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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

JAMES M. HARVEY,

Petitioner,

-vs- CASE NO. SC17-85

GEICO GENERAL INSURANCE COMPANY,

Respondent.
_____/

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REPLY 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 FACTS

GEICO's brief ignores adverse evidence, does not present the facts accurately or completely, and attempts to lead this Court into reweighing the evidence, all in violation of the directed verdict standard.

GEICO tries to create uncertainty as to whether Korkus refused Tejeda's request for Harvey to give a recorded statement. However, Tejeda unequivocally acknowledged that Korkus "flat refused to provide the statement," and that refusal was confirmed in her contemporaneous notes (T884; PDF:4880; R3777; PDF:3779). That refusal was without the knowledge, authority or consent of the insured and was completely unjustifiable, as Korkus's supervisor told her in his ALOG note: "[I]f such a request was made, we'd surely not deny that request on our own" (R3672-73; PDF:3674-75). GEICO also ignores that Korkus refused to correct her misrepresentation to the Estate despite being directed to do so by Harvey and her supervisor. Korkus admitted that she did not comply with their instructions, and could provide no explanation for failing to do so (T682-83; PDF:4678).

GEICO repeatedly contends that since the Estate did not expressly state that a recorded statement was a prerequisite to settlement, GEICO's complete failure to cooperate on that issue cannot be considered bad faith. That contention ignores the extensive and undisputed evidence that everyone involved in the transaction knew

that the information requested was critical to the Estate's ability to evaluate any settlement offer. This includes:

- Korkus conceded that the Estate's request for the information was reasonable, that plaintiff's attorneys requested that information "all the time", and that obtaining that information was part of Domnick's duty to exercise due diligence on his client's behalf (T708-10; PDF:4704-06);

- When Tejeda explained to Korkus the need for information regarding additional coverages,[1] Harvey's assets and whether he was in the course and scope of his employment, she described them as "common sense type of questions" (T883-84; PDF:4879-80);

- Domnick advised Korkus in their August 31, 2006 phone conversation that he needed the requested information in order to properly advise the Potts family on settlement issues (T1114 PDF: 5110);

- Korkus' supervisor testified that he directed Korkus to cooperate with the Estate to provide that information so that "we could get the case in a position where it could be settled" (T718; PDF:4714);

- Plaintiff's insurance expert testified that Domnick would have committed malpractice if he had advised the Estate regarding settlement without that information (T584-85; PDF:4580-81); and

- Defendant's insurance expert conceded that Domnick needed the information requested in order to properly advise the Estate regarding settlement (T833; PDF:4829).

Based on that evidence, which GEICO and the Fourth District ignored, it was obvious that everyone involved knew exactly why the Estate was requesting

[1] The affidavit of coverage sent by GEICO to the Estate on August 17, 2006, did not provide any coverage information as to U.S. Multico, the co-owner of the vehicle driven by Harvey, nor did it reveal Harvey's Canadian auto insurance policy, which GEICO knew about but only later determined would not providecoverage for this accident (R3961; PDF:3963).

that information and that the failure to provide it was a critical impediment to settlement. GEICO's suggestion that the request for a recorded statement was irrelevant to any bad faith analysis because it "cannot be construed as [a] settlement opportunity" is baseless. By misrepresenting to the Estate Harvey's availability to provide the information and failing to cooperate with the Estate, GEICO actively and unjustifiably prevented any possibility of a settlement.

GEICO mischaracterizes the evidence to suggest that Harvey was unwilling to give a recorded statement and the Fourth District echoed that falsehood. In fact, the evidence overwhelmingly supports Harvey's testimony that he was willing to do so:

- Harvey testified that he immediately called Korkus when he saw Domnick's August 24, 2006 letter because it said "I declined an offer, refused to make a statement and I had not done that;" and that he was moving forward "to prepare myself to be cooperative" (T1027; PDF:5023).

- Harvey testified that he called Korkus to tell her to contact Domnick and correct her misrepresentation including "I want to make sure that Mr. Domnick knows that, one, **I would give a statement**, and two, that my lawyer is not around." (T1036; PDF:5032) [E.S.]

- Korkus' ALOG notes from Harvey's call states that "insured does not want claimant attorney to think that we are not acting fast enough and **asked what we can do to let the claimant's attorney know we are working on this.**" (T1035; PDF:5031) [E.S]

- Harvey rejected GEICO's suggestion at trial that he was not willing to give a recorded statement, testifying "[i]t wasn't something I was not going to do" (T1037; PDF:5033).

GEICO claims Harvey told Korkus that he would consult with his attorney about whether to give a statement, when he actually told Korkus "I said I'd talk to my attorney about it, how to do it" (T1087; PDF:5083).

GEICO ignores that Korkus' supervisor instructed her that even if Harvey was waiting to consult his attorney to determine whether to give a statement "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)" (R3673; PDF:3675). It is undisputed that Korkus failed to comply with that directive, and did nothing to either follow up with Harvey or correct her misrepresentation to the Estate.

GEICO tries to discredit Harvey's testimony that he first learned of the request for a recorded statement when he saw Domnick's letter on August 31, 2006. However, Harvey's testimony on this point was unequivocal (T1027; PDF:5023):

> Q. Now, was this letter the first notification to you that Mr. Domnick wanted to take a statement?
>
> A. It is.

GEICO's contention that Harvey later testified he could not recall if that was the first time he learned of the request is a mischaracterization of his testimony. On cross-examination, Harvey was asked whether he had heard Korkus' testimony that

she believed she told him of the Estate's request in their August 14, 2006 phone call. He responded (T1068; PDF:5064):

> A. **I've got no recollection of that. It would have been important to me.** I assume it would have been critically important to Ms. Korkus and I assume it would have been critically important to the record [ALOG] and it's not there. I mean, maybe they were still discussing it. I don't know.
>
> Q. So what you're saying is you don't think it happened because it's not in the note?
>
> A. No, I'm just saying it's not in the note.
>
> Q. Okay. It's not in the note.
>
> A. I don't remember it happening.
>
> Q. Okay.
>
> A. **I don't think it happened. [E.S.].**

That testimony cannot be construed as Harvey not recalling whether he was informed of the Estate's request on August 14, 2006. And under the directed verdict standard a court cannot ignore Harvey's unambiguous testimony that August 31, 2006 was the first time he learned of that request (T1027; PDF:5023).

ARGUMENT

POINT I

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

The Fourth District Did Not Properly Apply The Directed Verdict Standard

As summarized in the Statement of the Facts, *supra*, GEICO distorts the record by mischaracterizing and ignoring evidence in an attempt to support the Fourth District's analysis. In the Initial Brief, Petitioner noted other examples where the Fourth District reweighed the evidence or made credibility determinations in violation of the directed verdict standard (IB 25-30). GEICO's brief does not justify those errors.

GEICO makes no attempt to justify the Fourth District's unfounded criticism of Harvey for his "inaction" in not providing a statement unilaterally (A8). First, the Estate had requested a recorded statement, not an affidavit or unilateral statement, a fact the Fourth District ignored. Additionally, the ALOG shows that Korkus told Harvey on August 31st that she would "get back to him" after she discussed the situation with management (R367; PDF:p.3675), but it is undisputed she never did so.

GEICO also fails to explain how the Fourth District could fault Domnick for not contacting Harvey's personal counsel, Geraghty, before filing suit (A4). The evidence is undisputed that Korkus never told Domnick that Harvey had obtained personal counsel, despite Harvey's specific request that she do so. Nonetheless, the Fourth District criticizes Domnick for failing to contact someone he did not know

had any involvement in the case. Thus, it is clear the Fourth District did not properly apply the directed verdict standard in evaluating this case.

The Fourth District Mischaracterized The Bad Faith Standard For Liability Insurers In Florida

In the Initial Brief Petitioner addressed statements in the Fourth District's opinion which created express and direct conflict with decisions of this Court regarding the standard of conduct which constitutes bad faith (IB 30-37). These pronouncements included that a liability insurer can fulfill its duty to its insured without acting "prudently or even reasonably," and that bad faith is limited to circumstances where an insurer has acted "solely on the basis of their own interest in settlement" (A5). GEICO makes no effort to justify those statements. This is simply an admission sub silentio that GEICO cannot justify those statements, nor reconcile them with decisions of this Court.

The Initial Brief, Petitioner explained how the concept that an insurer commits bad faith conduct only when it acts solely in its own interest originated from a statement taken out of context from State Farm Mut. Auto Ins. v. Laforet, 658 So.2d 55, 58 (Fla. 1995) and was never intended to be the standard for bad faith in Florida (IB. 33-36). However, GEICO does not contest that explanation, nor even cite Laforet in its brief. Its failure to try to do so is disturbing since GEICO has been successful in arguing that misstatement of law in federal courts. See Novoa, supra, Cousin v. Geico Gen. Ins. Co.,166 F. Supp. 3d 1290 (M.D. Fla.

2015); Hooks v. GEICO Gen. Ins. Co., No. 3:13-CV-891-J-34JBT, 2015 WL 134144 (M.D. Fla. Jan. 9, 2015); Moore v. GEICO Gen. Ins. Co., 2014 WL 2938430 (M.D. Fla. June 30, 2014), reversed, Moore v. GEICO Gen. Ins. Co., 633 F. App'x 924 (11th Cir. 2016).

As noted in the FJA Amicus Brief, this case is particularly important because it is one of the rare opportunities for this Court to address third party insurance bad faith law, which is now litigated almost exclusively in federal court. Therefore this Court should seize this opportunity to correct the erroneous statements of law in the Fourth District's opinion which have become commonplace in federal decisions. These include the notion that a liability insurer can fulfill its duty to its insured without acting prudently or even reasonably, and that bad faith only exists when an insurer acts solely in its own interest in settlement. These standards are inconsistent with the fiduciary duty imposed on liability insurers and cannot be reconciled with decisions of this Court, as evidenced by GEICO's complete silence on these issues.

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

It should be noted that GEICO never made the argument utilized by the Fourth District, either in its motion for directed verdict at trial (T1299-1303; PDF:5295-99) or in its briefs in the Fourth District. The only argument for a directed verdict presented by GEICO to the trial court and the Fourth District was

that because the Plaintiff could prove causation only by impermissibly stacking inferences. GEICO is represented by able and experienced counsel, and if they truly believed there was insufficient evidence to prove a breach of the duty to the insured, they would have argued that as a basis for directed verdict. Of course, now GEICO is "all in" with the Fourth District's rationale and does not even argue the "stacking of inferences" argument as an alternative basis for upholding the Fourth District's decision.

GEICO relies heavily on the Fourth District's discussion of Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980), a case GEICO never cited in its briefs before the Fourth District. GEICO's argument is fatally flawed because it does not acknowledge adverse evidence, nor consider the evidence in the light most favorable to the Estate, as required on a directed verdict.

As discussed in the Initial Brief (IB 38-43), the evidence cannot be construed as proving that GEICO satisfied its duties to advise the insured of settlement opportunities, or of steps to avoid an excess judgment; nor that it settled when a reasonably prudent person facing the prospect of the total recovery would have done so. Essentially, GEICO is arguing that it can act unreasonably, and in direct contravention of the insured's instructions to block the flow of information critical to the claimant's ability to evaluate any settlement offer. Accepting GEICO's argument would create a "Catch 22", where the insurer's wrongful

conduct prevents the claimant from being able to consider any settlement offer, but the insurer's conduct cannot be bad faith because the claimant did not make a settlement offer. Obviously, that cannot be the law and, not surprisingly, it is not the law.

Petitioner cited Powell v. Prudential Prop., 584 So.2d 12 (Fla 3d DCA 1991) (IB 40), where an insurer's failure to inform the claimant of the policy limits constituted bad faith because it unreasonably deprived the claimant of the ability to evaluate the insurer's proposed settlement. The court held that the withholding of critical information under those circumstances constituted bad faith. GEICO attempts to distinguish Powell by saying that there the information was "within the insured's control" (AB 23). However, here GEICO had within its control the ability to inform the Estate that Harvey had retained personal counsel, that he was planning to cooperate regarding the information requested, but that he needed time to do so. However, Korkus repeatedly and unreasonably refused to do that despite instructions from Harvey and her supervisor. Thus, GEICO's attempted distinction is without merit.

Similarly, in Menchise v. Liberty Mut. Ins. Co., 932 So. 2d 1130 (Fla. 2d DCA 2006), the insurer was held to be in bad faith because, while it disclosed the policy limits, it made no effort to provide information requested by the claimant regarding other coverages and whether the insured was acting in the course and

scope of his employment at the time of the accident. GEICO attempts to distinguish Menchise because the insurer there did not try to contact the insured to obtain that information. However, the practical effect of the insurer's misconduct in Menchise was identical to that here, GEICO unreasonably prevented the Estate from obtaining information necessary to evaluate any settlement offer.

Powell and Menchise demonstrate that the evidence here was sufficient to prove GEICO's bad faith. When the evidence is properly evaluated under the directed verdict standard, the totality of the circumstances demonstrate that GEICO breached its duty to Harvey to exercise good faith in handling the Estate's claim. The Fourth District did not fairly evaluate the evidence, nor properly apply Florida law in evaluating the duties breached by GEICO in this case.

Harvey is Not Asking This Court to Change The Law of Bad Faith In Florida

At the end of its brief GEICO claims that Harvey is asking this Court to extend the obligations of an insurer and impose a heightened standard of care. That is false. Harvey seeks only to maintain bad faith law as established by this Court and to resolve the conflicts in Florida bad faith law created by the Fourth District's decision. GEICO has not even attempted to justify many of the statements Harvey has attacked as creating conflict in Florida bad faith law.

Contrary to GEICO's contention, Harvey is not asking this Court to hold that an insurer is obligated to ensure that an insured actually takes steps to avoid an

excess judgment nor compelled it to provide financial information of the insured that it does not control. Those are "straw man" arguments that have no relevance to the resolution of this case. Harvey is asking this Court only to apply existing bad faith law to GEICO's wrongful conduct in flatly refusing the claimant's request for a recorded statement from the insured, without the knowledge, authority or consent of the insured, and maintaining that unreasonable position despite express directions from the insured that he was willing to cooperate. Additionally, GEICO unreasonably failed to convey to the claimant, as requested by Harvey, that he had retained personal counsel and was collecting the financial records needed to provide the information sought. This wrongful conduct constitutes bad faith because, as everyone involved knew, and both experts testified at trial, that information was absolutely critical to the Estate's ability to evaluate any settlement offer.

As noted previously, the nature of the duties violated here were found to constitute bad faith in both Powell, supra and Menchise, supra, which are consistent with Boston Old Colony, supra and other decisions of this Court. As a result, Harvey should prevail here not by this Court extending the law of bad faith, but as a result of this Court's application of well-settled principles governing the fiduciary duty of a liability insurer to its insured.

POINT II

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

GEICO makes no attempt to support the Fourth District's unprecedented theory of causation, to wit, that if the insured's actions or inactions contribute in any way to the excess judgement, the insurer cannot be liable for bad faith (A7)[2]. GEICO dodges this issue by claiming that it was only a "secondary discussion" and was "mere dicta" (AB 34). However, it was clearly an alternative holding because after stating this unprecedented causation theory, the Fourth District stated "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" (A7-8). As this Court has noted, there is a distinction between an alternative holding and dicta. See Nunez v. GEICO General Ins. Co., 117 So.3d 388, 392 (Fla. 2013); see also Hahn v. First National Bank of Delray Beach, 345 So.2d 345, 346 (Fla 4th DCA 1977).

Moreover, the mischief in the law that will result from this unprecedented theory of causation approved by the Fourth District needs to be corrected. There is

[2] Read literally, the standard adopted by The Fourth District would eliminate bad faith entirely because the excess judgment necessarily resulted from the tortious conduct of the insured, and thus necessarily the insured's actions must have contributed in part to the excess judgment.

no basis in precedent or in public policy for imposing a "contributory negligence" standard in bad faith cases whereby any action or inaction by the insured that contributes to an excess judgment releases the insurer from any bad faith.

Response to Amicus Briefs

The Florida Justice Reform Institute has filed an Amicus brief contending that this Court should discharge jurisdiction on the basis that there is no conflict. Harvey will rely upon his jurisdictional brief as a response to that contention.

The American Insurance Association, et al., have filed an Amicus brief contending primarily that this case involves mere negligence and does not rise to the level of bad faith. The primary flaw in that brief is its contention that the only error GEICO made "was not immediately telling the insured that the claimant requested a statement of assets from him." (AIA B 6). That is a woefully inadequate characterization of GEICO's misconduct in this case. GEICO's misconduct in this case includes the following:

- Korkus' misrepresenting that the insured would not provide a recorded statement, without the knowledge, authority or consent of Harvey;
- Korkus' failing to correct that misrepresentation despite specific instructions from the insured;
- Korkus' failure to correct that misrepresentation despite a specific instruction from her supervisor;
- Korkus's lack of explanation for not complying with the instructions from the insured and her supervisor;

- Korkus' failure to remedy the situation despite multiple letters from claimant's counsel reiterating the need for a recorded statement;

- Korkus' failure to inform the Estate that Harvey had retained private counsel but needed time to prepare for a recorded statement, despite specific instructions to do so from her supervisor;

- Korkus' failure to call Harvey back to update him about the situation after representing she would do so after consulting with management; and

- All of the above misconduct occurred despite GEICO knowing and previously warning Korkus for failing to comply with supervisory instructions and not maintaining "an acceptable level of file quality and desk management."

These facts do not constitute "mere negligence" nor did the jury's finding of bad faith punish GEICO for unintentional acts. This was a conscious pattern of misconduct which obviously breaches the most minimal standard for fiduciary duty. GEICO cannot avoid responsibility for its employee, especially since it was aware of Korkus' prior failings and the supervisor was aware of her misconduct in this case and did not follow up to protect the insured. Therefore, the concern of the American Insurance Association, et al., is misplaced 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 August 1, 2017.

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