FLORIDA SUPREME COURT

CASE NO. SC17-XXX

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

PETITIONER'S BRIEF ON JURISDICTION

BURLINGTON & ROCKENBACH, P.A.
Philip M. Burlington, Esquire
Bard D. Rockenbach, Esquire
Andrew A. Harris, Esquire
444 West Railroad Avenue
Suite 350
West Palm Beach, FL 33401
Telephone (561) 721-0400
pmb@FLAppellateLaw.com

BOLDT LAW FIRM, P.A.
Kimberly L. Boldt, Esquire
Mario R. Giommoni, Esquire
Ryan C. Tyler, Esquire
160 West Camino Real, 262
Boca Raton, FL 33432
Telephone (561) 316-6531
eservice@boldtlawfirm.com

DOMNICK CUNNINGHAM & WHALEN, P.A.
Fred Cunningham, Esquire
Greg Yaffa, Esquire
2401 PGA Blvd., Suite 140
Palm Beach Gardens, FL 33410
Telephone (561) 625-6260
fred@dcwlaw.com
gyaffa@dcwlaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

SUMMARY OF ARGUMENT

This Court should accept review of the Fourth District's decision because it significantly misstates Florida bad faith law, conflicting with this Court's decisions in *Boston Old Colony*, *Berges*, *Doe*, *Perera* and multiple Florida Standard Jury Instructions on bad faith. The Fourth District held that insurers have no obligation "to act . . . prudently or even reasonably" despite this Court's holdings that an insurer owes a fiduciary duty to its insured. The Fourth District held that GEICO fulfilled its obligation to settle the claim against Mr. Harvey *as a matter of law* because GEICO **tendered the policy limits** in nine days despite the fact that it repeatedly obstructed the claimant's request for disclosure of information regarding other available insurance and the extent of the insured's assets. As to causation, the Fourth District held that an "insurer cannot be liable for bad faith" . . . "where the *insured's own actions or inactions* result, at least in part, in an excess judgment" – a holding that completely negates legal cause and concurring cause in bad faith actions. This Court should correct these misstatements of law to maintain uniformity in the legal standards governing bad faith actions in Florida.

The Fourth District's decision also misapplies the directed verdict standard in conflict with this Court's decisions in *Sanders, Friedrich* and *Cox.* This Court cautioned the district courts not to substitute their view of the evidence in place of the jury's when considering directed verdict issues, but that is exactly what the

Fourth District did. The Fourth District explicitly rejected the credibility of Mr. Harvey and his witnesses on critical issues in holding that the lower court should have granted a directed verdict. This express disregard of the directed verdict standard must be corrected to preserve the integrity of the Court's holdings in *Sanders, Friedrich* and *Cox.*

STATEMENT OF THE CASE AND FACTS

Plaintiff James Harvey filed a bad faith action against his insurer, GEICO, alleging that GEICO failed to settle a claim brought against him as a result of an automobile accident which resulted in the death of John Potts. (A2-3). Following a jury trial in the death action, a final judgment was entered against Mr. Harvey for $8.47 million. (A3). In the bad faith action, Mr. Harvey alleged that GEICO acted in bad faith by failing, *inter alia*, to communicate or cooperate with the estate's attorney regarding critical information the estate's attorney had requested. Since GEICO's policy only provided $100,000 of coverage, the estate attorney's paralegal asked GEICO's adjuster, Fran Korkus, "to arrange for a statement from the insured regarding the insured's personal and business assets, whether the insured was acting within the course and scope of his business at the time of the accident, and other potential insurance coverage for the claim." (A2). The paralegal testified at trial that Korkus "refused to make the insured available for a statement[.]" (A2). GEICO tendered the $100,000 policy limits, but failed to advise Mr. Harvey about the

request for a statement. Mr. Harvey was not told about the request until 17 days after it was made. (A2). The next day, Mr. Harvey contacted Korkus and asked her to advise the estate's attorney that he was not available for a statement for five days and was preparing a financial statement. (A3). The Fourth District then notes "Although Korkus's supervisor instructed Korkus to relay the insured's message to the estate, Korkus did not do so." (A3). The Fourth District then blames the lack of follow up on Mr. Harvey and his personal counsel: "However, despite the insured's attorney return to availability on September 5, and despite the insured knowing the estate wanted a statement, neither the insured nor his attorney took any further action to provide the estate with a statement." (A3).

As to causation, the estate's attorney testified "had he known the insured planned on giving a statement, he would have recommended delaying the filing of the wrongful death suit[.]" (A4). The estate's personal representative testified "she would have followed her attorney's advice and would have declined to file the lawsuit." (A4). Most importantly, Mr. Harvey testified he would have provided the statement, but the Fourth District rejected his credibility: "Although, after the fact, the insured claimed he would have provided a statement had GEICO acted differently, the insured's own inaction belied the after-the-fact assertion." (A8).

The trial court denied GEICO's motion for directed verdict and the jury returned a verdict in favor of Mr. Harvey (A4). The Fourth District reversed, holding

that GEICO's motion for directed verdict should have been granted, and that there was no competent substantial evidence of bad faith because, *inter alia*, GEICO tendered its policy limits nine days after the accident (A6). Additionally, the Fourth District ruled that, as a matter of law, GEICO's conduct was not a cause of the excess judgment because "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).

ARGUMENT

Issue I – THE DECISION OF THE FOURTH DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE DIRECTED VERDICT STANDARD ON APPEAL.

The Fourth District reversed the trial court's denial of directed verdict and remanded for entry of a judgment in favor of GEICO on grounds that the evidence was insufficient as a matter of law to show that GEICO acted in bad faith. (A1, 8). The Fourth District's misapplication of the directed verdict standard is expressly stated in the opinion in direct conflict with this Court's decisions in *Sanders v. ERP Operating. Ltd. P'ship*, 157 So. 3d 273 (Fla. 2015); *Friedrich v. Fetterman & Ass'n, P.A.*, 137 So. 3d 362 (Fla. 2013) and *Cox v. St. Josephs Hosp.*, 71 So. 3d 795 (Fla. 2011). In *Sanders*, *Friedrich* and *Cox*, this Court cautioned district courts about applying the incorrect directed verdict standard. *Sanders*, 157 So. 3d at 277. A district court may not "reweigh[] the evidence and substitute[] its own evaluation of the evidence in place of the jury." *Cox*, at 800; *Friedrich*, at 365 (reviewing court may not "substitute its judgment concerning credibility of the witnesses for that of

the trier of fact"). Where a district court misapplies the directed verdict standard, this Court has accepted review. *Friedrich,* at 363 ("We conclude that by reweighing the evidence [on directed verdict], the Fourth District's decision below expressly and directly conflicts with this Court's decisions in Cox[.]").

Numerous times throughout the opinion, the Fourth District relies on the statement that "[a]t no time did the estate's attorney provide a deadline for obtaining the statement" (A2, 3, 4 and 7). Yet, the supposed significance of that fact is based solely on the Fourth District's rejection of the testimony of Mr. Harvey's witness, i.e., the estate attorney's paralegal, who testified that "*Korkus refused to make the insured available for a statement*[:]"

> *According to the employee [of the estate's attorney]*, she asked Korkus to arrange for a statement from the insured regarding the insured's personal and business assets . . . . *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. At no time did the estate's attorney provide a deadline for obtaining this statement, nor was Korkus told that the insured's statement was a prerequisite to settling the insured's claim.*

(A2). However, the jury obviously accepted the paralegal's testimony that GEICO's adjuster *refused* to provide the statement, and Korkus did not change that position even after the estate's counsel made a second request for the information (A3). Thus, there was no reason to set a deadline for obtaining a statement that was not going to be provided. This example shows the misapplication of the directed verdict standard and, thus, the conflicts with *Sanders, Friedrich* and *Cox.*

The Fourth District also improperly reweighed Mr. Harvey's testimony and rejected his credibility when it stated 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." (A8). According to the Fourth District, "the insured knew the estate wanted a statement" "[b]efore the estate ever filed suit[.]" (A8). However, the Fourth District acknowledges earlier in the opinion that Mr. Harvey "asked Korkus to let the estate's attorney know that the insured was working on preparing the financial statement" and, more importantly, "[a]lthough Korkus's supervisor instructed Korkus to relay the insured's message to the estate, Korkus did not do so." (A3). In both instances, the Fourth District clearly misapplied the directed verdict standard by reweighing the evidence and rejecting the credibility of Mr Harvey and his witnesses on certain key facts which supported the jury's finding of bad faith. As this Court previously held, "the issue of bad faith ordinarily is one of fact for the jury . . . [b]ecause this standard requires the examination of the totality of the circumstances[.]" *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 687 (Fla. 2004). Because the Fourth District's opinion expressly and directly conflicts with this Court's decisions in *Sanders, Friedrich* and *Cox*, this Court should accept review.

Issue II – THE FOURTH DISTRICT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE STANDARD APPLICABLE IN BAD FAITH ACTIONS.

The Fourth District begins its analysis by correctly stating the legal standard

applicable in a bad faith action as held by this Court in *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980). (A4-5). But, the Fourth District then quotes from the Eleventh Circuit Court of Appeals' decision in *Novoa* for the following proposition, which expressly conflicts with extensive precedent from this Court: "To fulfill the duty of good faith, an insurer *does not* have to act perfectly, **prudently**, or **even reasonably**." *Novoa v. GEICO Indem. Co.*, 542 F. App'x 794, 796 (11th Cir. 2013).[1] (A5). To state that an insurer has no obligation "to act . . . prudently, or even reasonably" conflicts with *Boston Old Colony, Doe* and *Berges* where this Court held that a fiduciary relationship exists between an insured and his insurer. *Boston Old Colony Ins. Co.*, 386 So. 2d at 785; *Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 374 (Fla. 1995); *Berges*, 896 So. 2d at 677. In fact, *Boston Old Colony* holds that an "insurer must . . . settle, if possible, where a *reasonably prudent person*, faced with the prospect of paying the total recovery, would do so." *Id.* at 785. *See also* Fla. Stat. Jury Inst. 404.4. By concluding that an insurer has no obligation to act "prudently, or even reasonably[,]" the Fourth District has fundamentally changed the legal standard for bad faith to that of an intentional tort.

The Fourth District relies heavily on *Novoa* and other federal cases, but a review of those decisions shows that the federal courts have misstated Florida bad faith law. The Fourth District's reliance on those misstatements leads it to the

[1] All emphasis is added unless noted otherwise.

incorrect legal conclusion that GEICO fulfilled the 7th prong of *Boston Old Colony* by merely "tendering without limitation or even a demand, the full policy limits to the estate's attorney." (A6). An insurer's duty to "settle, if possible, where a reasonably prudent person . . . would do so" goes much further than merely tendering a check to the claimant's attorney, especially when the insurer fails to provide the claimant with critical information, when requested, such as other insurance coverage or the insured's assets (A6). Yet, the Fourth District held that the fact of the tender alone "showed that GEICO also fulfilled this final obligation." (A6). This is another example of conflict given this Court's decisions which hold that bad faith is a factual question determined from the totality of the circumstances, i.e., not by insolating one component of a settlement scenario. *Boston Old Colony*, *supra*; *Doe*, *supra*; *Berges*, *supra*.

Issue III – THE FOURTH DISTRICT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING CAUSATION IN BAD FAITH ACTIONS.

The Fourth District also creates a principle of Florida bad faith law with respect to causation which is completely contrary to this Court's decision in *Perera v. United States Fidelity and Guaranty Co.,* 35 So. 3d 893 (Fla. 2010), the Florida Standard Jury Instruction 404.6(b) on causation in bad faith actions, and basic principles of legal cause. The Fourth District stated that **"where the *insured's own actions or inactions* result, <u>at least in part</u>, in an excess judgment, the insurer cannot be liable for bad faith."** (A7). (Italics emphasis in original). The Fourth

District did not cite any Florida decisions for this statement of law, but rather relied on two federal cases: *Barnard v. Geico Ins. Co.*, 448 F. App'x 940, 944 (11th Cir. 2011) and *Novoa, supra,* at 796-97.[2] This statement of law is directly contrary to basic principles of causation, which this Court has incorporated into Florida bad faith law. *See Perera, supra*. This Court specifically approved a standard jury instruction for bad faith cases on legal cause, which relies on the "but for" standard from tort cases. *See* Fla.St.Jury Inst. 404.6(a). In *Jones v. UTICA Mut. Ins. Co.*, 463 So.2d 1153, 1156 (Fla. 1985), this Court specifically recognized that the "but for" legal cause standard does not require that a defendant's conduct be the only cause of the damage. Additionally, Florida Standard Jury Instruction 404.6(b) incorporates into bad faith law general principles of "concurring" cause, and specifically directs a jury that "to be regarded as a legal cause … bad faith conduct need not be the only cause." The Fourth District's decision directly conflicts with those fundamental principles.

The Fourth District's statement that "the insured's own actions or inactions" can be a *complete bar* to recovery in a bad faith action as a matter of law finds no support in precedent nor policy consideration. In *Perera*, this Court held that "there

[2] The Fourth District's reliance on *Barnard* and *Novoa* is perplexing since neither of those cases address the insured's conduct, but rather the conduct of the claimant. *See, e.g., Barnard,* at 944 (claimant's attorney "made it impossible to engage in settlement discussions;" no references to the insured's conduct); *Novoa,* at 796 (claimant "declined every settlement offer Geico made;" no discussion of the insured's conduct).

must be a causal connection between the damages claim and the insurer's bad faith." 35 So. 3d at 902. This Court did not hold that the existence of any other cause serves to immunize an insurer's bad faith conduct. The Fourth District's new principle conflicts with *Berges*, which stated 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 at 677. Under the Fourth District's reasoning, the focus is on the insured's conduct because his actions, or inactions, can be dispositive.

CONCLUSION

This Court should accept jurisdiction because the Fourth District has drastically altered Florida law on bad faith as to liability and causation. Moreover, this Court will have few opportunities to establish uniformity on these issues because virtually all third party bad faith actions are litigated in federal court. As noted above, federal courts have misconstrued and misapplied Florida law on bad faith, and the Fourth District's decision now incorporates those errors of law into our state's jurisprudence. For these reasons, and the conflict on the directed verdict standard, this Court should exercise jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was served via the Florida Courts E-Filing Portal this January 20, 2017 to: B. Richard Young, Esquire and Adam Duke, Esquire of Young, Bill, Roumbos & Boles, P.A., One Biscayne Tower, Suite 3195, 2 South Biscayne Boulevard, Miami, Florida, 33131; **ryoung@flalawyer.net** and **aduke@flalawyer.net**.

Respectfully submitted,

BURLINGTON & ROCKENBACH, P.A.
444 West Railroad Avenue, Suite 350
West Palm Beach, Florida 33401
Telephone (561) 721-0400
pmb@FLAppellateLaw.com

By: /s/ PHILIP M. BURLINGTON
PHILIP M. BURLINGTON
Florida Bar No. 285862
BARD D. ROCKENBACH
Florida Bar No. 771783
ANDREW A. HARRIS
Florida Bar No. 10061

BOLDT LAW FIRM, P.A.
160 West Camino Real, #262
Boca Raton, Florida 33432
Telephone (561) 316-6531
eservice@boldtlawfirm.com

By:/s/ KIMBERLY L. BOLDT
KIMBERLY L. BOLDT
Florida Bar No. 957399
MARIO R. GIOMMONI
Florida Bar No. 97925
RYAN C. TYLER
Florida Bar No. 121934

-and-

DOMNICK CUNNINGHAM & WHALEN, P.A.
2401 PGA Blvd., Suite 140
Palm Beach Gardens, Florida 33410
Telephone (561) 625-6260
fred@dcwlaw.com
gyaffa@dcwlaw.com

By: /s/ Fred A. Cunningham
FRED A. CUNNINGHAM
Florida Bar No. 775487
GREGORY M. YAFFA
Florida Bar No. 586412

CERTIFICATE OF FONT COMPLIANCE

Counsel for Petitioner hereby certifies that this Jurisdictional Brief has been prepared in 14 point Times New Roman.

By: /s/ KIMBERLY L. BOLDT
KIMBERLY L. BOLDT
Fla. Bar. No. 957399