IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JAMES M. HARVEY,

Plaintiff/Petitioner,

-vs- CASE NO. SC17-85

GEICO GENERAL INSURANCE COMPANY,

Respondent.
_____/

INITIAL BRIEF ON THE MERITS

On appeal from the Fourth District Court of Appeal of the State of Florida

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STATEMENT OF THE CASE

This proceeding arises out of a bad faith suit brought by an insured, James Harvey, against his liability insurer, GEICO General Insurance Company ("GEICO"). Harvey was involved in an automobile accident which had resulted in the death of John Potts. As the Statement of the Facts, infra, explains, the wrongful death claim of the Potts' estate was filed in the circuit court because the pre-suit negotiations with GEICO did not result in a settlement. The estate's wrongful death claim was tried to a jury, resulting in a verdict finding Harvey liable and assessing over $8 million in damages (R3816; PDF: 3818).

Harvey then filed suit against GEICO for his exposure to the excess judgment. That claim also went to trial and the only question presented to the jury was "Did the defendant, GEICO General Insurance Company, act in bad faith by failing to settle the claim of the estate of John Potts against its insured, James Harvey?" (R3056; PDF:3058). The jury answered the question "yes" (R3056; PDF:3058). in its post-verdict motions, GEICO presented one argument for why it was entitled to a judgement in accordance with its motion for directed verdict (R3091-93; PDF:3093-92): that the jury had to improperly stack inferences in order to reach the factual determination that GEICO had acted in bad faith. The trial court denied all GEICO's post-trial motions and entered a final judgment in favor of Harvey against GEICO (R3256-57; PDF:3258-59).

GEICO appealed to the Fourth District Court of Appeal and argued, inter alia, that the trial court erred in denying its motion for directed verdict, again arguing solely that the jury had to impermissibly stack inferences in order to reach a finding of bad faith (4th DCA Initial Brief p.17-28). After full briefing and oral argument, the Fourth District issued its opinion, GEICO General Insurance Company v. Harvey, 208 So.3d 810 (Fla. 4th DCA 2017) and reversed the circuit court and remanded for entry of directed verdict and a judgment in favor of GEICO. The Fourth District's opinion was not based on the "stacked inferences" argument presented by GEICO, but on the Fourth District's independent conclusion that the evidence was insufficient to prove that GEICO had violated any duties to the insured and that its conduct "did not amount to bad faith as a matter of law." 208 So.3d at 816. That issue is addressed in Point I, infra.

Additionally, the Fourth District also ruled that GEICO was entitled to a directed verdict on the issue of causation, even though causation was never an issue presented to the jury either in the jury instructions (T1242-49; PDF:5238-39) nor in the verdict (R3056; PDF:3058).

Petitioner is seeking through this proceeding to quash the Fourth District's decision and to uphold the judgment entered in the circuit court based on the jury verdict.

STATEMENT OF THE FACTS

The Underlying Accident Caused By Harvey Resulted In Mr. Potts' Death

On August 8, 2006, James Harvey was involved in an automobile accident which caused the death of John Potts (T1006; PDF:5002). Potts was fifty-one years old, leaving behind a wife and three children (T897; PDF:4893). At the time of the accident, GEICO insured Harvey with a policy providing $100,000 of liability coverage (T1054; PDF p.5050). The vehicle driven by Harvey was registered in both his own name and his business name, U.S. Multico (R3657; PDF:3659). Harvey's wife reported the accident to GEICO the day it occurred, including the fact that Potts had died (T1066; PDF:5002). GEICO assigned the claim to an adjuster named Fran Korkus (T693; PDF:695).

On August 9, 2006, the day after the accident, Dana Armstrong, a GEICO supervisor, noted in the activity log that excess exposure needed to be **explained** to Harvey (R3666; PDF p.3668). Korkus testified that GEICO knew that there was significant personal exposure to Harvey because Potts had died leaving multiple survivors and the coverage was only $100,000. (T644-45; PDF pp.4640-41). The ALOG[1] reveals GEICO resolved the liability issue adversely to Harvey two days after the accident (R3667; PDF p.3668).

[1] ALOG is an abbreviated reference to GEICO's activity log which details the actions taken by claims adjusters on their various files. (R3663-3769; PDF:3671-3771).

On August 11, 2006, Korkus sent Harvey a letter which explained that Potts' claim could exceed his policy limits and that he had the right to hire his own attorney given the personal exposure he faced. (T645-46; PDF:4641-42) (R3669, 3771; PDF:3671, 3673).

Ms. Korkus Failed to Advise Mr. Harvey of the Request for a Recorded Statement Regarding Additional Assets and Other Insurance

On August 14, 2006, a paralegal representing the Potts Estate named Vivian Tejeda called Korkus and advised that attorney Sean Domnick was representing the Estate. She testified to the critical part of the conversation as follows (T883-85; PDF pp.4879-81):

> Q. So you have an independent recollection of that conversation before you reviewed your notes regarding it?
>
> A. Oh, absolutely. Yes, sir.
>
> 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 [he] in the course [and] [sic] 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 that?

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. When you say that she asked you why you would need that, did you respond to those questions?

A. Absolutely. Just said -- yes, I explained to her I need to make sure. The gentleman was in a Hummer. It's the middle of the day. There was a question whether he was going home for lunch. I didn't know if he was an attorney doing a deposition. I didn't know whether he was in the scope and course of his business. Is there additional coverage?

Q. Okay.

A. I have no idea at that time. That's why I needed him to be available.

Tejeda contemporaneously documented the conversation with Korkus, noting her request for the recorded statement and that Korkus denied that request; that document was admitted into evidence (R3777; PDF:3779). GEICO's claim activity log, which Korkus maintained as the adjuster on the file, documented the fact that Korkus spoke to Tejeda that day, but did not identify anything about the substance of the conversation. (T647-48, 662; PDF:4643-44, 4658) (R3669-70; PDF:3671-72).

Harvey unequivocally testified that Korkus did not tell him about the August 14th request for a recorded statement (T1027; PDF:5023). Korkus testified that she recalled Tejeda's request for a recorded statement and claimed she discussed it with Harvey, even though she had not documented the substance of that call (R3669; PDF:3671). Korkus admitted that she should have documented the substance of the call. (T647-648, 656, 662, 686; PDF:4643-44, 4652, 4658, 4682) (R3669-70; PDF:3671-72).

GEICO Tendered But With An Improper Release and Without Providing Information That Could Enable The Estate to Reasonably Accept It

On August 15, 2006, Tim Holleran, Korkus' supervisor, authorized her to tender the policy limits to the Potts Estate (R3670; PDF:3672). On August 17, 2006, GEICO delivered the policy limits check to attorney Domnick's office along with a release and affidavit of coverage (T1114; PDF:5110). However, GEICO provided absolutely no information as to the co-owner of the car, U.S. Multico, or whether it had any insurance or assets. The release GEICO submitted was too broad because it released the Estate's property damage claim which had not been resolved (T1114; PDF:5110). In addition, before any release could be executed, Domnick still needed information regarding the three issues raised by Tejeda: (1) additional insurance coverage; (2) Harvey's personal assets; and (3) whether Harvey was within the course and scope of his employment at the time of the accident (T1114–17; PDF:5110-13).

Harvey Meets with Attorney Geraghty

On August 23, 2006, in response to receiving GEICO's August 11, 2006 excess letter, Harvey traveled to Fort Myers to meet with an attorney recommended to him, Patrick Geraghty. (T1024, 1066; PDF:5020, 5062) (R3771; PDF:3773). Harvey brought various financial records with him because the excess letter advised that his personal assets were at risk in the event of an excess judgment. **At this point, Harvey did not know that Domnick had requested a recorded statement** (T1025; PDF:5021) (R3771; PDF:3773). At that time, Harvey's business, U.S. Multico, had one attachable asset which was a bank account with approximately $85,000. (T1025, 1077-78, 1132-33; PDF:5021, 5073-74, 5128-29).

Domnick Acknowledged The Tender But Reasonably Requested More Information

On August 24, 2006, Domnick wrote a letter to Korkus acknowledging receipt of the tender and the release (R3789; PDF:3791). Domnick documented the fact that Korkus had previously refused to make Harvey available for a recorded statement. (R3789; PDF:3791).

> We are in receipt of the check and release you dropped off at my office last week. I saw the affidavit of coverage for GEICO as well. When you and 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.**[2]
>
> 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.

Korkus never responded by letter or phone call to Dominick to say he was wrong about her declining to allow a statement from Harvey (T1118; PDF:5014).

Korkus received Domnick's letter on August 31, 2006 and faxed the letter to Harvey with a handwritten note that said, "I will keep you advised." (T1027-28; PDF:5023-24). This was the first time Harvey learned that there had been any request for him to give a statement (T1027; PDF:5023). That same day, Harvey called Korkus to discuss the letter (R3672; PDF:3674). Harvey testified that he was "**angry because this letter, though be it from Searcy, Denny**, **says that I declined an offer, refused to make a statement and I had not done that.**" (T1027 PDF:5023).

Later that day, Korkus forwarded Domnick's letter to her supervisor, Holleran, with a handwritten note which read: "Plz review + advise if I need to respond to this–". Holleran responded within ten minutes, giving Korkus specific instructions (R3672-73; PDF:3674-76):

[2] All emphases in quotations added unless otherwise noted.

> **[W]as there ever a request made that the insured be made available for a statement? I saw no reference to that on the file and if such a request was made, we'd surely not deny that request on our own.** The decision whether the insured wanted to provide a statement would be made by him. After he consulted with his personal atty if he wished. **We should speak to atty Domnick to find out what type of statement they'd like to take from the insured** so we can pass that request on to the insured and his personal counsel. We should also make sure that we clarify whether any other policies (i.e. from the insured's employer or the Canadian policy that is referenced in an earlier August ALOG note) are applicable to the loss.

What Holleran did not know, because Korkus failed to document it, was that Domnick's office had requested a recorded statement on August 14th and Korkus denied the request. In fact, Korkus already knew the answer to the question Holleran posed – "speak to attorney Domnick to find out what type of statement they'd like to take from the insured" – because Tejeda told her on that call that a recorded statement was necessary to determine the extent of Harvey's assets, additional insurance, if any, and whether Harvey was in the course and scope of his employment at the time of the accident. (T883; PDF p.4879) (R3669; PDF p.3671).

After receiving Holleran's e-mail, Korkus called Domnick on August 31, 2006 at 1:48 p.m. and he returned the call at 2:06 p.m. (R3673; PDF p.3675). Domnick explained to Korkus that he needed the same financial information that his paralegal, Tejeda, had already requested: information regarding Harvey's assets and other insurance coverage. (T1120; PDF p.5116) (R3673; PDF p.3675).

Domnick advised Korkus that he needed this information in order to properly advise the Potts family on how to proceed (T1114; PDF:5110). Later that day, Domnick faxed a letter confirming the scope of the conversation with Korkus (R3801; PDF:3803)[3]:

> 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.**

Korkus never responded to Domnick's letter in any way (T1118; PDF:5114).

The very next day, Harvey called to speak with Korkus again. He had read Domnick's August 31st letter and did not want Domnick to think that he was not working quickly enough on the claim or that he would not give a recorded statement (T1035; PDF:5031) (R3673; PD:3675). An ALOG entry on September 1, 2006 contained Korkus' note regarding Harvey's call:

> Received call from insured. He received the fax. Said his company attorney Pat Geraghty is not available until Tuesday after the holiday weekend. **Insured does not want claimant attorney to think we are not acting fast enough and asked what we can do to let the claimant's attorney know we are working on this.** I told insured I will discuss letter with management and get back to him. Insured requested I fax him a copy of any response before it's sent.

[3] The letter Domnick sent on August 31, 2006 was mistakenly dated August 24, 2006 (T1122; PDF:5118).

Harvey testified that, as a result of the August 31st letter, he was concerned Domnick was under the impression that he was not cooperating or that he had refused to give a statement, which was not true (T1035–37; PDF:5031-32):

> Q: Why is it that you didn't want Sean Domnick to think you weren't working fast enough?
>
> A: Because from the previous correspondence and the intimation that I wasn't cooperating or wouldn't give a statement or whatever, here's the second communication from Searcy, Denney. They're still mightily unhappy and I'm trying to, as best I could, manage the situation with GEICO so that I could explicitly say, you need to do this, this, and this.
>
> **I want to make sure that Mr. Domnick knows that, one, I would give a statement**; two, that my lawyer is not around; and three, that given the history of the communications that I wanted to see whatever is being sent ahead of time so that we could head off any further problems.

Harvey also testified that he wanted to see copies of responses that GEICO was sending to Domnick because at this point his "[t]rust factor [was] down" (T1037; PDF p.5033). He testified that he "want[ed] to make sure that whatever's being said about [him was] correct[.]" (T1037; PDF:5033).

After speaking to Korkus on September 1, 2006, Harvey believed she would call Domnick to let him know that Harvey would be meeting with Geraghty to review the financial documents and that they would be working on the information requested (T1044; PDF:5040). Harvey also believed that Korkus would write a follow-up letter to Domnick's correspondence (T1044; PDF:5040). Korkus did

neither of those things and despite her telling Harvey that she would "get back to him" after discussing Domnick's letter with Holleran, it is undisputed that she did not "get back" to Harvey about that (T1041; PDF:5037) (R3673; PDF:3675).

Korkus' Supervisor Directed Her to Update Domnick, as Harvey Had Requested, But She Failed To Do So

Later that same day, September 1, 2006, Holleran wrote a note in the ALOG to Korkus regarding her call with Harvey, which directed Korkus to send a letter to Domnick, Geraghty and Harvey (R3673; PDF p.3675):

> Is Mr. Harvey indicating that he is not sure whether he'll submit to giving a statement until he speaks with his personal attorney next week? If that is the case, we should send a letter to Domnick explaining this with a Cc going to the insured (and his personal attorney, if we have his address).

Holleran testified that he expected Korkus to take action based on that instruction that he wrote in the ALOG. (T722; PDF:4718). In his words, Holleran "wanted [Korkus] to explain what the situation was to Mr. Domnick" so that "we could [] get the case in a position where it could be settled." (T717-18; PDF:4713-14). Korkus admitted she did **not** follow Holleran's instructions and did not take any action on the matter (T682; PDF:4678). Despite Harvey's request and Holleran's directions, the ALOG shows that between September 1st and 13th, neither Korkus nor anyone at GEICO notified Domnick that Harvey and Geraghty would be reviewing Harvey's financial records and that they intended to provide a

statement (R3673-75; PDF:3675-77). In fact, GEICO did not communicate with Domnick in any way during that time period (R3673-75; PDF:3675-77).

GEICO Knew Korkus Was Having Difficulty Handling Her Files

Korkus was handling approximately 130 open claims at the time Harvey's claim arose (R3837-38; PDF p.3839-40). During that same time period, Korkus told her supervisor that she was handling too many claims (T642; PDF:4620). Korkus' personnel file showed that she had trouble managing her claims properly, which included communication failures.

Korkus' personnel file contained two performance appraisals and other warnings which demonstrated that she was having difficulty managing her workload and needed closer supervision (T523-31; PDF:4519-27).[4] The first performance appraisal, for January 1, 2005 through December 31, 2005, stated:

[4] GEICO sought to exclude evidence of Korkus' personnel file at trial claiming it was inadmissible evidence of prior bad acts (R313-19; PDF:315-21). Harvey's counsel successfully opposed that objection, as follows (R3422–23; PDF:3424-25):

> MR. CUNNINGHAM: That's not what it's being offered for, Your Honor. Again, it's the totality of the circumstances standard. . . . They're going to argue for every day of the trial that this is just negligence, this is not bad faith. So they have to act with due regard for the interests of the insured, I think we all agree on that. That's what Boston Old Colony says, that's what Berges says, . . .
>
> So I think the jury is entitled to question if GEICO knew that this adjuster had problems managing her desk, as they talk about, reporting to home office. I think the jury is entitled to ask whether they are acting with due regard for the interests of Mr. Harvey if they

> Fran's quality rating was high overall. However, her productivity numbers fell below average. Fran was placed on a warning as a result of the Yow file. Without rehashing, there is now exposure to our insured and to GEICO for extra contractual damage. Fran could use help with her organizational skills, filtering her e-mails, along with organizing her desk would greatly benefit her.

(T524; PDF:.526) (R3822–25; PDF:3824-27).

There was a second warning to Korkus August 8, 2005 (exactly one year before the Harvey accident) which stated: "[Korkus] received a file with catastrophic injuries and exposure. **I noted the exposure and gave appropriate instructions. However, [Korkus] failed to place the file on home office control in a timely manner."** (T525-26; PDF:4521-22) (R3827; PDF:3829). Harvey's expert, Daniel Doucette testified that placing a file on home office control "alerts the home office . . . It's either a catastrophic loss or it's a very serious coverage case. . . you're telling the home office, keep an eye on this file" (T526; PDF:4522). The August 8, 2005 warning identified goals that Korkus was to meet, which included: **"Fran will follow supervisory instructions in a timely and complete**

> were keeping this adjuster on this file. They told her less than a year before this accident that you had a major problem with the Yow case, and if this conduct persists, if this happens again, you could be terminated.
>
> * * *
>
> So this conduct is crucial to my case, because I don't think that GEICO should have left this woman on this file. She . . . had a long-documented history of not being able to keep up with her files. Look at all of the sloppy claims handling in this case, there is no documentation in this.

fashion. Files must be outlined with an action plan that is updated at each diary" (R3827; PDF:3829). The August 8, 2005 warning came one year before Harvey's claim and the 2005 annual performance appraisal showed that Korkus still needed supervision at the end of 2005, eight months before Harvey's claim arose. (T529-30; PDF:4525-26) (R3820-21; PDF:3822-23). Korkus' second performance appraisal which covered 2006, the time during which she adjusted Harvey's claim, stated (T529-30; PDF:4525-26) (R3820-21; PDF pp.3822-23):[5]

> Fran has done a good job maintaining a high productivity closure ratio for both files and features. However, she has struggled throughout the year with desk management, which is magnified in her file quality rating. Fran will need to develop a system that will allow her to maintain an acceptable level of file quality and desk management.

Korkus Left Domnick in the Dark Which Resulted in the Suit Being Filed

As a result of Korkus' 1) unauthorized and unreasonable refusal to provide a recorded statement from Harvey; 2) failure to submit the request to Harvey; 3) failure to inform Domnick of Harvey's later willingness to provide a statement with the appropriate information; 4) failure to follow unambiguous instructions from her supervisor and; 5) failure to inform Domnick that Harvey had retained

[5] Despite the significant evidence of Korkus' failures in connection with handling important settlement communications on her catastrophic files, the Fourth District merely notes in its Opinion that Mr. Harvey presented evidence "that Ms. Korkus had received some deficient performance review, and at times had difficulty managing her workload." (A4).

private counsel; Domnick did not have sufficient information to reasonably advise Potts to accept the policy limits (T1109-10; PDF:5105-06).

In fact, at trial, Korkus conceded that it was reasonable for Domnick to request information about whether Harvey had other insurance coverage and the extent of his assets (T708-09; PDF pp.4704-05). She admitted that Plaintiff's attorneys asked for that information "all the time" (T709; PDF:4705). She also acknowledged that determining that information was part of Domnick's duty to exercise due diligence on his clients behalf (T709-10; PDF:4705-06).

Harvey's insurance expert, Daniel Doucette, an attorney, testified at trial that Domnick would have committed malpractice if he had advised Potts to accept the policy limits without determining Harvey's assets or the availability of other insurance coverage (T584-85; PDF:4580-81). Even GEICO's expert at trial, John B. Atkinson, Esq., admitted that Domnick needed that information in order to properly advise the estate regarding settlement (T833; PDF:4829).

Domnick testified that he did not receive any response to his August 31, 2006 letter and, in fact, did not receive any communication from GEICO between September 1st and September 14, 2006 (T1128; PDF p.5124). He discussed the ramifications of filing a lawsuit against Harvey with Potts on September 11, 2006, when she called for an update (T1128-29; PDF:5124-25). Domnick memorialized the call in a letter (R3809-10; PDF:3811-12). Domnick testified that he would not

have advised Potts to file the lawsuit if he had been notified that Harvey had retained personal counsel or that he had met with counsel to review his assets[6] (T1133-34; PDF:5129-30). Domnick also testified that if he had known that the only attachable asset was the U.S. Multico bank account, he would still have advised Potts not to file the lawsuit and instead accept the policy limits and release Harvey given the economic considerations of going forward with litigation (T1134-37; PDF:5130-33):

> A: Once we file the lawsuit and I have to start spending money and things like that, and more of my time and my staff's time and things of that nature, the fee goes up to 40 percent of that first million. And of course, costs start adding up [quickly] because we start having to hire experts to go out and reconstruct the accident . . . .
>
> * * *
>
> A: The 85,000 on top of the hundred thousand dollar policy limit, the net effect to my client of us fighting to get that extra little bit of money would not really have resulted in any more money in their pocket . . . . So those would be the conversations that I would be having.
>
> We'd make an effort at it but at the end of the day, if it wasn't being offered to us, my recommendation absolutely would be, let's take the hundred thousand dollars at least from Mr. Harvey. Let's give him a release and we can still see what we do with Multico, **but there's no doubt that we would have let Mr. Harvey out.**

Potts testified that if Domnick had recommended that she settle, she would have followed his advice and accepted the policy limits offered by GEICO:

[6] The Fourth District also omits the fact that Mr. Domnick never knew Mr. Harvey had personal counsel before the Potts' lawsuit was filed, yet faulted Mr. Domnick for not contacting attorney Geraghty before filing suit.

> Q: Were you willing to settle your claim against Harvey for $100,000?
>
> **A: I would have done what my -- what Sean had advised me to.**

(T991; PDF:4987). Having been left in the dark, Domnick filed suit against Harvey on September 13, 2006 (R3812; PDF:3814). The action went to trial and concluded in the entry of a final judgment against Harvey for $8,470,000.00 (R3816; PDF:3818). Subsequently, Harvey filed this action against GEICO for bad faith (R18-32; PDF:20-34).

<u>At Trial, Mr. Harvey Presented Competent, Substantial Evidence of GEICO's Bad Faith</u>

In addition to the evidence summarized above, Harvey presented at trial the testimony of Daniel Doucette, an expert in insurance bad faith, who opined that GEICO failed to act fairly and honestly toward Harvey in handling his claim and with due regard for his interests (T468-71; PDF:4464-67):

> [P]art of the fairness is the ability to rely on the expertise and the claim handling of the insurance company. The contract they have, gives them the right to control all aspects of the claim handling. . . .
>
> . . . . To be fair to Mr. Harvey, what you have to do was give him the information he needed so he could take steps to protect himself and in this case GEICO did not do that. They had several occasions where they should have done that and they didn't.
>
> * * *
>
> Due regard would mean that you are giving consideration to the needs of Mr. Harvey in this case to protect himself. The claim is bigger than the hundred thousand dollars. . . .

> In this case that would have involved letting him know a statement had been requested of him; letting Mr. Domnick know that Mr. Harvey had retained personal counsel; communicating much more with Mr. Harvey about the status of what was happening.
>
> It would also involve, I guess I'd simply call it, a sense of urgency. This was a serious claim. It was a death claim. Very early on GEICO recognized that the exposure was well in excess of their policy.
>
> * * *
>
> If you think about due regard, you'd like to say you'd treat it as if it was your own money . . . you wouldn't sit there for weeks at a time and do nothing. You'd be trying to find out what the other side needs to settle . . . that wasn't happening here.

Doucette testified that it would have been in Harvey's best interests had Korkus told Domnick that Harvey hired personal counsel because that would have facilitated the recorded statement, a fact Korkus admitted. (T497-98; 683; PDF:4493-94, 4679). "If Mr. Domnick knows that Geraghty is involved, one of the first things he would do is he would call Geraghty and he would say, okay, they've offered 100,000 but I'm still waiting for a statement from your insured. Can you help facilitate that?" (T497; PDF:4493). Moreover, as Doucette explained, Harvey could not contact Domnick directly: "[t]he insurance company, by their policy of insurance, their contract takes onto itself the right to the exclusion of the insured to control all aspects of handling the claim. They get to talk to Domnick. They get to decide what to do[.]" (T522-23; PDF:4518-19). Harvey had to use Korkus as the go-between given his duty to cooperate with his insurer (T523; PDF:4519).

In addition, Harvey testified that would have given the estate a recorded statement (T1036; PDF p.5032). As noted above, Potts testified that she would have followed Domnick's recommendation to settle the case, had that been his advice. (T991-92; PDF:4987-88). And, Domnick testified that he would have recommended settling for the policy limits had he been permitted to obtain the necessary information regarding Harvey's assets in a timely manner (T1134-37; PDF:5130-33). In short, the evidence presented at trial showed that the Potts' claim could have settled had GEICO handled the claim properly.

SUMMARY OF THE ARGUMENT

The Fourth District's decision reversing the trial court's denial of GEICO's motion for directed verdict should be quashed because the Fourth District misapplied well-settled principles of directed verdict law regarding the evaluation of the evidence. The Fourth District did not view the facts in the light most-favorably to the non-movant, i.e. the insured instead, it made credibility determinations contrary to those made by the jury, and it failed to consider extensive evidence that was adverse to the non-movant, i.e. GEICO.

Additionally, the Fourth District's opinion is premised on erroneous statements of law regarding the duties owed by a liability insurer to its insured. The principles governing bad faith conduct by an insurer have been well-settled in this state through a long line of consistent opinions from this Court. Nonetheless, the

Fourth District deviated from that clear precedent and ruled, inter alia, that an insurer does not have to act prudently or even reasonably to satisfy its duty of good faith to its insured. That determination is inconsistent with the fundamental principle established by this Court that a liability insurer owes a fiduciary duty to its insured; and a fiduciary cannot be said to comply with its duties when it acts imprudently or unreasonably.

Additionally, the Fourth District ruled that an insured has to prove that the insurer acted solely in its own interest in order to prevail in a bad faith suit. That has never been the law of Florida, and it is inconsistent with the extensive precedent defining the nature and scope of duties owed by a liability insurer to its insured.

Finally, the Fourth District's opinion conflicts with decisions of this Court regarding the issue of causation. Without citing to any valid precedent, the Fourth District held that if the insured contributed in any way to the excess judgment, the insurer is immunized from any bad faith conduct. This is essentially a "contributory negligence" analysis which finds no support in case law nor in the policy considerations underlying the good faith duties owed by a liability insurer to its insured.

When the facts of this case are properly evaluated in the light most favorable to the insured, there way amble evidence supporting the jury's verdict that GEICO

acted in bad faith in failing to settle the estate's claim against Harvey. Additionally, the evidence was sufficient to demonstrate the requisite causal connection between GEICO's bad faith and the excess verdict. However, it should be noted that at GEICO's request, the trial court eliminated any reference to causation from the final jury instructions, and the only question on the verdict did not include any issue of causation.

For the reasons stated above, the decision of the Fourth District should be quashed and the cause remanded for reentry of judgment in accordance with the jury verdict.

POINT I

THE FOURTH DISTRICT ERRED IN GRANTING A DIRECTED VERDICT TO GEICO ON HARVEY'S BAD FAITH CLAIM

Standard of Review

This Court's review of a ruling on directed verdict is de novo. Christenson v. Bowen, 140 So.3d 498, 501 (Fla. 2014).

The Directed Verdict Standard

The Fourth District reversed the trial court's denial of GEICO's motion for directed verdict and remanded for entry of a judgement in favor of GEICO, ruling that the evidence was insufficient as a matter of law to prove GEICO acted in bad faith. However, it is clear from the record in this case, that in reaching that

conclusion the Fourth District violated the directed verdict standard established and consistently enforced by this Court.

Furthermore, the record demonstrates that the Fourth District's ruling was not what GEICO argued in its post-trial motion nor in its briefs before the Fourth District. The Fourth District created its own rationale to justify a directed verdict, and the "stacking of inferences" argument presented by GEICO was not adopted, nor even mentioned in the opinion. Thus, the Fourth District's ruling violates not only preservation principles but, as argued infra, fundamental standards governing the directed verdict analysis.

This Court has stated that "[T]he power to direct a verdict should be cautiously exercised" Katz v. Bear, 52 So.2d 903, 904 (Fla. 1951). Also, "[I]t is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury" Castillo v. E.I. Du Pont De Nemous & Co., Inc., 854 So.2d 1264, 1277 (Fla. 2003). This admonition is of particular force in bad faith cases in which liability is determined based on the "totality of the circumstances" Berges v. Infinity Ins. Co., 896 So.2d 665, 680 (Fla. 2004); Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So.2d 1216, 1236 (Fla. 2006). As a result, this Court has long held that "The question of failure to act in good faith with due regard for the interests of the insured is for the jury."

Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980), (citing Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1974)).

This Court has stated that in reviewing a trial court's directed verdict ruling, an appellate court:

> "[M]ust view the evidence and all inferences of fact in the light most favorable to the nonmoving party."

Owens v. Publix Supermarkets, Inc., 802 So.2d 315, 329 (Fla. 2001). Additionally, an appellate court "will not reweigh the evidence or substitute its judgment concerning credibility of the witnesses for that of the trier of fact." Cox v. St. Joseph's Hospital, 71 So.3d 795, 801 (Fla. 2011). See also Friedrich v. Fetterman & Associates, P.A., 137 so.3d 362 (Fla. 2013); Sanders v. ERP Operating, Ltd., 157 So.3d 273 (Fla. 2015).

A motion for directed verdict admits not only all the facts that the evidence reveals, viewed in the light most favorable to the non-movant, but also "every conclusion favorable to the adverse party that a jury might freely and reasonably infer from the evidence." Nelson v. Ziegler, 89 So.2d 780, 782 (Fla. 1956). As a result, it is improper for an appellate court to ignore any evidence or reasonable inference favorable to the nonmoving party in making its directed verdict analysis. See Marriott Int., Inc. v. Perez-Melendez, 855 So.2d 624, 630 (Fla. 5th DCA 2003). A directed verdict can only be justified when "no proper view of the evidence

could sustain a verdict in favor of the nonmoving party." Owens, supra, 802 So.2d at 329.

The Fourth District Did Not Properly Apply the Directed Verdict Standard

Contrary to the directed verdict standard discussed above, the Fourth District did not view the facts in the light most favorable to the non-movant, i.e. Harvey; and it weighed the credibility of witnesses and ignored critical evidence supporting his bad faith claim.

For example, in discussing the August 14, 2006 phone call between Tejeda and Korkus, the Fourth District states (208 So.3d at 812):

> 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.

Under a proper application of the directed verdict standard, Tejeda's very clear testimony that Korkus flatly denied her request for a recorded statement from Harvey had to be accepted as true, but the Fourth District obviously did not do that.[7]

[7] As noted previously, not only was Tejeda's testimony clear, but she contemporaneously documented the conversation consistent with her testimony (T883-85; PDF:4879-81) (R3777; PDF:3779). Korkus did **not** document the substance of her call with Tejeda in the ALOG although she had an obligation to do so (R3669; PDF:3671). Furthermore, the Fourth District's contention that Korkus said that she would not have refused if the attorney requested the statement should be disregarded for directed verdict purposes since it was speculative and no one ever testified or argued that a paralegal was not authorized to make that request.

Also, with respect to the August 14, 2006 phone call, the Fourth District did not view the facts in the light most favorable to the insured because it stated that Korkus was not told "the insured's statement was a prerequisite to settling the insured's claim." (208 So.3d at 812). That is contradicted by Tejeda's testimony, which must be accepted as true under the directed verdict standard, in which she said she explained to Korkus why she **needed** a recorded statement about Harvey's assets, other coverages, and whether he was acting in the course and scope of his employment at the time of the accident (T883-85; PDF:4879-81). Moreover, Korkus admitted at trial that she knew the Estate's attorney had to obtain that information to satisfy his duty to exercise due diligence on behalf of his client and that plaintiffs' attorneys requested that information "all the time" (T709-10; PDF:4705-06). Additionally, GEICO's expert admitted that Domnick needed that information to properly advise the Potts family regarding settlement decisions (T833; PDF:4879). Furthermore, Holleran, Korkus' supervisor, recognized this obvious fact when he directed Korkus to cooperate so "we could get the case in a position where it could be settled" (T718; PDF:4714). This evidence, which was ignored by the Fourth District, demonstrates that GEICO knew that receipt of the requested information was a reasonable prerequisite to any settlement decision by the estate.

The Fourth District also omitted critical information when it stated that GEICO submitted a policy limits check on August 17th, but failed to mention that the attached release was totally inappropriate since it released Potts' property damage claim which had not been resolved. Additionally, the opinion does not mention the fact that when the check was presented, GEICO provided no information regarding U.S. Multico, the co-owner of the vehicle Harvey was driving in the accident.

Also, the Fourth District notes that on August 23, 2006, Harvey met with Geraghty, his personal attorney, but omits the fact that Harvey did not know at that time that the estate had made a request for a recorded statement from him about his assets, other coverages, and the course and scope issues.

The Fourth District's opinion noted that Korkus faxed Domnick's August 24, 2006 letter, to Harvey on August 31, 2006, and then says **"[A]ccording to this insured, this was the first time he learned the estate wanted a statement"** (208 So.3d at 813). Again, the Fourth District violated the directed verdict standard by making a credibility judgment since Harvey's testimony was unequivocal that he did not learn of the estate's request for a recorded statement until receiving a copy of that letter on August 31, 2006. Harvey explicitly testified that he was angry that Domnick's letter said he declined a request to give a statement when he had not, in fact, done so (T1027; PDF:5023). That testimony, which demonstrates that

Korkus' initial refusal was without the consent or knowledge of the insured and that Harvey was not even informed of the request for over two weeks, has to be deemed true for purposes of the directed verdict analysis.

The Fourth District noted Korkus' telephone conversation with Domnick on August 31, 2006 but failed to note that she did not change her refusal to produce Harvey for a recorded statement. Furthermore, the opinion does not mention that this intransigence occurred despite Holleran's prior statement to Korkus in the ALOG that "We'd surely not deny that request on our own" (R3672-73; PDF:3674-75). Instead, the Fourth District is critical of Domnick for not providing a deadline for the recorded statement, which is unjustifiable since this was the third time that Korkus maintained her refusal to produce Harvey for a recorded statement. Why would someone impose a deadline on a request that had been effectively denied three times? Additionally, the court omits Domnick's testimony that in the August 31, 2006 conversation he advised Korkus that he needed the financial and coverage information in order to properly advise the estate regarding settlement decisions (T1114; PDF:5110). This, also, conflicts with the Fourth District's statement that Potts never made the financial statement a condition of settlement.

The Fourth District also did not view the facts in the light most favorable to the insured with respect to Harvey's second phone call to Korkus on September 1,

2006. While the opinion notes that Harvey requested that Korkus tell Domnick that he was gathering his financial information, the opinion does **not** mention that Korkus' ALOG notes state that she told Harvey she would discuss Domnick's letter with management and "get back to him" (R3673; PDF:3675. It is undisputed that Korkus never got back to Harvey despite Harvey's request, Holleran's directive, and Korkus' own representation that she would do so. Harvey was left completely in the dark.

Additionally, the Fourth District categorizes Holleran's August 31, 2006 directive to Korkus as simply to "relay the insured's message to the estate." However, whereas the instructions in the ALOG were clear that Korkus should send a letter to Domnick that Harvey was consulting with his personal counsel and was willing to give a recorded statement, and that copies of the letter should be sent to the Harvey and his personal attorney (R3673; PDF:3675). Korkus did nothing in response to that directive from her supervisor. The Fourth District also omits the fact that despite Domnick's letter of August 31, 2006, no one from GEICO communicated with him by any means over the next two weeks.

Finally, the Fourth District also made an improper credibility judgment in questioning Harvey's willingness to provide the information requested by the estate. As discussed in more detail in Point II, infra, the Fourth District criticized Harvey and rejected his testimony because he did not provide the requested

information unilaterally before suit was filed even though 1) the estate had requested a recorded statement, not an affidavit or unilateral statement; 2) Korkus promised Harvey on August 1, 2006 that she would "get back to him" about the estate's request after talking to "management"; 3) Korkus did not contact Harvey again until after suit was filed. In that additional way, the Fourth District violated the directed verdict standard.

The Fourth District viewed the evidence in the light most favorable to the movant, i.e. GEICO, and ignored extensive evidence that was critically adverse to the insurer. This error, in conjunction with the district court's mischaracterization of the legal standard governing bad faith conduct (discussed next), compels rejection of the Fourth District's ruling.

The Fourth District Mischaracterized the Bad Faith Standard for Liability Insurers in Florida

In addition to improperly applying the directed verdict standard in its evaluation of the facts in this case, the Fourth District's opinion conflicts with the court's pronouncements on the law of bad faith in Florida which contributed to its erroneous reversal of the circuit court judgment. While citing many of the cases that established the legal duties of liability insurers to their insureds, the opinion below contains some blatant misstatements which apparently distorted the district court's reasoning.

For example, the Fourth District quoted an unpublished federal decision that says an insurer can fulfill its duty to its insured without acting "prudently or even reasonably." 208 So.3d at 814, citing Novoa v. GEICO Indemnity Co., 542 Fed. Appx. 794, 796 (11th Cir. 2013). That is clearly an erroneous statement of Florida law and ignores multiple decisions of this Court which unambiguously state that the relationship between an insured and its liability insurer is a fiduciary relationship. In fact, the word "fiduciary" never appears in the Fourth District's opinion.

Additionally, the Fourth District stated that "the essence of a bad faith claim is that the insurer put[s] its own interests before that of the insured." 208 So.3d at 814. [Citations omitted]. That statement conflicts with longstanding Florida precedent that the insurer owes a duty of reasonable care to the insured and that its liability is not contingent on whether the insured can prove that the insurer acted solely in its own interest.

In Auto Mutual Indemnity Co. v. Shaw, 184 So. 852 (Fla. 1938), this Court first discussed the duties of liability insurers after the auto insurance market had transitioned from indemnity policies to liability policies. In its extensive discussion of how the change in contractual obligations affected the relationship of the parties, this Court noted that the insured's relinquishment of control over the defense and negotiation of claims required the imposition of a duty of good faith upon the

insurer. In its survey of the law on the subject, this Court quoted with approval from Hilker v. Western Automobile Ins. Co, 235 N.W. 413, 415 (Wis. 1931) to the effect that (184 So. At 858):

> [A] good-faith decision on the part of the insurance company upon the question of settlement must be preceded by the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims.

After further discussion, this Court in Shaw adopted the general rule, as to an insurer's duty which applies to this day, as follows (184 So.2d at 859):

> It appears that the insurance company in the settlement of claims and in conducting a defense before the court on suits filed should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business.

See also Perera v. United State Fidelity & Guaranty, 35 So.3d 893, 898 (Fla. 2010) (quoting same language). Thus, directly contrary to the language in the Fourth District's opinion, it is well-established under Florida law that an insurer cannot satisfy its obligation of good faith to its insured if it acts imprudently or unreasonably.

This conclusion is further buttressed by the settled principle that the relationship between the liability insurer and its insured is a fiduciary relationship. This conclusion was adopted in district court decisions multiple times, see Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973); Florida Farm Bureau Mut. Ins. Co. v. Rice, 393 So.2d 552 (Fla. 1st DCA 1980); before being expressly

adopted by this Court in Doe v. Allstate Ins. Co., 653 So.2d 371, 374 (Fla. 1995). Additionally, in State Farm Mut. Auto Ins. v. Laforet, 658 So.2d 55, 58 (Fla. 1995), this Court stated that because insureds were dependent on the insurer's conduct on the defense and negotiations to avoid personal exposure, "[t]his placed insurers in a fiduciary relationship with their insureds similar to that which exists between an attorney and client." (citing Baxter, supra). There is no Florida authority which holds that a fiduciary is entitled to perform its fiduciary obligations imprudently or unreasonably.

As noted previously, the Fourth District cited Novoa, 542 Fed. Appx. at 792 for the proposition that "to fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably." 208 So.3d at 814. It is noteworthy that the Novoa opinion does not cite any Florida authority, in fact no legal authority at all, for that proposition, which obviously undermines the basic premise of a fiduciary relationship. Instead, the Novoa opinion follows that statement with the following comment (542 Fed. Appx. At 796):

> Rather, insurers must "refrain from acting solely on the basis of their own interests in settlement." State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 58 (Fla.1995).

An analysis of the Laforet opinion demonstrates that the quoted language is taken entirely out of context in Novoa and, as the preceding review of Florida law

demonstrates, that has never been the standard for evaluating an insurer's conduct in a bad faith case in Florida.

The language from Laforet relied upon in Novoa is taken from this Court's historical discussion of the development of insurance policies from indemnity policies, in which the insurer had no duty to defend, to liability policies where the insurer controls the defense and negotiation of the claim. In that context, this Court stated (Laforet, 658 So.2d at 58):

> Consequently, courts began to recognize that insurers "owed a duty to their insureds to refrain from acting solely on the basis of their own interests in settlement.

Roger C. Henderson, The Tort of Bad Faith and First Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute, 26 U.Mich. J.L. Ref.1, 21 (Fall 1992). That comment in Laforet was never intended to establish the entire parameters of the duties owed by a liability insurer to its insured, but only to address the developments in insurance law which required a reconsideration of the nature and scope of an insurer's duties to its insured. That historical discussion then continued with a discussion of Shaw supra, where the duties of liability insurers to their insureds were clearly defined in terms of "reasonable diligence" and "prudence" Shaw, supra, 184 So.2d at 858. Obviously, the language seized on by the Eleventh Circuit in Novoa was never intended to establish the scope of the duties of a liability insurer in Florida.

In fact, the law review article quoted in Laforet separately discusses the standards adopted by courts to be applied to liability insurers (26 Mich. J.L. Ref. at 21-22:

> The type of situations described above led the courts to recognize the clear conflict of interests that might occur under a liability insurance policy. Even though such a policy did not, by its express terms, impose upon the insurer a duty to settle claims, courts began to hold that insurers owed a duty to their insureds to refrain from acting solely on the basis of their own interests in settlement, rather than considering the interests of their insureds. This duty was grounded in the power inherent in the insurer as a result of the relationship created by a third-party insurance contract. **As to the standard of culpability that accompanied this newfound duty, some courts couched it in terms of due care on the part of the insurer. Others defined the duty as the exercise of good faith or, conversely, as the avoidance of bad faith.**

Clearly, that law review article did not suggest that the entire parameters of a liability insurer's duty to its insured was to refrain from acting "solely on the basis of their own interest in settlement."[8]

Thus, neither the language in Laforet, nor the law review article it quoted, can be construed to stand for the proposition that the defining test of bad faith is whether the insurer acted solely on the basis of its own interests. Laforet did not

[8] In fact, the footnote to that language in the law review article cites one case which defines the standard of bad faith in Oregon as requiring "due diligence" as well as a duty to properly inform and assist the insured to take steps for his or her own protection. Radcliffe v. Franklin National Ins. Co., 298 P.2d 1002, 1024 (Or. 1956).

overrule or modify Shaw, nor any other decision of this Court regarding the scope and nature of a liability insurer's duty of good faith.

Nonetheless, some federal decisions have converted that language from the historical discussion in Laforet into the defining standard for evaluating evidence in a bad faith case. See e.g. Novoa, supra. The Fourth District's decision here goes even further and states "the essence of a bad faith claim is that the insurer puts its own interest before that of the insured" citing Macola v. Government Employees Ins. Co., 953 So.2d 451, 455 (Fla. 2006) (citing Allstate Indemnity Co. v. Ruiz, 899 So.2d 1121, 1225 (Fla. 2005). However, neither Macola nor Ruiz said that was the "essence" of a bad faith claim, nor did they make any modification to the longstanding principles governing bad faith liability established in Shaw, supra and Boston Old Colony, supra. In fact, Macola and Ruiz only quote language from Laforet in their historical discussions of the development of bad faith law.

While the statement upon which the Fourth District relied certainly describes one type of violation of an insured's good faith duty, the Fourth District's attempt to elevate it to the litmus test of a plaintiff's bad faith claim ignores the extensive law that the relationship between the liability insurer and its insured is a fiduciary one. The inherent nature of a fiduciary relationship imposes due care, honesty, and good faith, which is justified by the insurer's claims handling expertise and its exclusive control over the investigation and resolution of the claim against the

insured. The Fourth District's mischaracterization of an insured's fiduciary duty to its insured clearly contributed to the erroneous result in this case.

Harvey Presented Sufficient Evidence of GEICO's Bad Faith to Support the Jury Verdict

In Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980), this Court reiterated that an insurer has a duty to use reasonable care in handling the defense and negotiation of a liability claim, and it itemized seven duties that were subsumed within that duty:

> This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. Ging v. American Liberty Ins. Co., 423 F.2d 115 (5th Cir. 1970). The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Government Employees Ins. Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975), cert. discharged, 332 So.2d 13 (Fla.1976); Government Employees Ins. Co. v. Campbell, 288 So.2d 513 (Fla. 1st DCA 1973), quashed, 306 So.2d 525 (Fla.1974); Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), cert. discharged, 317 So.2d 725 (Fla.1975). Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. American Fidelity and Casualty Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958); DeLaune v. Liberty Mutual Ins. Co., 314 So.2d 601 (Fla. 4th DCA 1975). The question of failure to act in good faith with due regard for the interests of the insured is for the jury. Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla.1974).

The Fourth District discussed each of the seven duties itemized by this Court in Boston Old Colony in the opinion, but, its analysis was fatally flawed due to its failure to properly view the evidence and its mischaracterization of the controlling law.

For example, as to the first duty noted in Boston Old Colony regarding the insured's obligation to advise the insurer of settlement opportunities, the Fourth District makes two glaring errors. While it acknowledged that GEICO never informed Harvey of the estate's request for a recorded statement until August 31, 2006, it inexplicably found that conduct acceptable. However, it ignored that Korkus initially denied the estate's request for a recorded statement **without the knowledge or consent of the insured**. That conduct not only disregarded the insured's interest, but it was blatantly unreasonable since Korkus admitted that the information the estate requested was necessary to evaluate any settlement offer and that such requests were made "all the time" (T709; PDF:4705). To compound the wrongdoing, Korkus maintained that refusal through subsequent requests and even in the face of her supervisor's statement that "we'd surely not deny that request on our own" (R3672-73; PDF:3674-75). This must be considered in light of the undisputed fact that despite Harvey's two phone calls to Korkus expressing his willingness to give a recorded statement, and his request that she inform Domnick of that, she never did so. To put it bluntly, Korkus was an impenetrable

impediment between the insured and the estate regarding that necessary information.

The Fourth District compounded this error by saying that GEICO fulfilled its obligation because the estate never informed it that the recorded statement was a condition of any settlement. 208 So.3d at 812. This ignores the fact that both Tejeda and Domnick testified that in their phone calls with Korkus they told her that the information was necessary and, more importantly, Korkus' own admission that she knew that information was required for Domnick's ability to do his due diligence and to advise the Potts family regarding settlement (T709; PDF:4705). Even GEICO's expert testified that Domnick was required to obtain that information to satisfy his duty to his client (T833; PDF:4829). Quite simply, that evidence cannot be reconciled with a conclusion that GEICO exercised the degree of care and prudence that a person would exercise in the management of their own business. Boston Old Colony, supra.

The Fourth District also erred in concluding GEICO had satisfied its obligation to "advise the insurer of any steps he might take to avoid" any excess judgment. While GEICO sent a form letter telling Harvey he might have personal exposure above the policy limits, the insurer's obligation to advise the insured how to avoid excess exposure cannot be viewed so myopically that it can then repeatedly interfere with the insured taking those steps. Here, on the very day

Harvey learned that Korkus had flatly denied the estate's request for a recorded statement, he immediately called Korkus and informed her he was willing to do that. He also told her he had retained personal counsel, was reviewing his financial information, and was willing to convey that information to the estate's attorney. A second conversation the next day reiterated that concern and, as Harvey testified, he assumed that Korkus would comply with his reasonable instructions (T1044; PDF:5040). Nonetheless, despite an express directive from her supervisor, Korkus did nothing to rescind her unambiguous rejections of the estate's request. Clearly, GEICO did not satisfy its obligation in its role as a fiduciary to inform and enable Harvey regarding steps he could take to avoid an excess judgment.

In Powell v. Prudential Property, supra, a bad faith case, the Third District specifically noted that the insurer's failure to inform the claimant of the policy limits unreasonably deprived the claimant of an ability to evaluate the insurer's proposed settlement. The court also determined that evidence supported the reversal of the circuit court's grant of directed verdict in favor the insurer. The same rationale applies here, where GEICO deprived the estate of critical information necessary to properly evaluate any settlement offer, in direct contravention of Harvey's intention and the customary and reasonable practice of the industry. That conduct clearly supports the jury's verdict finding that GEICO acted in bad faith.

As to the seventh aspect of the duty of good faith identified in Boston Old Colony, the Fourth District also erred in concluding that GEICO's tender of the policy limits within nine days of the accident fulfilled its obligation to "settle, if possible where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." 208 So.3d at 815. As the discussion above demonstrates, this conclusion is inherently flawed where GEICO was the primary cause of the claimant's inability to obtain critical information necessary to properly evaluate the policy limits offer. Furthermore, as noted previously, the Fourth District ignored the undisputed fact that GEICO submitted an overbroad release with its tender of the policy limits, a release which the estate could not reasonably be expected to execute.

The Fourth District's conclusion that GEICO satisfied its duty to attempt to settle ignores that bad faith claims must be evaluated under the totality of the circumstances Berges, supra, and that it is improper to isolate specific aspects of the claims handling to justify a conclusion that an insurer complied with its fiduciary duties.

For example, in Burgess, supra, the insurer argued on appeal that because it agreed within the claimant's time deadline to pay the policy limits, the issue of bad faith should be determined in its favor as a matter of law. This Court rejected that contention and quashed the Second District's decision to grant a directed verdict to

the insurer. In Burgess, the policy limits were not actually paid within the deadline and, despite the need to obtain court approvals for the settlements, the insurance company failed to be diligent in pursuing the finalization of the settlements. This Court noted that after the insurer agreed to pay the limits (896 So.2d at 681):

> [T]he evidence construed in the light most favorable to Berges reveals that **instead of doing everything reasonably possible to complete the settlement** following the May 11 conversation, Fryer never contacted Taylor again or followed up with Korth to stress the urgency of the time limits.

Similarly here, the evidence construed in the light most favorable to the Harvey clearly reveals that GEICO did not do everything reasonably possible to enable the estate's acceptance of the policy limits offer. GEICO consistently refused to inform the estate that Harvey was willing to give a recorded statement revealing his financial situation and any facts relevant to other insurance coverages. Instead, it maintained an unreasonable refusal to do so despite the insured's willingness to do so and his instructions to convey that to the estate. Furthermore, the evidence revealed that if the appropriate information had been provided to the estate, it would have accepted the policy limits offer, thereby eliminating any personal exposure to Harvey.

Menchise v. Liberty Mut. Ins. Co., 932 So.2d 1130 (Fla. 2d DCA 2006) bears many similarities to this case. In Menchise, as here, there was clear fault on the insured, significant injuries and the insurer knew that the policy limits were

insufficient to satisfy any reasonable verdict. The claimant offered to settle for the policy limits if provided with an affidavit that there was no other insurance available and proof that the insured was not acting in the course and scope of his employment. The insurer simply tendered a check for the policy limits without making any effort to provide the requested information, and the claimant rejected the offer.

In Menchise, the trial court granted a summary judgment in favor of the insurer on the bad faith claim, and the Second District reversed. The Second District noted that the tender of the policy limits was insufficient to satisfy the insurer's fiduciary obligation to its insured because it ignored the reasonable conditions that the claimant imposed on the settlement. Under those circumstances, the Second District determined it was an issue of fact for the jury whether the insurer had acted in bad faith because it could not be said, as a matter of law, that it had used the same degree of care and diligence as a person of ordinary care and prudence would exercise in a management of their own business.

Similarly here, if GEICO were faced with the sole liability for the death of Mr. Potts, there is no doubt it would have conveyed to Domnick that Harvey was willing to give a recorded statement and provide the necessary financial data and other information necessary to determine whether other insurance coverage was available. Any reasonable person or entity in that position would obviously be sure

that the requisite information was provided, especially when, as here, the most reasonable response of the claimant to that information would be to accept the policy limits offer. GEICO's repeated failure to do that cannot be reconciled with a determination that GEICO satisfied its fiduciary obligation to Harvey as a matter of law. Therefore, the Fourth District's decision should be quashed and the cause remanded for reentry of the judgment which was based on the jury verdict.

POINT II

THE FOURTH DISTRICT ERRED IN APPLYING AN UNPRECEDENTED THEORY OF CAUSATION TO JUSTIFY A DIRECTED VERDICT IN FAVOR OF GEICO

Standard of Review

Review of rulings on directed verdict are conducted under the de novo standard. Christenson v. Bowen, 140 So.3d 498, 501 (Fla. 2014).

Merits

At the conclusion of its opinion, the Fourth District includes an alternative basis for its grant of directed verdict, determining that the plaintiff failed to prove, as a matter of law, that any bad faith by GEICO caused the excess judgment. In reaching this conclusion, the Fourth District announced a standard of causation that has never existed in bad faith law in Florida.

But even more surprisingly, the Fourth District sua sponte granted a directed verdict on an issue that was never presented to the jury. The jury was never

instructed on any issue of causation (T1242-49; PDF:5238-39), at the specific request of GEICO (see T1229-38; PDF:5225-34). The only question presented to the jury was whether GEICO acted in bad faith by failing to settle the estate's claim against Harvey (R3056; PDF:3058). The jury answered "yes" (R3056; PDF:3058). Needless to say neither GEICO's post-trial motion nor its briefs in the Fourth District argued for a directed verdict on the causation issue. Nonetheless, the Fourth District sua sponte ruled (alternatively) on that basis.

The Fourth District ruled there was no competent evidence of causation because (208 So.2d at 816):

> [W]here the insured's own actions or inactions result, at least in part, in an excess judgment, the insurer cannot be liable for bad faith.

The only legal authority cited for that statement is two unpublished federal court opinions, neither of which states that proposition. Novoa, supra; Barnard v. GEICO General Ins. Co., 448 Fed. Appx. 940 (11th Cir. 2011). In fact, neither of those cases even involved any issue regarding an insured's actions or inactions which caused the excess judgment. Thus, the Fourth District's new causation standard is literally unprecedented and creates conflict in Florida decisional law.

Earlier in its causation discussion, the Fourth District cites Perera v. United State Fidelity & Guaranty, 35 So.3d 893 (Fla. 2010), however that case only states that "there must be a causal connection between the damages claimed and the insurer's bad faith." Id. 35 So.3d at 902. Neither Perera, nor any other Florida case

justifies the creation of a new causation standard which essentially constitutes a "contributory negligence" defense for insurance companies. That is, the Fourth District's pronouncement means that if there is any fault, no matter how minor, on the part of the insured, the insurance company has a complete defense to its bad faith conduct.[9]

The Florida Standard Jury Instructions on bad faith include an instruction on legal cause, and it states the standard causation principles utilized in tort cases Fla. St.Jur.Inst. 404.4 (a):

> Bad faith conduct is a legal cause of [loss] [damage] [or] [harm] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [damage] [or] [harm], so that it can reasonably be said that, but for the bad faith conduct, the [loss] [damage] [or] [harm]would not have occurred.

The Fourth District in Nationwide v. King, 568 So.2d 990 (Fla. 4th DCA 1990) upheld the trial court's denial of the insurer's request for a special instruction on causation in a bad faith case, and noted that the standard instruction adequately covered the law on that issue. Fla.St.Jur.Inst. 404.4 (a) incorporates the standard "but for" analysis test that clearly does not allow an insurer to avoid liability on the rationale that any fault of the insured eliminates legal cause. In Jones v. UTICA Mut. Ins. Co., 463 So.2d 1153, 1156 (Fla. 1985), this Court

[9] Of course, comparative bad faith has been rejected as a defense in insurance bad faith cases. See Nationwide Property & Casualty Ins. Co. v. King, 568 So.2d 990 (Fla. 4th DCA 1990).

specifically recognized that the "but for" legal cause standard does not require that a defendant's conduct be the only cause of the damage. In fact, the standard instructions also authorize a concurring cause and intervening cause instruction in bad faith cases. See Fla.St.Jur.Instr. 404.6 (b) and (c); which are also in conflict with the Fourth District's analysis.

In addition to the legal error that is apparent in the Fourth District's causation analysis, the opinion also reveals that the court did not properly apply the directed verdict standard to the facts (see supra pp. 25-30). The Opinion states (208 So.3d at 816):

> Even assuming that GEICO handled the insured's claim improperly, the insured failed to establish that GEICO's conduct caused the excess judgment against the insured. Although, after the fact, the insured claimed he would have provided a statement had GEICO acted differently, the insured's own inaction belied this after-the-fact assertion. Before the estate ever filed suit, the insured knew the estate wanted a statement, knew what the estate wanted in that statement, and had the materials to produce a statement. Further, the insured never provided a statement to the estate despite having the assistance of legal counsel for several days before suit was eventually filed. Therefore, the insured failed to show that he would have provided the requested statement but for GEICO's purported "bad faith."

Those factual assertions violate the principle that a directed verdict analysis requires consideration of the facts in the light most favorable to the non-movant and that the appellate court should not make any credibility determinations in conflict therewith (Point I, supra). Moreover, the Fourth District obviously chose to disbelieve Harvey's testimony by inappropriately construing the evidence in the

light most favorable to GEICO. More importantly, those factual findings reveal a fundamental misunderstanding of the facts of this case. The Fourth District's statement erroneously assumes that the estate simply required a unilateral statement by Harvey when, in fact, the record is undisputed that the estate consistently requested a recorded statement, as is consistent with general insurance practices. Thus, contrary to the fundamental premise of the Fourth District's criticism of Harvey, he and his attorney could not have complied by generating a unilateral statement which may or may not have addressed all of the factual issues the estate needed to investigate in order to make a reasonable decision regarding settlement.[10]

Furthermore, it is undisputed that Harvey told Korkus to communicate with Domnick and tell him that he had hired personal counsel and that he was willing to give a recorded statement. Harvey also testified that he believed Korkus would do that (T1044; PDF:5040). Since a recorded statement requires the presence of the insured, his personal counsel (if any), a representative of the insurance company, and the claimant's attorney, it was obvious that Harvey was waiting for Korkus to "get back" to him, as she promised, for the scheduling of such a meeting. Therefore, it was unreasonable, and violated the directed verdict standard to

[10] Harvey also sued his attorney Geraghty (and his law firm) for legal malpractice, but that claim was resolved and those Defendants were dismissed pursuant to a joint stipulation (R182-83; PDF:184-85). GEICO reversed a full setoff for that settlement.

construe his inaction as an unwillingness to comply with the estate's request, as he repeatedly stated he would do.

Therefore, since the legal principle upon which the Fourth District justified a directed verdict on causation is unprecedented and unjustifiable and its factual predicate is inconsistent with the application of the appropriate directed verdict analysis, the Fourth District clearly erred in granting a directed verdict to GEICO on this basis. Here, the evidence clearly demonstrates that GEICO's failure to satisfy its fiduciary duties to Harvey was a "but for" cause of the excess judgment. Korkus, an employee that GEICO knew had persistent performance problems, completely prevented the estate from knowing that Harvey was willing to appear for a recorded statement and provide information. As the evidence demonstrated, if Domnick had been provided the facts regarding Harvey's finances, the course and scope question and the unavailability of other insurance, he could have provided reasonable advice regarding the estate's acceptance of the policy limit offer. Mrs. Potts testified that she would have followed that advice and accepted that offer. That was clearly an adequate factual predicate for the jury to find causation in this case.

CONCLUSION

For the reasons stated above, the decision of the Fourth District Court of Appeal should be quashed and the cause remanded for entry of judgment in accordance with a jury verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by email to B RICHARD YOUNG, ESQ. (ryoung@flalawyer.net) and ADAM DUKE, ESQ. (aduke@flalawyer.net); One Biscayne Tower, Suite 3195, 2 South Biscayne Boulevard, Miami, Florida, 33131, on June 29, 2017.

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