IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

OLIVE GOHEAGAN, as personal representative of the estate of MOLLY SWABY, individually and as assignee of JOHN PERKINS,

Appellant,

v.

Case No. 4D10-3781
L.T. Case No. 502009-CA-017298

AMERICAN VEHICLE INSURANCE CO., a Florida for profit corporation,

Appellee.

BRIEF OF *AMICUS CURIAE* FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLEE

George N. Meros, Jr.
Florida Bar No. 263321
Andy Bardos
Florida Bar No. 822671
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone: 850-577-9090
Facsimile: 850-577-3311

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Journals and Law Reviews

PRELIMINARY STATEMENT

In this Brief, Appellant, American Vehicle Insurance Co., is referred to as "AVIC."

Reference to the record on appeal shall be by "R" followed by the volume number and page number(s), *e.g.*, (R1:30). Reference to the document contained in the Appendix to this Brief shall be by "App."

All emphases in this Brief are supplied.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Justice Reform Institute is a not-for-profit organization dedicated to the restoration of fairness, equality, predictability, and personal responsibility in civil justice. It has filed *amicus* briefs in cases that implicated these objectives and supported civil-justice reform measures in the Legislature.

This case presents an issue of great importance to citizens and Florida's economic climate. The *amici* in support of Appellant advocate a highly skewed summary-judgment standard that cannot be satisfied even where no construction of the facts yields a reasonable inference of bad faith. The proposed standard would defeat the function of summary judgment "to avoid the expense and delay of trials . . . when a party is unable to support by any competent evidence a contention of fact." *Nat'l Airlines v. Fla. Equip. Co. of Miami*, 71 So. 2d 741, 744 (Fla. 1954).

In bad-faith litigation, an impossibly demanding summary-judgment standard places a burden on insurers to settle almost every allegation of bad faith, however frivolous, to avoid the costs of discovery and trial. An insurmountable summary-judgment standard becomes outcome determinative in many cases with severe implications for the cost of insurance for all Floridians. It also incentivizes legal gamesmanship, to the detriment of Florida's administration of justice.

Accordingly, this case directly affects the Florida Justice Reform Institute's mission to promote fairness, predictability, and responsibility in civil justice.

SUMMARY OF ARGUMENT

This Court correctly affirmed the trial court's entry of summary judgment. The insurer made active and repeated attempts to settle the claim for policy limits. Rebuffed time and time again, the insurer commendably persevered in its efforts to settle. The undisputed facts reveal no trace of bad-faith conduct by the insurer.

Berges v. Infinity Insurance Co., 896 So. 2d 665 (Fla. 2004), did not foreclose summary judgment in favor of insurers. The Court emphasized that its decision neither alters the law of bad faith nor creates a novel jurisprudence as to bad faith. *Berges* makes crystal clear that, where material issues of fact that can support a finding of bad faith are undisputed, summary judgment remains proper.

This Court correctly applied the state-law summary judgment. The summary-judgment standard is not (and should not be) insurmountable. Summary judgment is not precluded where no construction of the facts yields a "reasonable" inference of bad faith. The Court also correctly applied the law of bad faith, which takes into account the totality of circumstances—including the claimant's conduct.

The perception that summary judgment is not available in bad-faith cases has encouraged claimants to manufacture bad-faith allegations rather than settle for policy limits, while insurers have acceded to large settlements to avoid expensive jury trials. This Court's decision restores balance and discourages gamesmanship. The Court should decline Appellant's request for reconsideration of that decision.

ARGUMENT

If hard cases make bad law, this is an easy case that stands to make good law. It could not be clearer that AVIC's repeated attempts to settle this claim showed an appropriate and even admirable degree of care and diligence. This case makes good law because it reaffirms that summary judgment remains available in bad-faith litigation where, as here, no "material issues of fact which would support a jury finding of bad faith remain in dispute." *See Berges v. Infinity Ins. Co.*, 896 So. 2d at 665, 680 (Fla. 2004). The Court should deny Appellant's Motion for Rehearing, Rehearing *En Banc*, and/or Certification to the Florida Supreme Court.

I. THE COURT CORRECTLY AFFIRMED SUMMARY JUDGMENT.

A. The Court Correctly Appraised the Material Facts.

This case cries out for summary judgment. From start to finish, neither Appellant nor her attorney returned the insurer's calls, initiated any contact with the insurer, or even demanded settlement. At the same time, the uncontradicted evidence shows that the insurer made prompt and repeated attempts to settle the claim, but that its diligent efforts were continually rebuffed and stymied.

No construction of the material facts yields a reasonable inference of bad faith. The insurer investigated the claim and quickly determined that the insured was the cause of the accident. (Op. at 1.) With an intent to settle for policy limits, the insurer called the claimant on seven occasions: twice on February 28, and once

each on March 1, March 7, March 21, March 27, April 16. (*Id.* at 1-2). It placed the first two calls a mere four days after the accident. (*Id.*) On the very first call, the adjuster was informed that Appellant had retained an attorney. (*Id.*) On the second call, the adjuster was told that Appellant was unavailable, but the adjuster provided her contact information. (*Id.*) The next two calls were unanswered, but the adjuster left a voice message seeking the identity of Appellant's attorney. (*Id.*) On three subsequent calls, the adjuster spoke with Appellant herself and requested the identity of her attorney. (*Id.*) Each time, Appellant avoided an answer to the inquiry and hastily brought the conversation to a close. (*Id.*) All of these contacts took place within the first sixty days after the accident.

On April 20, one day after discovering the identity of Appellant's attorney in the *Palm Beach Post*, the adjuster called the attorney, but was informed that the attorney was unavailable. (R.3:447.) The adjuster followed with a letter to the attorney, communicating the insurer's offer of policy limits. (*Id.*) The attorney did not respond until May 14, when he indignantly rejected the offer. (R.3:538.) On June 7, the insurer again offered policy limits, but this too was rejected. (Op. at 2.)

Appellant skirts these dispositive facts and emphasizes the insurer's imagined omissions. The insurer, she claims, should have mailed her a check. (Mot. for Reh'g at 14.) But this Court correctly held that, once the adjuster learned of Appellant's representation by counsel, the adjuster code of ethics barred any

efforts to "negotiate or effect settlement directly or indirectly" with Appellant. *See* Fla. Admin. Code R. 69B-220.201(3)(i); *see also* § 626.878, Fla. Stat. (2011) (directing the adoption of an adjuster code of ethics); *id.* § 626.621(3) (authorizing revocation of license of adjuster that violates rules); *id.* § 626.611(13) (requiring revocation of license of adjuster that willfully violates rules). By its plain text, the rule prohibited all further negotiation with Appellant, except through her attorney.

Ironically, if the insurer had made a settlement offer directly to Appellant despite actual knowledge that she had retained an attorney, and while Appellant's daughter lay comatose in the hospital, Appellant would certainly have refused the offer and alleged bad faith and improper conduct by negotiating a settlement with a distraught mother represented by counsel. The purpose of such ethical restrictions is to prohibit overreaching and interference with the attorney-client relationship.[1]

But even apart from these ethical restrictions, summary judgment is appropriate. The insurer's actual conduct so clearly exhibits an admirable degree of care and diligence that it moots all conjecture about additional steps the insurer

[1] *Cf.* R. Regulating Fla. Bar 4-4.2(a) cmt. (explaining that the ethical prohibition upon attorney contacts with represented parties "protect[s] a person who has chosen to be represented by a lawyer . . . against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation"). Like the adjuster code of ethics, the bar against attorney contacts with represented parties applies once the attorney has actual knowledge "of the fact of the representation," not of the attorney's identity. *Id.*

might have taken. Importantly, a finding of bad faith requires conduct more culpable than negligence. (Op. at 5 n.3). "[W]ell-established law in Florida . . . only allows an insured to sue an insurer for bad faith and not simple negligence." *King v. Nat'l Sec. Fire & Cas. Co.*, 656 So. 2d 1338, 1339 (Fla. 4th DCA 1995).

The undisputed facts do not come close to an inference of bad faith. The insurer "acted fairly and honestly" and still could not settle the claim. *See* Fla. Std. Jury Instr. (Civ.) 404.4 ("Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly . . . ."). And it is clear that Florida law permits, and *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004), did not foreclose, the entry of summary judgment in favor of insurers in bad-faith litigation.

B. The Court Correctly Held That Summary Judgment Remains Available to Insurers in Bad-Faith Cases.

While litigants and advocates have debated the implications of *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004), *Berges* disclaims any attempt to alter the law of bad faith or deprive insurers of the benefit of summary judgment.

First: *Berges* made no change to the law of bad faith: "In our decision today, we have not attempted to alter bad faith jurisprudence, nor has any party requested that we do so." 896 So. 2d at 682. *Berges*, therefore, did not call into question earlier decisions expounding the law of bad faith (other than the decision it quashed)—decisions in which courts had granted or affirmed summary

judgments in favor of insurers. Cases that predate *Berges* remain valid precedent.

Second: *Berges* did not introduce a regime that treats bad-faith cases differently from other cases: "In sum, our decision today does not carve out any novel jurisprudence regarding bad faith claims." *Id.* at 683. The same principles on which courts grant or deny summary judgment in other cases apply to bad faith.

Third: *Berges* did not preclude summary judgment in favor of insurers in bad-faith litigation. While the Court noted that "bad faith is *ordinarily* a question for the jury,"[2] it recognized that "this Court and the district courts have, in certain circumstances, concluded as a matter of law that an insurance company could not be liable for bad faith." *Id.* at 680. It then stated the applicable standard: "where material issues of fact which would support a jury finding of bad faith remain in dispute, summary judgment is improper." *Id.* at 680. Thus, where material issues of fact are not genuinely in dispute, summary judgment is proper.

In appropriate cases, Florida courts have granted summary judgment in favor of insurers in bad-faith litigation. In *Caldwell v. Allstate Insurance Co.*, 453

[2] Far from sounding the death knell of summary judgments in bad-faith cases, *Berges* indicated stronger support for such determinations than at least one of its precedents. In *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980), the Court in *dicta* stated flatly that the "question of failure to act in good faith . . . is for the jury." *Berges* qualified this statement with the word "ordinarily," which did not appear in *Gutierrez*, *see Berges*, 896 So. 2d at 680 (quoting *Gutierrez*, 386 So. 2d at 785), and thus made room for decisions that had affirmed summary judgments in favor of insurers.

So. 2d 1187 (Fla. 1st DCA 1984), after an investigation, the insurer concluded that the policy afforded no coverage, but it instituted a declaratory judgment action to settle the question. 453 So. 2d at 1189. The Court found coverage. Two months later, the insurer paid the policy limits without a waiver of the claimants' right to pursue an excess claim. On these facts, the Court affirmed summary judgment in favor of the insurer, concluding that the insurer "exercised reasonable diligence in investigating [the] claim." *Id.* at 1190. "It cannot reasonably be said," the Court explained, "that [the insurer] was guilty of the kind of conduct which has typified those cases in which the courts have found the existence of bad faith." *Id.*

In *Clauss v. Fortune Insurance Co.*, 523 So. 2d 1177 (Fla. 5th DCA 1988), three weeks after an automobile accident, the claimant's attorney demanded that the insurer tender policy limits within twenty days. Twenty-one days after sending the demand, the attorney repeated the demand and threatened to revoke the offer if not accepted within five days. 523 So. 2d at 1177. Two days after the attorney sent the second demand, the insurer requested medical reports and "expressed its desire to tender the policy limits after verification." *Id.* The attorney provided a report two days later. *Id.* Finally, eight days after sending the second demand, the attorney revoked the offer and declared that a bad-faith action was forthcoming. *Id.* at 1177-78. On the next day, the insurer tendered the policy limits. *Id.* at 1178. On these involved facts, the Court affirmed summary judgment in favor of the

insurer. It explained that "[t]here was only a one-month time span between the initial demand . . . and the notice of the bad-faith failure to settle." *Id.* The insurer, though willing to settle, "desired verification." *Id.* "A one-month period . . . was not excessive, and certainly does not rise to the level of bad faith." *Id.*; *see also RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095 (Fla. 4th DCA 1997) (affirming summary judgment where the evidence showed "beyond any doubt that the primary insurer at no time missed an opportunity to settle").

Berges did not contradict these cases. Summary judgment was improper in *Berges* because two genuine issues of material fact required a trial. First, the evidence conflicted as to whether the claimant had suspended his twenty-five day deadline to tender policy limits. 896 So. 2d at 676. The insurer argued that it had offered policy limits without mention of the deadline, and that the claimant, in concurring, implicitly suspended that deadline. *Id.* The claimant testified that he had understood the insurer to agree to tender policy limits within the deadline. *Id.* Second, the insurer argued that it was impossible to secure the necessary court approvals within the twenty-five day period, while the claimant presented evidence tending to prove the opposite. *Id.* at 677-78. Clearly, it does not follow that because summary judgment was inappropriate in *Berges*, it is inappropriate here.

Caldwell, *Clauss*, and *RLI Insurance* establish that summary judgment is available in bad-faith actions, and *Berges* confirms that conclusion. While no

reported decision since *Berges* has affirmed the entry of summary judgment in favor of insurers, Berges expressly did not alter the law of bad faith or "carve out any novel jurisprudence regarding bad faith claims." *Id.* at 683. Rather, *Berges* confirms that where material facts are not in dispute and do not "support a jury finding of bad faith," the insurer is entitled to summary judgment. *Id.* at 680.

This case will decide whether *Berges* is true to its word, or whether, against its own protest, it effected the elimination of summary judgment in bad-faith cases.

C. The Court Correctly Applied the Summary Judgment Standard.

Amici curiae in support of Appellant concede that "summary judgment is appropriate in the proper context," (*Amicus Curiae* Br. of the Florida Justice Association at 6), but argue that this Court was "distracted" or "retreated" from Florida's familiar summary-judgment standard. It did no such thing.

Contrary to *amici*'s contentions, this Court did not apply the federal summary-judgment standard, but faithfully applied the familiar, Florida standard. While the Court discussed federal cases in which summary-judgment had been granted, nothing in its opinion indicates that it mistakenly imported the federal standard or predicated its decision on federal cases. The Court cited both state and federal decisions[3]—and the state decisions alone are more than enough to support

[3] So too has *amicus curiae*, the Florida Justice Association. In 2011, when a committee of the Florida Senate debated bad faith, a representative of the Florida

its holding. At most, the Court's research was more thorough than necessary.

Amici's description of the standard for summary judgment is so skewed *against* summary judgment that the procedure would quickly become useless. While *amici* repeat (as some cases have done) that the movant bears the burden to show "conclusively" the nonexistence of a material issue of fact, this imposing adverb does not require the movant to "exhaust[] the evidence pro and con," *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 783 (Fla. 1965), or to "exclude every possible inference from other evidence that may have been available," *Stepp v. State Farm Fire & Cas. Co.*, 656 So. 2d 494, 496 (Fla. 1st DCA 1995) (quoting *DeMesme v. Stephenson*, 498 So. 2d 673, 675 (Fla. 1st DCA 1986)). Indeed, if the movant's initial burden were to negate every conceivable inference and conjecture, however immaterial or impossible, it would be an "unnecessary exercise" ever to shift the burden to the non-movant. *See* Bruce J. Berman, *Florida Civil Procedure*, ¶ 510.4[6][b] (2011-2012 ed.); *see also O'Donnell v. BellSouth Adver. & Publ'g Corp.*, 906 So. 2d 1264, 1264 (Fla. 4th DCA 2005) ("When the movant produces

---

Justice Association sought to assure the committee that reform was unnecessary, and that "in about a half hour of research, [he had] found about twenty cases where the insurance industry has either won the bad-faith case at trial or has won on summary judgment," citing two *federal* summary-judgment cases: *Green v. Omni Insurance Co.*, No. 3:00-cv-00077-RV (N.D. Fla. Jan. 11, 2001), and *Johnson v. GEICO General Insurance Co.*, 318 Fed. Appx. 847 (11th Cir. 2009). *See* Fla. S. Comm. on Judiciary, recording of proceedings (Feb. 22, 2011) (on file with the Secretary of the Senate) (testimony of Fred Cunningham, representing the FJA).

sufficient evidence to support summary judgment, it is the opponent's burden to come forward with either counter-evidence or justifiable inferences . . . ." (quoting *Nat'l Indem. Co. v. Consol. Ins. Servs.*, 778 So. 2d 404 (Fla. 4th DCA 1999))).

The movant's burden is to "come forward with competent evidence to demonstrate the non-existence of a material issue of fact." *Bratt ex rel. Bratt v. Laskas*, 845 So. 2d 964, 966 (Fla. 4th DCA 2003). While the *amici* emphasize that the "slightest doubt" about the existence of a factual dispute will defeat a motion for summary judgment, the doubt must concern a "material fact" and be based on "reasonable inferences." *See Briggs v. Jupiter Hills Lighthouse Marina*, 9 So. 3d 29, 31 (Fla. 4th DCA 2009) (quoting *Walter T. Embry, Inc. v. LaSalle Nat'l Bank*, 792 So. 2d 567, 568 (Fla. 4th DCA 2001)). An issue of immaterial fact will not suffice: "the 'issue' must be one of material fact. Issues of nonmaterial fact are irrelevant to the summary judgment determination." *Cont'l Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000).

Ultimately, summary judgment must be granted if the facts do not yield a reasonable inference of bad faith. *See Fisel v. Wynns*, 667 So. 2d 761, 764 (Fla. 1996) (approving summary judgment in a negligence case; "[n]o construction of these facts yields a reasonable inference of negligence"); *Laremont v. Absolute Health Care for Women of All Ages, P.A.*, 988 So. 2d 735, 737 (Fla. 4th DCA 2008) ("[W]hen no construction of the facts yields a reasonable inference tending

to prove an element necessary for the claim, summary judgment is warranted."). Unreasonable or speculative inferences will not give rise to a cognizable "doubt" sufficient to defeat a motion for summary judgment. Thus, conclusory affidavits are insufficient to raise a genuine doubt. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979); *Heitmeier v. Sasser*, 664 So. 2d 358, 360 (Fla. 4th DCA 1995).

The Court correctly applied these principles. The insurer filed a motion for summary judgment that demonstrated prompt and reiterated efforts to effect a settlement and a clear pattern of avoidance by the claimant. The insurer's evidence was competent to shift the burden to Appellant to show, through counter-evidence or justifiable inferences, the existence of a genuine, triable issue of fact. Appellant responded with the affidavit of Mark Lemke, whose testimony consisted of bald legal conclusions insufficient to create a genuine dispute. Lemke testified that the insurer acted in bad faith (a legal conclusion), that the insurer should immediately have perceived that this case called for tender of policy limits (it did), and that no prohibition precluded the tender of policy limits to Appellant (a legal conclusion). This Court properly found that such conclusions of law cannot create triable issues.

If summary judgment were not available on a record so clear and undisputed, the summary-judgment procedure would be meaningless. Under the standard proposed by *amici*, Florida would be a hopeless outlier and encourage frivolous litigation of every kind. And the Court's rehearing of this case would

signal the unavailability of summary judgment in bad-faith cases, exacerbating the perverse incentives that fuel bad-faith litigation in Florida. *See infra* Part II.

"The function of summary judgment procedure is to determine if there is sufficient evidence to justify trial upon the issues made by the pleadings, to expedite litigation, and to obviate expense." *Page v. Staley*, 226 So. 2d 129, 130 (Fla. 4th DCA 1969); *see also Cia. Ecuatoriana de Aviacion v. U.S. & Overseas Corp.*, 144 So. 2d 338, 340 (Fla. 3d DCA 1962) ("[Summary judgment] is an integral part of the judicial system of the State."). In bad-faith cases in particular, the perceived unavailability of summary judgment, and the resulting expectation of expensive trials, has distorted the litigation calculus and placed an artificial burden on insurers to prefer the settlement even of meritless allegations of bad faith to the cost of a defense. As discussed below, the absence of a realistic check on baseless allegations has implications far beyond the parties themselves. *See infra* Part II.

D. The Court Correctly Applied the Law of Bad Faith.

This Court did not misunderstand the law of bad faith.[4] *Amici* for the

[4] Appellant and *amicus curiae* Taxpayers Against Insurance Bad Faith, Inc., challenge the Court's assertion that the "focal point of a bad faith case is that the insurer puts its own interests ahead of the interests of the insured." (Mot. for Reh'g at 5-6; *Amicus Curiae* Br. of Taxpayers Against Insurance Bad Faith, Inc., at 18.) The Court, they claim, was again misled by a federal case. But the Florida Supreme Court itself placed the same characterization on bad-faith actions. In dismissing concerns about the economic effect of its decision in *Berges*, the Court stated that "it is far more likely that the insurer's knowledge of the potential

Appellant insist that the Court may not even *consider* the claimant's conduct in determining whether the insurer acted reasonably and appropriately. But *amici* are wrong: the claimant's conduct is relevant, not because (as *amici* fear) the claimant may relieve the insurer of its duty to the insured, but because the reasonableness of one party's conduct in any negotiation is inseparable from the conduct of the other party. The propriety of one party's conduct simply cannot be assessed in isolation.

In bad-faith cases, "the issue is whether, under all of the circumstances, the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly toward its insured and with due regard for his interests." *Berges*, 896 So. 2d at 679. By its plain words, this "totality of the circumstances" standard embraces *all* circumstances—including the claimant's conduct.

Amici suggest that *Berges* held otherwise, citing the axiom that "the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." *Berges*, 896 So. 2d at 677. The Court did not hold, however, that the *exclusive* focus is on the insurer's conduct, or that the claimant's conduct is not a factor to consider—often an important factor—in an evaluation of the insurer's conduct. In fact, in *Berges* itself, one of the two disputes of fact that precluded summary judgment was whether the *claimant* had

---

consequences of *placing its own interests over that of its insured* has a beneficial effect on the handling of claims." *Berges*, 896 So. 2d at 683.

agreed to suspend his initial twenty-five day demand for a tender of policy limits. *See id*. at 676-77. Whether the claimant had time-limited his demand in the first place, and later suspended the time limitation, would never have raised a material issue of fact if the insurer's conduct were the *exclusive* focus of a bad-faith case. The *Berges* Court itself later "assum[ed]" for argument that the claimant's conduct "is a *factor to consider* in deciding whether [the insurer had] acted in bad faith," and then proceeded to examine whether the claimant "was uncooperative or in any way hindered [the insurer's] attempts" to settle. *Id*. at 678.

Two years after the Florida Supreme Court decided *Berges*, this Court soundly rejected the notion that a claimant's intransigence is irrelevant to the reasonableness of the insurer's conduct. In *Barry v. GEICO General Insurance Co.*, 938 So. 2d 613 (Fla. 4th DCA 2006), the Court concluded that although "the focus of an insurance bad faith case is not on the motive of the claimant[,] . . . that does not mean that all inquiries into prior conduct and motives are irrelevant":

> [T]he insurer has the burden to show that there was no realistic possibility of settlement . . . . This question is decided based upon the totality of the circumstances. . . . The conduct of [the claimant] and her attorney would be relevant to the question of whether there was any realistic possibility of settlement. Despite [the claimant's] testimony at trial that she would have settled the case if GEICO had not made the mistake, her actions and those of her attorney suggested otherwise. The jury could have concluded that the failure of her attorney to notify GEICO of his representation coupled with her refusal to meet with [the adjuster] on the settlement, among other incidents, showed that she did not want to settle with GEICO for the policy limits. Thus, GEICO did not inject irrelevant information into the case . . . .

938 So. 2d at 618; *see also Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991) (concluding that claimant's failure to offer to settle is "a factor to be considered"); *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975) (finding no bad faith where the claimant's demand rendered acceptance "virtually impossible").[5] Thus, the Court properly considered the reasonableness of the insurer's conduct in light of all surrounding circumstances.

II. RUNAWAY BAD-FAITH LITIGATION HAS SERIOUS IMPLICATIONS FOR THE COST OF INSURANCE AND THE ADMINISTRATION OF JUSTICE.

The perception that summary judgment is unavailable to insurers, and that even the most frivolous bad-faith claims are entitled to be heard by a jury, has created perverse incentives with harmful consequences. It encourages claimants to avoid a prompt settlement for policy limits and instead to manufacture allegations of bad faith in order to transform limited into unlimited coverage—or at least into large settlements. Without a realistic check on baseless claims, insurers willingly settle even frivolous bad-faith claims to avoid the expense of trials.

The winners in this too-common scenario are claimants whose recoveries

[5] Citing *Barry* (as well as federal cases), one opponent of legislative bad-faith reform recently found "no support for the contention that any court has precluded an insurer from showing that despite its reasonable efforts, it could not settle claims. . . . [Court] decisions have consistently addressed the likelihood that intransigence or a failure to cooperate by a claimant in settlement negotiations will fatally undermine a bad faith claim." Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. B.J. 8, 13 (2011).

exceed their rightful entitlement, and the attorneys who share in the spoils. The losers are the general public, whose premiums are inflated by large settlements, and the judicial process that tolerates such gamesmanship.

This Court was right to note the "concern over potentially disingenuous bad faith claims." (Op. at 7 n.7.) As Justice Wells explained in dissent in *Berges*, "there are strategies which have developed in the pursuit of insurance claims which are employed to create bad faith claims against insurers when, after an objective, advised view of the insurer's claims handling, bad faith did not occur." 896 So. 2d at 685. These strategies include arbitrary deadlines for settlement, conditions on settlement that the insurer cannot possibly satisfy, vague or ambiguous language in demand letters, and a refusal to cooperate with the insurer in its investigation of the claim. "The goal of this strategy is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage." *Id*.

Judicial tolerance of this "strategy" has placed heavy burdens on insurers and consumers alike. A recent report authored by professional staff of the Florida Senate's Judiciary Committee sets forth telling data provided by insurers and insurance trade associations. *See* App. (Fla. S. Comm. on Judiciary, *Interim Report 2012-132: Insurance Bad Faith* (2011)). One national insurer reported that 18.4 percent of its bad-faith claims between 2004 and 2008 originated in Florida (158 of 861), including 28 percent of bad-faith claims in 2008. *Id*. In fact, the number of

bad-faith claims against the insurer increased from 28 in 2006 to 48 in 2008. *Id*. Similarly, an insurance trade association reported that demands on its members increased steadily from 27,135 in 2006 to 51,944 in 2010, and that the percentage of demands that were "conditional" tripled over the same period. *Id*. According to another insurance trade association, the average period of time between the initial injury report to the payment of a claim is 183.3 days without attorney involvement and 295.9 days with attorney involvement. *Id*. Significantly, the estimated claim amount paid in Florida for all bodily injury claims was 29.3 percent greater than in other states—$18,396, compared to $14,222. *Id*. at 15.

These costs fall largely on consumers of automobile insurance, including large numbers of elderly residents on fixed incomes. While insurers may not include bad-faith awards and settlements in their rate bases, *see* § 627.0651(12), Fla. Stat. (2011), neither settlements made to avoid litigation nor the expenses of claims adjustment or litigation are excluded. Further, allegations of bad faith often enlarge settlements of underlying tort claims. When insurers incur such expenses, "someone has to fill up the [insurance] pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased." *Berges*, 896 So. 2d at 686 (Wells, J., dissenting).

The lessons learned by other states are equally instructive. In California, the Supreme Court recognized third-party bad-faith actions in 1979. *See* App. at

18. According to a study by the RAND Institute for Civil Justice, both the cost and frequency of bodily injury claims, which had been similar to those in other states with similar laws, increased dramatically. *Id*. When the California Supreme Court reversed course in 1988, foreclosing third-party bad-faith claims, these increases suddenly reversed. *Id*. While this Court is bound by precedent to recognize third-party bad-faith claims, California's example highlights the correlation between bad-faith jurisprudence and the behavior of claimants and the burdens on insurers.

Courts have a profound influence on bad-faith law and, of course, on the litigation climate. The perceived unavailability of summary judgment in bad-faith cases has turned the scales of justice in one direction, and balance must be restored. Bad-faith claims "must be carefully screened by the courts so that only real—rather than created—bad faith claims provide a basis for a bad faith recovery of damages against an insurer." *Berges*, 896 So. 2d at 686 (Wells, J., dissenting). "The Court . . . has a responsibility to not allow contrived bad faith claims that are the product of sophisticated legal strategies and not the product of actual bad faith." *Id*.

CONCLUSION

This Court correctly affirmed the entry of summary judgment in this case. The undisputed record establishes that insurer acted with proper care and diligence, while the claimant, wittingly or unwittingly, frustrated all hopes of settlement. The Court should deny Appellant's request for rehearing or certification of a question.

CERTIFICATE OF SERVICE

I certify that this brief was emailed to the Court at efiling@flcourts.org and that a true and correct copy of this brief was sent by United States Mail this 22nd day of August 2012, to the persons listed on the service list that follows.

/S/ ANDY BARDOS
George N. Meros, Jr.
Florida Bar No. 263321
Andy Bardos
Florida Bar No. 822671
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311
Email: george.meros@gray-robinson.com
andy.bardos@gray-robinson.com

Attorneys for Amici Curiae

SERVICE LIST

Bard D. Rockenbach
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, Florida 33401
Attorneys for Appellant

Michael S. Smith
LESSER, LESSER, LANDY & SMITH, PLLC
101 Northpoint Parkway
West Palm Beach, Florida 33407
Attorneys for Appellant

Hinda Klein
CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.
3440 Hollywood Boulevard, 2d Floor
Hollywood, Florida 33021
Attorneys for Appellee

Jay B. Green
GREEN, ACKERMAN & FROST, P.A.
1200 Corporate Place, Suite 301
1200 North Federal Highway
Boca Raton, Florida 33432
Attorneys for Appellee

Judith H. Littky-Rubin
CLARK, FOUNTAIN, LA VISTA, PRATHER, KEEN & LITTKY-RUBIN, LLP
1919 North Flagler Drive, 2d Floor
West Palm Beach, Florida 33407
Attorneys for Amicus Curiae, *Florida Justice Association*

Harold R. Mardenborough, Jr.
CARR, ALLISON, PUGH, HOWARD, OLIVER & SISSON
305 South Gadsden Street
Tallahassee, Florida 32301
Attorneys for Amicus Curiae, *Florida Defense Lawyers Association*

Dale M. Swope
Shea T. Moxon
Robin A. Horton
SWOPE RODANTE, P.A.
1234 East 5th Avenue
Tampa, Florida 33605
Attorneys for Amicus Curiae, *Taxpayers Against Insurance Bad Faith*, *Inc.*

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/S/ ANDY BARDOS
George N. Meros, Jr.
Florida Bar No. 263321
Andy Bardos
Florida Bar No. 822671
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311
Email: george.meros@gray-robinson.com
andy.bardos@gray-robinson.com

Attorneys for Amici Curiae