

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2012

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

v.

AMERICAN VEHICLE INSURANCE COMPANY, a Florida for profit
corporation,
Appellee.

No. 4D10-3781

[December 5, 2012]

ON MOTION FOR REHEARING

HAZOURI, J.

We grant Goheagan's motion for rehearing, withdraw our original opinion, and substitute the following in its place.

Olive Goheagan, as Personal Representative of the Estate of Molly Swaby, Individually and as Assignee of John Perkins, appeals a final summary judgment entered in favor of American Vehicle Insurance Company (AVIC) on Goheagan's claim of bad faith in failing to protect its insured Perkins from an excess judgment. We reverse.

Goheagan¹ filed a bad-faith claim against AVIC which arose as a result of a motor vehicle accident in which AVIC's insured, Perkins, traveling at a high rate of speed with a blood alcohol of .19, rear-ended decedent, Swaby. The collision occurred on February 24, 2007. At the time Perkins was insured under a policy issued by AVIC which provided for bodily injury liability coverage in the amount of \$10,000/\$20,000. Swaby sustained catastrophic injuries and remained hospitalized in a coma until she died on May 12, 2007.

¹ Goheagan is the mother of Molly Swaby, and a survivor under the wrongful death act. §§ 768.16-768.26, Fla. Stat. (2007).

The wrongful death claim was not resolved and on January 20, 2009, a judgment was entered against Perkins in favor of Goheagan, as Personal Representative of the Estate of Swaby, in the amount of \$2,792,893.65 with an additional cost judgment for \$28,070 entered on February 9, 2009.

The underlying facts of the accident including Perkins's liability and the catastrophic nature of injuries to Swaby are not in dispute. The gravamen of this appeal is whether there are material issues of fact to be resolved by a jury concerning whether AVIC acted in bad faith resulting in a judgment against Perkins in the amount of \$2.8 million.

On February 26, 2007, two days after the accident, Perkins reported the accident to AVIC and the claim was assigned to Lee Ann Grieser. Greiser immediately notified Perkins that his policy limits for bodily injury claims were \$10,000 per person, \$20,000 per accident, and advised him that she would make every attempt to settle all claims for bodily injury in accordance with his policy limits. Within a few days of being assigned the claim, Grieser concluded that Perkins was the sole cause of the accident, Swaby's injuries were far in excess of the policy limits, and the claim should be settled.

On February 28, 2007, Grieser called and spoke with Swaby's stepfather who told her that Goheagan had retained an attorney and that Grieser would have to talk to Goheagan to obtain the name of the attorney. That same day Grieser called a different number for Goheagan and spoke to a person identified as a friend and was advised that Goheagan was not available. On March 1, 2007, Grieser again called Goheagan and left a voice mail message with her name and number. There was no further attempt by Grieser to contact Goheagan until March 21, 2007, at which time Grieser spoke with Goheagan and asked for the name of her attorney. Goheagan advised Grieser to call back at a later time. Grieser again called Goheagan on March 27, 2007, and again sought the name of the attorney and was advised by Goheagan that she was not in a position to discuss matters at the time. On April 16, 2007, Grieser once again called Goheagan and again Goheagan advised Grieser that this was not a convenient time to speak about the matter. On April 19, 2007, Grieser learned that suit had been filed against Perkins; thereafter AVIC attempted to tender its policy limits which was not acceptable to Goheagan, which thereafter resulted in the aforementioned final judgment of \$2.8 million.

An insurer's duty toward its insured is best summarized by the Florida Supreme Court's decision in *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980):

An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. . . . The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.

Id. at 785 (citations omitted).

This duty of good faith has been reaffirmed in numerous cases decided since *Boston Old Colony* and as recently as the Florida Supreme Court's decision in *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004).

In moving for summary judgment AVIC asserted that it acted fairly and honestly toward its insured with due regard for his interest but was prevented from entering into settlement negotiation or consummating a settlement for two reasons: (1) Swaby was in a coma and there was no one to make the offer to; and (2) because AVIC had been made aware of the fact that there was a lawyer involved, Florida Administrative Code 69 and 69B-220.201² prohibited it from communicating or negotiating a

² (i) An adjuster shall not negotiate or effect settlement directly or indirectly with any third-party claimant represented by an attorney, if the adjuster has knowledge of such representation, except with the consent of the attorney. For purposes of this subsection the term "third-party claimant" does not include the insured or the insured's resident relatives.

.....

settlement with Swaby or her mother, Goheagan. In opposition to the motion, Goheagan filed the affidavit and deposition of Mark Lemke, an expert witness on insurance claim handling. He gave his opinion that AVIC breached its duty of good faith by failing to proactively adjust the claim and timely tender the policy limits. "The claim should have immediately been recognized as one requiring tender of the \$10,000 policy limits. Steps should have been taken to immediately tender the \$10,000 policy limits to Molly Swaby. This did not happen." He opined that AVIC failed to recognize the urgency of tendering the check and there were no ethical prohibitions that would have prevented Grieser from tendering a check. "Even after the lawsuit was filed the adjuster showed no sense of urgency in tendering a check."

At the hearing on the motion for summary judgment, AVIC argued that the evidence of bad faith was insufficient as a matter of law. The trial court granted AVIC's motion for summary judgment based upon AVIC's first point that because Swaby was in a coma and no guardianship had been set up prior to her death, there was no one to whom to make an offer. At the hearing on the motion for summary judgment the following colloquy occurred between the court and Goheagan's attorney Mr. Smith:

MR. SMITH: . . . In this case, Your Honor, the insured was drunk at 8:00 in the morning on a Saturday morning, .19 blood alcohol. He's going about 60 miles an hour on Military Trail and he rear ends a line of cars that are lawfully stopped for a red light.

THE COURT: Mr. Smith, with all due respect, this has nothing to do with the underlying facts of the case. It has to do with the actions of the insurance company. Let's stick to that.

(l) An adjuster shall not attempt to negotiate with or obtain any statement from a claimant or witness at a time that the claimant or witness is, or would reasonably be expected to be, in shock or serious mental or emotional distress as a result of physical, mental, or emotional trauma associated with a loss. The adjuster shall not conclude a settlement when the settlement would be disadvantageous to, or to the detriment of, a claimant who is in the traumatic or distressed state described above.

MR. SMITH: Yes, Your Honor. And it's our position, Your Honor, given those facts, which are undisputed, that there should have been an immediate tender of the policy limits.

THE COURT: To whom?

MR. SMITH: If I could – if you'll bear with me, Judge, I will get to that.

On March 1st of '07, a few days after the accident, the insurance company had concluded this was a case to pay. They knew where the claimant was, and they knew she was in critical condition. Mr. Green [attorney for AVIC] pointed out to Your Honor that Ms. Goheagan is the mother of Ms. Swaby. I think the court needs to understand, I'm sure the court does understand, Ms. Swaby was in her 40s. Ms. Swaby was not a minor. Ms. Swaby was of age. The insurance company had no evidence that Ms. Goheagan was empowered by way of a guardianship or otherwise to act on her behalf at that point.

Their argument, Your Honor, is that the adjuster code of ethics bars them from action. There is no mention in the adjuster's log that she felt constrained because of the adjuster code of ethics. That code is not mentioned anywhere. And it's significant, Your Honor, that the property damage adjuster from the same insurance company that was operating out of the same log had direct communication with Ms. Goheagan to settle the property damage claim. Ms. Goheagan, the mother, owned the car that her daughter was driving at the time. A reasonable jury could conclude that this argument of adjuster code of ethics is something that occurred after the fact because another employee of the same insurance company dealt with the mother on the property damage claim. They had a direct communication to the mother.

I asked the adjuster, Your Honor, in her deposition if Molly Swaby had an attorney. She says in her deposition, I'm prohibited from dealing with her. At Page 77 she says I don't believe Molly Swaby ever had one because she was unable to retain one because she was in a coma. It's our position, Your Honor, and it is our expert's opinion that the adjuster certainly wasn't prohibited from disclosing the

policy limits. That never happened. They never said we only have \$10,000 in coverage. The adjuster was not prohibited from expressing a desire to pay. That never happened. The adjuster never said we have limited coverage and I want to pay. The adjuster never sent any letters at all to Mrs. Goheagan or Ms. Swaby that said anything. No letters were sent and the president of the company, when I deposed him, Judge, said yeah, she should have sent the letter. I think that in and of itself creates an issue of fact. There was no prohibition and our expert has testified that she could have tendered a check made payable to Molly Swaby and her attorney, identity unknown or somehow qualified the check so it couldn't be negotiated and forwarded the check.

. . . .

Your Honor, I've given the court the affidavit of Mark Lemke who's been in the insurance business for over 30 years. It is not conclusory. He explains why American Vehicle did not adjust this claim properly. He explains that they should have immediately tendered the policy limits, and this did not happen. He explains why there were not prohibitions under the adjuster code of ethics that would have prevented a tender, that a tender should have occurred as an urgent matter, that the supervision of the claim fell below industry standards, that communications with the insured fell below industry standards and the insured was not adequately advised of the exposure and his liability for the exposure. They could have tendered the check.

THE COURT: With all due respect, Mr. Smith, you still didn't answer my question. To whom would they have tendered?

MR. SMITH: They could have tendered the check to Molly Swaby, Your Honor.

THE COURT: In a coma who never recovered?

MR. SMITH: There's a difference between tendering the check and her ability to cash the check.

THE COURT: The law doesn't require a futile act, Mr. Smith. If they knew she was in a coma why would they tender the check to her?

MR. SMITH: They could have tendered the check, Your Honor, to Olive Goheagan.

THE COURT: Who was not authorized to accept by your own admission.

"The standard of review of a summary judgment is *de novo*. In reviewing a summary judgment, [the court] must consider all record evidence in a light most favorable to the non-moving party. If material facts are at issue and the slightest doubt exists, summary judgment must be reversed." *Mills v. State Farm Mut. Auto. Ins. Co.*, 27 So. 3d 95, 96 (Fla. 1st DCA 2009) (citations omitted).

"In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard." *Berges*, 896 So. 2d at 680 (Fla. 2004) (citing *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 63 (Fla. 1995)). "Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

Goheagan argues that there remained genuine issues of material fact which precluded summary judgment. She argues that the issue of whether an insurer acted in bad faith is decided by reviewing the steps taken by the insurer to offer to settle or tender, not the actions of the claimant. She asserts there is a dispute as to whether Goheagan's retention of an attorney was an impediment to communication of a settlement offer and whether the fact that Swaby was in a coma prevented any possible settlement so there was no point in making the offer or tender. We agree.

"Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." *Powell*, 584 So. 2d at 14; *see also Farmers Ins. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977) (duty to initiate settlement negotiations arises if carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured); *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 323 A.3d 495 (1974) (where substantial injuries and potential liability of insured are obvious, failure to offer policy limits constitutes

bad faith even where there is no assurance that action can be settled); *Alt v. Amer. Family Mut. Ins. Co.*, 71 Wis. 2d 340, 237 N.W.2d 706 (1976) (insurer has affirmative duty to investigate possibilities of settlement); *Eastham v. Oregon Auto Ins. Co.*, 273 Or. 600, 540 P.2d 364 (1975) (insurer may be found to have acted in bad faith for delaying an offer to settle). See generally 14 *Couch on Insurance 2d* § 51:17 (Rev. ed. 1982); J. Appleman, *Insurance Law and Practice* § 4711, at 383 (Rev. ed. 1979).

Clearly the trial court erred in granting summary judgment based on its assumption there could be no bad faith because Swaby was in a coma and therefore there was no one to whom to make an offer. See *Berges*, 896 So. 2d at 675 (a guardian or personal representative who has not yet been appointed can negotiate a settlement on behalf of a claimant). Furthermore we can find no case law support for AVIC's argument that it could not have at least made a written offer and/or tender to Swaby through her mother. It is unclear at what point an attorney had been retained. If in fact Goheagan had retained an attorney, the assistance of the attorney may have been necessary to finalize a settlement but would not have precluded an offer. With the catastrophic injuries, clear liability, and the limited available liability limits of \$10,000, a jury could decide that there was not much to negotiate; and the representation by an attorney would not have been an impediment to at least make an offer to settle.

AVIC cites to several federal district court cases outlining factual circumstances which warranted the granting of a summary judgment in bad faith cases. However, as this court noted in *Byrd v. BT Foods Inc.*, 948 So. 2d 921 (Fla. 4th DCA 2007), "federal cases [which] permit summary judgment based on Federal Rule of Civil Procedure 56 . . . are of limited precedential value in Florida summary judgment cases [] [because] Florida places a higher burden on a party moving for summary judgment in state court, requiring the movant to: '[S]how conclusively that no material issues remain for trial.'" *Id.* at 923-24 (citation omitted). We also noted in *Byrd* that "[w]hen reviewing a ruling on summary judgment, an appellate court must examine the record and any supporting affidavits in the light most favorable to the non-moving party." *Id.* at 923. "Where credibility issues impact the determination of material facts, summary judgment is not appropriate." *Id.*

The financial exposure to Perkins was a ticking financial time bomb. Suit could be filed at any time. Any delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith. See *Boston Old Colony*, 386 So. 2d at 785 ("The question of failure

to act in good faith with due regard for the interests of the insured is for the jury.”); *see also Campbell v. Gov’t Emps. Ins. Co.*, 306 So. 2d 525, 530-31 (Fla. 1974) (“[R]easonable diligence and ordinary care [are] material in determining bad faith. Traditionally, reasonable diligence and ordinary care are considerations of fact – not of law.”).

We do not hold as a matter of law that AVIC was guilty of bad faith. It may be that, based upon the facts of this case, the jury might conclude that AVIC acted reasonably and prudently in attempting to protect Perkins. However, there are disputed issues of fact and issues of credibility that must be resolved and that cannot be done by way of a summary judgment. We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and Remanded for Further Proceedings.

POLEN, J., concurs.

LEVINE, J., dissents with opinion.

LEVINE, J., dissenting.

I respectfully dissent from the majority’s granting of Goheagan’s motion for rehearing. I would find that, as a matter of law, the insurer AVIC did not act in bad faith, and I would affirm the trial court’s entry of summary judgment.

“[W]hen an insurer is handling claims against its insured, it ‘has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.’” *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 898 (Fla. 2010) (quoting *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004)).

This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (citation omitted). Further, “[b]ad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause.” *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991). In this case, the evidence does not support the proposition that AVIC failed to settle the claim “if possible, where a reasonably prudent person . . . would do so” nor does it demonstrate that the failure to settle was “willful and without reasonable cause.”

The facts are that after the collision on February 24, AVIC attempted to contact Swaby’s mother, Olive Goheagan, on February 28, March 1, March 7, March 21, March 27, and April 16. From the first contact, AVIC was told by the stepfather that Goheagan had retained an attorney. The stepfather gave Goheagan’s cell phone number to AVIC and told Grieser, the adjuster, to call Goheagan. AVIC consistently attempted to get the name of the attorney from Goheagan or Goheagan’s family. Goheagan refused to give AVIC the name of the attorney after AVIC’s repeated attempts to obtain it.

Specifically, Grieser attempted to call Goheagan several times before getting her on the phone. When Grieser reached Goheagan on March 21, Goheagan told Grieser that they would talk later.³ Grieser called again, and Goheagan initially told Grieser to speak to someone else. When Grieser asked Goheagan for the name of the attorney that the stepfather had informed her was hired regarding this accident, Goheagan said she would call Grieser back. Another time, Grieser called Goheagan and again Goheagan said it was not a convenient time to talk and that Grieser would have to call some other time. Only after these repeated attempts by AVIC, through Grieser, to obtain the name of the attorney was a suit filed regarding this accident.

Section 624.155(b)1., Florida Statutes, requires an insurer to act in “good faith” and to act “fairly and honestly toward its insured and with due regard for her or his interests.” Although Goheagan alleged a common law cause of action for bad faith, the obligation expressed in this statute can be looked to for guidance, because it “is identical to the common law duty of good faith imposed on insurers in third-party claims.” *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1069 (Fla. 2011) (Pariente, J., specially concurring); *Macola v. Gov’t Emps. Ins. Co.*, 953 So. 2d 451, 456 (Fla. 2006) (“the same obligations of good faith that existed for insurers dealing with their insureds in the

³ After this phone call, Grieser indicated in her notes that she “did not discuss anything else . . . as [Goheagan] is [represented].”

third-party context were extended by statute to the first-party context”); *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 559 (Fla. 4th DCA 2003). The common law duty “imposed upon the insurer the obligation of exercising good faith in negotiating for and in effecting a settlement of the claim against an insured.” *Clauss v. Fortune Ins. Co.*, 523 So. 2d 1177, 1178 (Fla. 5th DCA 1988). Attempting to contact Goheagan to determine the name of Goheagan’s counsel six times would hardly appear to constitute the lack of diligence or care envisioned as an example of a bad faith claim. It is hard to see, from the facts in this case, how AVIC failed to act in good faith with due regard for the interests of its insured, Perkins.

Although the majority rejects the argument that AVIC “could not have at least made a written offer and/or tender” of the liability limits to Swaby through Goheagan, the failure to do either does not mean that AVIC has failed to meet its obligations. The facts of this case have AVIC literally repeatedly calling Goheagan to obtain the name of the attorney, and AVIC repeatedly being put off.

The focal point of a bad faith case is that the insurer puts its own interests ahead of the interests of its insured. “The essence of an insurance bad faith claim is that the insurer acted in its own best interests, failed to properly and promptly defend the claim, and thereby exposed the insured to an excess judgment.” *Boateng v. Geico Gen. Ins. Co.*, 2010 WL 4822601, at *2 (S.D. Fla. Nov. 22, 2010) (citation omitted).⁴ There is no evidence in this record which demonstrates that AVIC placed its interests above the interests of Perkins. Nor is there any evidence of the “insurer’s failure to properly or promptly defend the claim.” *Macola*, 953 So. 2d at 458 (citation omitted).

At oral argument, counsel for Goheagan appeared to argue that AVIC should have sent a letter enclosing a check for the policy limits to Goheagan, despite the fact that AVIC knew of the existence of an attorney hired by Goheagan. According to Goheagan’s counsel, the insurer should have gone forward with this attempt, but not concluded the settlement. This court should reject this interpretation of what an insurer must do to meet its obligation to demonstrate that it is defending a claim in good faith.

⁴ Even an insurer’s negligent conduct, alone, is insufficient to support a claim of bad faith. *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).

To accept Goheagan's theory of bad faith, AVIC would have had to tender a letter with a check that could not be cashed. Since Swaby's stepfather informed AVIC that Goheagan had retained an attorney regarding this accident, Florida Administrative Code Rule 69B-220.201 applied to AVIC's conduct. Pursuant to that rule, "[a]n adjuster shall not negotiate or effect settlement directly or indirectly with any third-party claimant represented by an attorney, if the adjuster has knowledge of such representation, except with the consent of the attorney." Fla. Admin. Code R. 69B-220.201(3)(i).

The majority notes the absence of case law supporting AVIC's argument that this rule prevented it from making an offer or tendering a check to Swaby through Goheagan. But the plain language of the rule would appear to prohibit even the tendering of a check, since that could be construed as "negotiating" or "effecting" a settlement. "Negotiate" is defined as "To communicate with another party for the purpose of reaching an understanding"; "To bring about by discussion or bargaining"; or "To transfer (an instrument) by delivery or indorsement, whereby the transferee takes the instrument for value, in good faith" *Black's Law Dictionary* (9th ed. 2009). Although the majority finds that "[i]t is unclear at what point an attorney had been retained," the appropriate inquiry under the rule is that AVIC "ha[d] knowledge of such representation" following Grieser's initial conversation with the stepfather. For this reason, I respectfully disagree with the majority's suggestion that it must be left to the jury to determine whether "the representation by an attorney [was] an impediment to at least make an offer to settle." Of course, "[a] summary judgment should not be granted unless . . . nothing remains but questions of law." *Progressive Express Ins. Co. v. Camillo*, 80 So. 3d 394, 399 (Fla. 4th DCA 2012). As an example of a "question of law" in a bad faith case, "[i]f an insurer is given a reasonable period of time in which to settle . . . and it is entirely clear that within that time the plaintiff is not going to release the driver, the insurer as a matter of law cannot have breached a duty of good faith to the driver." *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16, 22 (Fla. 4th DCA 2006) (Klein, J., concurring specially). In this case, given the undisputed fact that Grieser had been informed of Goheagan's retention of an attorney after speaking with the stepfather, whether the representation of the attorney, whose identity was unknown to Grieser, was an "impediment" to the making of an offer is a "question of law" that could be judicially determined by the granting of a motion for summary judgment.

Regarding the affidavit and deposition of Mark Lemke, "statements which are framed in terms only of conclusions of law," as well as factual

conclusions, “are not sufficient to either raise a genuine issue of material fact or prove the non-existence of a genuine issue of material fact.” *Progressive*, 80 So. 3d at 399; see also *Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14, 15 (Fla. 3d DCA 2006). In his affidavit, Lemke expressed his opinions that AVIC “did not adjust the underlying claim in good faith and breached the duty of good faith it owed its insured,” and that “[t]he claim should have immediately been recognized as one requiring tender of the \$10,000 policy limits.”⁵ These factual and legal conclusions are insufficient to defeat summary judgment. Lemke’s opinion that “[t]here were no ethical prohibitions that would have prevented [Grieser] from tendering a check” is refuted by Florida Administrative Code Rule 69B-220.201.

Although normally the question of whether an insurer acted in good faith is to be decided by a jury, there are instances where the evidence demonstrates that the insurer fulfilled all its legal obligations. *Gutierrez*, 386 So. 2d at 785 (“The evidence presented in the present case demonstrates that Boston Old Colony fulfilled all these obligations.”). Where the insurer fulfills its obligations and there is “no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer,” then summary judgment should be granted for the insurer. *Id.*

For example, in *Barnard v. Geico General Insurance Co.*, 2011 WL 2039560, at *3-4 (N.D. Fla. May 25, 2011), *aff’d*, 448 F. App’x 940 (11th Cir. 2011), summary judgment was granted for an insurer, in part because “[i]t [was] clear that [the insurer] made every attempt to settle the claim for the policy limits, despite [the injured party’s attorney’s] inexplicable evasive behavior.” On appeal, the Eleventh Circuit affirmed, finding that “[n]o reasonable juror could find that [the insurer] acted in bad faith when [the attorney] made it impossible to engage in settlement discussion.” 448 F. App’x at 944. Similarly, in the present case, AVIC aspired to “engage in settlement discussion,” a process which would begin with tendering the policy limits, but it was precluded from doing so before learning the name of the attorney, a task that Goheagan prevented.⁶

⁵ The evidence showed that AVIC did recognize that the accident involved clear liability. The fact that liability was clear was the reason AVIC called Goheagan six times to try to obtain the name of the attorney.

⁶ The concern over potentially disingenuous bad faith claims “was debated in the majority and dissenting opinions in *Berges*, and it is far from over.” *United Auto Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So. 3d 782, 788 (Fla. 3d DCA 2011) (footnote omitted). One concern highlighted is “being unresponsive to the

Other courts, including Florida courts, have also granted summary judgment in favor of an insurer where there was no evidence from which a jury could find that the insurer acted in bad faith.⁷ See *Aboy v. State Farm Mut. Auto. Ins. Co.*, 394 F. App'x 655, 656-57 (11th Cir. 2010) (affirming summary judgment for insurer because the insurer had no duty to verify the injured party's injuries when the injured party refused to cooperate, and "acted immediately" once it learned of injuries' severity by speaking with injured party's attorneys); *McGuire*, 2012 WL 712965, at *11 ("from the very beginning, [insurer] stood ready to tender" the policy limit "and attempted to tender it"); *Boateng*, 2010 WL 4822601, at *5 ("there is no evidence" that insurer "sought to avoid settling Plaintiff's claims for the policy limits"); *RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095, 1096 (Fla. 4th DCA 1997) (finding that facts showed "beyond any doubt that the primary insurer at no time missed an opportunity to settle which would have put it in a bad faith posture"); *Clauss*, 523 So. 2d at 1178 (finding no bad faith as a matter of law where there was one month between initial demand for policy limits and notice of bad-faith failure to settle, and insurer "expressed its willingness to tender the policy limits, but desired verification"); *Caldwell v. Allstate Ins. Co.*, 453 So. 2d 1187, 1190 (Fla. 1st DCA 1984) (determining that insurer was not "guilty of the kind of conduct which has typified those cases in which the courts have found the existence of bad faith").

The majority notes that it was error for the trial court to grant summary judgment "based on its assumption there could be no bad faith because Swaby was in a coma and therefore there was no one to whom to make an offer." Nevertheless, the trial court correctly entered summary judgment, not because there was no one to make an offer to since Swaby was in a coma, but rather because there was no issue of material fact as to whether AVIC acted in bad faith. See *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("the Appellate Court will make its own determination as to the correctness of

insurance companies' attempts at communication." *McGuire v. Nationwide Assurance Co.*, 2012 WL 712965, at *12 (M.D. Fla. Mar. 5, 2012).

⁷ In moving for rehearing, Goheagan argues that the original opinion applied the summary judgment standard applicable in federal courts in order to find no bad faith on the part of AVIC. The summary judgment standard in Florida continues to be that the movant "must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought." *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 848 (Fla. 2007) (quoting *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)).

the decision of the lower court, regardless of the reasons or theories assigned therefor”) (citation omitted).

In this case, the undisputed facts demonstrate no basis from which a reasonable jury could conclude that AVIC acted solely in its own interest. AVIC acted “promptly and properly” in continually contacting Goheagan in order to discover the name of the attorney retained by her, so that it could then contact the attorney. The majority’s position, reversing the granting of summary judgment, on the unique facts of this case, undeniably leaves the conclusion that one would be hard pressed to find a set of facts in a bad faith case where the granting of summary judgment would be sustained on appellate review. I would deny the granting of the motion for rehearing and would affirm the trial court’s grant of summary judgment on behalf of AVIC, based on the undisputed evidence that AVIC acted in good faith in attempting to settle this case.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Senior Judge; L.T. Case No. 502009CA017298XXXXMB.

Bard D. Rockenbach and Philip M. Burlington of Burlington & Rockenbach, P.A., West Palm Beach, and Michael S. Smith of Lesser, Lesser, Landy & Smith, PLLC, West Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.