement from Harvey to obtain information regarding the circumstances of the accident, including whether Harvey was in the course and scope of his employment, and whether there was additional coverage or assets applicable to the accident. [T. 883-85, 985]. Tejeda testified to the substance of the conversation as follows:

> Q. Can you tell me what that independent recollection was? What did you remember about it?
>
> A. The one thing that stands out is when I asked Fran to make her client available for a statement, just her attitude stunned me and she

was being not cooperative. She asked me why I needed it and I explained to her to find, you know, what additional coverage, assets, was in the course of scope of his business. Just common sense type of questions.

Q. What did she say to you as far as the request for the statement?

A. It was -- it's what she said and how she said it. It's, why would you need that, type of -- and I may be paraphrasing. I don't know the exact words, but that was her attitude. And I told her.

Q. Did she flat out refuse to provide a statement from Mr. Harvey or, you know, to communicate with Mr. Harvey about the request or did she just say, you know, we'll get back to you on it or something like like?

A. No, she never said, I'll get back to you. I can assure you that. Because when I finished the conversation I just jumped out of my chair and went to Sean and said, you won't believe this.

Q. So she flat refused to provide the statement?

A. Right. And her attitude in asking me, why would you need that, a statement.

***

Q. Did she say that he was never going to be available?

A. No, I - - she never - - we never get to that point where there was any other conversations. She asked that. We finished the conversation.

[T. 883-885].

***

Q. Right. So is it your testimony then that she first told you in the first that he would not be provided for a statement at this time and

> then later went on to say that he won't ever be provided for a statement?
>
> A. I don't know the ever part.

[T. 892].

Adjuster Korkus testified that she recalled having a discussion with Tejeda regarding the Estate's request for a statement, [T. 646], and that she never denied or refused the Estate's request [T. 650, 1208]. Tejeda testified that she did not advise adjuster Korkus that her request for a statement from Harvey was a condition or impediment to settling the Estate's claim and that she never placed a time restriction on her request. [T. 987-88].

> Q. Okay. In your conversation with Ms. Korkus, did you tell her that if Mr. Harvey was not made available for a statement that you would not settle or you and your firm would not be able to settle the claim against Mr. Harvey?
>
> A. No. I couldn't make that statement.
>
> Q. Okay. Did you put any kind of timeframe or time limit on when he must be made available for a statement?
>
> A. No.
>
> Q. Did you ever tell Ms. Korkus that Ms. Potts would be in a position to settle or would be willing to settle under any circumstances, whether a statement was provided or anything else?
>
> A. No.

[*Id*.]. Tejeda testified that the purpose of the statement "would have been to discuss whether there would have been additional coverage, assets, was he in the scope and course of his business, so that we can properly evaluate the case and make the proper recommendations for our clients." [T. 985].

Following adjuster Korkus's discussion with Tejeda on August 14, 2006, adjuster Korkus contacted Harvey and informed him of the status of the claim. [R. 3848]. Adjuster Korkus testified that based on what she documented in the ALOG note after the telephone call, she reasonably would have informed Harvey of the Estate's request for a statement at that time. [T. 655-56].

Harvey first testified that during this telephone call, adjuster Korkus did not explain to him that Attorney Domnick's office wanted to take a statement from him, [T.1021], but later testified that he could not recall whether adjuster Korkus informed him of the request for a statement during the August 14, 2006, telephone call. [T. 1068]. Harvey testified that, had he been told of the request for a statement on August 14th, he would have:

> …accelerated the end with [Geraghty] and had [Geraghty] find -- catch up with GEICO or have GEICO catch up with [Geraghty] and coordinate my end of this transaction so that, one, I would have a better understanding of what a statement is, how a statement applied to this incident, what was needed and move forward.

[T. 1022].

On August 17, 2006, nine days after the accident, GEICO unconditionally tendered a check for Harvey's $100,000 policy limits to Attorney Domnick's office. [R. 3849]. The corresponding cover letter that accompanied the check, which was hand delivered, noted that GEICO was also enclosing a proposed release and Affidavit of Coverage. [R. 3960-64]. GEICO tendered the policy limits in the absence of any demand or conditional terms of settlement. [T. 987-88]. GEICO also provided Harvey with a copy of the proposed release, which Harvey then e-mailed to Attorney Geraghty because he "wanted an independent attorney's opinion as to what it [meant to him.]" [T. 1023].

Also on August 17, 2006, three (3) days after adjuster Korkus provided Harvey with a status update on the case, Harvey compiled his financial and asset information and set up a meeting with Attorney Geraghty, [T. 1070], which took place on August 23, 2006. [T.1024, 1086].

The asset information compiled by Harvey reflected $925,166.89, in various financial and retirement accounts, in addition to vehicles and two (2) homes. [T.1075-74]. Harvey testified that he gathered all of his personal and financial documents because he did not understand what was meant by a statement:

Q. What were those documents [submitted to Geraghty]?

> A. They were – I had collected up anything that I thought might be relevant to any question that might be asked and having no idea what is *meant by a statement*, *nor what was being asked for* or anything else, decided that it's much better to provide more information than less information…

[T. 1024, (emphasis added)].

> Q. Well, when you were asked on direct examination why you gathered all that asset information, your response – and I wrote it down – was that you gathered everything relevant to anything that might be asked having no idea what was meant by a statement. Do you recall that answer?
>
> A. Sure

[T. 1071].

On August 31, 2006, adjuster Korkus received a letter from Attorney Domnick dated, August 24, 2006. [R. 3966]. The substance of the letter reads as follows:

> Dear Ms. Korkus, We are in receipt of the check and release you had dropped off at my office last week. I saw the Affidavit of Coverage for GEICO as well. When you and Ms. Vivian Ayan-Tejeda, my paralegal spoke, there was discussion about whether Mr. Harvey was in the course and scope of his employment. You, as I understand it, indicated you were uncertain. Ms. Tejeda asked for Mr. Harvey to be made available for a statement. You declined her offer.
> Again, we have what I understand is GEICO's final monetary offer. I will discuss this with my client. Should you have any questions or comments, please do not hesitate to contact me.

[*Id.*].

Upon receipt and review of Attorney Domnick's letter, adjuster Korkus immediately contacted the insureds and informed Mrs. Harvey of the letter. [R. 3851]. Following the conversation with Mrs. Harvey, adjuster Korkus faxed Harvey a copy of Attorney Domnick's letter. [T. 1079; R. 3968].

A short time later, Harvey contacted adjuster Korkus in response to receiving adjuster Korkus's fax. [R. 3851, T. 1029]. During the conversation, Harvey provided adjuster Korkus with the contact information of Attorney Geraghty so that adjuster Korkus could fax a copy of letter to Attorney Geraghty, which she did. [T. 1029, 1079, R. 3851]. Harvey testified that this was the first time that he had been notified that Attorney Domnick wanted a statement from him. [T. 1027]. However, there was no testimony offered by Harvey, that he told adjuster Korkus that he would make himself available for a statement. Harvey testified that after the conversation with adjuster Korkus, he attempted to contact Attorney Geraghty. [T. 1031]. Attorney Geraghty was not available so Harvey left a message for Attorney Geraghty to review Attorney Domnick's letter that adjuster Korkus had faxed. [*Id*.]

Thereafter, adjuster Korkus contacted Attorney Domnick to acknowledge receipt of his letter and to advise Attorney Domnick that she had faxed his letter to Harvey. [R. 3852]. Adjuster Korkus inquired as to what type of statement Attorney Domnick wanted from Harvey and informed Attorney Domnick that she

would provide the information to Harvey so Harvey could make the decision. [*Id*.].

Attorney Domnick testified at trial that he wanted to know if Harvey had any additional insurance coverage that applied to the loss, whether Harvey was in the course and scope of employment, and to explore potential avenues of recovery, so he could determine the best strategy for his client. [T. 1109-10, 1154-55]. Attorney Domnick testified that it was part of his practice to request a statement under the circumstance of this case. [T. 1110].

Following the conversation between Attorney Domnick and adjuster Korkus, adjuster Korkus contacted Harvey again. [R. 3852; T. 1032-33, 1086-87]. Harvey testified that adjuster Korkus relayed to him the information that Attorney Domnick was requesting and what Attorney Domnick wanted to know. [T. 1082]. As reflected in adjuster Korkus's ALOG note, [R. 3852], Harvey testified that during this telephone conversation, he told adjuster Korkus that he would discuss the issue of giving a statement with Attorney Geraghty [T. 1033, 1086-87]. Harvey further testified that he never told adjuster Korkus that he was willing to provide the statement to Attorney Domnick. [T. 1087].

Harvey testified that prior to the August 31, 2006 telephone calls with adjuster Korkus, he had already provided his asset information to Attorney Geraghty and that he was relying on Attorney Geraghty to advise him as to which

of those documents, if any, would be relevant before he was willing to produce them. [T. 1034].

The following day, September 1, 2006, adjuster Korkus reviewed a letter that Attorney Domnick faxed the previous evening, which purported to memorialize the conversation between Attorney Domnick and adjuster Korkus. [R. 3852, 3972]. Although the letter is dated August 24, 2006, the parties stipulated that the letter was prepared and faxed on August 31, 2006. Said correspondence provides:

> Dear Ms. Korkus, This confirms our conversation in which you told me that you had received our recent letter regarding this matter. You asked me why we wanted a statement from Mr. Harvey. I told you that it was the same reason that Ms. Tejeda had outlined previously as well as that referenced in my recent letter. We want to determine what other coverage or assets may be available to cover this incident. You were unable to confirm that he would be available for a statement.

[R. 3972]. Consistent with Attorney Domnick's letter, Attorney Domnick testified at trial that during the August 31, 2006 telephone conversation, Attorney Domnick asked adjuster Korkus, "Will you make a commitment now to make Mr. Harvey available for his statement? And she said, no." [T. 1120]. Adjuster Korkus wasn't able to confirm that Harvey would make himself available, as Harvey never told adjuster Korkus that he would give a statement. [T. 678, 1087].

Upon receiving Attorney Domnick's correspondence, adjuster Korkus again immediately faxed a copy of the letter to Harvey, along with a sample affidavit. [T. 1083-84; R. 3982-83]. Later that day, Harvey contacted adjuster Korkus to inform her that he received the documents, but that Attorney Geraghty would not be available until September 5, 2006. [T. 1089-90]. Harvey testified that he wanted to wait until Attorney Geraghty was available again so that he could speak to Attorney Geraghty about whether he should provide a statement to Attorney Domnick. [T. 1091]. Harvey also provided a copy of the sample affidavit to Attorney Geraghty. [T. 1089].

When Harvey was asked whether he or Attorney Geraghty ever called GEICO or Attorney Domnick in September of 2006 to say Harvey would give a statement and talk about his assets with Attorney Domnick, Harvey testified "I can say I didn't." [1091-92]. It is undisputed that Harvey never provided the requested statement to Attorney Domnick.

At trial, Attorney Domnick testified that even if Harvey would have made himself available for a statement, he wouldn't have known if he would have recommended settling for Harvey's policy limits without knowing what information Harvey was willing to disclose.

> Q. And in fact, you can't say that you would have recommended settlement for the policy limits even had he given a statement before suit, can you?

A. Depends on what would have been in that statement.

Q. So you had to see what he would have said, right?

A. Correct.

[T. 1163].

On September 11, 2006, Harvey e-emailed Geraghty: "Hi, Pat. Just a reminder about the GEICO call. Many thanks. Let me know." [T.1045]. Harvey testified that the e-mail was sent to "remind Pat to, one, tell Pat that I haven't heard anything; and two, just give him a heads up that it had been a few days and had he heard anything." [*Id*.]

On September 13, 2006, without warning to Harvey or GEICO, the Estate filed a wrongful death lawsuit against Harvey, which resulted in the entry of a final judgment on May 24, 2011, in excess of Harvey's policy limits. [T. 3816-17].

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal appropriately considered the evidence in the light most favorable to Harvey, applied the correct standard for determining bad faith under Florida law, applied the correct standard for directed verdict, and properly concluded that GEICO was entitled to judgment as a matter of law.

The Fourth District specifically itemized and discussed the obligations of an insurer as described in this Court's decision in the *Boston Old Colony* case and

determined that, viewing the evidence in the light most favorable to Harvey, GEICO had fulfilled its duty of good faith under Florida law.

The Fourth District clearly viewed the evidence in the light most favorable to Harvey, and therefore applied the correct directed verdict standard. Harvey has utterly failed to establish that the Fourth District improperly reweighed the evidence or made determinations of credibility contrary to well established principles regarding judgment as a matter of law. Because the Fourth District's opinion does not conflict with that of any other District Court of Appeal, this Court should discharge jurisdiction.

Moreover, the Fourth District did not misapply principles of Florida bad faith law in its opinion, but rather correctly described the duty of good faith and an insurer's obligation in a manner consistent with well settled jurisprudence regarding the duty of good faith in Florida. Harvey's argument that the Fourth District's mere omission of the word "fiduciary" from its opinion is somehow an indication that the Fourth District did not properly apply principles of Florida bad faith law is without merit. The Fourth District's discussion and application of Florida bad faith law was correct and consistent with existing law, and provides no basis for reversal.

Finally, Harvey argues for an extension of the law to impose upon insurers as part of their duty of good faith an additional obligation to not only advise an

insured of steps they may take to avoid an excess judgment, but to somehow ensure that those steps are actually taken. Such an obligation has no basis in Florida law and would be impossible to comply with. In this case, GEICO was not in possession of the requested financial information, which was known only to Harvey. GEICO had no ability or duty to somehow compel Harvey to provide that information. GEICO's only obligation was to advise Harvey of the request for the information so that he could then take whatever steps he deemed appropriate. It is undisputed that GEICO advised Harvey of the request. Therefore, GEICO fulfilled its obligations under the law.

The opinion of the Fourth District should be affirmed. In the event that this Court quashes the Fourth District's opinion, the matter must be remanded to the Fourth District for consideration of the issues that GEICO raised in its Motion for New Trial, which were not reached by the Fourth District in its opinion.

ARGUMENT

I. The Fourth District Appropriately Applied the Correct Standard for Determining Bad Faith Under Florida Law.

The Fourth District applied well-established Florida law to the undisputed testimony and evidence of this case in reaching its decision that the evidence was insufficient as a matter of law to show that GEICO acted in bad faith in failing to settle the Estate's claim.

The Fourth District began its discussion by addressing the standard for determining bad faith liability on the part of insurer in quoting this Court's decision in *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980):

> An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. For 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. *Id*. at 785. (Internal citations omitted).

[A. 4-5]. The Fourth District then specifically itemized the seven (7) obligations of an insurer when exercising its duty of good faith, which this Court compiled almost forty (40) years ago. The Fourth District noted:

> Thus, an insurer is obligated to (1) "advise the insured of settlement opportunities"; (2) "advise as to the probable outcome of the litigation"; (3) "warn of the possibility of an excess judgment"; (4) "advise the insured of any steps he might take to avoid same"; (5) "investigate the facts"; (6) "give fair consideration to a settlement offer that is not unreasonable under the facts; and (7) "settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."

[A. 5]. The Fourth District properly noted that the determination of whether an insurer satisfied its obligations is considered under the "totality of circumstances," and that the evidence must support the allegation that the insurer acted in bad faith, not simply that the insurer was negligent in some regard. [*Id*.]. The Fourth

District noted that the essence of a bad faith claim is that the insurer put its own interests before that of the insured. [*Id*.].

The Fourth District then applied the testimony and evidence, in a light most favorable to Harvey, to each of the seven (7) obligations as announced in *Boston Old Colony*.

(1) Advise the insured of settlement opportunities.

Just as the testimony is undisputed that the Estate never made a settlement offer, the undisputed testimony and evidence presented at trial establishes that the Estate never presented a settlement opportunity to either Harvey or GEICO, whereby the Estate would have agreed to settle its claim and release Harvey. Tejeda specifically testified that she never told adjuster Korkus that the Estate would be willing to settle if Harvey made himself available for a statement, or under any other circumstances. [T. 987-88]. There was no testimony offered by Attorney Domnick that he presented a settlement opportunity to GEICO, that if accepted, would effectuate a settlement and release of the Estate's claim. The two (2) letters that Attorney Domnick sent to GEICO before suit was filed, on their face, do not present conditional terms of a settlement offer that would equate to a settlement opportunity.

The mere request for Harvey to make himself available for a statement, without more, cannot be construed as settlement opportunity. As Tejeda and

Attorney Domnick testified at trial, the request for a statement was a routine part of their investigation and standard practice. [T. 985, 1110]. Viewed in a light most favorable to Harvey, there is no record evidence that the Estate framed its routine request for a statement in a manner that presented a settlement opportunity to Harvey, when the Estate never conditioned settlement on its request or provided a deadline for Harvey to comply. Moreover, Attorney Domnick admitted at trial that even if Harvey made himself available for a statement, the recommendation to his client would have depended on what information Harvey actually disclosed. [T. 1163]. Notably, Harvey never offered any testimony at trial as to what information he would or would not have disclosed, had he given a statement to Attorney Domnick.

Although the Fourth District acknowledged that the Estate did not inform GEICO that a full settlement of its claim against Harvey was contingent upon providing a statement, the Fourth District unquestionably viewed the evidence in the light most favorable to Harvey and considered Attorney Domnick's request for Harvey to make himself available for a statement as a settlement opportunity. The Fourth District rightfully found, based upon the undisputed testimony, that GEICO satisfied this obligation by notifying Harvey on August 31, 2006 that the Estate wanted his statement. At trial, Harvey admitted that adjuster Korkus informed him of the Estate's request for a statement on August 31, 2006. [T. 1027, 1080, 1082].

Adjuster Korkus also faxed a copy of the letter to Attorney Geraghty.

Harvey argues, without support, that the Fourth District inexplicably found that it was acceptable that adjuster Korkus informed Harvey of the request for the statement on August 31, 2006. There is no argument presented by Harvey as to why the notification of the request for the statement on August 31, 2006 was not sufficient to satisfy this obligation. Even if Harvey wasn't aware of the request that was made on August 14, 2006, Attorney Domnick renewed his request on August 31, 2006, and it is undisputed that Harvey was immediately notified.

It is undisputed that the Estate did not place a deadline on its request or provide Harvey with any warning that the Estate would file suit just eleven (11) days later, which included a holiday weekend, if Harvey did not make himself available for a statement. [T. 1157-58]. Attorney Domnick's letter to adjuster Korkus, dated August 31, 2006, which purported to memorialize their conversation that day, noted that adjuster Korkus was "unable to confirm that [Harvey] would be available for a statement." [R. 3972]. This statement is consistent with what adjuster Korkus knew. Harvey testified at trial that he told adjuster Korkus that he needed to discuss the issue of whether he should provide a statement with Attorney Geraghty. [T. 1086-87, 1091-92]. Harvey admitted that he never actually told adjuster Korkus that he would give a statement. [*Id.*].

GEICO maintains that the record evidence fails to establish that the Estate

submitted a settlement opportunity to GEICO, even when viewing the evidence in the light most favorable to Harvey. Moreover, even if the request for a statement is considered to be a settlement opportunity, the uncontroverted evidence establishes that GEICO informed Harvey of the request made by the Estate and that Harvey and Geraghty were fully aware of the request. As such, GEICO fulfilled its duty.

(2) Advise the insured as to the probable outcome of the litigation, and (3) warn of the possibility of an excess judgment.

Here, the Fourth District found that GEICO satisfied these obligations as the record reflects that GEICO promptly warned Harvey as to the possibility of an excess judgment. Harvey does not dispute GEICO satisfied these obligations.

(4) Advise the insured of any steps he might take to avoid an excess judgment.

In this regard, the Fourth District concluded that GEICO satisfied this obligation by recommending that Harvey retain his own attorney and informing Harvey that the Estate wanted a statement from him. In disputing the Fourth District's finding that GEICO fulfilled this requirement, Harvey misrepresents that after receiving Attorney Domnick's letter on August 31, 2006, Harvey "immediately called Korkus and informed her he was willing to do that." [I.B. 40]. Notably, Harvey fails provide any citation to the record to support this statement. Again, Harvey's own testimony at trial is contrary to this assertion. Harvey clearly acknowledged that he never actually told adjuster Korkus that he

would provide a statement. [T. 1087, 1091-92].

GEICO's obligation in this regard is to advise Harvey of the steps he can take to avoid an excess judgment. Adjuster Korkus's letter, dated August 11, 2006, advised Harvey that he could retain an attorney to protect him against personal exposure in excess of his policy limits. [T. 1064-65]. Adjuster Korkus also advised Harvey and Geraghty of the Estate's request for a statement and Harvey knew what was being requested. The undisputed testimony at trial shows that the Estate never made the request a condition of settlement, never informed Harvey or adjuster Korkus that a statement was needed immediately or suit would be filed, and never provided Harvey with a deadline to make the decision as to whether he would submit to the Estate's request for a statement. Neither *Boston Old Colony*, nor any other Florida decision, obligates the insurer to see that the insured complies with a claimant's request, regardless of whether the request is a condition to settlement or otherwise. An insurer such as GEICO *cannot* force an insured to provide a statement or to otherwise comply with requests made by claimants which are wholly within the insured's control. For that reason, the duty of good faith only obligates an insurer to communicate the request to the insured, not to guarantee that the request is complied with.

Harvey's reliance on *Powell v. Prudential Prop.*, 584 So. 2d 12 (Fla 3d DCA 1991), is misguided. In *Powell*, the insurer ignored the claimant's repeated

requests for the insurer to disclose the insured's policy limits. Such a request is within the insurer's control, and is wholly distinguishable from the request made of the insured, Harvey, in this case. Here, it is undisputed that GEICO provided Attorney Domnick with an Affidavit of Coverage, which disclosed Harvey's $100,000 policy limits, and did so without Attorney Domnick making a request for the same. [T. 1114, R. 3961]. However, only Harvey, not GEICO, had the ability to provide the requested financial statement. All GEICO could do was inform Harvey of this request. Because the undisputed record establishes that GEICO advised Harvey and Geraghty of the request for a statement, GEICO satisfied this obligation.

(5) Investigate the facts.

The Fourth District found that GEICO satisfied its obligation to investigate the facts as nothing in the record indicated that GEICO was deficient in this regard. Harvey does not dispute that GEICO satisfied this obligation.

(6) Give fair consideration to a settlement offer that is not unreasonable under the facts.

The Fourth District properly found that the evidence was undisputed that the Estate never made a settlement offer. Therefore, this factor is not applicable to the facts of this case. Harvey does not dispute that the Estate never made a settlement offer.

(7) Settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Here, the Fourth District found that GEICO fulfilled this obligation as GEICO unconditionally tendered Harvey's full policy limits just nine (9) days after the accident. The Estate never conditioned its request for a statement in a manner that would have made settlement possible. The Estate never provided GEICO with any warning that suit would immediately be filed if Harvey didn't make himself available for a statement, and never provided Harvey with a deadline to comply with the Estate's request. Moreover, Harvey never told adjuster Korkus that he would give a statement of any kind to Attorney Domnick.

In criticizing the Fourth District's conclusion, Harvey raises the same flawed arguments that GEICO somehow prevented Harvey from making himself available for a statement and again misrepresents that Harvey offered testimony at trial that he told adjuster Korkus that he "was willing to give a recorded statement revealing his financial situation and any facts relevant to other insurance coverage." [I.B. 42]. As discussed at length, both Harvey and Geraghty were aware of the Estate's request for a statement and Harvey testified at trial that he told adjuster Korkus that he needed to discuss the issue of whether he should provide a statement with Attorney Geraghty. [T. 1086-87, 1091-92]. Harvey admitted that he never actually told adjuster Korkus that he would give a

statement. [*Id*.].

Harvey also argues that the Fourth District's conclusion ignored the purported fact that GEICO's proposed release was overboard. There is no record evidence that GEICO's proposed release was an impediment to settling the Estate's claim. Attorney Domnick acknowledged at trial that he never advised GEICO that he had an issue with GEICO's proposed release. [T. 1115, 1152].

Harvey's reference to *Berges v. Infinity Ins. Co*. has no application to the facts of this case. 896 So. 2d 665 (Fla. 2004). In *Berges*, there was an actual demand for the insured's policy limits with express terms for settlement. *Id.* at 669. In this case, Harvey concedes that the Estate never made a settlement offer with express terms for settlement.

Similarly, the facts presented in *Menchise v. Liberty Mut. Ins. Co*., 932 So. 2d 1130 (Fla. 2d DCA 2006), are entirely distinguishable from the facts at bar. In *Menchise*, the claimant's attorney wrote a letter to the insurer, which made a conditional offer to settle the claim for the insured's policy limits:

> To settle the claim, the letter required that within twenty days Liberty Mutual must tender the $10,000 policy limits, furnish an affidavit by McClelland stating that she had no other available insurance, and give proof that McClelland was not acting in the course and scope of her employment at the time of the accident.

Id. at 1132. The insurer did not notify its insured of the offer, nor did the insurer ask its insured about other insurance or whether she was working at the time of the

accident. *Id.* The insurer proceeded to tender a check for the policy limits, without the requested affidavit. *Id.* Had the insurer provided the claimant's attorney with an affidavit as specifically requested, the claim against its insured would have actually settled.

Unlike the claimant's clear and unambiguous settlement offer, with express conditions for settlement, made in *Menchise*, the Estate in the instant action never made a settlement offer with any specific conditions for settlement. Even if Harvey made himself available for the requested statement, there is no record evidence that the information Harvey would have been willing to provide, would have resulted in a settlement of the Estate's claim. Moreover, the facts of this case establish that GEICO informed Harvey and Attorney Geraghty of the request for a statement and Harvey never told adjuster Korkus that he would provide one.

After the Fourth District analyzed each of the obligations set forth in Boston Old Colony, the Fourth District concluded that GEICO satisfied every obligation as announced in *Boston Old Colony,* that GEICO owed to Harvey. The Fourth District considered these obligations in the light most favorable to Harvey, and the Fourth District's opinion should therefore be affirmed.

II. The Fourth District Appropriately Applied the Standard for Directed Verdict.

As this Court recognized in *Berges*, "[a]lthough the issue of bad faith is

ordinarily a question for the jury, [the Florida Supreme Court] and the district courts have, in certain circumstances, concluded as a matter of law that an insurance company could not be liable for bad faith." 896 So. 2d at 680. Even though this Court noted in *Boston Old Colony*, that "[t]he question of failure to act in good faith with due regard for the interests of the insured is for the jury," this Court went on to find that the evidence presented in the case was legally insufficient to show bad faith on the part of the insurer. 386 So. 2d 783 (Fla. 1980). Here, the undisputed testimony and evidence presented at trial was legally insufficient to show that GEICO failed to satisfy its obligation as set forth in *Boston Old Colony*.

In applying the directed verdict standard to the undisputed evidence presented in this case, the Fourth District concluded that:

> [t]he evidence, taken in a light most favorable to the insured as the nonmoving party, showed that the insurer unconditionally tendered the estate the policy limits nine days after the accident, the insurer notified the insured that the estate wanted a statement seventeen days after the request, and the insured subsequently failed to provide a statement to the estate despite having the opportunity to do so before suit was filed.

[A. 1]. In finding that GEICO satisfied the obligations set forth in *Boston Old Colony*, the Fourth District did not reevaluate the testimony, but viewed the testimony and evidence in the light most favorable to Harvey. It also cannot be shown that the Fourth District substituted its judgment concerning the credibility

of witnesses. The Fourth District clearly accepted as true the testimony offered by Harvey and his witnesses.

In an attempt to argue that the Fourth District misapplied well-established principles of directed verdict law, Harvey mischaracterizes the Fourth District's mere recitation of the testimony presented at trial as an indication that the Fourth District weighed the credibility of witnesses and ignored critical evidence purported to support Harvey's bad faith claim. These assertions are unfounded. Notably, many of the statements and omissions complained of were not material to the Fourth District's holding that GEICO satisfied its obligations under *Boston Old Colony*.

For example, Harvey takes issue with the Fourth District's background statement that "while the employee claimed that Korkus refused to make the insured available for a statement, Korkus said that if the attorney for the estate had asked for a statement she would not have refused the request." [I.B. 25]. Harvey concludes, without any support, that the Fourth District did not accept Tejeda's statement as true. The fact that the Fourth District merely recited portions of the trial testimony does not establish that the Fourth District inappropriately reweighed the credibility of that trial testimony, including that of Tejeda, as Harvey argues.

Harvey also criticizes the Fourth District's notation of the trial testimony

that Korkus was not told "the insured's statement was a prerequisite to settling the insured's claim." [I.B. 26]. Simply put, this was Tejeda's own admission at trial. Tejeda testified that she did not tell Korkus that if Harvey was not made available for a statement that the Estate would not settle. [T. 987]. Also, there was no testimony presented at trial that the Estate's routine request for a statement was a condition of settlement.

Harvey further argues that the Fourth District erred in omitting the testimony that when Harvey met with Geraghty on August 23, 2006, Harvey did not know that the Estate had made a request for a recorded statement. [I.B. 27]. This omission is immaterial as the Fourth District viewed Harvey's testimony in the light most favorable to Harvey and accepted as true, that August 31, 2006, was the first time Harvey learned the estate wanted a statement. Harvey then proceeds to illogically argue that the Fourth District made a credibility argument and did not deem Harvey's testimony as true, even though the Fourth District's opinion clearly accepted Harvey's testimony that he first became aware of the request on August 31, 2006.

Harvey criticizes the Fourth District for not noting that during the August 31, 2006 telephone call between Korkus and Attorney Domnick, that Korkus "did not change her refusal to produce Harvey for a recorded statement." [I.B. 28]. This assertion is not supported by the record. Attorney Domnick's August 31,

2006 letter, which memorialized said conversation, stated that "[Korkus was] unable to confirm that [Harvey] be available for a statement." [R. 3972]. As Harvey admitted at trial that he never informed Korkus that he would make himself available for a statement, Korkus could not have confirmed that Harvey would do so.

The Fourth District did not make an improper credibility judgment by allegedly questioning Harvey's "willingness" to provide the information requested by the Estate. [I.B. 29]. The Fourth District properly determined, and the undisputed record revealed: 1) that Harvey and Geraghty were made aware of the request made by Attorney Domnick, 2) that Harvey knew what information Attorney Domnick wanted, 3) Harvey never told adjuster Korkus that he would make himself available for a statement prior to suit being filed, and 4) Harvey never made himself available to give a statement. Harvey's unexpressed "willingness" to provide a statement is not relevant to whether GEICO fulfilled its good faith obligations when Harvey admitted at trial that he never actually told adjuster Korkus that he would provide a statement of any kind.

Harvey's contention that the Fourth District deviated from the directed verdict standard is unfounded. A review of the record evidence shows that the Fourth District's opinion can only be viewed as accepting the testimony and evidence in a light most favorable to Harvey. The Fourth District relied on

undisputed testimony to find that GEICO satisfied its obligations under *Boston Old Colony*.

Moreover, the Fourth District cited and applied the appropriate standard when reviewing whether GEICO complied with its good faith duty. The Fourth District recognized the standard that was reaffirmed by this Court in *Boston Old Colony,* noting that GEICO had a duty "to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." 386 So.2d 783, 785. [A. 4]. Because it cannot be shown that the Fourth District's opinion is in direct and express conflict with the directed verdict standard, nor can it be shown that the Fourth District's decision is in direct and express conflict with the standard for determining bad faith, this Court should now reject jurisdiction.

III. The Fourth District Did Not Misapply Principles of Florida Bad Faith Law.

Harvey argues that the Fourth District misapplied the bad faith standard for liability by not mentioning the word "fiduciary" in its opinion. Harvey's argument is wholly meritless and fails to establish that the Fourth District did not apply the correct standard. As correctly acknowledged by the Fourth District, the bad faith standard for determining liability is whether the insurer carried out its obligations, as set forth in *Boston Old Colony,* in the same manner as a "person of ordinary

care and prudence," and "with due regard for the interests of the insured." [A. 4-5](citing *Boston Old Colony*, 386 So. 2d at 785). As properly noted by the Fourth District, this determination is made in consideration of the "totality of the circumstances." [A. 5](citing *Berges*, 896 So. 2d at 680).

Even though the Fourth District did not specifically state that there is a fiduciary relationship between an insurer and its insured, the Fourth District noted, "the essence of a bad faith claim is that the insurer put its own interests before that of the insured." [A. 5]. This statement is entirely consistent with the *Boston Old Colony* standard and the duties inherent in the relationship between an insurer and an insured, whether labeled "fiduciary" or not. As correctly noted in Harvey's brief, there is longstanding Florida precedent that the insurer owes a duty of reasonable care. [I.B. 31]. The Fourth District began its discussion of the duty of good faith by quoting the standard that was established in *Shaw* over a century ago, and later reaffirmed by *Boston Old Colony*. An insurer "has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business . . . and [shall] make such decisions in good faith and with due regard for the interests of the insured." [A. 4-5]; *Boston Old Colony*, 386 So. 2d at 785(citing *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938)(emphasis added)).

The duty of good faith requires an insurer to act with due regard for the

interests of the insured. Worded differently, the insurer must put the insured's interests ahead of its own. Stated yet another way, the insurer must refrain from acting in its own interests to the detriment of the insured. These statements are consistent with each other, consistent with the opinion of the Fourth District, and consistent with long established principles of good faith claims handling set forth in Florida law. As noted by Harvey, the inherent nature of the relationship between an insurer and an insured imposes duties of due care, honesty, and good faith. [I.B. 36]. The Fourth District's statement that "the essence of a bad faith claim is that the insurer put its own interests before that of the insured" is entirely consistent with the standard noted in *Boston Old Colony* that the insurer must make "decisions in good faith and with due regard for the interests of the insured." [A. 5](citing *Boston Old Colony*, 386 So. 2d at 785). As the Fourth District notes, if the insurer breaches its standard of care and does not carry out its obligations under *Boston Old Colony* in good faith and with due regard for the interests of the insured, i.e. "the insurer put its own interests before that of the insured," a cause of action for bad faith may accrue.

In support of Harvey's position that the Fourth District improperly applied the bad faith standard for liability, Harvey primarily focuses on the Fourth District's reference to the decision, *Novoa v. GEICO Indem. Co.*, 542 F. App'x 794 (11th Cir. 2013). However, the Fourth District's reference to *Novoa* was not

central to the Fourth District's opinion, and was separate and apart from the Fourth District's conclusion that GEICO satisfied its obligations under *Boston Old Colony*. After the Fourth District rendered its holding, the Fourth District went on to offer additional commentary, which included a reference to *Novoa*, but not before clearly asserting that the added discussion was "not dispositive" to the Fourth District's analysis. [A. 6]. The Fourth District's commentary after its central holding is mere *dicta*. Even if this Court disagrees with the opinion of the Eleventh Circuit Court of Appeals in *Novoa*, the Fourth District did not rely on *Novoa* in reaching its holding that GEICO satisfied its obligations as announced in *Boston Old Colony*.

Similarly, the same holds true for the Fourth District's secondary discussion as to causation, which is mere *dicta*. The Fourth District's discussion of causation was not dispositive to the Fourth District's analysis. While GEICO submits that the Fourth District's causation analysis is not in direct and express conflict with Florida law, even if this Court disagrees with the Fourth District's discussion of causation, the Fourth District's central opinion that GEICO satisfied its obligations under *Boston Old Colony* stands on its own.

As the Fourth District applied the proper standard of liability for bad faith, and did not deviate from the principles of Florida bad faith law, the Fourth District's opinion should be affirmed.

IV. Harvey's Brief Serves as a Plea to this Court to Extend the Obligations of an Insurer and Impose a Heightened Standard of Care.

Harvey postures his brief as a plea to this Court to reform the law of bad faith and create additional obligations for an insurer that Florida law does not recognize.

Harvey suggests that not only does an insurer have an obligation to advise the insured of steps that he might take to avoid an excess judgment, but that the insurer has an added obligation to see that the insured actually takes those steps. These assertions are entirely unfounded in the law of bad faith. As defined in *Boston Old Colony,* the insurer only has an obligation to advise the insured of the steps that he might take to avoid an excess judgment. To obligate an insurer to see that its insured actually complies with requests made by claimants would be opening the door to making settlement of claims an impossible task. This added obligation would also directly conflict with the insurer's obligation to "settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." If an insurer's obligation to settle, where possible, is dependent upon the actions of the insured, the reasonably prudent person standard is elevated to a standard of strict liability in which every case that fails to settle becomes a viable bad faith claim against the insurer.

GEICO had no ability to require Harvey to provide a financial statement, or

to provide the requested financial information to Attorney Domnick directly. The production of this financial information was entirely in the control of Harvey and outside of GEICO's control. In effect, Harvey's argument, if accepted, would require insurers to be a guarantor of settlement, regardless of whether settlement is conditioned on terms set by the claimant, or actions of the insured, which are beyond the insurer's control. An insurer cannot force a claim to settle. GEICO could not force Harvey to provide a financial statement, or likewise force Attorney Domnick or Potts to accept a settlement. It is undisputed that Harvey was advised of the request for the financial information, which is all that GEICO had the ability to do, and all that GEICO had a duty to do.

An insurer also has no obligation to provide a claimant with information or documentation, other than what is required under the policy of insurance and by Florida Statute. The obligations set forth in *Boston Old Colony* require the insurer to advise the insured of settlement opportunities; the probable outcome of the litigation; warn of the possibility of an excess judgment; and to advise the insured of any steps he might take to avoid the same. 386 So.2d at 785. There are no obligations imposed upon an insurer to advise the claimant.

Despite Harvey's suggestions, GEICO had no duty to inform Attorney Domnick that Harvey was represented by personal counsel, or to provide Attorney Domnick with Harvey's financial information, which was not in GEICO's

possession. GEICO had no ability to provide Harvey's financial information to Attorney Domnick, as that information was solely in Harvey's possession and control and had not been provided to GEICO. It is also undisputed that Harvey was aware of Attorney Domnick and that he, or his attorney Geraghty, could have contacted Attorney Domnick directly and relayed information of their choosing. GEICO's claim handling obligations are to investigate the facts of the loss; give fair consideration to a settlement offer that is not unreasonable under the facts; and to settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. As the Fourth District found, the record established GEICO satisfied these obligations.

Although Harvey acknowledges that an insurer owes a duty of reasonable care, the arguments raised by Harvey regarding GEICO's claim handling are an attempt by Harvey to impose a heightened standard on the insurer. Under current bad faith jurisprudence in Florida, an insurer is not required to take every conceivable step to protect the insured from an excess judgment at all costs. If this were the standard, an insurer would be forced to tender the policy limits every time a loss was reported. But even tendering the policy limits would not be enough; under Harvey's proposed standard an insurer would be exposed to liability beyond its policy limits in cases in which the insurer immediately tenders its policy limits, but the claim fails to settle for reasons beyond the insurer's

control. Under Florida law, insurers are not required to guarantee that every claim settled. Rather, an insurer must comply with its obligations under *Boston Old Colony* in the same manner as a person of ordinary care and prudence, and with due regard for the insured's interest, in *attempting* to settle claims. As GEICO satisfied its obligations under *Boston Old Colony* in a manner consistent with a person of ordinary care and prudence, and with due regard for the insured's interest, the Fourth District's opinion should be affirmed.

V. Conclusion

The Fourth District appropriately viewed the testimony and evidence in the light most favorable to Harvey and properly concluded that Harvey did not present substantial competent evidence that GEICO failed to satisfy its obligations as set forth in *Boston Old Colony*. Therefore, the opinion of the Fourth District should be affirmed. In the event that this Court quashes the Fourth District's opinion, the matter must be remanded to the Fourth District for consideration of the issues that GEICO raised in its Motion for New Trial, which were not reached by the Fourth District in its opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was served via the Florida Courts E-Filing Portal this 19th day of July, 2017:

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Undersigned counsel hereby certifies that GEICO GENERAL INSURANCE COMPANY's Answer Brief to Petitioner's Initial Brief on the Merits has been completed in the font style of Times New Roman 14pt and complies with the font requirements of Fla. R. App. P. 9.210.

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