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CASE LAW UPDATE

Dear Ladies and Gentlemen:

The Florida Supreme Court and the Florida District Courts of Appeal have recently issued several opinions concerning coverage and bad faith that may be of interest to you.

EXECUTIVE SUMMARY

In *Novoa v. Geico Indemnity Company,* the Eleventh Circuit United States Court of Appeals affirmed summary judgment in favor of an insurance carrier finding that there was no record evidence that the insurer had acted in bad faith. The Court found that the insured failed to provide evidence sufficient for a reasonable jury to conclude that the insurance carrier had acted in bad faith and that the insurance carrier's bad faith caused the excess judgment.

In *Goheagan v. Am. Vehicle Ins. Co.,* the Fourth District Court of Appeal granted a motion for rehearing and reversed a trial court's order entering summary judgment in favor of an insurance carrier. The trial court had concluded that the insurance carrier did not act in bad faith since the claimant was in a coma and there was no one the insurance carrier could have made an offer or tender. The Fourth District held that there were disputed issues of fact that precluded summary judgment, including whether the claimant's mother's retention of counsel was an impediment to communication of a settlement offer and whether the fact that the claimant was in a coma prevented any possible settlement so that there was no point in the insurance carrier making an offer.

In *Hope v. Citizens Property Insurance Corporation,* the Third District Court of Appeal affirmed a trial court's order granting summary judgment in favor of an insurance carrier finding that the insured failed to provide prompt notice to the carrier which the court determined alone was sufficient to bar the insured's claim without addressing prejudice against the carrier.[1] The Court held that the insured failed to provide evidence to rebut the presumption of prejudice to the carrier. The Court stated that although the trial court did not address the issue of prejudice, the trial court arrived at the correct conclusion. The appellate court affirmed the trial court's order based on the tipsy coachman doctrine.

In *Lantana v. Thornton,* the Third District Court of Appeal quashed a trial court's order denying an insurance carrier's motion to dismiss a third-party complaint. The court concluded that the third-party complaint should have been dismissed since the Plaintiff, was not an insured under the insurance carrier's policy and thus, pursuant Fla. Stat. §627.4136, was required to obtain to obtain a verdict or settlement against the insured.

[1] The court relied on *Kroener v. Florida Insurance Guaranty Association* for this proposition.

In *Merely Nunez v. Geico General Insurance Company,* the Florida Supreme Court answered the question of "whether, under Fla. Stat. § 627.736, an insurer can require an insured to attend an examination under oath as a condition precedent to recovery of PIP benefits" in the negative. The court held that examinations under oath conditions were invalid as contrary to the terms of Fla. Stat. § 627.736.

In *Carvajal v. Penland,* the Second District Court of Appeal reversed a final judgment and cost judgment in favor of an insured. The Second District held that the trial court abused its discretion by denying Defendants' motions for a new trial when Plaintiff and Plaintiff's counsel made prejudicial and inflammatory statements regarding the insurance carrier's handling of the claim. The court stated that Plaintiff's counsel's comments that the insurance carrier was acting in bad faith shifted the focus from damages to the carrier's claims handling which was not at issue in this case. These statements, cumulatively and independently from the Plaintiff's statements, denied Defendants a fair trial.

I. *Novoa v. Geico Indemnity Company,* 2013 WL 5614269 (11th Cir. October 15, 2013)

FACTS AND PROCEDURAL HISTORY

This matter involved a lawsuit filed by the Plaintiff Ms. Viviana Novoa ("Ms. Novoa"), against Geico Indemnity Co. ("Geico") alleging that Geico failed to act in good faith towards its insured Mr. Christoper Meldon ("Meldon"). On November 10, 2007, Ms. Novoa's husband, Mr. Jose Ordonez ("Ordonez"), stopped to assist Mr. Ethel Walker ("Walker"), a stranded driver. While assisting Mr. Walker, Mr. Christoper Meldon ("Meldon") crashed into Mr. Ordonez, his vehicle, and Mr. Walker's vehicle. Mr. Ordonez sustained fatal injuries as a result of the accident and both vehicles were damaged.

On November 10, 2007, the day of the accident, the claim was reported to Geico.[2] On November 13, 2007, Ms. Lisa DePoy ("Ms. DePoy"), Geico's Claims Examiner interviewed Mr. Meldon regarding the accident. On November 27, 2007, two weeks after the accident, Ms. DePoy sent correspondence to Ms. Novoa advising her to discuss with her insurance carrier any uninsured motorist coverage available to her. Ms. DePoy also requested Ms. Novoa provide Geico her insurance information in order for Geico to properly evaluate her property damage claim. In this correspondence, Ms. DePoy stated that Ms. Novoa's insurance policy would cover the Death Benefit under the Personal Injury Protection Coverage. Enclosed with this correspondence was a check in the amount of the $10,000.00 bodily injury limits of Mr. Meldon's policy and a document titled "release of all claims." Although the letter stated that the bodily injury claim and personal injury claim were being handled separately and implied that the release would only resolve Ms. Novoa's bodily injury claims, the release stated that it applied to

[2] The District Court's opinion does not indicate who reported the accident to Geico.

all of Ms. Novoa's claims arising from the accident.[3] Ms. Novoa did not cash the check nor sign the release.

On December 12, 2007, Ms. Novoa sent Geico correspondence wherein she demanded Geico pay $3,100.00 for her property damage claim. Geico did not respond to this letter and it did not present the demand to Mr. Meldon. On January 11, 2008, Ms. Novoa filed a complaint in state court alleging wrongful death against Mr. Meldon and Geico and PIP Death Benefits against Geico.

On January 28, 2008, Geico sent Ms. Novoa correspondence offering her $1,425.29 for her property damage claim.[4] With this correspondence, Geico enclosed a property damage release. On that same day, Geico sent Mr. Meldon an excess letter advising that the property damage claims arising from the accident exceeded his property damage limits. Geico further advised that it would attempt to settle the property damage claims within the policy limits.[5]

On February 5, 2008, Geico received the Complaint. Thereafter, the Personal Injury Death Benefit count was settled. On February 7, 2008, Ms. Novoa rejected Geico's offer for the $10,000.00 bodily injury policy limits of Mr. Meldon's policy and returned the check to Geico. The case proceeded to trial and Ms. Novoa received a judgment in the amount of $16,591,426.07, plus interest.

Subsequently, Ms. Novoa filed a bad-faith action against Geico in federal court seeking to recover the full amount of the judgment. Ms. Novoa alleged that Geico breached its duty of good faith by: 1) failing to communicate with her in Spanish; 2) providing her a release that would extinguish all of Ms. Novoa's claims; 3) failing to notify Mr. Meldon of Nova's demand for the $3,100.00 property damage; 4) offering Ms. Novoa $1,425.29 for her property damage claim without first consulting with Mr. Meldon; and 5) failing to resolve the Death Benefits under the Personal Injury Protection Coverage in a timely manner. Geico then moved for summary judgment.

The U.S. District Court of Appeal granted Geico's motion for summary judgment finding that there was no evidence in the record which would support that Geico acted in bad faith.[6] Ms. Novoa appealed the trial court's order to the Eleventh Circuit Court of Appeals.

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[3] In subsequent depositions, Geico stated that its intent was for the release only to extinguish Ms. Novoa's bodily injury claims.

[4] In this correspondence, Geico explained that the $1,425.29 was a prorated amount. The property damage limits under the policy were $10,000.00. Mr. Walker's property damage claim was for $18,650.00 and Ms. Nova's property damage claim was for $3,000.00.

[5] Geico enclosed the correspondence it sent to Mr. Walker's insurance company and Ms. Novoa offering her the $10,000.00 bodily injury limits.

[6] Please note that Mr. John Bond Atkinson, Partner at Atkinson & Brownell, P.A., testified as Geico's expert prior to the U.S. District Court of Appeal's decision granting Geico's motion for summary judgment.

ELEVENTH CIRCUIT COURT OF APPEALS DECISION

The Eleventh Circuit Court of Appeals affirmed the district court's decision finding that Ms. Novoa failed to provide evidence for a reasonable jury to conclude that Geico acted in bad faith and that Geico's bad faith caused the excess judgment.

Ms. Novoa contended that Geico acted in bad faith by failing to diligently pursue a settlement. The court citing to *State Farm Mutal Auto Ins. Co. v. LaForet,* explained that ***"to fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably. Rather, the insurer must refrain from acting solely on the basis of its [sic] own interests in settlement."***[7] Ms. Novoa's contentions with respect to how Geico could have handled her claim only demonstrated that Geico could have improved its claim handling process, ***"not that Geico acted in bad faith."***[8] Further, the court found that Geico diligently sought to settle the claim. Only nine days after the accident, Geico tendered the full amount available under Mr. Meldon's policy.

The Court went on to explain that even if Geico had acted in bad faith, Ms. Novoa "must still show that Geico's bad faith caused the excess judgment."[9] In this case, Ms. Novoa had refused on multiple occasions to discuss settlement, had never made a settlement offer nor made any counteroffers and delayed providing Geico requested information. Ms. Novoa stated that she would have settled her claims against Mr. Meldon and Geico, if Geico would have offered $1,674.71 more for her property damage claim. However, she provided no reason why she would settle the claim for less than its actual value or why she never proposed this settlement until after filing suit. As such, Ms. Novoa failed to provide evidence for a reasonable jury to conclude that Geico acted in bad faith and that Geico's bad faith caused the excess judgment.

II. *Goheagan v. Am. Vehicle Ins. Co.,* 107 So.3d 433 (Fla. 4th DCA 2012)

FACTS AND PROCEDURAL HISTORY

This matter arose out of an automobile accident which occurred on February 24, 2007 in which Mr. John Perkins ("Mr. Perkins") rear-ended a vehicle operated Molly Swaby (Ms. Swaby") while speeding. At the time of the automobile accident, Mr. Perkins was insured by American Vehicle Insurance Company ("AVIC") with an automobile policy which provided for bodily injury policy limits of $10,000.00 per person and $20,000.00 per accident. Ms. Swaby sustained severe injuries and remained in a coma until her death a couple of months later. Mr. Perkins reported the accident to AVIC two days after the accident. AVIC immediately contacted Mr. Perkins and advised him of his bodily injury policy limits and that AVIC "would make every attempt to settle all claims for bodily injury in accordance with his policy limits." Within a few days, AVIC had determined that the Mr. Perkins had caused the subject accident, Ms. Swaby's

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[7] 658 So.2d 55, 58 (Fla. 1995)
[8] *Novoa v. Geico Indemnity Company*, 2013 WL 5614269 (11th Cir. October 15, 2013)
[9] *Id.*

injuries exceeded the policy limits under Mr. Perkins' policy, and that the claim should be settled.

On February 28, 2007, AVIC spoke with Ms. Swaby's stepfather who advised AVIC that Ms. Swaby's mother, Olive Goheagan (Ms. Goheagan") had retained an attorney and that AVIC would have to contact her to obtain the attorney's name. That same day, AVIC called a different number it had for Ms. Goheagan but was advised by a person identified as a friend that Ms. Goheagan was unavailable. On March 1, 2007, AVIC left Ms. Goheagan a voicemail with contact information for Ms. Goheagan to call. On March 21, 2007, AVIC was able to speak with Ms. Goheagan. During this discussion, AVIC requested the name of the attorney representing her however, Ms. Goheagan informed AVIC to call back at a later time. On March 27, 2007, AVIC called Ms. Goheagan and again requested the name of the attorney name of the attorney. Ms. Goheagan informed AVIC that she was not in a position to discuss the matter. AVIC contacted Ms. Goheagan on April 16, 2007 who again stated that it was not a convenient time to talk.

On April 19, 2007, AVIC learned that Ms. Goheagan had filed suit against Mr. Perkins. At that time, AVIC attempted to tender its policy limits however, the Ms. Goheagan did not accept the offer. Thereafter, a judgment was entered against Mr. Perkins in favor of Ms. Goheagan in the amount of $2,792,893.65. Ms. Goheagan then filed a bad faith action against AVIC alleging that AVIC acted in bad faith in failing to protect its insured, Mr. Perkins, which resulted in the $2,792,893.65 judgment against him.

AVIC moved for summary judgment alleging that it had acted fairly and honestly towards it insured with due regard for his interest but was prevented from entering into settlement negotiations because Ms. Swaby was in a coma and since AVIC was aware that Ms. Goheagan had retained an attorney, AVIC was prohibited from entering into settlement negotiations with Ms. Goheagan under Florida Administration Code Rule 67B-220.201. In opposition to the motion for summary judgment, Ms. Goheagan filed an affidavit and the deposition of Mr. Mark Lemke, an expert witness on insurance claim handling.[10]

The trial court granted the motion for summary judgment finding that since Ms. Swaby was in a coma and Ms. Goheagan was not authorized to accept settlement, there was no one to whom AVIC could have made an offer and therefore, AVIC had not acted in bad faith. Ms. Goheagan appealed the trial court's ruling granting summary judgment in favor of AVIC. In the Court's original opinion, the appellate court concluded that the trial court properly granted summary judgment, because a claim for bad faith for failure to settle should be reserved for situations where the insurer actively refuses to settle and not in situations where it was attempting to settle. The Court found that AVIC was aware that Ms. Goheagan had retained an attorney and that pursuant to Florida Administration Code Rule 67B-220.201, AVIC was barred from negotiating directly with Ms. Goheagan. Further, AVIC on numerous occasions attempted

[10] Mr. Lemke provided his opinion as to AVIC's claim handling and concluded that AVIC breached its duty of good faith by failing to "proactively" adjust the claim and timely tender the policy limits.

to obtain the name of the attorney retained but Ms. Goheagan refused to disclose this information. Ms. Goheagan filed a motion for rehearing on the Court's ruling.

APPELLATE COURT- MOTION FOR REHEARING

The appellate court granted Ms. Goheagan's motion for rehearing and reversed the trial court's ruling granting the motion for summary judgment in favor of AVIC. In support of her motion for rehearing, Ms. Goheagan contended that there remained genuine issues of material fact which precluded summary judgment. Specifically, Ms. Goheagan argued that there remained a dispute as to whether her retention of counsel was an impediment to communication of a settlement offer to her and whether the fact that Ms. Swaby was in a coma prevented any possible settlement so that there was no point in making an offer.

The appellate court noted that there was no case law to support AVIC's argument that it could not have made a written offer and/or tender to Ms. Swaby through Ms. Goheagan. The court concluded that although "the assistance of an attorney may have been necessary to finalize a settlement, it would not have precluded an offer."[11] Based on the circumstances of the case, including the injuries involved, clear liability, and the limited policy limits of $10,000.00, a jury could determine that there was not much to negotiate and representation by counsel would ***not*** have been an impediment to make an offer. The court explained that under the circumstances of the case, any delay in making an offer, even if it was not certain that the claim could be settled, could be viewed by the jury as evidence of bad faith.

The Fourth District Court of Appeal disagreed with the trial court's finding that there could be no bad faith because Ms. Swaby was in a coma and thus, there was no one to whom to make an offer. The appellate court concluded that there were disputed issues of fact that precluded summary judgment, including whether Ms. Gohagean's retention of counsel was an impediment to communication of a settlement offer and whether the fact that Ms. Swaby was in coma prevented any possible settlement so that there was no point in AVIC making an offer.

In a dissenting opinion issued by Judge Levine, the dissent concluded that the motion for the rehearing should have been denied and the trial court's entry of summary judgment should have been affirmed. The dissent further stated that as a matter of law, AVIC did not act in bad faith. AVIC consistently attempted to obtain the name of the attorney representing the estate. AVIC's failure to make a written offer of the liability limits to Ms. Swaby did not mean that AVIC failed to meet its obligations to Mr. Perkins. Moreover, since AVIC was informed that Ms. Goheagan had retained an attorney, Florida Administration Code Rule 67B-220.201 applied to AVIC's conduct. Whether the representation by counsel was an impediment to AVIC making an offer, was a question of law that could be resolved on a motion for summary judgment. The dissent held that the undisputed facts in the case demonstrated that there was no basis for which a jury could determine that AVIC acted in its own interest.

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[11] The Fourth District noted that it was unclear exactly at what point Ms. Gohagean retained an attorney.

Although, we normally do not criticize appellate court decisions or the logic behind these decisions, we respectfully disagree with the appellate court's decision and its analysis. As explained herein, the court's decision is in contravention to Florida case law. First, the appellate court failed to address the ethical concerns involved if AVIC's adjuster would have communicated or negotiated a settlement with Ms. Swaby or Ms. Goheagan.

Pursuant to Florida Administrative Code Rule 69B-220.201(i):

> [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. For purposes of this subsection the term "third-party claimant" does not include the insured or the insured's resident relatives.

Mr. Lemke, Ms. Goheagan's expert witness, opined that there were no ethical prohibitions under the adjuster code of ethics that would have prevented AVIC's adjuster from tendering the check. However, based on the plain language of Rule 69B-220.201(i), AVIC's adjuster was strictly prohibited from communicating or negotiating with Ms. Goheagan. Rule 69B-220.201(i) also prohibited AVIC from tendering a check since this could have been construed as "negotiating" and/or "effectuating a settlement" under the Rule.[12] The extent of any communications by AVIC's adjuster with Ms. Goheagan was limited to requesting her attorney's name. It is clear from the record, that AVIC's adjuster consistently attempted to obtain the name of the attorney. However, AVIC's attempts were hindered by Ms. Goheagan's own actions.

The appellate court determined that based on the circumstances of the case, a jury could determine that there was "**not much to negotiate**" and representation by counsel would ***not*** have been an impediment to make an offer. However, the Court did not consider that even if AVIC would have communicated a settlement offer to Ms. Goheagan, the assistance of counsel would have been necessary to resolve all matters related to settlement including: issues involving indemnification; resolution of any medical liens; financial affidavits; and affidavits of no other insurance coverage. Thus, several issues would have remained outstanding to negotiate before any settlement agreement could have been consummated.

Lastly, there is no evidence in the record that would demonstrate that AVIC placed its interests above the interests of its insured. There is also no evidence that AVIC failed to properly or promptly defend the claim. As the appellate court stated in its original opinion,

> [t]he 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

[12] Florida Administrative Code Rule 69B-220.201(i):

> interests, failed to properly and promptly defend the claim, and thereby exposed the insured to an excess judgment.[13]

In this case, AVIC made every attempt to engage in settlement discussions but was precluded from doing so prior to obtaining the name of the attorney. All attempts to discover the name of the attorney were prevented by Ms. Goheagan. According to *Powell v. Prudential,* where liability is clear and injuries so serious that judgment in excess of policy limits is likely, an insurer has an **affirmative duty to initiate settlement negotiations**.[14] AVIC met its obligation and duty under *Powell* by repeatedly calling Ms. Goheagan to obtain the name of the attorney she retained. At all times, AVIC acted in good faith with due regard for the interests of Mr. Perkins.

Based upon *Novoa* and other Florida case law addressing an insurance carrier's good faith obligations, we are of the opinion that *Goheagan* was wrongly decided.

III. *Hope v. Citizens Property Insurance Corporation,* 114 So.3d 457 (Fla. 3d DCA 2013)

FACTS AND PROCEDURAL HISTORY

This matter involved a lawsuit filed by an insured against his insurance carrier for breach of contract after the carrier failed to provide coverage for damage sustained to the insured's property from Hurricane Wilma. The Plaintiff, Mr. Henry Hope's ("Plaintiff" or "Mr. Hope") property was insured under a policy issued by Citizens Property Insurance Company ("Citizens"). Due to Hurricane Wilma, Mr. Hope's property suffered damage. Mr. Hope failed to file a claim with Citizens until four (4) years after the date of loss. During the four (4) years, Mr. Hope made various repairs to the property in order to mitigate the damage. When the issues at the property continued, Mr. Hope hired a public adjuster to estimate the damages and then filed a claim with Citizens. Citizens denied coverage based on Mr. Hope's failure to provide prompt notice of the loss. Citizens alleged that since Mr. Hope waited four (4) years to provide notice to Citizens, it could not attribute any damage to a covered loss. Plaintiff filed a lawsuit which included allegations of breach of contract.

Citizens filed a motion for summary judgment contending that Mr. Hope failed to fulfill his post loss duties under the policy to give prompt notice to Citizens and that the repairs conducted by Mr. Hope prejudiced Citizens' ability to properly evaluate the damage caused by Hurricane Wilma. The trial court granted Citizens' motion for summary judgment based on Mr. Hope's failure to provide notice to Citizens but did not reach the issue of prejudice. In granting summary judgment, the trial court relied on the Fourth District Court of Appeal's decision in *Kroener v. Florida Insurance Guaranty Association.*[15] In *Kroener,* the court held that the

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[13] *Goheagan v. American Vehicle Ins. Co.,* 2012 WL 2121082 (Fla. 4th DCA 2012), *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 (1938)
[14] 584 So. 2d 12 (Fla. 3d DCA 1991).
[15] 63 So.3d 914 (Fla. 4th DCA 2011).

Plaintiff's notice of loss, two years after the date of loss, was not prompt notice and alone was sufficient to bar the insured's claim without addressing prejudice. Based on the *Kroener* decision, the trial court concluded that Mr. Hope's notice was, as a matter of law, a failure to comply with his policy's notice provisions and alone was sufficient to grant summary judgment in favor of Citizens without addressing the issue of prejudice.

APPELLATE COURT DECISION

The Third District Court of Appeal affirmed the trial court's decision granting Citizens motion for summary judgment. After the *Kroener* decision, several cases were decided and receded from the *Kroener* decision.[16] These cases clarified the *Kroener* decision and provided that if an insured breached the notice provision of an insurance policy, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice.[17]

Since the issue of prejudice was raised in Citizens' summary judgment motion, the court examined the record to determine whether the evidence supported the trial court's decision to grant the motion. There was no dispute that Mr. Hope failed to give prompt notice as required under the policy. As a result, there was a presumption that the late notice prejudiced Citizens. The issue was whether Mr. Hope provided sufficient evidence to overcome the presumption of prejudice raised in Citizens motion for summary judgment. In Mr. Hope's response to the Motion for Summary Judgment, Mr. Hope alleged that the record was sufficient to overcome the presumption of prejudice and attached several documents in support of his position including: the homeowner's affidavit, a roofer's estimate and the public adjuster's report detailing repairs that were necessary on the property.

The Court concluded that the evidence provided by Mr. Hope was conclusory and failed to rebut the presumption of prejudice to Citizens where the passage of time rendered Citizens unable to determine what damage was attributed to Hurricane Wilma. The Court determined that although the trial court's reliance on the *Kroener* decision was misplaced, the trial court arrived at the correct conclusion. Based on the "tipsy coachman doctrine," the court affirmed the summary judgment.[18]

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[16] The first case receding from *Kroener v. Florida Insurance Guaranty Association,* 63 So.3d 914 (Fla. 4th DCA 2011) was *Bankers Insurance Co. v. Macias,* 475 So.2d 1216 (Fla.1985).

[17] *See Stark v. State Farm Fla. Ins. Co.,* 95 So.3d 285 (Fla. 4th DCA 2012); *Kings Bay Condo. Ass'n v. Citizens Prop. Ins. Corp.,* 102 So.3d 732, 733 (Fla. 4th DCA 2012); *Kramer v. State Farm Fla. Ins. Co.,* 95 So.3d 303, 306 (Fla. 4th DCA 2012); and *Soronson v. State Farm Fla. Ins. Co.,* 96 So.3d 949, 952–53 (Fla. 4th DCA 2012). Once the presumption of prejudice is raised in favor of the, the burden shifts to the insured to show that the insurer was not prejudiced by untimely pre-suit notice of loss.

[18] Under tipsy coachman doctrine, appellate courts are bound to affirm a trial court's decision if it reached the correct result, even if it reached that result for the wrong reason. This doctrine does not apply in summary judgment proceedings where the issue was never raised in the motion for summary judgment.

IV. *Lantana v. Thornton,* 3D13-583, 2013 WL 3723499 (Fla. 3d DCA 2013)

FACTS AND PROCEDURAL HISTORY

This case involved a declaratory action filed by an insurance carrier to determine whether there was coverage under an insurance policy issued to its insured, Mr. Jean Thornton, for injuries Ms. Markhamat Abdujalalova sustained when Mr. Thornton was walking a dog and "clothes-lined" Ms. Abdujalalova while operating a scooter. Mr. Thornton was insured under two homeowner's policies with Lantana Insurance ("Lantana") and with Alfa Insurance ("Alfa"). After the incident involving Mr. Thornton, Ms. Abdujalalova and her husband brought a lawsuit against Mr. Thornton for negligence.

Both insurance carriers, Lantana and Alfa denied coverage. Alfa then brought a separate declaratory action regarding coverage. In the declaratory action, Ms. Abdujalalova filed a third-party complaint against Lantana. Lantana moved to dismiss the third-party complaint on the grounds that Fla. Stat. §627.4136 barred the third-party action since Ms. Abdujalalova and her husband had not obtained a settlement or verdict against Mr. Thornton.[19] The trial court denied the motion and abated the action. Lantana filed a petition for writ of certiorari requesting review of the trial court's order.

APPELLATE COURT DECISION

The court granted the petition for writ of certiorari and quashed the trial court's order denying Lantana's motion to dismiss and abating the action. The court explained that certiorari review is generally not available to address interlocutory orders denying motions to dismiss. Nevertheless, when an insurance carrier demonstrates that the requirements of Fla. Stat. § 627.4136 have not been met, certiorari review of an order denying a motion to dismiss is appropriate. The court held that the third-party complaint should have been dismissed since Ms. Abdujalalova and her husband had not obtained a verdict or settlement against Mr. Thornton. They had no beneficial interest in the Lantana insurance policy and no cause of action against Lantana had accrued.

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[19] Florida Statute 627.4136 states in pertinent part:

> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

V. *Merely Nunez v. Geico General Insurance Company, 117 So.3d 388 (Fla. 2013)*

FACTS AND PROCEDURAL HISTORY

This matter involved a lawsuit filed by an insured against her insurance carrier for personal injury protection coverage. The Plaintiff, Merly Nunez was insured under an automobile insurance policy issued by Government Employees Insurance Company ("Geico") including personal injury protection ("PIP") coverage. Plaintiff filed a claim with Geico after she sustained injuries in an automobile accident. Geico denied the Plaintiff's claim based on her failure to satisfy the condition under the policy which required the insured to submit to an examination under oath ("EUO").[20] The Plaintiff filed a class action complaint in the circuit court seeking declaratory relief and alleging that Geico violated Fla. Stat. §627.736. The case was later removed to the federal district court. Geico filed a motion to dismiss which the Court granted ruling in part that there was no language in the PIP statute prohibiting an insurer from requiring an EUO.[21] The Court denied Plaintiff's motion for reconsideration and the Plaintiff filed a notice of appeal to the Eleventh Circuit Court of Appeals.

While the case was pending appeal, the Florida Supreme Court issued its opinion in *Custer Medical Center v. United Automobile Insurance Co.* In *Custer,* the court stated that with respect to EUOs, the Florida No-Fault statute was mandatory and did not recognize EUOs as a condition. Thus, such conditions were invalid and contrary to the statutory terms.[22] Based on this court's decision, the Plaintiff and Geico disputed whether the statements in *Custer* were dicta or amounted to part of the court's holding. The Eleventh Circuit Court determined that Florida law was unclear on this issue and certified the following question to the Florida Supreme Court:

> Whether, under FLA. STAT. § 627.736, an insurer can require an insured to attend an EUO as a condition precedent to recovery of PIP benefits?

On May 4, 2012, Govenor Rick Scott approved amendments to the PIP statute including the requirement that insureds seeking benefits under the statute were required to comply with the terms of their insurance policy including submitting to an examination under oath.

FLORIDA SUPREME COURT DECISION

The court began its analysis by reviewing the decision in *Custer.* In *Custer*, the Court explained in a footnote that "[a] purported verbal exam under oath without counsel in the PIP

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[20] The condition in the policy stated the following "[t]he insured or any other person seeking coverage under this policy must submit to an examination under oath by any person named by us when and as often as we may reasonably require."
[21] *Nunez v. Geico General Insurance Co.,* 2010 WL 1924441 (S.D. Fla. Apr. 13, 2010).
[22] 62 So.3d 1086, 1091 (Fla. 2010).

context [was] invalid and more restrictive than permitted by the statutorily mandated coverage and the terms and limitations permitted under the statutory provisions. The Court explained further that "[t]he prohibition of policy exclusions, limitations, and non-statutory conditions on coverage controlled by statute [was] clear.[23] Although the Eleventh Circuit considered these statements to be dicta, several courts had affirmatively applied *Custer* to cases involving EUO's. The *Custer* decision was more than just persuasive as it was correct in its terms with the PIP statute, the purpose of the statute of swift and virtually automatic payment to the insured, and Florida case law.

The Court then went on to analyze the PIP statute and the statute's purpose. The court noted that the PIP statute was silent with respect to EUOs and did not authorize the use of EUOs or the denial of benefits for failure to attend one.[24] The court explained that conditions that were not expressly addressed in a statute governing insurance coverage were subject to a two part test: (1) whether the condition or exclusion unambiguously excludes or limits coverage and (2) whether enforcement of a specific provision would be contrary to the purpose of the ... statute.[25] The focus of this case was whether the EUO provision was contrary to the purpose of the PIP statute.

The court rejected the dissents view that by adhering to *Custer* and *Flores* in this case, the court was abrogating unambiguous provisions permitted by Fla. Stat. § 627.414(3) and that the EUO provision in Geico's policy could be applied pursuant to Fla. Stat. § 627.414(3).[26] In rejecting the dissents assertions, the court stated that PIP provisions in insurance policies should be consistent with the statutory goal under Fla. Stat. §627.736, of ensuring "swift and virtually automatic payment" of benefits to insureds.[27] Geico's delay and denial of PIP benefits, kept the Plaintiff from recovering in a swift and virtually automatic manner.[28]

Moreover, the court rejected Geico's contentions that EUO's did not interfere with the PIP statute's purpose of requiring swift payment of benefits and explained that enforcing EUO conditions caused delay and denial of benefits in contravention of the PIP statute's objective. Moreover, the court noted that, similar to uninsured motorist insurance, PIP insurance was a

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[23] *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 745 (Fla.2002); *Salas v. Liberty Mut. Fire. Ins. Co.,* 272 So.2d 1, 5 (Fla.1972); *Mullis v. State Farm Mut. Auto. Ins. Co.,* 252 So.2d 229, 232–34 (Fla.1971); *Diaz–Hernandez v. State Farm Fire & Casualty Co.,* 19 So.3d 996, 1000 (Fla. 3d DCA 2009); and *Vasques v. Mercury Cas. Co.,* 947 So.2d 1265, 1269 (Fla. 5th DCA 2007).

[24] Geico contended that EUO's were consistent with several provisions of the No-Fault Statute. Specifically, Geico pointed to section 627.414(3) which authorizes insuers to include additional provisions not inconsistent with the code and neither prohibited by law nor in conflict with any other provisions. *Nunez,* 685 F.3d at 1209.

[25] *Flores v. Allstate Ins. Co.,* 819 So. 2d 740, 745 (Fla. 2002)).

[26] Fla. Stat. §627.414(3) states that: "[a] policy may contain additional provisions not inconsistent with this code and which are....neither prohibited by law nor in conflict with any provisions required to be included therein." *Id.*

[27] Fla. Stat. §627.736.

[28] The court also addressed the issue of whether Geico unreasonably exercised authority by requiring insureds who sought PIP benefits, to be subjected to an EUO as a condition precedent. The court citing to *Custer* concluded that Geico's EUO policy provision requiring attendance at an EUO as a condition precedent was unreasonable under Florida law.

statutorily mandated coverage and was not susceptible to an insurers attempt to limit or negate PIP protection.[29] As such, enforcement of EUO conditions to delay or deny benefits negated statutory PIP protection and were considered invalid.

The court held in alignment with the *Custer* decision that EUO conditions were invalid as contrary to the terms of Fla. Stat. §627.736 and disapproved the holding in *Shaw v. State Farm Fire & Casualty.*[30]

With respect to the amendments to the 2012 PIP statute, the court found that the amendments at issue were substantive changes and not legislative clarification of the PIP statute as suggested by Geico. The Court concluded that the 2012 amendments did not control the court's disposition in the case.

VI. *Carvajal v. Penland,* 2D12-4123, 2013 WL 2451351 (Fla. 2d DCA, June 7, 2013).

FACTS AND PROCEDURAL HISTORY

This matter involved a personal injury action brought by a motorist for injuries sustained in a motor vehicle accident. Ms. Leonor Carvajal was the driver and co-owner of a vehicle that rear-ended a vehicle operated by Ms. Karen Penland ("Ms. Penland" or "Plaintiff"). Ms. Penland sued Ms. Carvajal and her husband, Mr. Sergio Cravagal, as co-owner of the vehicle, for personal injuries arising from the accident. Ms. Penland also sued her uninsured motorist carrier, State Farm Fire and Casualty Company ("State Farm")(Mr. and Ms. Carvagal and State Farm are collectively referred to as "Defendants"). The case proceeded to trial on the issues of causation and damages. Prior to trial, the trial court granted State Farm's motion in limine, which requested the court to prelude any evidence or argument regarding State Farm's failure to comply with its contractual obligations to the Plaintiff. In its motion, State Farm contended that the case was not a breach of contract case and that the amount of insurance was not at issue.

During the Plaintiff's direct testimony at trial, the Plaintiff made comments regarding State Farm "dropping her" from the company. State Farm and the Carvajals objected to her comments. State Farm moved for a mistrial contending that a curative instruction would be inadequate to repair the harm done and that Plaintiff's comments violated the Court's order on the motion in limine. The Carvajals joined in the motion for a mistrial. The trial court sustained the Defendants' objections but reserved on the mistrial issue.

The Defendants renewed their request for a mistrial prior to proceeding with testimony the next day. Prior to closing arguments, the Defendants raised the issue of the appropriateness of any comments regarding State Farm's claims handling of the Plaintiffs claim. However,

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[29] *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 745 (Fla. 2002).

[30] 37 So.3d 329. The issue before the court in *Shaw* was whether an EUO provision in an insurance policy was binding on an assignee of the right to payment of PIP benefits. The court in *Shaw* stated that an EUO is a condition precedent to recovery of benefits if the policy requires the insured to submit to an EUO. The question was certified to the Florida Supreme Court but has not been answered by the court.

despite the concerns expressed by the Defendants, Plaintiff's counsel made numerous references about State Farm not accepting responsibility and "not owning up to the responsibility to pay the Plaintiff's damages" and criticizing State Farm's handling of the case. Throughout the closing arguments, State Farm objected on the grounds that the comments were improper contract based arguments.

Additionally, Plaintiff's counsel made a comment on how State Farm joined with the Carvajals' attorney in an effort to make the Plaintiff out as an untrustworthy character. The Carvajals objected contending that these comments were improper and inflammatory and requested a mistrial. The objection was sustained but the motion for a mistrial was denied. After these objections were made, Plaintiff's counsel continued to make similar comments regarding State Farm's failure to take responsibility. Neither Defendant objected to these statements. The jury returned a verdict in the amount of 1,777,309.59 and the trial court entered a judgment in favor of Plaintiff. The Defendants moved for a new trial arguing in part that the verdict was contrary to the weight of the evidence and that the trial court erred in denying the motions for mistrial. The trial court denied all motions.

APPELLATE COURT DECISION

The Second District Court of Appeals reversed the final judgment and cost judgment and remanded for a new trial on causation and damages. In its analysis, the court explained that if improper argument has been properly preserved, the trial court should grant a new trial if the argument was so highly prejudicial and inflammatory that it denied the objecting party its right to fair trial. Improper witness testimony, which is highly prejudicial and inflammatory, also warrants a new trial particularly when compounded by improper argument.

The Plaintiff contended that the Defendants' claims in failing to grant a new trial were based on statements that were not objected to at trial. The court agreed that the un-objected to statements were not properly preserved. However, the improper statements which were properly preserved warranted a new trial and as such, there was no need for the court to consider the un-objected to statements.

The Court concluded that the trial court abused its discretion in denying the motions for a new trial since Plaintiff's counsel comments that State Farm was acting in bad faith shifted the focus from damages to the claims handling of the Plaintiff's claim which were not issues at trial. Further, the Court held that a new trial should have been granted since the Plaintiff's statements were prejudicial and any instruction to disregard her statements could have no curative value. Plaintiff's statements were an inappropriate plea to the jurors's sympathies. The effect of the Plaintiff's statements and her counsel's statements during closing argument, independently and cumulatively, denied the Defendants a fair trial.

We hope you find the above cases helpful and insightful. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,

JOHN BOND ATKINSON
VERONICA RUBIO