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 RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

SUMMARY OF ARGUMENT

In reaching its decision that there was insufficient evidence as a matter of law to show that GEICO acted in bad faith in failing to settle the estate's claim, the Fourth District correctly applied the undisputed testimony and evidence to the enumerated obligations set forth in *Boston Old Colony*. As the Fourth District's decision does not expressly and directly conflict with any decisions of this Court, or any other appellate decisions, this Court should deny Harvey's request for discretionary review.

ARGUMENT

I. The Fourth District's Opinion does not Expressly and Directly Conflict with This Court's Decisions in *Sanders, Friedrich*, or *Cox*.

Harvey asserts that the Fourth District's opinion expressly and directly conflicts with the directed verdict standard applied by this Court in *Sanders v. ERP Operating Ltd. P'ship*, 157 So.3d 273 (Fla. 2015); *Friedrich v. Fetterman & Assocs., P.A.*, 137 So.3d 362 (Fla. 2013); and *Cox v. St. Josephs Hosp.*, 71 So.3d 795, 796 (Fla. 2011); stating that "[a] district court may not 'reweigh[] the evidence and substitute[] its own evaluation of the evidence in place of the jury.'" [Pet. B. at 4]. As the Fourth District's opinion rests solely on uncontradicted testimony and evidence as to whether GEICO fulfilled its good faith obligations enumerated in *Boston Old Colony*, the Fourth District's decision does not expressly and directly

conflict with the directed verdict standard reviewed in *Sanders, Friedrich*, or *Cox*.

In *Cox*, the issue before this Court was whether the district court reweighed legally sufficient evidence of causation from the plaintiff's expert witness in a negligence action, to find that the negligence "probably caused" the plaintiff's injury. *See Cox*, 71 So.3d at 799. This Court noted that the district court, in applying the negligence standard, "held that even though [plaintiff's expert] testified that the negligence probably caused the injury, her testimony was pure speculation." *Id.* at 800. The rule of law stated in *Cox* is that "while a directed verdict is appropriate in cases where the plaintiff has failed to provide evidence that the negligent act more likely than not caused the injury, it is not appropriate in cases where there is conflicting evidence as to the causation or the likelihood of causation." *Id.* at 801. In reviewing the district court's decision, this Court found "that the district court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of the jury." *Id.* In reaching this holding, this Court reasoned that even though an "expert cannot merely pronounce a conclusion that the negligent act more likely than not caused the injury . . . [plaintiff's expert] did not simply provide a summary conclusion without a factual basis." *Id.* at 801.

Similiarly, in *Friedrich*, the issue in the negligence action was whether the district court "reweighed legally sufficient evidence of causation from plaintiff's

expert witness." 137 So.3d at 364. In *Friedrich*, the Court noted that "[i]n order to establish causation in a negligence action, 'Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury.'" *Id.* at 365 (citations omitted). This Court found that the district court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of that of the jury after the "parties presented expert witnesses who provided different opinions regarding whether [the defendant] should have or could have discovered the defect of the chair upon reasonable inspection." *Id*. at 366.

The issue before this Court in *Sanders*, was whether the district court properly relied on *Brown v. Motel 6 Operating, L.P., Ltd.*, 989 So.2d 658 (Fla. 4th DCA 2008), in a negligence action to conclude that where there "was no sign of a forced entry" and "[w]ithout proof of how the assailants gained entry into the apartment, [plaintiff] simply could not prove causation." *See* 157 So.3d at 278. In *Sanders*, this Court noted that in "order for a court to remove the case from the trier of fact and grant a directed verdict, there must only be one reasonable inference from the plaintiff's evidence." *Id.* at 277 (citations omitted). However, "if the jury is forced to stack inferences to find that the plaintiff presented a prima facie case of the defendant's negligence, then a directed verdict is warranted." *Id.* This Court ultimately concluded that the district court's focus on the lack of forced entry, was not

dispositive of the causation issue under the facts presented. *Id.* at 282.

The standards and rules of law applicable in the case at bar, are entirely distinguishable from the factual circumstances presented in *Sanders, Friedrich*, and *Cox*. In the context of a bad faith action, the standard for determining liability is whether the insurer actually acted in bad faith, not whether the insurer was negligent. *See Campbell v. Gov't Emps. Ins. Co.* 306 So.2d 525, 530 (Fla. 1974); *DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 602-603 (Fla. 4th DCA 1975). Both Harvey and GEICO agree that the applicable legal standard in a bad faith action is whether the insurer fulfilled its obligations to its insured as enumerated in *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).

In this case, the Fourth District appropriately applied the directed verdict standard and found that the evidence was insufficient as a matter of law to show that GEICO acted in bad faith. [A1]. Specifically, the Fourth District enumerated the seven (7) obligations of an insurer as announced in *Boston Old Colony*. The Fourth District then went through each obligation one-by-one and applied uncontradicted evidence and testimony to find that GEICO satisfied every applicable obligation that was present under the facts of this case. [A5-6]. This case did not present conflicting evidence as to whether GEICO fulfilled its good faith duty under *Boston Old Colony*, nor did the Fourth District reweigh evidence to reach its central ruling that "GEICO

fulfilled every obligation that an insurer owes the insured as announced in *Boston Old Colony*." [A6]. If an insurer does not breach any of its obligations under *Boston Old Colony*, there can be no bad faith as a matter of law.

Harvey's argument that the Fourth District rejected the testimonial evidence of the estate attorney's paralegal and reweighed the testimonial evidence of Harvey is unfounded. Harvey misses the significance of the Fourth District's statements that the estate's attorney never provided a deadline for obtaining the statement in either one of his requests for a statement. The purpose of the Fourth District's statements is to highlight the fact that Harvey failed to link the request for a statement, with an opportunity to settle. This is apparent from the Fourth District's consideration of the sixth enumerated obligation from *Boston Old Colony*, wherein the Fourth District found that "GEICO could not have given 'fair consideration to a settlement offer' because the evidence was undisputed that the estate never made a settlement offer." [A6]. The Fourth District did not reject the testimony from the estate attorney's paralegal, who testified that Korkus refused to make the insured available for a statement when they spoke the first time. This testimony was simply immaterial because, as the Fourth District points out, the estate's attorney renewed his request for a statement, and it is undisputed that the renewed request was relayed to Harvey. [A2-3].

Similarly, it cannot be said that the Fourth District reweighed Harvey's testimony to conclude that GEICO fulfilled its obligations under *Boston Old Colony*. The specific statement complained of by Harvey – that "[a]lthough, 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,"– was made solely in connection with the Fourth District's causation analysis. However, the Fourth District's causation analysis was secondary to the Fourth District central ruling that GEICO fulfilled its obligations under *Boston Old Colony* and finding "no factual basis to sustain the bad faith judgment." [A6].

The factual circumstances in *Cox*, *Friedrich*, and *Sanders* are drastically different than the facts presented in this case. Unlike those cases, the case at bar did not present issues with conflicting evidence, nor can it be said that the Fourth District reweighed the evidence and substituted its own evaluation of the evidence in place of the jury to find that GEICO had fulfilled every obligation announced in *Boston Old Colony*. Because the Fourth District said nothing that expressly and directly conflicts with this Court's decisions in *Cox*, *Friedrich*, or *Sanders*, this Court should deny Harvey's request for discretionary review.

II. The Fourth District's Decision does not Expressly and Directly Conflict with Decisions Regarding the Applicable Standard in Bad Faith Actions.

Harvey's argument that the Fourth District misapplied the applicable standard

in bad faith actions is discarded by Harvey's own acknowledgment that the correct legal standard applicable in a bad faith action is set forth in *Boston Old Colony*. [Pet. B. 6-7]. While the Fourth District may have referenced other decisions in its opinion, the Fourth District clearly arrived at its central ruling by evaluating the seven (7) individual obligations the Fourth District enumerated from *Boston Old Colony*. [A5-6].

After the Fourth District made its dispositive ruling, i.e. GEICO fulfilled its obligations under *Boston Old Colony*, the Fourth District went on to discuss other decisions, which lend support to the Fourth Districts holding. Notably, the Fourth District merely references the Eleventh Circuit's opinion in *Novoa v. GEICO Idem. Co.*, among other Florida cases, in "support" of its discussion that mere negligence does not prove bad faith. [A6-7]. Notably, *Novoa* quotes this Court's opinion in *Campbell* that the "standard for determining liability in an excess judgment case is bad faith rather than negligence." *Novoa*, 542 F. App'x 794, 796.

Harvey also incorrectly concludes that the Fourth District erred in finding that GEICO fulfilled its obligations under the seventh prong of *Boston Old Colony* – that GEICO was required to "settle, ***if possible***, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." [A6](emphasis added). However, this assertion is unsupported by the undisputed evidence relied on by the

Fourth District. Moreover, an insurer cannot force its insured to provide a claimant with financial and asset information. As the Fourth District decision does not expressly and directly conflict with this Court's decision in *Boston Old Colony*, or any other Florida case as to the standard of bad faith, this Court should deny Harvey's request for discretionary review.

III. The Fourth District's Decision does not Expressly and Directly conflict with Decisions Regarding Causation in Bad Faith Actions.

Even though the Fourth District did not need to reach a decision on causation, considering the Fourth District had already determined GEICO fulfilled its good faith duty, the Fourth District correctly applied the causation standard as expressed by this Court in *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 902 (Fla. 2010). In addition to relying on *Perera*, the Fourth District's citation to *Novoa* and *Barnard v. Geico Ins. Co.,* 448 F. App'x 940, 944 (11th Cir. 2011), [A7] does not conflict with this Court's holding in *Perera* that "the damages claimed by the insured or its assignee ***must*** be caused by the insurer's bad faith." *Perera* 35 So.3d 902 (emphasis added).

The Fourth District's statement that "where the *insured's own actions or inactions* result, at least in part, in an excess judgment, the insurer cannot be liable for bad faith," [A7], while *dicta*, is supported by this Court's decision in *Boston Old Colony*. In *Boston Old Colony*, this Court addressed a question of great public interest as to whether Florida law "authorized a bad faith action against an insurance

company when that company has refused to settle a claim ***at the express direction of its own insured***...." *See* 386 So.2d at 784 (emphasis added). In finding that Boston Old Colony fulfilled its duty of good faith, this Court took into consideration that "[the insured] expressly requested Boston Old Colony not to settle the claim because he was pursuing a counterclaim against plaintiff." *Id.* at 786.

Moreover, the Fourth District specifically found, in accordance with *Perera*, that Harvey failed to establish that GEICO's conduct caused the excess judgment. In so concluding, the Fourth District reasoned that:

> 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." [A8].

The Fourth District also noted, in connection with *Perera*, that the "record in this case shows that GEICO did not fail to meet any deadlines or other requirements established by the estate, as a requirement for settling the claim and avoiding the filing of a lawsuit against its insured." [A7]. Contrary to Harvey's assertions, this finding is consistent with the language in *Berges v. Infinity Ins. Co.*, stating that the focus of a bad faith case is on the conduct of the insurer in fulfilling its obligations to the insured. 896 So.2d 665, 677 (Fla. 2004). Nevertheless, the Fourth District's

statement criticized by Harvey was not dispositive to the issue of whether GEICO fulfilled its *Boston Old Colony* obligations, as the Fourth District had already concluded there was insufficient evidence GEICO acted in bad faith. [A1].

As the Fourth District decision does not expressly and directly conflict with this Court's decision in *Perera*, or any other Florida case, as to the standard of causation in the context of bad faith, this Court should deny Harvey's request for discretionary review.

CONCLUSION

This Court should deny jurisdiction because the Fourth District's decision is entirely consistent with this Court's decision in *Boston Old Colony* regarding the applicable standard in a bad faith action. As the Fourth District's decision does not expressly and directly conflict with any decision of this Court, discretionary review is inappropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petitioner's Brief on Jurisdiction was served via the Florida Courts E-Filing Portal this 9th day of February 2017, to:

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CERTIFICATE OF FONT COMPLIANCE

Undersigned counsel hereby certifies that this Response to Petitioner's Brief on Jurisdiction has been prepared in 14 point Times New Roman font.

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