DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January 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

[June 13, 2012]

LEVINE, J.

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 find, as a matter of law, that the insurer AVIC did not act in bad faith. We therefore affirm.

On February 24, 2007, Perkins rear-ended the decedent, Swaby, while traveling at a high rate of speed. Perkins had bodily injury liability coverage under an AVIC policy in the amount of $10,000/$20,000. Swaby was severely injured in the accident and remained hospitalized in a coma until her death on May 12, 2007.

Two days after the collision, on February 26, Perkins reported the accident to AVIC. AVIC opened a claims file and assigned the claim to adjuster Lee Ann Grieser. AVIC spoke to Perkins's attorney on February 27. On February 28, Grieser sent a letter to Perkins advising him that the bodily injury claims for the accident may exceed his policy limits, and that AVIC would "make every attempt to settle all claims for bodily injury in accordance with [his] policy limits." As of March 1, Grieser had determined that Perkins was the sole cause of the accident and intended to settle the claim for Perkins's $10,000 policy limit.

Grieser attempted to contact Goheagan, Swaby's mother, on February 28, March 1, March 21, March 27, and April 16. On February 28, Grieser was told by Swaby's stepfather that Goheagan had retained an attorney. The stepfather gave Goheagan's cell phone number to Grieser and told Grieser to call Goheagan. Later that day, Grieser called Goheagan's home number and was told by a friend of Goheagan that Goheagan was not available. Grieser left her contact information with Goheagan's friend.

On March 1, Grieser left Goheagan a voicemail message asking for Goheagan's attorney's information. On March 7, an AVIC property adjuster called Goheagan and received no answer or answering machine.

Grieser reached Goheagan on March 21 and asked for the name of Goheagan's attorney. Goheagan told Grieser that they would talk later.[1] Grieser called again on March 27. 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. On April 16, 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. On April 19, Grieser learned that Goheagan had filed a wrongful death suit against Perkins. AVIC offered to tender Perkins's $10,000 available coverage to Goheagan's attorney on April 26, which was rejected. Goheagan also rejected a second settlement offer dated June 7.

Subsequently, Goheagan's wrongful death action against Perkins went to trial. Following a jury verdict, a final judgment was entered against Perkins in the amount of $2,792,893.65 on January 20, 2009. An additional cost judgment in the amount of $28,070 followed.

Goheagan filed the instant common law bad faith action against AVIC after the final judgment was entered against Perkins in her wrongful death suit. Goheagan alleged that AVIC breached its duty of good faith with regard to the interests of Perkins, in part, by failing to affirmatively initiate settlement negotiations with Swaby, failing to actually tender the policy limits in a timely fashion, and failing to warn Perkins of the possibility of an excess judgment.

---

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

AVIC moved for summary judgment, arguing that no genuine issue of material fact existed as to whether AVIC fulfilled its duty of good faith toward Perkins.

Goheagan filed the affidavit and deposition of Mark Lemke in opposition to AVIC's motion for summary judgment. In Lemke's opinion, "[t]he 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." Lemke also submitted that no ethical rules would have prohibited Grieser from tendering a check to Goheagan.

The trial court granted summary judgment in favor of AVIC.[2] This appeal follows.

We apply a de novo standard of review to an order granting summary judgment. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "The movant carries the burden of showing that no genuine issue of material fact exists, making summary judgment appropriate." *Jervis v. Tucker*, 82 So. 3d 126, 128 (Fla. 4th DCA 2012) (citation omitted). "If the evidence shows that an issue of material fact exists such that different reasonable inferences can be drawn, the issue should go to the jury as the finder of fact." *Id.*

"[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)).

---

[2] At the hearing on AVIC's motion, the trial court asked counsel for Goheagan, "To whom would they have tendered?" Goheagan's counsel responded that the check could have been tendered to Swaby. The court questioned, "In a coma who never recovered?" Goheagan responded that there is a distinction between tendering a check and the recipient having the ability to cash the check. The court replied that the law does not require a futile act. When counsel suggested that AVIC could have tendered a check to Goheagan, the court answered, "Who was not authorized to accept by your own admission." As explained more fully below, we disagree with the trial court's reasoning in this regard. However, we affirm the entry of summary judgment for AVIC based on our independent review of the entire record. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999).

> 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). *See also Berges*, 896 So. 2d at 680 (explaining that "whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard"). In this case, we find that 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."

Section 624.155, 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, we look to the obligation expressed in this statute 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 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 "impose[s] 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). Grieser's attempts to contact Goheagan to determine the name of Goheagan's counsel five 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 dissent postulates that AVIC could "have at least made a written offer and/or tender" of the liability limits to Swaby through Goheagan, the fact that AVIC refrained from doing 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. "[T]he 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." *Maldonado v. First Liberty Ins. Corp.*, 546 F. Supp. 2d 1347, 1353 (S.D. Fla. 2008); *see also Auto Mut. Indem. Co. v. Shaw*, 184 So. 852, 859 (Fla. 1938).[3] 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. We reject this interpretation of what an insurer must do to meet its obligation to demonstrate that it is defending a claim in good faith.

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.[4] 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

---

[3] 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).

[4] Section 626.878, Florida Statutes (2007), provides that "[a]n adjuster shall subscribe to the code of ethics specified in the rules of the department. The rules shall . . . ensure preservation of the rights of the claimant to participate in the adjustment of claims."

of such representation, except with the consent of the attorney." Fla. Admin. Code R. 69B-220.201(3)(i).

The dissent notes the absence of case law permitting an insurer to rely on this rule as authority for its decision to refrain from making a written offer or tendering a check. 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 dissent finds that "[i]t is unclear at what point an attorney had been retained" and that the attorney's assistance "would not have precluded an offer," we find that the appropriate inquiry under the rule is that AVIC "ha[d] knowledge of such representation" following Grieser's initial conversation with the stepfather.

We also find that the affidavit and deposition of Mark Lemke[5] are insufficient to defeat summary judgment. "[S]tatements which are framed in terms only of conclusions of law 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 Express Ins. Co. v. Camillo*, 80 So. 3d 394, 399 (Fla. 4th DCA 2012). Factual conclusions are also insufficient. *See 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."[6] We consider these to be factual and legal conclusions. Lemke also opined that "[t]here were no ethical prohibitions that would have prevented [Grieser] from tendering a check." This legal conclusion is refuted by Florida Administrative Code Rule 69B-220.201. To the extent Lemke's deposition raised other disputed issues of fact as to what AVIC should have done differently, they are not material because there is

---

[5] The dissent argues that Lemke is "exceptionally qualified" to render his opinion although Lemke has never offered opinion testimony as an expert witness in court previously.

[6] The evidence showed that AVIC did promptly recognize that the accident involved clear liability. The fact that liability was clear was the reason Grieser called Goheagan five times to try to obtain the name of the attorney.

no evidence in this record from which a reasonable juror could infer that AVIC failed to act with due regard for Perkins's interests.

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.[7]

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. *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 v. Nationwide Assurance Co.*, 2012 WL 712965, at *11 (M.D. Fla. Mar. 5, 2012) ("from the very beginning, [insurer] stood ready to tender the [policy] limit and

---

[7] 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*, 36 Fla. L. Weekly D679 (Fla. 3d DCA Mar. 30, 2011) (footnote omitted). One concern highlighted is "being unresponsive to the insurance companies' attempts at communication." *McGuire*, 2012 WL 712965, at *12.

attempted to tender it"); *Boateng v. Geico Gen. Ins. Co.*, 2010 WL 4822601, at *5 (S.D. Fla. Nov. 22, 2010) ("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").

In the present case, as noted by the dissent, "the trial court did not do a comprehensive evaluation of the" entire record. 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 genuine issue of material fact as to whether AVIC acted in bad faith. *See Dade Cnty. Sch. Bd.*, 731 So. 2d at 644 ("the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor") (citation omitted).

"The claim for 'bad faith' failure to settle should be exactly that—only for situations in which the insurer truly is refusing in bad faith to settle, not when it is in fact attempting to settle the claim." Gwynne A. Young & Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement*, 85 Fla. Bar. J. 9, 14-15 (Feb. 2011). 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 "properly [and] promptly" in continually contacting Goheagan in order to discover the name of the attorney retained by her, so that it could then contact the attorney. *Macola*, 953 So. 2d at 458. We affirm the trial court's grant of summary judgment on behalf of AVIC, based on the unrefuted evidence that AVIC acted in good faith in attempting to settle this case.

Affirmed.

POLEN, J., concurs.
HAZOURI, J., dissents with opinion.

Hazouri, J., dissenting.

I respectfully dissent and would reverse the granting of the summary judgment on Goheagan's claim of bad faith. An insurer's duty toward its insured is best summarized by the Florida Supreme Court's decision in *Boston Old Colony Insurance Company 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 in the Florida Supreme Court decision in *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004).

This statement in *Boston Old Colony* is a more complete definition of what the duties and obligations of the insurance company are toward its insured than is reflected in the majority opinion. The majority appears to accept a new standard as outlined in its reference to the article appearing in the *Florida Bar Journal* entitled *The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement,* 85 Fla. Bar. J. 9, 14-15 (Feb. 2011), wherein it states that "the claim for bad faith failure to settle should be exactly that—only for situations in which an insurer truly is refusing in bad faith to settle, not when it is in fact attempting to settle the claim." This would insulate insurers from a claim of bad faith by merely attempting to settle the claim no matter how anemic the attempts were. That is a new standard and not one established by our Florida Supreme Court.

What *Boston Old Colony* points out is that an insurer has a duty to use the same degree of care and diligence that a person of ordinary care and prudence should exercise in the management of its own business. In other words, faced with the prospect of paying the entire amount of the judgment, would AVIC have immediately tendered its limits and advised Mrs. Goheagan that it was acknowledging liability and had only $10,000 worth of liability insurance available to cover the claim. *Boston Old Colony* also emphasizes the fact that the insured, in this case Mr. Perkins, pursuant to the insurance policy had surrendered to AVIC all control over the handling of the claim, including all decisions with regard to litigation and settlement. AVIC has a fiduciary duty to Mr. Perkins. It is up to AVIC to see to it that he was not exposed to a judgment in excess of his policy limits.

Mr. Perkins fulfilled all of his obligations to AVIC. He paid his premiums timely, reported the accident promptly, cooperated fully with AVIC in the investigation of the accident and the handling of the claim. The question remains for a jury to decide, did AVIC fulfill all of its obligations to Mr. Perkins.

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) that Ms. Swaby was in a coma and there was no one to make the offer to; and (2) that because AVIC had been made aware of the fact that there was a lawyer involved, Florida Administrative Code 69 and 69b-220.201[8] prohibited them from communicating or negotiating a settlement with Ms. Swaby or her mother, Ms. Goheagan. In opposition to the motion, Goheagan filed the

---

[8] (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.

. . . .

(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.

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.

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 Ms. 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.
>
> 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 Ms. 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, this 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." *See Mills v. State Farm Mut. Auto. Ins. Co.*, 27 So. 3d 95, 96 (Fla. 1st DCA 2010) (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 v. Infinity Ins. Co.*, 896 So. 2d 665, 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. 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. I agree.

In *Powell*, the court held:

> 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. *Id.* at 14. *See also Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, 567 P.2d 1359, 1366 (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.2d 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. American Family Mut. Ins. Co.*, 71 Wis.2d 340, 237 N.W.2d 706, 13) (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).

Powell, 584 So. 2d at 14.

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 there is no case law to support 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.

The enormous financial exposure to Mr. Perkins was a ticking 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 Gutierrez*, 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 Ems. 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.").

The majority opinion 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. 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 a 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 majority gives only superficial consideration to the affidavit and deposition of Goheagan's expert, Mark Lemke, filed in opposition to AVIC's motion for summary judgment. As an expert in handling insurance claims, he is exceptionally qualified to give opinions concerning the handling of a personal injury claim such as the one in this case. Additionally, the majority fails to address the fact the trial court did not do a comprehensive evaluation of the record which included depositions and affidavits but simply concluded that summary judgment should be granted based upon the fact that Molly Swaby was in a coma and there was no one to whom to make an offer to settle.

The majority is also incorrect in relying upon section 624.155, Florida Statutes, as the basis and standard for what constitutes bad faith. The complaint in this case was not based upon section 624.155 but upon a common law claim of bad faith. Section 624.155(8) makes it clear that:

> The civil remedy specified in 624.155 does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or the statutory remedy, but shall not be entitled to a judgment under both remedies.

§ 624.155(8), Fla. Stat. (2007). It is clear based upon decisions by the Florida Supreme Court and the district courts of this state that "bad faith" must be considered in light of the totality of the circumstances and is generally considered a question for the jury.

By my dissent I would 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 a jury would conclude that AVIC acted reasonably and prudently in attempting to protect Mr. Perkins. However, there are disputed issues of the facts and issues of credibility that must be resolved and that cannot be done by way of a summary judgment. Therefore, I would reverse this granting of a summary judgment and remand for a jury trial.

* * *

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.

Hinda Klein of Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A., Hollywood, for appellee.

Harold R. Mardenborough, Jr., of Carr Allison, Tallahassee, for Amicus Curiae Florida Defense Lawyers Association.

Not final until disposition of timely filed motion for rehearing.