SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BARRY L. BERGES,)
)
Petitioner,)
)
vs.) Case No.: SC01-2846
)
INFINITY INSURANCE COMPANY,)
formerly known as Dixie)
Insurance Company,)
)
Respondent.)
)
)

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NOS. 2D99-5014 AND 2D00-1972

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The key issue in this case is whether an insurer acts in bad faith when it timely agrees to pay the demanded policy limits to settle claims against its insured, but payment is not delivered to the claimant within his stated time limit because he did not have the legal authority within that time period to release the insured.

The Accident and the Settlement Offer

The tort claims involved a wrongful death, minor survivors, and injury to a minor. On March 29, 1990, a vehicle owned by Barry Berges and driven by Linda Moody collided with a vehicle operated by Marion Taylor in which her minor daughter Christina Taylor was a passenger. (R.V.1, P.1). Ms. Taylor was killed and Christina Taylor was injured.

Mr. Berges was insured under an Infinity automobile insurance policy with bodily injury liability limits of $10,000.00. The policy required Mr. Berges to notify Infinity "promptly" of any accident. (R.V.5, P.832). Mr. Berges did not do so. (R.V.5, P.840). Infinity's first notice of the accident was a letter received April 23, 1990 from the office of attorney Dale Swope stating that he represented Mr. James Taylor, the husband of the late Marion Taylor and father of Christina. (R.V.4, P. 738; R.V.5, P.836; R.V.6, P.1094; R.V.34, P.E.678) (T.329).

On May 2, 1990, Infinity wrote to its insured, Mr. Berges, advising him of the claim. Infinity also advised Mr. Berges that his

violation of the notice and cooperation conditions of the policy, as well as his failure to advise Infinity that Ms. Moody was an additional driver residing in his household, may void coverage for the claim. (R.V.4, P.738; R.V.5, P.842).

On May 2, 1990, Mr. Swope wrote to Infinity, stating that he no longer represented Mr. Taylor. (R.V.5, P.841). On the same date, Mr. Swope filed a petition requesting that Mr. Taylor be appointed personal representative of his wife's estate. (R.V.5, P.849).

Also on the same date, James Taylor offered to settle "the death claim of the estate of Marion Viola Taylor and the personal injury claim of Christina Michelle Taylor for the policy limits." (R.V.1, P.3)(R.V.5, P. 843-848). Mr. Taylor's letter first explains that Mr. Swope no longer represented him and that he wanted to settle the claims directly. (R.V.5, P.843). In offering to settle his daughter's injury claim for the $10,000.00 policy limits, Mr. Taylor wrote:

> This money is for my daughter. I will be more than happy to put it in a special account until she turns 18 if that is what you want and if it takes special papers to be filed in court for this, I will work with your lawyers to handle this.

(R.V.5, P.844-45).

In offering to settle the claim for the death of his wife for $10,000.00, Mr. Taylor wrote:

> Dale Swope, the lawyer filed the papers to have me made personal representative of the estate and I will pay him to finish that. I will settle this claim also for $10,000.00, but only if you have it paid to me or me as the personal representative of my wife's estate, either one within 25

> days. If we have to file papers in court on this settlement I will work with your lawyers to do that.

(R.V.5, P.845-46). Mr. Taylor demanded payment of his daughter's claim by June 1 and payment of the death claim within 25 days. (R.V.5, P.845).

On May 11, 1990, nine days after Mr. Taylor's offer and 23 days after its first notice of the suit, Infinity had completed its investigation into both the tort claims and the coverage issues and agreed to pay its policy limits despite the late notice and unlisted driver. (R.V.4, P.739; R.V.7, P.1236). As Mr. Taylor's offer had expressly noted, he had not yet been appointed personal representative of his wife's estate, Mrs. Taylor had two surviving minor children at the time of the accident, and the minor daughter's injury claim would require court approval and a guardian appointment before settlement could be effected. Infinity therefore advised Mr. Taylor that it would pay for an attorney to handle the guardianship and minor settlement approval, and that he would receive payment when he was appointed personal representative and when the minor settlement conditions were fulfilled. (R.V.3, P. 492; R.V.4, P.739; R.V.6, P.1196).

On May 16, 1990, Infinity hired attorney Kevin Korth to handle the minor settlement and guardian appointment.[1/] (R.V.3, P.492; R.V.4, P.739; R.V.6, P.1196). On May 24, 1990, Mr. Korth sent Mr. Taylor a letter confirming that Infinity had agreed to pay its policy limits and

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[1/] It is undisputed that Mr. Korth is not an employee of Infinity.

that payment would be made when the court approval proceedings were concluded and when he was appointed personal representative of his wife's estate. (R.V.5, P.858).[2/]

On June 11, 1990, Mr. Swope, who apparently had resumed representation of Mr. Taylor, wrote to Infinity and stated that "all settlement offers previously given in this case are hereby revoked." (R.V.5, P. 860). At that time, the letters of administration had not been issued, and the minor settlement approval and guardianship had not been accomplished. On June 12, 1990, Mr. Swope instructed Mr. Korth to discontinue his efforts to authorize the minor settlement. (R.V.5, P.863).

Mr. Korth confirmed that Infinity remained "ready willing and able" to pay the policy limits. (R.V.5, P.863). Mr. Taylor admitted Infinity never retracted its offer to pay the limits. (R.V.6, P.1170).

However, Mr. Taylor refused the policy limits which he had agreed to accept seven weeks earlier, and filed suit against Ms. Moody and Mr. Berges, on June 20, 1990. (R.V.3, P.494; R.V.3, P.869). On that date, Mr. Taylor also obtained the letters of administration appointing him personal representative of his wife's estate. (R.V.5, P.876). Thus, despite Mr. Taylor's representation that he would have Mr. Swope complete the personal representative appointment in order to effectuate the settlement, those proceedings did not occur until after the

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[2/] The receipt of the letter was delayed due to an incorrect zip code. (R.V.5, P.858).

settlement “offers” had been “revoked” by Mr. Taylor. (R.V.5, P.876). Mr. Taylor later testified that Mr. Swope had told him that he could settle the claims without further legal proceedings. (R.V.6, P.1147).

On June 25, 1990, Mr. Swope again wrote to Infinity, stating that Infinity’s failure to actually tender payment prior to the establishment of the guardianship, personal representative and minor settlement proceedings was a rejection of the settlement offer so “there is no deal,” and that he intended to pursue “all remedies.” (R.V.5, P.877). Mr. Swope took the position that the only way that the cases could have been settled was by actual delivery of payment, even without his client having obtained the legal capacity to release the claims. (R.V.5, P.877-878).

On June 25, 1990 and July 2, 1990, Mr. Swope contacted Mr. Berges, advised him of the tort complaint against him, and recommended that he pursue a bad faith claim against Infinity. (R.V.4, P. 740). Mr. Swope referred Mr. Berges to the attorneys who represented him in this case. (R.V.4, P.740; R.V.5, P.991; T.864-65).

Infinity hired defense counsel to defend Mr. Berges in the tort case. (R.V.4, P.741). On June 26, 1990, Infinity advised Mr. Berges that the settlement had fallen through and advised him that the claims may result in an excess judgment. (R.V.34, P.E.762-66). On August 31, 1990, Mr. Swope reconfirmed that his client was unwilling to accept the policy limits.

The “Cunningham” Proposal

In August 1990, within a few months of filing the tort complaint, Mr. Swope asked Infinity to stipulate to stay the tort action and proceed to have Infinity's alleged bad faith determined. (R.V.5, P.904-06). Mr. Swope imposed the following conditions on this proposed agreement: (1) Infinity would agree to expedited trial and discovery; (2) the bad faith case would be in the form of a declaratory judgment action by Berges against Infinity, using an attorney acceptable to Mr. Taylor and Mr. Swope, and paid for by Mr. Taylor, and Berges would be required to cooperate "fully" with that attorney and Mr. Taylor in the bad faith case; (3) Infinity would file an answer, admitting the case was proper for declaratory relief; (4) the bad faith issue would be resolved by jury; and (5) if the court did not agree to the procedure, the agreement would not be subject to the principles of <u>Fidelity and Casualty Co. v. Cope</u>, 462 So. 2d 459 (Fla. 1985). (R.V.5, P.904-09). This proposal would later be referred to as a "Cunningham" proposal.[3/]

Infinity did attempt to have the bad faith issues determined at that time, but would not consent to Mr. Swope's conditions. (R.V.5, P.981). Instead, Infinity filed an action for declaratory judgment,

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[3/] The long-established rule is that a claimant must obtain an excess judgment against the insured before proceeding with a bad faith claim against the insurer. The Florida Supreme Court in <u>Cunningham v. Standard Guaranty Insurance Co.</u>, 630 So.2d 179 (Fla. 1994), held that the insurance company and the claimant can stipulate to determine the bad faith issues first under certain circumstances. It is Infinity's position that the proposal by Mr. Swope did not comply with the requirements enunciated in <u>Cunningham</u>, but that term has since been used to describe the proposal.

seeking a determination that it had not acted in bad faith in the Taylor settlement. (R.V.4, P.742; R.V.5, P.944-949; R.V.6, P.1037). Mr. Swope twice moved to dismiss that action on the ground that the issues could not be decided by declaratory judgment, (R.V.3, P.531-32; R.V.5, P.984-85), although he had proposed to use the same procedure. The Record does not reflect any explanation for Mr. Swope's position that a declaratory judgment could have been used only if Infinity agreed to his conditions.

Infinity also moved to intervene in the tort action to determine the bad faith issue. (R.V.5, P.911-916). Mr. Swope objected to the intervention, and continued to insist that Infinity could only have the bad faith issues determined at that time if it consented to his conditions and signed his stipulation. (R.V.4, P.742; R.V.5, P.889; 979). Upon Mr. Swope's objection, Infinity's motion to intervene was denied. (R.V.5, P.1002). The parties ultimately agreed to stay the bad faith declaratory action pending resolution of the tort case. (R.V.4, P.742).

The Taylor v. Berges case

The Taylor v. Berges tort case proceeded, with Mr. Swope representing Mr. Taylor. Berges asserted that Mr. Taylor and Infinity had reached an enforceable settlement of the claims for $20,000.00. (R.V.5, P.988-89; 1005-06; R.V.6, P.1033-34; R.V.8, P.1492; 1496). Significantly, Mr. Taylor asserted that there could have been no binding settlement because (1) the minors' claims could not be settled

until a guardian had been appointed and the settlement had been approved by the court; (2) the death claim could not be settled by anyone other than the personal representative, and Mr. Taylor did not have that status when the Infinity offer was made; (3) that Infinity had no authority to settle on behalf of Berges; and (4) that the settlement lacked essential terms. (R.V.8, P.1532-33). Mr. Swope also claimed that the minor children had specifically disapproved the settlement. (R.V.4, P.803; R.V.8, P.1543-49).

Mr. Berges countered that an insurer has the authority to settle claims on behalf of its insured, and argued that a valid settlement had taken place. (R.V.8, P.1577-81). Mr. Swope moved for judgment on the pleadings and for summary judgment on these issues. (R.V.8, P.1534; 1569-72; 1573-76). At the hearings, Mr. Swope again argued that there could have been no binding settlement between his client and Infinity since his client was not the personal representative of his wife's estate and since the settlements would require court approval. (R.V.8, P.1545, 1588-96; 1602-08) ("until the judge approved it there was no agreement at all"). He contended that it would have been "impossible" for anyone to make an enforceable agreement. (R.V.8, P.1545). In fact, he filed a detailed memorandum of law explaining that no binding settlement could have been reached by his client without a guardian appointment and court approval. (R.V.8, P.1573-76). The trial court in the tort case ultimately granted summary judgment in favor of Mr. Taylor, accepting his argument that there could have been no binding

settlement between he and Infinity since he had no authority to release the insured. (R.V.8, P.1610-11).

The estate of Marion Taylor recovered a judgment against Barry Berges and Linda Moody jointly and severally in the amount of $911,400.00, and Christina Taylor recovered a judgment against Mr. Berges and Ms. Moody jointly and severally in the amount of $500,000.00. (R.V.1, P.7-8).[4/] Infinity paid its $20,000.00 policy limits in partial satisfaction of the judgments. (R.V.1, P.5). Mr. Berges argued the settlement enforcement issues in post trial motions, which were denied, and on appeal. (R.V.8, P.1619). The Second District affirmed the judgment, thereby making final the determination that no binding settlement could have been reached by Mr. Taylor. (R.V.8, 1626-27; 1628-29).[5/]

The Bad Faith Case

Mr. Berges then filed the present case against Infinity, claiming that Infinity had acted in bad faith by failing to reach an enforceable settlement with Mr. Taylor and by failing to advise him of the purported settlement opportunity. (R.V.1, P.1-6).

Significantly, Mr. Berges prosecuted this bad faith case under an agreement with Mr. Taylor that makes Mr. Taylor the real party in

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[4/] An additional $3,000,000.00 was awarded solely against Ms. Moody. (R.V.1, P.7-8).

[5/] The trial court in the present case, by agreement of the parties, took judicial notice of all proceedings in the tort case and in the declaratory judgment action. (R.V.18, P.3539; 3576).

interest in any recovery in this case. (R.V.11, P.2192-98). The agreement requires Mr. Berges among other things to use and cooperate with the lawyers selected by Mr. Taylor, and to give Mr. Taylor the proceeds of any recovery. (R.V.11, P.2194-95). In fact, Mr. Berges does not have the authority to settle this bad faith claim without Mr. Taylor's approval. (R.V.11, P.2195).

Infinity moved for summary judgment, on the grounds that it could not have paid the Taylor claims because Mr. Taylor had no legal authority to release the insured during the time his demand was open. (R.V.4, P.790). Infinity also requested that the trial court grant it summary judgment on the "Cunningham" issue - the claim that Infinity's failure to agree to the Plaintiff's requested procedure for resolving the bad faith claim amounted to another instance of bad faith. (R.V.4, P.789). The trial court granted Infinity's summary judgment motion on the "Cunningham" issue and denied the remainder of the motion. (R.V.18, P.3543-47).

The case proceeded to trial. Counsel for Berges stipulated that no events after July 2, 1990, were relevant to Infinity's bad faith, except for the judgment in the underlying case. (R.V.28, P.5583). The trial consisted essentially of a parade of bad faith experts on both sides, all hired to explain to the jury whether Infinity could legally have settled the Taylor claims in May 1990. Berges' first expert, William A. Pruett, admitted that Infinity told Mr. Taylor on May 11, 1990 that it was willing to pay the $20,000.00 policy limits. (T.

361). He confirmed that Infinity had completed its coverage investigation by May 8, 1990. (T. 388-89). He further admitted that any settlement entered into by Mr. Taylor before he was appointed personal representative and before he obtained court approval would not be binding. (T. 346-48). He also testified that minor approval proceedings would take thirty days or more. (T. 360). Finally, he testified that Infinity "did not have any ability to stop [this claim] from going into litigation." (T. 393).

Berges' second expert, Leon Handley, admitted that Infinity made its determination to pay policy limits in this case "with all due haste." (T.830). He confirmed that Mr. Berges had not notified Infinity of the accident. (T. 872). Mr. Handley confirmed that a personal representative is the only person with authority to settle a claim for wrongful death. (T. 881). He confirmed that because minors' claims were involved, court approval would be required to reach an enforceable settlement in this case and "in order to obtain a binding release under the law." (T. 882;886). He testified that in May 1990, Mr. Taylor was not in a position to provide a binding release of either the injury claim or the death claim. (T. 886). He acknowledged that had Infinity made payment to Mr. Taylor without court approval and without letters of administration, Infinity's insured would not have been protected from further claims. (T. 887). He confirmed that an insurance company acting in its insured's best interests is "obligated to" obtain a valid release when settling claims. (T. 887). He also

testified that when an insurance company hires an attorney to complete minor settlement proceedings, that attorney is an independent contractor of the insurance company. (T.878).

Mr. Berges also presented the testimony of Infinity's claims handler, Robert Fryer, and the supervisor responsible for the claim, Bobbie Walker Hall, who both testified that Infinity had agreed to settle for the policy limits, they believed the case had been settled, checks had been issued, and payment would have been delivered as soon as Mr. Taylor had the required authority to settle the claims. (T. 517; 662-63; 696; 784-85).

Infinity presented former Florida Supreme Court Justice Arthur England as an expert witness. Mr. England testified that Infinity acted in good faith toward Mr. Berges under all the circumstances. (T. 915). Mr. England explained that the May 2, 1990 demand by Mr. Taylor was not a reasonable one because Mr. Taylor did not have the legal capacity to perfect the settlements, and did not acquire that capacity within the stated time frame. (T.915-17). He explained that there is no legal procedure by which Infinity could have paid the policy limits to Mr. Taylor before he acquired the authority to release the claims, while still ensuring that the insured would be protected. (T. 921-24).

Mr. England also testified that had Infinity paid the settlement moneys to Mr. Taylor individually, without requiring him to have the capacity to release the claims, it would have left its insured exposed to further claims. (T. 922). He explained that the duty of good

faith does not require an actual settlement, just that the insurance company attempt to settle. (T. 992).

Mr. England further explained that Infinity had no duty to advise Mr. Berges of the settlement with Mr. Taylor, since the company had agreed to pay the claimed policy limits. (T. 927). He also noted that since Mr. Berges had not timely notified Infinity of the accident and had not been in contact with Infinity regarding the accident, it was unnecessary to advise him of the settlement. (T. 928). Mr. England explained that there could have been no duty in May 1990 to advise Mr. Berges of the probable outcome of "the litigation" because there was no litigation. (T. 930).

Infinity also presented the expert testimony of insurance claims handling experts June Glenn, and Alton Pitts, who opined that Infinity acted in good faith. (T.1020; 1278; 1292). Mr. Pitts testified that there was no method by which Infinity could have paid Mr. Taylor the settlement proceeds and obtained valid releases for its insured without Mr. Taylor being the personal representative and establishing court approval. (T. 1269; 1283). He concluded that the demand made in Mr. Taylor's May 2, 1990 letter could not have been met. (T. 1291-92).

Infinity requested a number of jury instructions designed to explain the duty of good faith to the jury, all of which were denied. Infinity's requested jury instructions were filed at pages 5490-5550 of the Record on Appeal, volume 27. Over Infinity's objection, the trial court gave Plaintiff's requested special instruction that "The duty of

good faith 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 or she might take to avoid the same.” (T.1499). The instruction was not limited to “under all the circumstances” or “in due regard for the insured’s interests,” as the standard instructions require. (T. 1499). In other words, no level of fault was attached to the instruction on the failure to advise the insured.

Additionally, the trial court refused to allow Infinity to present evidence that the bad faith claims were the result of a “set up.” (R.V.28, P.5604; T. 919). It was Infinity’s theory that Mr. Swope had orchestrated the settlement “opportunity” so that no genuine opportunity to settle ever existed, thereby creating a bad faith claim that would allow recovery in excess of the minimal policy limits purchased by Mr. Berges.

Infinity moved for directed verdict, on the ground that no evidence of bad faith had been presented, and on the capacity to settle issue. Those motions were denied. (T. 1394-96).

The jury found that Infinity acted in bad faith. (R.V.28, P.5703). The trial court entered final judgment in favor of Mr. Berges in the amount of the underlying judgment plus interest, for a total of $1,893,066.41. (R.V.28, P.5728). Infinity timely filed motions for

new trial and renewed directed verdict, (R.V.28, P.5733-40; 5741-51), which were denied. (R.V.30, P.6109; 6110).

The Second DCA Decision

Infinity appealed to the Second District Court of Appeal. The Second District agreed with Infinity that it was entitled to judgment as a matter of law. The Second District first determined that Infinity was not in bad faith for holding delivery of its policy limits until Mr. Taylor had authority to release the insured, reasoning that Infinity's duty was to protect its insured. The Second District further held that Infinity had no duty to advise the insured of the Taylor demand, because it was not a genuine "settlement opportunity," and because Infinity had agreed to pay the demanded policy limits.

Berges cross-appealed, contending that Infinity's failure to accept the 1990 "Cunningham" proposal was an independent act of bad faith. The Second District did not reach this issue because the state of law when the proposal was made was that a bad faith case could not be brought prior to a resolution of the underlying action. The Second District concluded that Infinity could not be in bad faith for failing to consent to a legally impermissible procedure. The only proposal at issue in the Second District was the 1990 proposal.

New Issue: The 1994 "Cunningham" Proposal

For the first time in this Court, Berges claims that another "Cunningham" proposal was made by Mr. Swope on May 3, 1994, several

months after this Court's decision in Cunningham. This 1994 letter simply renews the earlier proposal, under the same terms.

SUMMARY OF THE ARGUMENT

Mr. Berges admits that Mr. Taylor had no authority to release the claims when the demand period expired. An insurer's duty of good faith requires it to protect its insured. Infinity's failure to deliver the policy limits to a person with no authority to release the insured from liability was in compliance with, not a breach of, that duty.

Mr. Berges' "relation back" argument was not raised in the Second District, and thus should not be addressed at all. On the merits, the doctrine applies only to actions benefitting the estate, and has never been used to validate a release. Furthermore, the timing of the offer makes its impossible for the relation back doctrine to cure the defect in Mr. Taylor's capacity in this case.

Mr. Berges should not be permitted to argue that Mr. Taylor had authority to settle the claims, because a prior final judgment in the tort case determined he did not. The parties in this case are in privity with and have the same interests as the parties in that case. The prior judgment should have preclusive effect here.

The Second District also correctly held that Infinity did not act in bad faith in failing to advise the insured of the Taylor demand, both because it was not a genuine "settlement opportunity," and because Infinity agreed within the stated time period to pay the demand. The duty to advise is designed to ensure that the insured can protect himself if the insurance company fails to do so. Here, Mr. Berges

could not have obtained a valid release, and could not have protected himself, any more than Infinity could.

The Second District also correctly affirmed the trial court's summary judgment in favor of Infinity on the Cunningham issue. The 1990 proposal was made when the law would not have allowed the procedure proposed by Mr. Swope. Infinity cannot be in bad faith for refusing to agree to a legally impermissible procedure. Likewise, the 1990 proposal does not meet the requirements of the Cunningham decision. The 1994 proposal was never argued at the Second District, and cannot be raised in the Court for the first time.

Contrary to the characterization offered by Berges and the Academy, Infinity did not wholly refuse to negotiate with the claimant. Infinity agreed to pay its policy limits, timely and within the original demand period. To the extent that an insurer in the future reads the Berges decision to validate its complete refusal to evaluate and negotiate a claim before a personal representative is appointed or a guardianship established, the hypothetical arguments raised by the Academy and by Berges should be addressed. However, this is simply not the case here.

STANDARD OF REVIEW

The issues determined by the Second District Court of Appeal are questions of law. This Court, like the Second District, is entitled to review those issues de novo.

ARGUMENT

I. INFINITY DID NOT ACT IN BAD FAITH BY FAILING TO DELIVER THE OFFERED POLICY LIMITS TO MR. TAYLOR WITHIN HIS ARBITRARY TIME LIMIT, WHEN HE DID NOT HAVE THE LEGAL AUTHORITY TO RELEASE THE INSURED FROM LIABILITY DURING THE TIME HE WAS WILLING TO ACCEPT THE POLICY LIMITS.

There is no question that Infinity timely evaluated the case, acknowledged Mr. Taylor's authority to make and negotiate the claims, and agreed during the demand period to pay the policy limits to Mr. Taylor. Infinity simply refused to physically deliver the policy proceeds to Mr. Taylor until he had the legal authority to release Infinity's insured, Mr. Berges. It is likewise undisputed that Mr. Taylor never had that legal authority during the time that he was willing to accept the policy limits. The Second District properly reaffirmed that an insurer's duty of good faith is to protect its insured, not to deliver payment to claimants who cannot release the insured from further exposure.[6/]

[6/] Infinity continues to contend that there is no express and direct conflict in this case, for the reasons expressed in its jurisdictional brief. Infinity will not repeat those arguments here, and will direct this brief to the grounds for an approval of the DCA decision. Nevertheless, Infinity does alternatively request that this Court simply enter an order determining that jurisdiction was improvidently granted.

A. AN INSURER'S DUTY OF GOOD FAITH REQUIRES IT TO PROTECT THE INSURED, AND THE INSURED IS NOT PROTECTED UNLESS THE POLICY LIMITS ARE PAID TO A CLAIMANT WHO CAN EXECUTE A VALID RELEASE.

The basis of an insurer's duty of good faith is its obligation to protect its insured from excess judgments. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla.1980). As such, the carrier has the duty to settle a claim when such settlement is reasonable and in the insured's best interest. In this case, the Second District properly concluded that any delivery of the policy proceeds to Mr. Taylor before he had the authority to execute a release would not have been in the insured's best interest.

It is significant, and undisputed, that Infinity agreed to pay the policy limits during the time demand period, and that this agreement was never withdrawn. The sole issue is whether funds should have been actually delivered to the claimant before he had the capacity to release the insured. (R.V.5, P.877-878).

It is well established that a release of the insured is a valid and necessary condition of an insurer's offer to settle a claim. See Erhardt v. Duff, 729 So.2d 529(Fla. 4th DCA 1999).[7/] This rule is

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[7/] In this case, Mr. Taylor's May 2, 1990, settlement demand expressly recognized these conditions. He agreed to take the steps necessary to effectuate his ability to settle both claims. This is not a case where the insurer injected a new or unexpected condition to the settlement. Compare Nichols v. Hartford Ins. Co. of the Midwest, 27 Fla. L. Weekly D2188 (Fla. 1st DCA 2002).

logical given the basis for the duty of good faith – to protect the insured from the risk of excess judgment. To require insurers to pay their limits without obtaining a release of the insured improperly subordinates the duty to protect the insured to some "duty" to pay the claimant.

This Court has expressly rejected the argument that the insurer's duty is to pay the claimant as opposed to protecting the insured. In Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459 (Fla. 1985), this Court explained that when it allowed third party claimants to bring bad faith actions:

> nowhere . . . did we change the basis for recovery. We did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party.

462 So. 2d at 460-61.

Likewise, in State Farm Fire and Casualty v. Zebrowski, 706 So. 2d 275 (Fla. 1997), this Court held that an insurer's duty to settle claims runs only to the insured and not to third party claimants. This Court recognized that to extend a duty to settle to a third party claimant would:

> place a liability insurance company in the dilemma of having a good-faith obligation to a third-party claimant as well as to its insured when the best interest of one would not necessarily be in the best interest of the other.

706 So.2d at 277.

Courts around the country have recognized that an insurer may not be held liable in bad faith for rejecting a settlement offer that

leaves the insured exposed to other claims. See Coe v. State Farm Mut. Auto. Ins. Co., 136 Cal.Rptr. 331 (Cal. App. 1977); Strauss v. Farmers Insurance Exchange, 31 Cal.Rptr.2d 811(Cal.App. 1994). See Risinger v. State Farm Mutual Automobile Ins. Co., 711 So. 2d 293 (La. App. 1997)("The insurer in the present case, by conditioning its settlement offer upon a release of its insured, obviously sought to protect that party to whom its primary duties extended.")(Hightower, J., concurring).

It is therefore clear that an insurer does not breach its duty to its insured by requiring a binding release of the insured before payment is delivered.

B. INFINITY'S ACTIONS IN THIS CASE WERE CONSISTENT WITH ITS DUTY TO PROTECT THE INSURED, SINCE TAYLOR HAD NO AUTHORITY TO RELEASE THE INSURED DURING THE TIME HE WAS WILLING TO ACCEPT THE POLICY LIMITS.

1. Taylor Did Not Have Authority to Release the Minor Claims

Mr. Taylor did not have the ability to give a binding release during the time period he arbitrarily chose for settlement of the claim. A settlement of a minor's claim of $5,000.00 or greater is not binding absent court approval and compliance with the provisions of chapter 744.[8/] See Fla. Stat. §§ 744.301(2); 744.387(2); 744.387 (3)(a); Auerbach v. McKinney, 549 So. 2d 1022 (Fla. 3d DCA 1989). The

[8/] Court approval is not required for settlements of less than $5,000.00. There is no question that the claim in this case exceeded that limit.

guardian does not have authority to execute a binding release, and the defendant is not protected from later attack, unless the settlement is approved by the court as required in the statute. Fla. Stat. § 744.387(3)(b); Orkin Exterminating Co., Inc. v. Lazarus, 512 So. 2d 1120 (Fla. 3d DCA 1987); Central Nat. Ins. Co. v. Fernandez, 307 So. 2d 906 (Fla. 3d DCA 1975); Lee v. State Farm Mut. Auto. Ins. Co., 303 So. 2d 349 (Fla. 3d DCA 1974). The settlement-approval procedures apply equally to pre-suit settlements. Sullivan v. Department of Transp., 595 So. 2d 219 (Fla. 2d DCA 1992).

In Sullivan v. Department of Transportation, 595 So. 2d 219 (Fla. 2d DCA 1992), the court allowed the father/personal representative to bring a wrongful death claim on behalf of his minor children/survivors, despite an earlier settlement. The defendant was left exposed to the claim because the earlier settlement had not been court-approved.

In fact, these principles are so well-founded that in Auerbach v. McKinney, 549 So. 2d 1022 (Fla. 3d DCA 1989), the court found it "inexplicable" that an insurer would make payment in settlement of a minor's claim without court approval. The court even questioned the ethics of the parties in making the payment, because "this conduct is so contrary to the requirements of the law, and therefore of the universal practice deemed necessary to protect the clients of defense counsel." 549 So. 2d at 1031, n.1. The Plaintiff's argument in this case is that Infinity was in bad faith for not doing what the Auerbach court found "inexplicable" and contrary to the "requirements law" and

"universal practice" in that case. Under Auberbach, Infinity would have breached its duty to its insured had it delivered the funds to Mr. Taylor prior to court approval. The Second District correctly held that Infinity cannot be in bad faith for doing what Auerbach requires.

To avoid the minor settlement approval issues, Berges cites Government Employees Ins. Co. v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975). In Grounds, an insurer failed to offer to settle a claim and argued that it could not have made the offer because an outstanding government lien precluded settlement. The court held that rather than failing to make a settlement offer, the insurer should have offered its limits subject to the lien being settled, thereby fulfilling both its duty to protect its insured against all the pending claims and its duty to settle the case.

In this case, Infinity did precisely what the court required in Grounds. Infinity negotiated with Mr. Taylor, agreed to pay him the policy limits, and simply required the court approval prior to delivery of payment. Even the authority relied upon by Berges supports Infinity's actions in this case.

2. Taylor Did Not Have Authority to Release the Wrongful Death Claim.

The same analysis applies to the wrongful death claim. Mr. Taylor did not have the authority to settle the wrongful death claim during the demand period because he was not the personal representative of his wife's estate. It is clear that wrongful death claims can only be

settled by the personal representative. See Fla. Stat. § 768.20; Williams v. Infinity, 745 So. 2d 573 (Fla. 5th DCA 1999) (rejecting the argument that an insurer was in bad faith for insisting that its payment be made only to the personal representative); Ding v. Jones, 667 So.2d 894, 897 (Fla. 2d DCA 1996); Continental National Bank v. Brill, 636 So. 2d 782, 784 (Fla. 3d DCA 1994); Funchess v. Gulf Stream Apartments of Broward County, Inc., 611 So. 2d 43, 45 (Fla. 4th DCA 1992).

Berges apparently concedes, as he did during the district court proceedings, that Taylor had no authority to execute a valid release until the letters of administration were issued to him. Likewise, he does not dispute that the letters were not issued until after the settlement period (which was unilaterally established by him) had expired. Nonetheless, he argues that the issuance of the letters of administration "relates back" to validate the settlement "offer" he made prior to their issuance.

Notably, section 733.601 and the "relation back" argument were not raised by Berges in the DCA proceedings until the rehearing motion. Arguments not presented to the District Court of Appeal may not be raised for the first time in this Court. See Metropolitan Dade County v. Chase Federal, 737 So.2d 494 (Fla. 1999); Schreiber v. Schreiber, 217 So.2d 301 (Fla. 1968). The argument should be rejected for that reason alone.

On the merits, Berges argues that Taylor had authority to "act" for the estate as of the date of death. This is not in dispute. Infinity was dealing with Taylor and had even agreed to pay him the policy limits. Infinity did not refuse to negotiate with Mr. Taylor, as Berges and the Academy fear that the District Court decision allows insurers to do. The sole issue, which Berges has not addressed, is whether Taylor had authority to execute a valid release in order to conclude the settlement. Significantly, Berges cites no authority for the proposition that the relation back doctrine can validate a release signed by the would-be personal representative during the pre-issuance period.

In fact, relation back will apply only to those acts which are "beneficial to" the estate. See Griffin v. Workman, 73 So.2d 844 (Fla.1954). Releasing a claim of the estate is not for the estate's benefit. Infinity did not condition payment of the policy limits on Taylor's signing the release prior to his obtaining the letters of administration. Mr. Taylor did not have to take some action within a certain period of time in order to obtain payment of the policy limits. Berges' citation of cases allowing a survivor to file a wrongful death action before letters are issued simply illustrates the point. The relation back doctrine allows protection of the estate assets

(such as by filing a claim before the statute of limitations expires) but not waiver of such assets.

Furthermore, <u>Griffin</u> held that the relation back doctrine applies only if no other party is deprived of a "substantial right." 73 So.2d at 847. Allowing the doctrine to validate an invalid settlement opportunity, after the opportunity is no longer available, and then holding that an insurer is in bad faith for refusing to pay its limits to the claimant before the defect in capacity was cured, would prejudice not only the insurer's rights but also the insured's. Assuming that Petitioner is not arguing that the insurer is always in bad faith, he must be arguing that Infinity would have been in good faith had it paid its policy limits to Mr. Taylor before he could release the insured. Such a rule would leave insureds exposed to numerous claims in cases where the defect in capacity does not ultimately get cured.

Even if the relation-back doctrine would have validated a pre-issuance settlement, it does not create a duty on the part of the insurer to predict that it will, pay its policy limits in reliance on that prediction, and leave its insured exposed to additional claims until such time as the prediction may come true. In fact, an insurer may be in bad faith for doing exactly what Petitioner suggests - paying policy limits to a person without authority to release the insured.

Furthermore, the time frames in Berges' argument are faulty. Taylor was appointed personal representative by an order dated May 14, 1990, at which time his authority to act was contingent on his posting a bond and being issued letters of administration. The bond was not posted and the letters did not issue until June 20, 1990. Significantly, at that time, Taylor had already withdrawn the settlement proposal. Thus, in order to agree with Berges' contentions, this court would have to find that the issuance of the letters not only provides Taylor with back-dated authority to release the insured during the relevant time frame, but also that it eradicates the intervening withdrawal of the settlement "offers" by Taylor. Berges apparently asks this court to find that Taylor had authority to make the settlement offers but not to withdraw them. Berges cites no authority for his selective application of the relation back doctrine, and does not explain how that doctrine could resurrect the withdrawn settlement offers.

The timing of the appointment also prevents application of the relation back doctrine. Griffin held that a wrongful death suit filed before the letters were issued was not void as long as "the defect in legal capacity to sue is corrected before the defense of limitations has been formally raised." 73 So.2d at 847. Under Griffin, the defect must be cured within the substantive window of opportunity to make the claim. In

contrast, Taylor's defect was not corrected during the window of opportunity to settle the case. <u>Griffin</u> cannot be used to retroactively cure the capacity defect during the window of opportunity which had already been closed by the claimant himself.

Likewise, the relation back doctrine relates back to the date of death, not the date of filing the petition or the date of appointment. Even if the authority to release the tort claims did relate back, this timing quandary illustrates the defect in Berges' case - the date of death would also be outside his arbitrary settlement period, and even long before Infinity had notice of the accident. Berges, therefore, asks this Court to create a new "date of appointment" relation back so that he can pinpoint the timing of his "authority" during the settlement period which he created. He cites no authority for his argument that the date of appointment is significant to the relation back analysis.

If this court were to hold as Berges asks, the problems created in probate law would be immense. A survivor could be liable to other survivors for executing such releases (were they suddenly made valid by this Court) before he has authority to act on behalf of the estate. If this Court were to accept Berges' theory, insurers would have a duty to determine which survivor might be appointed personal representative and issued

letters of administration, and pay policy proceeds (and often, in death cases, policy limits) to that survivor, at the risk of liability to the remaining survivors should the first claimant not ultimately qualify as the personal representative.

This is obviously not the intent of the relation back provisions, which have specifically been reserved for cases in which the authority to act is clear at the time of the act to be validated. For example, in Glickstein v. Sun Bank/Miami, 922 F.2d 666 (11th Cir. 1991), the court held that the "potential personal representative" could bring an action on behalf of estate, where his appointment as personal representative "would have been assured" because will contests had been concluded. There is no such protection in the principles urged by Berges.

Finally, this relation back argument applies only to the wrongful death claim, and does not even purport to affect Mr. Taylor's ability to release the insured for the minors' claims. The requirements for minor settlements apply to wrongful death claims involving minor survivors. See Sullivan, 595 So. 2d 219; Maugeri v. Plourde, 396 So. 2d 1215 (Fla. 3d DCA 1981); Fla. Stat. §§ 768.25; 768.23. Thus, even if the relation back argument were correct, Mr. Taylor still did not have the authority in May 1990 to release his minor daughters' claims, both for personal injury and for the death of their mother.

3. There is no Duty to Pay a Claimant who Cannot Release the Insured; in Fact, There May Be a Duty Not to Do So.

Infinity cannot be in bad faith for declining to deliver payment to Mr. Taylor until he obtained the proper settlement authority. In fact, in a case directly on point, the Fifth District held that no bad faith claim could be made when the insurer refused to make payment until the claimant became the personal representative of the estate.

In Williams v. Infinity, 745 So. 2d 573 (Fla. 5th DCA 1999), the court affirmed a dismissal of a bad faith case, and rejected the argument that insurers are obligated to settle with a survivor who does not have the authority as the personal representative to settle claims of the estate. "This is simply not the law, nor would it serve the purposes of the Wrongful Death Act to impose such an obligation on insurers." 745 So. 2d at 576. The court emphasized that a settlement and release between the insurers and the survivors individually would have left the insureds vulnerable to other claims:

> The insurers correctly point out that the only way they could fully protect their insureds was to settle the entire action for the amount of the policy limits, which only the personal representative or all of the beneficiaries could do. The only persons who would have benefitted from the proposed pre-estate settlement were the two appellants. The insureds were better off by reason of the insurers' ability to negotiate a full settlement and release of the entire estate for the policy limits, thereby foreclosing the possibility of any personal out-of-pocket obligation by [the insureds]. By not settling with [the non-personal representative claimants] individually, the insurers acted in their insureds' best interests.

745 So. 2d at 577. The court concluded that "it is clear that the bad faith in this suit was exhibited by counsel for [claimants], not by the insurance carriers, who had the good sense to reject the attempt by the [claimants] and their counsel" to demand a settlement that would have left the insureds exposed to other claims. 745 So. 2d at 577.

The same analysis applies here. Infinity took the steps legally necessary to protect its insured. Both the claimant in the injury claim and two of the survivors in the death claim were minors. Had Infinity paid Mr. Taylor without requiring court approval, Infinity's insured would have remained exposed to liability. As the court explained in Williams v. Infinity, supra, insisting that valid releases be executed is part of the insurer's duty to protect its insured, not a violation of that duty.

Berges has never responded to the point, recognized in Williams, that his contentions would create a catch-22 for insurers - insurers cannot have a duty to pay claimants who cannot release the insured, because that would leave the insured exposed, which is precisely what they have a duty to avoid.

Contrary to the Plaintiff's contentions, the duty is not to pay policy limits regardless of whether the insured is protected from further claims. Infinity's duty, as described by Boston Old Colony, was to "settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." No settlement was possible in this case, and no reasonably prudent person

would deliver payment without a binding release. Infinity stood ready and willing to pay the policy limits, and agreed to do so during the demand period. This Court in Boston Old Colony held that there was no bad faith where the insurer stood ready and willing to settle the claims but was not able to effectuate the settlement due to the needs of the insured. See also State Farm Fire and Casualty v. Zebrowski, 706 So. 2d 275 (Fla. 1997) (no bad faith absent a refusal to pay policy limits; to allow such claims would risk multiple litigation, unwarranted bad faith claims, coercive settlements, and increased transaction costs). Infinity agreed to pay, with the condition that the insured be protected. That was not bad faith.

C. BERGES' ALLEGED "PRACTICAL EFFECTS" OF THE SECOND DISTRICT DECISION ARE NOT SUPPORTED BY THE CASE ITSELF.

Berges portends that there will be several negative "practical effects" of the Second District's decision. However, neither the decision itself nor Infinity's actions in this case support such doomsday predictions.

First, Berges claims that insurers will "disregard settlement offers" in wrongful death and minor settlement cases. This prediction is belied by this very case. Infinity agreed to pay its policy limits to Taylor, and to deliver the proceeds as soon as he could release the insured. Infinity did not refuse to negotiate with Taylor or refuse to respond to his demand. The Second District's decision simply cannot be read to allow

carriers to “disregard” settlement offers, since that is not what Infinity did. To the extent that another insurer in a future case reads the Second District’s opinion to allow it to ignore a claimant or disregard settlement offers until personal representative appointment or court approval, these concerns can be addressed in those future cases. However, that would not change the result in this case.

Berges also claims that insureds and claimants will be forced to hire attorneys to validate their claims, which will result in unfair and considerable expense. He claims that carriers typically have undertaken to hire counsel for claimants in such cases, and that they will no longer do so. If Berges is correct that insurers have a duty to provide such representation under the supplementary payments portions of the policy, a breach of that duty will certainly result in a claim against the carrier. However, this was not an issue in the present case since Taylor agreed to have his lawyer finalize the estate documents and Infinity hired an independent attorney to handle the minor settlement proceedings. If Berges questions the speed with which Taylor’s attorney, or the independent attorney hired to assist Taylor, accomplished those tasks, that does not amount to bad faith on the part of Infinity.

In fact, the practical effects of the system proposed by Berges are much more problematic. Presumably, Berges does not

take the position that carrier is always in bad faith in a high damages/low policy limits case. He must therefore admit that if Infinity is in bad faith for failing to pay Taylor before he could validly release the insured, it would have been justified in making such payment. Carriers would then be able to protect themselves from bad faith exposure by paying any claimant in a death or minor case, without having to insure that payment was being made to a person with authority to release the insured. The insured would be left exposed, since the carrier would apparently no longer have a duty to ensure that its insured was validly released from the claim. There are obvious public policy defects in a rule which allows the carrier to protect itself from bad faith claims by leaving its insured exposed to tort claims.

Likewise, Berges' proposal would result in payment of policy limits and proceeds being made to persons having no authority (and therefore no duty) to act on behalf of an estate or a minor. The limited available insurance funds could frequently be unrecoverable after being delivered to a single survivor or a person without court supervision in a minor's claim. The remaining survivors or the injured minor would be left without recourse. In short, Berges is asking this court to remove the protections of the personal representative and minor settlement requirements. This argument should be rejected.

D. THE ALLEGED "EVIDENCE OF INFINITY'S BAD FAITH" DOES NOT CREATE A JURY QUESTION BECAUSE OF THE UNDISPUTED FACTS.

Berges' brief contains a section purporting to list the "evidence" of bad faith committed by Infinity. However, none of these alleged facts can supercede the undisputed facts that Infinity acknowledged Mr. Taylor's authority to make the demand, agreed to pay its policy limits during the demand period, and Mr. Taylor had no authority to release the insured during that time period. Whether Infinity had a duty to deliver its policy limits to someone who could not release the insured is a duty issue based on undisputed facts. The "evidence" catalogued by Berges does not overcome the legal principle that Infinity's duty was to protect its insured, and that Infinity upheld rather than breached that duty by holding delivery of its policy limits until the claimant had authority to release the insured.

It is well established that bad faith claims are properly resolved as a matter of law where the elements of the claim have not been met. See Talat Enterprises, Inc. v. Aetna Cas. and Surety Co., 753 So.2d 1278 (Fla. 2000) (affirming summary judgment in favor of insurer); State Farm Fire and Cas. Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997) (reinstating summary judgment in favor of insurer, because carrier has a duty settle when it is in the insured's best interest, not when it is in the claimant's best interest); RLI Ins. Co. v. Scottsdale Ins. Co., 691 So. 2d 1095 (Fla. 4th DCA 1997) (affirming summary judgment in favor of insurer where the undisputed facts showed insurer "at no time

missed an opportunity to settle," and thus could not be in bad faith as a matter of law); Swamy v. Caduceus Self Ins. Fund, 648 So. 2d 758 (Fla. 1st DCA 1994) (summary judgment in favor of insurer affirmed); State Farm Mutual Aut. Ins. Co. v. Otieza, 595 So. 2d 1094 (Fla. 3d DCA 1992) (directed verdict in favor of insurer); Caldwell v. Allstate Ins. Co., 453 So. 2d 1187 (Fla. 1st DCA 1984) (summary judgment in favor of insurer affirmed).

In this case, it was not for the jury to decide whether Mr. Taylor had the legal capacity to effectuate a valid settlement, or whether Infinity had a duty to pay the policy limits in the absence of such capacity. The Second District properly found that whether Mr. Taylor had the legal capacity to enter into a binding settlement should have been determined as a matter of law.

E. MR. BERGES IS COLLATERALLY OR JUDICIALLY ESTOPPED FROM ASSERTING THAT INFINITY HAD AN OPPORTUNITY TO SETTLE THE CLAIMS WITHIN POLICY LIMITS BECAUSE THERE WAS A FINAL JUDICIAL DETERMINATION THAT MR. TAYLOR HAD NO AUTHORITY TO SETTLE THE CLAIMS DURING THE "SETTLEMENT OPPORTUNITY" PERIOD.[9/]

Mr. Berges should have been precluded from arguing that a valid settlement could have been reached, because there was a final judicial determination to the contrary in the tort case.[10/] In that case, Mr.

[9/] Infinity has attempted to format its Answer Brief in a manner similar to the points on appeal provided by Berges in his Initial Brief. However, this point does not correspond to any point on appeal raised by Berges because this issue was not addressed in Berges' Initial Brief.

[10/] Mr. Berges agreed that the trial court in this case could take judicial notice of the proceedings in the tort case.

Taylor successfully defeated an attempt to enforce the settlement for the policy limits by arguing that he did not have the authority to enter into binding settlements absent personal representative appointment and court approval proceedings, so it was "impossible" that a settlement occurred. (R.V.8, P.1545).[11]

This is ironically and precisely Infinity's position here. The prior judgment in the tort case precludes Mr. Berges from rearguing the authority to settle issue in this case, both in his own right and as an agent of Mr. Taylor. In addition to the traditional preclusion doctrines of collateral estoppel and res judicata, the equitable doctrine of judicial estoppel also prevents litigants from taking inconsistent positions in separate judicial proceedings. See Smith v. Avatar Properties, 714 So. 2d 1103 (Fla. 5th DCA 1998); Federated Mutual Implement and Hardware Ins. v. Griffin, 237 So. 2d 38 (Fla. 1st DCA 1970).

It is expected that Mr. Berges will argue that there is no mutuality of parties between the tort case and the bad faith case. However, strict mutuality is not required for judicial estoppel, collateral estoppel or res judicata. As this Court explained in Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995), one who has an interest in the action is subject to collateral estoppel and is bound by the judgment as if he were a party. As long as the parties have

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[11] The specific arguments made by Taylor are outlined in detail in the Statement of the Case and Facts section of this brief.

privity of interest with a party to the prior proceeding, the prior judgment has preclusive effect. See Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971).

Privity has been defined as mutual or successive relationships to the same right of property, and as such an identification of interest between parties as to represent the same legal right. Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240, 242 (Fla. 4th DCA 1987). A person may be bound by a judgment even though not a party if one of the parties to the suit "is so closely aligned with his interest as to be his virtual representative." Stogniew at p. 209 (citing Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.), cert. denied, 423 U.S. 908 (1975)).

These principles have been applied to find preclusion in a number of cases not involving strict identity of parties. See Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989) (failed ineffective assistance of counsel claim precluded defendant from bringing a civil claim against the attorney, despite lack of mutuality); United Services Automobile Ass'n v. Selz, 637 So. 2d 320 (Fla. 4th DCA 1994) (prior tort judgment precluded contrary findings in an insurance claim; identity of issues rather than identity of parties determines defensive collateral estoppel in a civil to civil setting); West v. Kawasaki Motors Mfg. Corp., 595 So. 2d 92 (Fla. 3d DCA 1992) (res judicata and collateral estoppel bar similar claims against a new party); Hochstadt v. Orange

Broadcast, 588 So. 2d 51 (Fla. 3d DCA 1991) (plaintiff collaterally estopped from suing new defendants of the same standing).

Mr. Berges has prosecuted this bad faith claim pursuant to an agreement with Mr. Taylor, which required Mr. Berges among other things to use and cooperate with the lawyers selected by Mr. Taylor, to give Mr. Taylor the proceeds of any recovery in this case, and not to settle the case without approval from Mr. Taylor. (R.V.11, P.2192-98). Mr. Taylor is undisputedly the real party in interest in this case. See O'Hern v. Donald, 278 So. 2d 257 (Fla. 1973) (the claimant injured in an automobile accident is a third party beneficiary of the insurance contract and the real party in interest of a bad faith suit). This establishes privity. See Newport Div., Tenneco Chemicals, Inc. v. Thompson, 330 So. 2d 826 (Fla. 1st DCA 1976).

Likewise, it was clear that Mr. Taylor's attorney intended to try to collect any judgment in the tort case from Infinity by proving bad faith. Both because Infinity was defending its insured in the tort case and because Infinity had a recognized interest in the outcome of that case, Infinity's absence from that case as a named party does not destroy the preclusive effect of the prior judgment. See Southern Fidelity Insurance Co. v. Rice, 515 So. 2d 240, 242 (Fla. 4th DCA 1987) (collateral estoppel applies to bind insurer to the facts established in the tort claim against the insured, if the insurer is in privity with the insured and its interests were not adverse to the insured in the underlying suit); Radle v. Allstate Ins. Co., 758 F. Supp. 1464

(M.D. Fla. 1991) (a party not named in a suit will be bound by the judgment if the party participated in the proceeding); Kline v. Heyman, 309 So. 2d 242 (Fla. 2d DCA 1975) (accord). Thus, Infinity's absence from the tort case as a named party does not avoid the preclusive effect of that judgment.

The ruling on the settlement issue in the tort action conclusively establishes that Mr. Taylor had no authority to settle during the time period within which he was willing to accept the policy limits. That ruling was binding in this case. Infinity cannot be in bad faith failing to accomplish the settlement that the claimant himself described as "impossible." Although this issue was not directly addressed by the Second District in its opinion, this Court should approve the decision of the Second District on that alternative ground.

II. INFINITY DID NOT ACT IN BAD FAITH IN FAILING TO ADVISE ITS INSURED OF THE "SETTLEMENT OPPORTUNITY" BECAUSE THERE WAS NO GENUINE SETTLEMENT OPPORTUNITY AND BECAUSE INFINITY AGREED TO PAY THE POLICY LIMITS.

The Second District properly found that the failure to advise Mr. Berges of the "settlement opportunity" does not amount to bad faith. First, it is significant that this Court, in defining the events of which the insured should be informed, used the term "settlement opportunity," not "settlement offer" or "settlement demand." Boston Old Colony, 386 So. 2d 783, 785. In this case, there was no real "settlement opportunity," since Mr. Taylor could not have reached a binding settlement within the time frame imposed by him. Since there

was no genuine settlement "opportunity," there was nothing to advise the insured. See DeLaune v. Liberty Mutual Insurance Co., 314 So.2d 601 (Fla. 4th DCA 1975) (settlement demand with unreasonable time limit was invalid and insufficient to support bad faith claim); Pavia v. State Farm Mutual Auto. Ins. Co., 605 N.Y.S. 2d 208, 212 (N.Y. App. 1993) ("the plaintiff in a bad-faith action must show that the insured lost an actual opportunity to settle the claim").

Second, an insurance company does not act in bad faith in failing to advise its insured of settlement opportunities when the company has agreed to pay the policy limits settlement demand. See AW Huss Company v. Continental Casualty Company, 735 F. 2d 246, 251 (7th Cir. 1984); Koppie v. Allied Mutual Insurance Co., 210 N.W.2d 844, 848 (Iowa 1973). The duty to advise has been applied when the company refuses to pay the demand, and is based on the logic that in such cases, the insured should be given the opportunity to pay the demand and protect himself. See Powell v. Prudential Property and Casualty Co., 584 So.2d 12, 14 (Fla. 3d DCA 1991) (citing Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla.1980); Hollar v. Int'l Banker's Ins. Co., 572 So.2d 937 (Fla. 3d DCA 1990)).

There is only one case cited by Berges in support of his argument that a carrier who agrees to settle a case can still be liable for bad faith in failing to advise the insured of the settlement opportunity. See Odom v. Canal Insurance, 582 So.2d 1203 (Fla. 1st DCA 1991). However, the Odom case is directly

distinguishable. In Odom, the insurer agreed to pay the claimant only if the claimant would hold the carrier harmless against a medical lien claim. It was the carrier's attempt to protect itself from future exposure that precluded the settlement from being effectuated. In this case, in contrast, it was Infinity's attempt to protect the insured from future claims, by obtaining a valid release, that the claimant refused to accept as part of the settlement. See Williams v. Infinity, 745 So. 2d 573 (Fla. 5th DCA 1999) (no bad faith when the failure to settle was due to efforts to obtain a valid release for the insured). In Odom there was no good faith attempt by the carrier to settle in the first instance, since the condition to the payment was intended to protect the carrier from further claims, not the insured.

More importantly, it is clear that the duty to advise the insured exists so that the insured can take steps to protect himself if the carrier does not. In this case, there was nothing that Mr. Berges could have done to protect himself had he known of the May 2, 1990 demand. Mr. Taylor had no more ability to provide a valid release to Mr. Berges than to Infinity. Even if Mr. Berges could have paid the demanded amount, Infinity had already agreed to do so, so any offer by Mr. Berges would have been unnecessary. Had Mr. Berges been advised of the demand and given Mr. Taylor a check as he had required, Mr. Berges

would still have been at the same risk of further claims that Infinity was seeking to avoid.

The Second District correctly determined as a matter of law that there was no duty to advise the insured of a settlement "opportunity" that was not genuine, and no duty to advise the insured that the insurer intended to pay the policy limits.[12/]

Notably, if this Court finds that the Second District was incorrect in directing summary judgment for Infinity on the duty to advise issue, the result is not a reinstatement of the jury verdict. Instead, Infinity would be entitled to a new trial for two reasons. First, Plaintiff's special jury instruction erroneously stated that Infinity was liable for bad faith if it failed to advise the insured, (T.1499), without asking the jury to determine if Infinity should have done so "under all the circumstances," acting "fairly and honestly toward the insured and with due regard for the insured's interests." The instruction erroneously created strict liability, and would require a new trial.

Second, Infinity was improperly precluded from offering evidence and argument on, and instructing the jury on, its theory the offer was a "setup." It was Infinity's theory of the case that Mr. Swope and Mr. Taylor never intended to settle the claims for policy limits, and that an impossible settlement offer was made with a short time limit so as

to "set up" the case for an excess claim. Florida courts have discussed and recognized a "set up" theory of defense in bad faith cases. See Thomas v. Lumbermens Mutual Casualty Co., 424 So. 2d 36 (Fla. 3d DCA 1982). See also DeLaune v. Liberty Mutual Insurance Co., 314 So. 2d 601 (Fla. 4th DCA 1975); Hewko v. Genovese, 739 So. 2d 1189 (Fla. 4th DCA 1999).[13/] Infinity was entitled to present evidence on, argue, and have the jury instructed on, its theory of defense.

III. THE SECOND DISTRICT CORRECTLY AFFIRMED THE SUMMARY JUDGMENT FINDING THAT INFINITY WAS NOT IN BAD FAITH FOR REJECTING THE "CUNNINGHAM" PROPOSAL.

Berges next argues that the Second District erred in rejecting his contention that Infinity's refusal to enter into a "Cunningham" agreement amounted to a separate act of bad faith. This argument is factually and legally unsound for a number of reasons.

A. When the Proposal Was Made, it Could Not Have Been Accepted.

[13/] Other courts have likewise recognized the "set up" defense theory. See Baton v. Transamerica Insurance Co., 584 F.2d 907, 914 (9th Cir. 1978); Grumbling v. Medalion Insurance Co., 392 F.Supp. 717, 721 (D.Or. 1975); Nelson v. Progressive Corporation, 976 P.2d 859 (Alaska 1999); Pavia v. State Farm Mutual Automobile Insurance Company, 605 N.Y.S.2d 208, 212 (N.Y. 1993); Sampson v. Transamerica Insurance, 636 P.2d 32 (Cal. 1981); Kriz v. Government Employees Insurance Co., 600 P.2d 496 (Or. 1979); Miel v. State Farm Mutual Auto. Ins. Co., 912 P.2d 1333 (Ariz. App. 1995); Camelot by the Bay Condo minium Ass'n v. Scottsdale Insurance Co., 32 Cal.Rptr.2d 354 (Cal. App. 1994). See also McNally v. Nationwide Mutual Ins. Co., No. 863-865-WKS (D. Del. 1985), affirmed on other grounds, 815 F.2d 254 (3d Cir. 1987); Universe Life Insurance Company v. Giles, 950 S.W.2d 48 (Tex. 1997); Boicourt v. Amex Assurance Company, 93 Cal.Rptr.2d 763 (Cal. App. 2000).

First, this Court's decision in Cunningham v. Standard Guaranty Insurance Co., 630 So.2d 179 (Fla. 1994), issued in 1994, simply cannot apply to the proposal made August 31, 1990. Prior to 1994, Florida law held that bad faith claims could not be tried before the conclusion of the underlying litigation. See Fidelity and Casualty Co. v. Cope, 462 So.2d 459 (Fla. 1985); State Farm Mutual Auto. Ins. Co. v. Marshall, 618 So.2d 1377 (Fla. 5th DCA 1993); Standard Guaranty Insurance Co. v. Cunningham, 610 So.2d 458 (Fla. 1st DCA 1992), quashed, 630 So.2d 179 (Fla. 1994); Dixie Insurance Company v. Gaffney, 582 So.2d 64 (Fla. 1st DCA 1991). Therefore, when the 1990 proposal was made, Infinity could not have accepted it.

Parties are "entitled to rely on the existing law." Frazier v. Baker Material Handling Corporation, 559 So.2d 1091 (Fla. 1990). This rule has been applied in a directly analogous situation. In Brodose v. School Board of Pinellas County, 622 So.2d 513 (Fla. 2d DCA 1993), the court held that offers of settlement were controlled by the law in effect at the time of the offer, since the offer is the "operative event." 622 So.2d at 514 (quoting A.G. Edwards & Sons v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990), approved, 595 So.2d 12, 15 (Fla. 1992)). The court rejected the argument that case authority issued subsequent to the offer could control its effect since "the parties were entitled to rely on the law of this district applicable at the time of offer or the rejection thereof." 622 So.2d at 515. Significantly, the court reached that conclusion despite the fact that there was conflicting

precedent in other DCAs at the time of the offer. Even in the face of conflicting case law, a change in the law regarding a party's rights and duties under a settlement offer does not impact prior offers. The same analysis applies to Cunningham offers, which likewise contemplate a resolution of the case by agreement of the parties.

Berges does not and cannot explain how Infinity could possibly be in bad faith for refusing to agree to a procedure that would not have been allowed by law at the time. In fact, the pre-Cunningham rule was applied in this case at Taylor's insistence and to the detriment of Infinity, when Taylor had Infinity's declaratory judgment action dismissed and its motion to intervene denied, on the ground that the procedure, which was the very procedure Taylor had proposed, was improper.

B. The Proposal Was Not a Cunningham Proposal.

The terms of the August 1990 proposal were so restrictive that even if a Cunningham procedure were available in 1990, Mr. Swope's proposal would not comply with the requirements of Cunningham. The stated purpose of Cunningham is to allow stipulations which promote settlement and conserve judicial resources. These goals would have been accomplished by Infinity's attempts, rejected by Mr. Swope, to have its alleged bad faith determined either by declaratory relief or by intervention in the tort case. (R.V.4, P.742; R.V.5, P.911-16; 944-49; R.V.6, P.1037).

Mr. Swope gave no reason for rejecting these attempts other than he would only agree to try the bad faith issues before the tort issue if Infinity agreed to his conditions and limitations. (R.V.4, P.742; R.V.5, P.889; 979). These included the requirement that the bad faith case would be in the form of a declaratory judgment action by Berges against Infinity, using an attorney acceptable to Mr. Taylor and Mr. Swope, and paid for by Mr. Taylor, and Berges would be required to cooperate "fully" with that attorney and Mr. Taylor in the bad faith case. (R.V.5, P.904-06). This proposal was directly contrary to Mr. Swope's motion to dismiss Infinity's declaratory judgment action, in which he argued that the bad faith issues could not be decided by declaratory judgment. (R.V.3, P.531-32; R.V.5, P.984-85).

The plain fact is that Berges and Taylor did not want Infinity's bad faith liability determined early on in the case unless it was under their attorney's restricted terms. No such conditions were recognized in the <u>Cunningham</u> case, and the August 1990 proposal by Mr. Swope did not fulfill either the letter or the spirit of this Court's later ruling in <u>Cunningham</u>.

Both because the proposal came before the supreme court decision allowing the new procedure, and because the proposal would not qualify as a <u>Cunningham</u> proposal even under the new law, there was no <u>Cunningham</u> proposal in this case. Thus, Berges' argument that an insurer's refusal to accept a <u>Cunningham</u> proposal amounts to bad faith should not be reached.

C. The 1994 Proposal Does Not Change the Analysis.

For the first time in this Court, Berges has raised the argument that a 1994 proposal made by Mr. Swope also qualifies as a Cunningham proposal, and that Infinity had a duty to accept that proposal. This argument should be rejected for several reasons.

First, arguments not presented to the District Court of Appeal may not be raised for the first time in this Court. See Metropolitan Dade County v. Chase Federal, 737 So.2d 494 (Fla. 1999); Schreiber v. Schreiber, 217 So.2d 301 (Fla. 1968). Any argument concerning the 1994 proposal should be rejected for that reason alone.

Furthermore, the terms of the 1994 letter again do not meet the requirements set forth by this Court in Cunningham for use of that limited procedure; the 1994 letter simply adopts the conditions and limitations of the prior offer.

D. Even Rejection of a True "Cunningham" Proposal is Not Bad Faith.

Finally, should this Court reach the merits of the issue, it should reject Berges' contention that the failure to accept a Cunningham proposal in itself amounts to bad faith. For this argument, and in order to avoid duplication, Infinity adopts the amicus brief filed jointly by NAII and FDLA.

CONCLUSION

The decision of the Second District Court of Appeal should be approved. Alternatively, this Court should rule that there is no express and direct conflict, and decline to exercise its jurisdiction in this case.

Respectfully submitted,

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