

**SUPREME COURT OF FLORIDA**

**BARRY L. BERGES,**

**Petitioner,**

**vs.**

**CASE NO.: SC01-2846**

**INFINITY INSURANCE COMPANY,  
formerly known as Dixie  
Insurance Company,**

**Respondent.**

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

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**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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## **STATEMENT OF THE CASE AND FACTS**

### **A. PRELIMINARY STATEMENT**

Barry L. Berges, plaintiff in the trial court, seeks review of a decision from the District Court of Appeal, Second District, which reversed a final judgment entered upon a jury verdict in his favor in his insurance bad faith-excess judgment action brought against Infinity Insurance Company. Berges contends the decision should be quashed because the district court misconstrued or misapplied settled Florida law in the fields of insurance bad faith and probate and guardianship.

### **B. STATEMENT OF FACTS**

#### **Underlying Accident and Insurance Coverage**

On March 29, 1990, Linda D. Moody was driving an automobile owned by Barry L. Berges when she crossed the center line and collided head-on with an automobile owned and operated by Mary Viola Taylor in which her minor daughter, Christina Taylor, was riding as a passenger. (R-31 E18). Mrs. Taylor was killed and Christina suffered serious injuries. (R-31 E23-26).

Berges was insured by a policy of automobile liability insurance issued by Dixie Insurance Company, now known as Infinity Insurance Company, with bodily injury liability limits of \$10,000 per person and \$20,000 per accident. (R-31 E1-2, 19). Berges provided insurance information to the Florida Highway Patrol but did not immediately report the accident to Infinity because he thought the investigating officer would make the necessary report. (R-31 E15; R-45 ST 20-21).

James Taylor, Mary Viola Taylor's widower and Christina Taylor's father, consulted attorney Dale Swope to represent his family in connection with the accident. (R-42 1125). By letter dated April 16, 1990, Swope's paralegal notified Infinity of the

accident and of Swope's representation and requested a certified copy of the insurance policy and information concerning policy limits and coverage. (R-31 E17). In its insurance disclosure form dated April 27, 1990, Infinity notified Swope that it was reserving the right to deny coverage based on Berges' failure to give the company immediate notice of the accident and the possibility that Moody was a resident of Berges' household who should have been identified on the insurance application. (R-31 E19). Infinity mailed Berges a reservation of rights letter dated May 2, 1990, questioning coverage on the same grounds. (R-31 E9). The reservation of rights letter did not mention the likelihood of an excess judgment or suggest any steps Berges might take to protect himself from that eventuality. (R-31 E49). On May 8, 1990, Infinity completed its coverage investigation and concluded there were no policy defenses, determining that the insurer was not adversely affected by Berges' failure to immediately notify the company about the accident. (R-31 E13; R-39 725). Infinity did not inform Berges of its favorable coverage decision. (R-39 728, 730; R-45 ST 24).

### **Settlement Negotiations and Communications with the Insured**

By April 30, 1990, Infinity's investigation confirmed that its insured driver had been intoxicated and was "100%" at fault; Mrs. Taylor died as a result of her accident-related injuries; and Christina Taylor sustained severe injuries with over \$30,000 in medical bills. (R-31 E15, 23-26; R-38 423-24; R-39 724). Based on this information, Infinity knew by that date that the damages sustained by the Taylor estate and Christina exceeded the insured's policy limits. (R-37 263).

On May 2, 1990, the adjuster assigned to the claim, Robert Fryer, received a

letter from attorney Swope notifying Infinity that he was no longer representing Taylor in the wrongful death and bodily injury claims. (R-31 E13, 27). Fryer called Swope's office that same date and learned that Swope had filed "probate papers" for Taylor. (R-31 E13). Also on May 2, 1990, Taylor personally delivered to Fryer at Infinity's office a handwritten letter offering to settle all claims based on the following essential terms: (1) \$2,500 for damage to the Taylor vehicle plus \$25 per day loss of use; (2) \$10,000 for Christina Taylor's bodily injury claim payable by June 1, 1990, or if payment could not be made by June 1, 1990, the funds to be placed in an interest-bearing account with the interest accruing to Christina Taylor's benefit; and (3) \$10,000 for the death of Marion Viola Taylor payable within twenty-five days, or if payment could not be made within twenty-five days, the funds to be placed in an interest-bearing account with the interest accruing to the estate's benefit. (R-31 E28-48). Taylor indicated in his letter that if settlement of his daughter's claim required "special papers to be filed in court," he would "work with your [Infinity's] lawyers to handle that." (R-31 E30). Taylor also confirmed that Swope had "filed the papers to have me made representative of the estate and I will pay him to finish that," but he further indicated that "[i]f we have to file papers in court on this settlement [wrongful death claim] I will work with your lawyers to do that." (R-31 E30). Taylor emphasized that unless the money was paid either to him or into the escrow accounts by the stated deadlines, "there is no deal." (R-31 E31). Infinity did not send Berges a copy of Taylor's letter or otherwise inform its insured that a settlement offer had been submitted, even though the insurer had notified Berges by letter dated May 2, 1990, that it was reserving the right to completely deny coverage for the accident. (R-

39 656, 731-32; R-45 ST 23-24).

After obtaining policy limits settlement authority from his supervisor, Fryer contacted Taylor by telephone on May 11, 1990. (R-31 E11). During that conversation, Fryer offered Taylor \$10,000 for the wrongful death claim and \$10,000 for Christina's bodily injury claim, but only \$1,000 for property damage and only \$10 per day for loss of use. (R-31 E10-11). Fryer's handwritten notes indicate that he told Taylor "we need court approval on his daughter because of her age and copies of the probate papers on his wife naming him as executor of her estate to settle that portion." (R-31 E11). In this respect, Fryer told Taylor that "we as the insurance company would pay an attorney to arrange for the court approval of the settlement, that it would be no charge to him, that we would take care of the paperwork necessary for the guardianship to be set up and for us to set up the follow-up with him for the estate of his wife." (R-40 784). Although Infinity and Taylor both understood that court approvals were necessary, Infinity never questioned Taylor's authority to negotiate a settlement on behalf of the estate and the injured child. (R-41 964). Infinity did not inform Berges about its May 11 conversation with Taylor. (R-39 656-57; R-45 ST 25).

Fryer's notes of the May 11 conversation with Taylor further indicate that he "advised claimant that [he] was to meet with our atty on 5-14-90 to discuss court approval and that we would be in touch in the near future regarding the progress made in that respect." (R-31 E10). The meeting, however, between Fryer and the lawyer selected by Infinity to obtain the necessary court approvals, Kevin Korth, did not take place on May 14 as contemplated. (R-39 649). On May 16, Fryer mailed a letter to

Korth asking his office “to arrange a court approved settlement on Christina Taylor” and informing Korth that Taylor had “applied to the courts to have himself named as the representative of his wife’s estate and we should deal directly with him concerning settlement of his deceased wife’s bodily injury claim.” (R-31 E55). The record indicates that Taylor, through attorney Swope, filed a petition for administration on May 2, 1990, and was appointed personal representative on May 14, 1990. (R-34 E777-82). The order required Taylor to post a bond before issuance of letters of administration. (R-34 E782). Letters of administration were issued to Taylor on June 20, 1990. (R-34 E786).

Fryer testified at trial that he “felt” the settlement deadlines imposed by Taylor’s May 2 letter had been suspended after his May 11 conversation with Taylor. (R-39 643; R-40 792). Taylor disagreed and testified that although the time limits were not specifically discussed on May 11, he “assumed the man [Fryer] was fulfilling the obligation to the letter that I had submitted to him.” (R-42 1139). Consistent with Taylor’s understanding, Fryer told Korth in his May 16 letter that Infinity was operating under a “time demand” as outlined by Taylor’s May 2 letter which he enclosed for Korth’s review. (R-31 E55). On May 23, 1990, Korth called Fryer to advise that he would be “unable to have court approval in time for exp[iration] of time demand” but that he would write Taylor.<sup>1</sup> (R-31 E9). Fryer’s notes contain nothing contrary to Korth’s understanding that the settlement deadlines were still operative. (R-41 983; R-43 1375-76). Further confirming the viability of the deadlines, in the

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<sup>1</sup> Korth apparently had never handled a court approval for a minor’s settlement. (R-37 303-04).

insurer's 30-day report dated May 29, 1990, Bobbie Walker, Fryer's supervisor, directed Fryer to "[f]ollow up w/ Kevin Korth & copy of letter re: time demand pronto." (R-34 E736; R-39 660).

During their May 11 conversation, Fryer told Taylor "we would be in touch in the near future" to discuss the paperwork necessary to consummate the settlement. (R-31 E10). To that end, attorney Korth wrote Taylor on May 24, 1990, to inform Taylor that he was preparing the necessary guardianship papers. (R-31 E56). However, because Korth's office used an incorrect zip code, Taylor did not receive Korth's letter until June 20, 1990, after the settlement deadlines had expired on May 28 and June 1, 1990.<sup>2</sup> (R-31 E58; R-34 E767). Although Fryer told Taylor he "would be in touch in the near future," he never contacted Taylor after their May 11 meeting (R-39 650); Fryer's supervisor did not follow up (R-38 493); and the company did not maintain a diary or tickler system to alert the adjusters to critical deadlines. (R-40 827, 832; R-42 1068-70). Infinity never asked Taylor to extend the settlement deadlines, although Fryer testified such extensions are routinely requested (R-39 655), and never explored the feasibility of establishing the interest-bearing escrow accounts requested by Taylor in his May 2 letter. (R-37 294; R-38 490, 495; R-39 641-42, 720; R-40 798).

Having heard nothing further from Infinity by the expiration of the settlement deadlines, Taylor consulted Swope who notified Fryer by letter dated June 11, 1990, that Taylor's settlement offer was revoked and that suit would be filed against the

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<sup>2</sup> On the inside address, Korth correctly listed Taylor's zip code as 33527 but used 32257 on the envelope. (R-31 E56, 58).

insureds. (R-31 E62-63). On June 25, 1990, Swope filed the wrongful death and personal injury complaint as contemplated. (R-34 E775). After receiving the suit papers, Berges immediately contacted Fryer for a status report on the claim. (R-31 E84). Fryer spoke with Berges by telephone on June 25, 1990, but still did not inform Berges about any of the settlement negotiations. (R-39 745). By letter dated June 26, 1990, almost one month after the settlement deadlines had expired, Infinity advised Berges for the first time about the possibility of an excess judgment and his right to retain independent counsel. (R-31 E85-87; R-38 495-96; R-39 656). In a postscript, Infinity told Berges “that we have offered to pay your policy limits of \$20,000 for the above claim, but Mr. Taylor is refusing to settle for that amount.” (R-31 E86). Fryer conceded at trial that the postscript did not accurately reflect his negotiations with Taylor. (R-39 742). The postscript did not mention the settlement deadlines and other terms of Taylor’s May 2 settlement offer or that Infinity had allowed the deadlines to expire without contacting Taylor regarding the court approvals which the company had promised to obtain on May 11. (R-37 287-88; R-38 495-96; R-39 656, 731-32).

### **Cunningham Settlement Offers**

On August 31, 1990, Swope wrote Infinity’s attorney and offered to accept policy limits and release Berges and Moody if Infinity would agree to litigate the insurer’s alleged bad faith by declaratory judgment before adjudication of the underlying tort claims under what is now known as a “Cunningham agreement,” named after this court’s decision in Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994). (R-15 2944). Under the terms of Swope’s proposal, if Infinity were found not guilty of bad faith in the declaratory judgment action, Taylor would accept policy limits and

give Berges, Moody and Infinity a complete release. (R-15 2945). On the other hand, if Infinity were found guilty of bad faith, the insurer would be responsible for all of Taylor's damages irrespective of policy limits. (R-15 2945). Under either alternative, Berges would have been fully protected from an excess judgment. (R-15 2945). Infinity rejected Swope's offer by letter from its attorney dated October 30, 1990. (R-15 2966).

This court issued the Cunningham opinion on January 6, 1994. On May 3, 1994, Swope renewed his proposal to litigate the bad faith case before deciding the underlying tort claims with Berges receiving complete protection from an excess judgment. (R-15 2893 at Tab 40). In that letter, Swope specifically referenced the Cunningham decision and mentioned this court's resolution of the then unsettled jurisdictional issues. (R-15 2893 at Tab 40). Infinity declined Swope's renewed offer and Taylor proceeded with his claims against Berges. (R-8 1567).

### **Taylor v. Berges**

As affirmative defenses to Taylor's suit, Berges and Moody alleged accord and satisfaction, release and settlement based on the negotiations between Fryer and Taylor. (R-6 1033-34). The settlement defenses were bifurcated from the other issues and submitted to a jury with the following interrogatory: "Was there a settlement and compromise agreement between the Defendants and the Plaintiff to settle the claim of James Taylor as Personal Representative of the Estate of Marion Taylor and James Taylor as the natural guardian of Christina Michelle Taylor vs. Barry L. Berges and Linda Moody." (R-8 1492, 1496). The jury answered "yes." (R-8 1492, 1496). The trial court, however, granted Taylor a new trial because Berges and Moody used documentary evidence (the insurance policy) at trial which had not been disclosed previously. (R-8 1515-18).

After the trial court granted a new trial, Taylor filed a reply to the affirmative defenses in which he alleged that the minor's settlement was not binding without court approval and that he "had no authority to enter into a binding settlement until he was appointed Personal Representative of the Estate of Marion Viola Taylor, and court approval was obtained for the claims of the minor children pursuant to sections 744.387 and 768.25, Florida Statutes." (R-8 1532). Berges and Moody took the contrary position and argued: "The settlement agreement was for Dixie Insurance Company to pay the money upon court approval and for TAYLOR to accept the money upon court approval. The executory nature of obtaining court approval does not invalidate the agreement." (R-8 1578). Berges and Moody also argued that Taylor's conduct bound the estate pursuant to section 733.601, Florida Statutes, which "provides that actions taken by a personal representative prior to appointment are, in essence, ratified by appointment." (R-8 1578). The trial court

agreed with Taylor and granted partial summary judgment in his favor on the defense of accord and satisfaction. (R-8 1610-11).

A jury subsequently returned a damage verdict awarding Taylor \$911,400 for the wrongful death claim, \$500,000 for Christina's bodily injury claim and \$3,000,000 in punitive damages against Moody. (R-8 1615-18). On February 25, 1995, the trial court entered judgment upon the jury verdict. (R-8 1624-25; R-31 E99-100). By opinion dated February 26, 1996, the second district affirmed the final judgment except for the punitive damage award against Moody. (R-8 1628). See Moody v. Taylor, 670 So. 2d 1026 (Fla. 2d DCA 1996).

## **C. COURSE OF PROCEEDINGS IN THE COURTS BELOW**

### **Pleadings and Summary Judgment**

After the excess judgment was affirmed, Berges filed the instant bad faith action against Infinity based on the insurer's failure to settle the Taylor claims within policy limits and its failure to adequately communicate with and advise its insured. (R-1 1-8). Berges also alleged that Infinity breached its obligation of good faith by refusing to accept Taylor's Cunningham proposals. (R-1 5, ¶ 17).

Before Berges filed his complaint in the bad faith case, Berges, Taylor and Infinity entered into an agreement in which Berges assigned the proceeds of the bad faith action to Taylor and received a three-year stay of execution on the excess judgment. (R-11 2192-98). The stay of execution has expired, and the agreement does not provide for satisfaction of the excess judgment against Berges in the event the bad faith action ultimately proves unsuccessful. (R-11 2192-98).

Following extensive discovery, Infinity moved for summary judgment asserting that (1) the insurer could not, as a matter of law, settle Taylor's claims within the time frames established by his May 2 letter because Taylor lacked the necessary legal authority to effectuate a settlement for the estate and minor child; (2) the insurer timely tendered its policy limits; (3) Berges was judicially estopped from arguing that Infinity had failed to settle the claims in a timely manner because Taylor had successfully asserted in the underlying tort action that he lacked the requisite capacity to settle; and (4) the insurer was not obligated, as a matter of law, to accept Taylor's Cunningham offer to litigate the bad faith issue before deciding the underlying tort claims. (R-4 788-811). Berges moved for partial summary judgment on the issue of Infinity's breach of its duty to communicate with and advise its insured. (R-12 2225-44). The trial court granted summary judgment for Infinity on the Cunningham issue but otherwise denied both motions. (R-18 3543-47).

### **Bad Faith Trial**

The bad faith action proceeded to jury trial on August 23, 1999. (R-36 1). In addition to testimony from Taylor, Berges and Infinity's claims personnel, the parties presented expert testimony from attorneys and a claims consultant.<sup>3</sup> Attorney William A. Pruett testified that Infinity acted in bad faith by failing to settle the Taylor claims within policy limits and by failing to adequately advise Berges regarding settlement opportunities and his exposure to an excess judgment.<sup>4</sup> (R-37 251, 314). Pruett testified that the terms of

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<sup>3</sup> The evidence introduced at trial was essentially the same as the evidence submitted by the parties on motions for summary judgment. (R-15 2893, Tabs 1-43; R-5-9; R-9 1681-1867; R-10 1868-2023).

<sup>4</sup> Pruett gave similar opinions in his affidavit filed in opposition to Infinity's motion for summary judgment. (R-15 2888-92)

Taylor's settlement offer were reasonable and could have and should have been met by Infinity within the specified time limits. (R-37 280-83). In Pruett's opinion, if Infinity could not meet the deadlines, the insurer should have opened the escrow accounts discussed in Taylor's letter (R-37 281, 285) or requested an extension of time from Taylor, which is standard practice in adjusting claims. (R-37 306-07). Pruett described Infinity's May 11 response to Taylor's settlement offer as a counteroffer because it offered policy limits without any time restraints and less than the requested amount for property damage. (R-37 287-88, 295). In Pruett's opinion, Infinity's failure to settle Taylor's claims within the specified time limits caused the excess judgment against Berges. (R-37 314). Pruett also opined that Infinity's claims handling procedures fell below applicable standards. (R-37 251).

Concerning Infinity's duty to advise its insured, Pruett testified that the insurer should have communicated the May 2 settlement offer to Berges, especially because on that date the company was operating under reservation of rights which could have led to a coverage denial. (R-37 274). Pruett also testified that Infinity should have kept Berges apprised of all settlement negotiations, including the company's May 11 response to Taylor's offer, and should have advised Berges of the probable outcome of litigation and steps he might have taken to protect himself, including hiring a lawyer to intervene on his behalf. (R-37 289-90).

Berges' second expert witness, attorney Leon Handley, testified that Infinity could have and should have settled the Taylor claims within policy limits, recognizing that the claims involved "clearly outrageous liability" and "extreme damages," and the insurer should have kept the insured informed by timely advising him of settlement

opportunities and warning him of the possibility of an excess judgment, the probable outcome of litigation and steps he might have taken to avoid an excess judgment. (R-40 818-19, 823, 844-45). Handley explained that the necessary court approvals for the minor's settlement and the estate settlement could have been obtained during the time frames established by Taylor's letter since courts generally accommodate such emergencies. (R-40 848-49). Like Pruett, Handley criticized Infinity's claims handling practices, noting particularly that the insurer lacked a diary or tickler system to monitor critical deadlines and had not established special procedures for claims with excess judgment potential. (R-40 826-27, 832).

Infinity offered contrary opinions from attorneys Arthur England and Alton Pitts and from an insurance claims consultant, June Glenn. These experts opined that Infinity did not exercise bad faith by failing to effectuate a settlement within policy limits and properly discharged its duty to keep the insured advised. (R-41 915, 934, 1020, 1059; R-42 1255). England opined that Infinity could not have accepted Taylor's offer because Taylor lacked the legal authority to consummate the settlement and did not acquire the authority while the offer was pending. (R-41 915-17). England also testified that Infinity was not required to advise Berges of Taylor's settlement offer because the insurer had agreed to pay policy limits and also because Berges had not timely reported the accident to the insurer. (R-41 927-28). England and Glenn testified further that Infinity was not obligated to advise Berges regarding "the probable outcome of litigation" until suit was filed against him or the insurer decided not to pay the settlement demand. (R-41 930, 1035).

The trial court read the jury the standard charge on insurer bad faith (Fla. Std.

Jury Instr. (Civ.) MI 3.1) and separately instructed on the insurer's duty to advise its insured as follows (R-28 5664; R-44 1499):

The duty of good faith obligates an insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid the same.

The jury returned a single interrogatory verdict affirmatively responding to the following question: "Did Infinity Insurance Company act in bad faith with respect to the Taylor claims against its insured, Barry Berges?" (R-28 5703). Neither party requested a verdict form differentiating between the insurer's failure to settle and its failure to advise the insured (R-26 5186; R-27 5557-59; R-28 5701-02), and both parties consented to the verdict form drafted by the trial judge. (R-42 1218-20). Based on the jury verdict, the trial court entered final judgment in Berges' favor for \$1,893,066.41, representing the amount of the excess judgment plus accrued interest. (R-28 5728; R-30 6113). The trial court also awarded Berges attorney's fees and costs by separate orders. (R-45 6242-44).

### **District Court Decision**

Finding no bad faith as a matter of law, the District Court of Appeal, Second District, reversed the judgment by decision dated August 1, 2001, reported as Infinity Ins. Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001). The district court reasoned that "the insurer has no obligation to settle unless the settlement offer would protect its insured." Infinity, 806 So. 2d at 508. The court concluded that Infinity was not guilty of bad faith failure to settle, as a matter of law, because "Taylor did not present Infinity with an offer that would protect its insured, Berges." Infinity, 806 So. 2d at 508. The court

supported this conclusion by finding that Taylor lacked the requisite legal authority to consummate a settlement of his wrongful death claim and his minor daughter's bodily injury claim because "Taylor had neither been appointed personal representative of his deceased wife's estate, nor had he obtained court approval of a settlement on behalf of his minor daughter at the time he made his 'offer.'" Infinity, 806 So. 2d at 508.

The district court also held that Infinity was entitled to summary judgment concerning its duty to advise the insured. On this issue, the court held that Infinity was not obligated to communicate with Berges because the insurer had not received a "valid opportunity to settle" and "since the 'offer' contemplated settling within policy limits (i.e. the settlement would have included a release without any obligation to Berges), the duty to involve Berges in the discussions did not apply." Infinity, 806 So. 2d at 510. On the Cunningham issue, which Berges raised by cross-appeal, the court found that because the Cunningham case was not decided until after Infinity rejected Taylor's first proposal, and because the law at the time Taylor made his first proposal required an excess judgment before a bad faith cause of action accrued, "it was not bad faith on the part of Infinity to follow the law as it existed at that time and reject the proposal." Infinity, 806 So. 2d at 510.

## **SUMMARY OF ARGUMENT**

### **I. AUTHORITY TO SETTLE**

The district court misconstrued Florida law by holding that Taylor's May 2 settlement offer was not a "reasonable opportunity to settle" because, on that date, Taylor had not been appointed personal representative of his deceased wife's estate and had not obtained court approval for his minor daughter's bodily injury settlement.

Under sectiont proposal would have afforded Berges complete protection from an excess judgment, that offer should have been considered by the jury as part of the “totality of the circumstances” in evaluating the insurer’s conduct.

On this point, the district court erred by rejecting Berges’ Cunningham argument because the Cunningham decision had not been issued at the time the proposal was made and rejected. Although the state of the law existing at the time is relevant to the insurer’s decision whether to accept the proposal, the district court should have resolved this issue based on the law in effect when it decided the appeal. In any event, Taylor made a second Cunningham proposal after the Cunningham case was decided.

### **STANDARD OF REVIEW**

The district court held that Infinity was entitled to summary judgment on all bad faith issues submitted by Berges for review. Infinity, 806 So. 2d at 510. The appellate court reviews a summary judgment de novo. See Volusia County v. Aberdeen at Ormand Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Summary judgment should not be granted unless the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Infinity also argued on appeal that it was entitled to a directed verdict on the issue of bad faith. Viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, a directed verdict should not be granted unless “no proper view of the evidence could sustain a verdict in favor of the nonmoving party.” Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329 (Fla. 2001).

### **ARGUMENT**

**I. THE DISTRICT COURT MISCONSTRUED FLORIDA LAW BY HOLDING THAT INFINITY WAS NOT LIABLE FOR BAD FAITH, AS A MATTER OF LAW, BECAUSE TAYLOR LACKED AUTHORITY TO SETTLE HIS CLAIM FOR WRONGFUL DEATH AND HIS MINOR DAUGHTER'S CLAIM FOR BODILY INJURY AT THE TIME HE SUBMITTED HIS SETTLEMENT OFFER.**

**A. BAD FAITH – GENERAL PRINCIPLES**

When a claim is presented against an insured covered by a liability insurance policy, a fiduciary relationship arises under Florida law which obligates the insurer to exercise the utmost good faith towards its insured in investigating, evaluating and settling the claim. See Baxter v. Royal Indem. Co., 285 So. 2d 652, 655 (Fla. 1st DCA 1973), cert. discharged, 317 So. 2d. 725 (Fla. 1975). “This fiduciary obligation is imposed on an insurer because the insured surrenders to the insurer all control over handling a claim, including all decisions with regard to the litigation and settlement. In return, the insurer assumes a duty to exercise control of the claim and to make decisions with due regard for the interests of the insured.” Allstate Ins. Co. v. American Southern Home Ins. Co., 680 So. 2d 1114, 1116 (Fla. 1st DCA 1996). If the insurer breaches its fiduciary obligation, it becomes liable for any judgment rendered against the insured in excess of the policy limits. See Baxter, 285 So. 2d at 656.

“An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.” Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), cert. denied, 450 U.S. 922 (1981). “The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.” Id. “Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.” Id. Whether an insurer’s lack of care and diligence in handling the claim is simple negligence or whether it rises to the level

of bad faith presents a jury question. See Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 530 (Fla. 1974).

## **B. TAYLOR'S AUTHORITY TO SETTLE**

In holding that Infinity was entitled to summary judgment on the issue of bad faith, the court below reached the following conclusion:

Because our review of the record reveals that Taylor did not present Infinity with an offer that would protect its insured, Berges, we hold that Infinity cannot be guilty of bad faith for failing to settle. Taylor had neither been appointed personal representative of his deceased wife's estate, nor had he obtained court approval of a settlement on behalf of his minor daughter at the time he made his "offer." Since Infinity had no reasonable opportunity to settle the claim, Infinity could not have acted in bad faith as a matter of law.

Infinity, 806 So. 2d at 508 (emphasis supplied). In reaching the conclusion that Taylor's offer was not a "reasonable opportunity to settle" because Taylor had not been appointed personal representative and had not obtained court approval of the minor's settlement at the time he submitted his offer, Berges most respectfully suggests that the district court misconstrued the insurer's obligation of good faith under Florida law and also misinterpreted the applicable statutes and case law governing probate and guardianship procedure.

### **Wrongful Death Settlement**

Regarding Taylor's claim for wrongful death and his authority to act for the estate during settlement negotiations, the second district concluded:

Since Taylor was not the duly appointed representative as of May 2, his "offer" was merely an expression of his intent to settle once he became authorized to make an offer.

Infinity, 806 So. 2d at 508-09. In reaching this conclusion, the second district apparently overlooked section 733.601, Florida Statutes (1989), which provides: "The powers of a personal representative relate back in time to give acts by the person

appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring thereafter.” This statute is consistent with the common law rule holding ““that whenever letters of administration or testamentary are granted they relate back to the intestate’s or testator’s death”” and ““all previous acts of the representative which were beneficial in their nature to the estate and . . . which are in their nature such that he could have performed, had he been duly qualified, as personal representative at the time, are validated.”” Griffin v. Workman, 73 So. 2d 844, 846 (Fla. 1954). Under this principle, for example, if a survivor files a wrongful death action before qualifying as personal representative, the survivor’s subsequent appointment relates back to the date of decedent’s death and validates the cause of action, even though the statute of limitations expired before appointment. See Talan v. Murphy, 443 So. 2d 207 (Fla. 3d DCA 1983), rev. denied, 451 So. 2d 849 (Fla. 1984). Thus, once Taylor was appointed personal representative on May 14, 1990, his authority to act for the estate during settlement negotiations with Infinity related back to the date of his wife’s death, which means that Taylor held legal authority to act for the estate when he made his settlement offer on May 2, 1990. Accordingly, the district court erred by holding that Taylor’s May 2 settlement offer was not a valid settlement opportunity and further erred by holding that Taylor’s lack of authority on that date deprived Infinity of the ability to negotiate a settlement and protect its insured.

On this same point, the district court further concluded:

Although the probate court did appoint Taylor personal representative on May 14, 1990, there is nothing in the record to show that Taylor advised Infinity of that appointment, which would have transformed his “offer” into a valid “opportunity” to settle.

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[I]t is undisputed that as of the time Taylor revoked his “offer” on June 11, 1990, Infinity was without notice that Taylor was authorized to settle the claim.

Infinity, 806 So. 2d at 509. In addition to overlooking section 733.601, Florida Statutes, the district court’s analysis quoted above overlooks record evidence explaining why Taylor did not notify Infinity of his appointment as personal representative. Infinity’s

claims representative, Robert Fryer, learned on May 2 that Taylor had applied to the probate court for appointment as personal representative, and, consequently, Fryer told Taylor on May 11 (as confirmed by Fryer's trial testimony) that he would "follow-up with him [Taylor] for the estate of his wife." (R-40 784). Further, on May 16, Fryer informed the attorney whom Infinity retained to handle the guardianship, Kevin Korth, that Taylor had "applied to the courts to have himself named as the representative of his wife's estate" and instructed Korth to "deal directly with him [Taylor] concerning settlement of his deceased wife's bodily injury claim." (R-31 E55). The record is undisputed that through no fault of Taylor's, Fryer never "followed up" with Taylor regarding the estate as promised on May 11, and Korth never communicated with Taylor about the estate (or guardianship) as instructed by Fryer until after the settlement deadlines expired. Thus, despite the fact that Taylor never advised Infinity about his appointment as personal representative on May 14, the jury was justified in concluding that Taylor was not obligated to do so because he relied on Infinity's representation that it would contact him in that regard.

The district court's holding also overlooks the fact that Infinity never questioned Taylor's authority to negotiate a settlement on behalf of his wife's estate (and never refused to settle for that reason) until the insurer was sued for bad faith six years later. In fact, despite Infinity's steadfast insistence during the bad faith litigation that Taylor lacked legal authority to settle the wrongful death claim, the insurer issued Taylor a check covering the property damage to his deceased wife's vehicle before confirming Taylor's appointment as personal representative, even though the damaged vehicle was titled in the decedent's name and the property damage claim belonged to the estate.

(R-31 E10; R-42 1141).

The district court cited Williams v. Infinity Ins. Co., 745 So. 2d 573 (Fla. 5th DCA 1999), for the proposition that “[o]nly the personal representative is authorized to bind the estate and the survivors in the pre-suit settlement of a wrongful death claim” and thus “[t]he insurer is not obligated to settle with anyone other than the personal representative.” Infinity, 806 So. 2d at 508. In Williams, the decedent’s spouse and her child claimed the insurers acted in bad faith by failing to pay them policy limits before an estate had been opened and a personal representative appointed to the exclusion of the decedent’s three other children by a previous relationship. The fifth district rejected this contention because, under section 768.20, Florida Statutes, “a wrongful death action may be brought only by the personal representative for the benefit of all the decedent’s survivors and estate.” Williams, 745 So. 2d at 576. Thus, the personal representative must represent the interests of all survivors, and any settlement obviously must resolve the entire action for all survivors “to eliminate the possibility of a multiplicity of suits by competing beneficiaries and avoid a race to judgment.” Hess v. Hess, 758 So. 2d 1203, 1205 (Fla. 4th DCA 2000). In the instant case, unlike Williams, there were no competing claims from antagonistic family members and no contention that the insurer should have consummated a wrongful death settlement without court approval. Further, unlike decedent’s spouse in Williams, Taylor actually was appointed personal representative with full authority to bind the estate pursuant to section 733.601, Florida Statutes. Finally, nothing in Williams, the probate code or the wrongful death law prohibits the insurer from negotiating a settlement with the prospective personal representative subject to court approval.

## Minor's Settlement

Regarding Taylor's offer to settle his minor daughter's claim for bodily injury, the district court concluded:

Again, Taylor was without authority to make a valid offer to settle. He could not bind his daughter to the settlement without the court's prior approval, and he revoked his intent to settle prior to being appointed guardian and prior to the requisite court approval of the settlement offer. Infinity's failure to accept the "offer" cannot rise to the level of bad faith because Infinity simply did not have a reasonable opportunity to settle the claim.

Infinity, 806 So. 2d at 510 (emphasis supplied). By reaching this conclusion, the district court effectively held that a parent lacks authority to negotiate a settlement of his child's bodily injury claim without first being appointed guardian of the child's property and obtaining approval of the proposed settlement from the guardianship court. The district court's reasoning in this respect is directly contrary to the result reached by the first district in Government Employees Ins. Co. v. Grounds, 311 So. 2d 164 (Fla. 1st DCA 1975), cert. discharged, 332 So. 2d 13 (Fla. 1976). In that case, Nevils, a young flight student, was injured in a motor vehicle accident caused by the negligence of a drunk driver. Nevils' attorney offered to settle the case for policy limits but the insurer declined. An excess judgment was later entered against the insured. As one of its defenses to the subsequent bad faith action, the insurer contended that "since Nevils was a minor, his claim could not have been settled without approval of the court." Grounds, 311 So. 2d at 167. The district court rejected that defense to the bad faith action and succinctly noted:

This is correct, but a settlement of a minor's claim could never be accomplished if insurance companies took this attitude. All such settlements must necessarily be subject to court approval.

Grounds, 311 So. 2d at 167-68. Consistent with Grounds, Taylor acknowledged in

his May 2 letter that settlement of his daughter’s claim required “special papers to be filed in court” and that he would “work with your [Infinity’s] lawyers to handle that.” (R-31 E30). Infinity likewise understood this requirement and volunteered to obtain the necessary court approval at its expense. (R-40 784). Had Infinity followed through as agreed, as good faith required, Taylor would have been authorized to accept the settlement funds and execute a binding release of the insured. If Infinity was unable to comply with the deadline, as apparently was the case, it could have and should have requested a routine extension of time or deposited the settlement funds into an interest-bearing account as proposed in Taylor’s letter. Infinity, however, did neither—it ignored the claimant, failed to follow up on the court approval and, using the trial judge’s words, completely “dropped the ball,” resulting in an excess judgment against its insured.<sup>5</sup>

Although not citing Grounds, its rationale was applied by the court in Bateski v. Ransom, 658 So. 2d 630 (Fla. 2d DCA 1995). In that case, the court decided whether the parties reached a binding settlement of a minor’s bodily injury claim based on communications between the minor’s attorney and the tortfeasor’s liability insurer. The minor’s attorney offered to settle the claim for policy limits if tendered within 30 days and expressly conditioned the offer on execution of a special release. The liability insurer timely agreed to pay policy limits but conditioned acceptance of the offer on a “full release.” After the settlement deadline passed, the minor’s guardian

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<sup>5</sup> In response to Infinity’s argument that the insurer was not required to pay policy limits without a binding release, the trial judge cogently inquired: “Well, did not Infinity assume some obligation for effecting that [binding release] and then dropped the ball?” (R-44 OT 20).

filed suit. The trial court granted the defendants' motion to enforce the settlement.

The second district reversed because the parties had not reached a meeting of the minds regarding the form of release which was an essential term of the settlement offer. Concerning the claimant's status as a minor, the court observed:

The fact that Steven Bateski was a minor at the time of the offer does not control our decision in this matter. It is true that while Steven Bateski was a minor, the giving of a release form of any type would not have allowed the parties to conclude the matter since he and his mother would have had to cooperate in obtaining court approval of the settlement. That was not an essential term of any agreement, however, but was a contingency that did not affect the proposal in this instance.

Bateski, 658 So. 2d at 632. See also Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio, 343 So. 2d 1357, 1359 (Fla. 1st DCA 1977) (settlement offer submitted to minor pursuant to Rule 1.442, Florida Rules of Civil Procedure, was binding against minor for taxation of costs even though acceptance of such offer required court approval); Bodek v. Gulliver Academy, Inc., 702 So. 2d 1331, 1333 (Fla. 3d DCA 1997) (same as to offer submitted pursuant to section 768.79, Florida Statutes).

Grounds also is consistent with a well-reasoned decision from the Supreme Court of Wisconsin which further supports Berges on this issue. In Alt v. American Family Mut. Ins. Co., 71 Wis. 2d 340, 237 N.W.2d 706 (1975), summary judgment for the insurer in a bad faith case involving a minor's claim was granted, in part, because the trial court considered any settlement offer submitted by the minor's attorney without the guardian ad litem's participation a "nullity." Alt, 237 N.W.2d at 710. Under Wisconsin law, an insurer must give fair consideration to all settlement offers unless "jocular or frivolous." Baker v. Northwestern Nat'l Cas. Co., 26 Wis. 2d 306, 132 N.W.2d 493,

497 (1965). The insurer argued that a settlement offer without the guardian ad litem's participation was "jocular or frivolous" and could be ignored without incurring bad faith liability. In rejecting that argument, the Supreme Court of Wisconsin stated:

The trial court, and the insurance company on this appeal, seem to equate the offers of settlement, if indeed any offers were made, with those denominated as 'jocular or frivolous' in Baker II, because the claimant was a minor and the guardian ad litem had not joined in the offer. It is, of course, correct that a guardian ad litem must approve any settlement affecting his charge and, until that has been done, the settlement cannot be made final. Moreover, it is the practice of most insurance companies to insist that a settlement made with the consent of a guardian ad litem also be approved by the court. However, the fact that the agreement is not final until approved by the guardian and court does not mean that the antecedent offer is 'jocular or frivolous.'

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In the instant case, the insurance company and its lawyers were not ignorant of the law. They knew that these conditions subsequent are implicit in any settlement with a minor. In any event, we see no reason why the insurance company failed to take its obligation to its insured seriously merely because the guardian ad litem of the claimant failed to participate in the settlement overtures.

Alt, 237 N.W.2d at 714. In this case, the district court's conclusion that Infinity should be exonerated from bad faith liability because Taylor lacked legal authority to settle the minor's claim at the time he submitted his offer should be rejected for the same reasons stated in Alt.

The guardianship statutes cited by the district court likewise do not support the conclusion that Taylor lacked the requisite authority to settle his daughter's bodily injury claim. Section 744.387(2), Florida Statutes (Supp. 1990), requires a "legal guardianship" for net settlements over \$5,000, and section 744.387(1) requires court approval of such settlements in "the best interest of the ward." Section 744.387, however, does not require the guardian to obtain court appointment and approval of

the settlement before negotiating with the insurance company as the district court held. In fact, the statute contemplates settlements negotiated on the ward's behalf before appointment of a guardian:

When a settlement of any claim by or against the guardian, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, is proposed, but before an action to enforce it is begun, on petition by the guardian of the property stating the facts of the claim, question, or dispute and the proposed settlement, and on any evidence that is introduced, the court may enter an order authorizing the settlement if satisfied that the settlement will be for the best interest of the ward.

§ 744.387(1), Fla. Stat. (Supp. 1990) (emphasis supplied). Thus, the district court's holding that Taylor could not negotiate a settlement of his daughter's claim before his appointment as guardian and court approval of the proposed settlement is not supported by statute or case law and should not serve as a basis to relieve Infinity of its duty to consider the settlement offer in good faith.

### **C. PRACTICAL EFFECT OF DISTRICT COURT'S HOLDING**

The district court's holding overlooks the practical aspects of negotiating wrongful death and minor settlements with insurance companies, particularly when those claims involve limited insurance coverage. Typically, liability insurers and claimants, whether represented by counsel or not, agree to settle cases before the party acting for the family of the deceased or the minor's parent obtains court appointment as personal representative or guardian. After the insurer and family representative reach agreement, the insurance company generally handles the necessary court appointments and court approvals at its expense. Such expenses are payable under

the insurer's supplementary payments provision which covers settlement expenses over and above the bodily injury liability limits. (R-34 E790).

Under the district court's decision, insurers can disregard settlement offers in cases involving wrongful death or injuries to minors if the family member conducting negotiations has not been appointed by the court and has not obtained court approval to settle at the time the offer is made. Infinity, 806 So. 2d at 508. Thus, before submitting a settlement offer, the victim's family must retain counsel at considerable expense to secure the necessary court appointments and approvals even though the available insurance and potential recovery may be limited.

Further, under Florida law, "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992). Under the district court decision, insurers in wrongful death and bodily injury claims involving minors or other incompetents will not have an affirmative duty to initiate settlement negotiations as required by Powell unless and until a member of the victim's family or other qualified person has been appointed personal representative or guardian. This aspect of the district court's decision, Berges most respectfully suggests, marks a significant retrenchment in Florida insurance law which should not be sustained.

#### **D. EVIDENCE OF INFINITY'S BAD FAITH**

Infinity's failure to effectuate a settlement in this case within the prescribed time limits established by Taylor's offer is analogous to the insurer's conduct in Higgs v. Industrial Fire & Cas. Co., 501 So. 2d 644 (Fla. 3d DCA 1986), rev. denied, 511 So. 2d 298 (Fla. 1987). In that case, the insurer agreed to pay policy limits but delayed forwarding payment, resulting in the claimant filing suit and obtaining an excess judgment against the insured. In the bad faith action, the trial judge instructed the jury that the issue was limited to "whether Industrial Fire and Casualty failed to settle the claim of Edith Higgs against Sidney Jones within policy limits." Higgs, 501 So. 2d at 645. In reversing a judgment based on a jury verdict for the insurer, the appellate court reasoned that the jury instruction was too narrow; the trial court should have instructed pursuant to Florida Standard Jury Instruction (Civ.) MI 3.1 "on the issue whether Industrial had demonstrated bad faith through its failure to deliver the settlement draft on time." Id. In other words, although the insurer in Higgs offered to settle for policy limits, it still could be held liable for bad faith by failing to timely consummate the settlement as agreed. Here, although Infinity offered to settle for policy limits, the insurer (a) failed to procure Taylor's appointment as guardian and obtain court approval of the minor's settlement in a timely manner as agreed; (b) failed to communicate with Taylor regarding the guardianship even though Infinity promised Taylor it would do so; (c) failed to follow up with Taylor concerning his appointment as personal representative as agreed; and (d) simply allowed the settlement deadlines to expire without taking appropriate action. This evidence was sufficient to create a jury question concerning Infinity's bad faith in failing to settle Taylor's claims.

The jury's finding of bad faith also is supported by the opinions offered by Berges' expert witnesses that Infinity acted in bad faith. Under Florida law, expert testimony from practicing attorneys is relevant and admissible in bad faith actions on the ultimate issue whether the insurer has exercised good faith. See Grounds, 311 So. 2d at 168. Thus, the testimony from Berges' expert witness summarized in the statement of facts was sufficient to present a jury question on bad faith. See Cromarty v. Ford Motor Co., 341 So. 2d 507, 509 (Fla. 1971) (“[A]n expert opinion may support a jury verdict, so long as it is grounded in fact, even though it involves a conclusion as to causation, in other opinions, as well.”).

**II. THE DISTRICT COURT MISAPPLIED FLORIDA LAW BY HOLDING THAT A LIABILITY INSURER HAS NO DUTY TO ADVISE ITS INSURED (1) UNLESS THE INSURER RECEIVES A “VALID OPPORTUNITY TO SETTLE” OR (2) IF THE CLAIMANT’S SETTLEMENT OFFER CONTEMPLATES SETTLING WITHIN POLICY LIMITS.**

**A. DUTY TO ADVISE – EVIDENCE AND LEGAL ANALYSIS**

In addition to the obligation to settle, an insurer's duty under Florida law to exercise good faith and deal fairly with its insured requires it “to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same.” Boston Old Colony, 386 So. 2d at 785. The insurer's obligation to communicate with its insured and keep the insured fully informed is distinct from the insurer's obligation to settle claims within policy limits. Thus, even when it offers to pay policy limits, the insurer still may be found guilty of bad faith for failing to discharge its separate duty to advise the insured of the settlement offer and otherwise communicate meaningfully with the insured. See Odom v. Canal Ins. Co., 582 So. 2d 1203, 1205 (Fla. 1st DCA 1991) (“Canal has not referenced any authority for its argument that because it offered the

policy limits to the [claimants] with a 'reasonable condition' attached, it cannot be guilty of bad faith for failing to advise its insured of the offer.”).

In this case, the evidence was undisputed that Infinity breached the obligation mandated by Florida law to communicate with its insured by failing to inform Berges of Taylor's settlement offer and the insurer's response and by failing to warn the insured about the possibility of an excess judgment and steps he might take to avoid it until long after the settlement deadlines had expired. Had Berges been timely informed of the settlement negotiations and properly advised of the available measures to avoid an excess judgment, he could have contacted his insurance agent for assistance or hired an attorney who could have intervened to ensure that Infinity complied with the terms of Taylor's settlement offer. (R-37 289-90). As the instant case illustrates, a warning about an excess judgment communicated after the settlement deadline expires comes too late for the insured to take appropriate action to protect his interests. Moreover, once Infinity finally communicated with Berges by letter dated June 26, 1990, the insurer was less than candid when it told the insured that the company had offered policy limits of \$20,000 but that Taylor had refused to settle for that amount. (R-31 E85-87). Thus, the jury's verdict finding bad faith was amply supported on this additional basis. See Odom, 582 So. 2d at 1205 (holding that the trial court erred by granting summary judgment for the insurer when a jury might find that the insurer breached its separate obligation “to notify its insured of the [claimant's] offer and its own counteroffer”); Hartford Accident & Indem. Co. v. Mathis, 511 So. 2d 601, 602 (Fla. 4th DCA) (“In addition, there was evidence of the carrier's failure to communicate appropriately with its insured as well as a lack of candor and complete integrity in that which it did communicate, all of which could also justify the jury's finding of bad faith.”), rev. denied, 518 So. 2d 1275 (Fla. 1987).<sup>6</sup>

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<sup>6</sup> Infinity argued in the district court that the trial court erred by separately instructing the jury regarding Infinity's duty to advise the insured. However, because Infinity

## **B. DISTRICT COURT’S HOLDING ON DUTY TO ADVISE**

The district court held that Infinity did not breach its duty to advise the insured because (1) “if there was no valid opportunity to settle, Infinity could not have acted in bad faith by failing to notify Berges of the offer,” and (2) “since the ‘offer’ contemplated settling within policy limits (i.e. the settlement would have included a release without any obligation to Berges), the duty to involve Berges in the discussion did not apply.” Infinity, 806 So. 2d at 510. For the following reasons, Berges suggests that the district court’s decision on this point misapprehends the scope of an insurer’s duty to communicate with its insured.

### **Valid Opportunity to Settle**

An insurer’s duty under Florida law to exercise good faith and deal fairly with its insured requires it “to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same.” Boston Old Colony, 386 So. 2d at 785 (emphasis supplied). The term “settlement opportunities” employed by Boston Old Colony broadly refers to all settlement discussions and negotiations, not merely settlement offers which the insurer considers “valid settlement opportunities.” See Powell, 584 So. 2d 12 14-15 (“Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the

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stipulated to a general verdict form which did not differentiate between Berges’ two theories of recovery—failure to settle and failure to advise—the two issue rule precludes appellate review on this point. See Barth v. Khubani, 748 So. 2d 260 (Fla. 1999) (R-42 1218-20).

insurer fails to disclose settlement overtures to the insured, the jury may find bad faith.”) (emphasis supplied).

The district court’s holding that the insurer is not obligated to communicate with the insured unless the offer represents a “valid opportunity to settle” also overlooks Florida decisions which hold that an insurer’s duty to communicate with and advise the insured may arise before the insurer receives a settlement offer or even when the insurer never receives a settlement offer. In Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938), this court determined that the insurer’s duty to advise the insured of a potential excess judgment arises, not when a valid settlement opportunity develops or when the claimant files suit, but as soon as it becomes apparent to the insurer that the claimant’s potential damages exceed policy limits. See Shaw, 184 So. at 858 (“After it has made an investigation of the accident and the injury, and faces the probability that a recovery will exceed indemnity, it plainly becomes the duty of the insurer to indicate such fact to the insured, to the end that he may take such steps as may be open to him for his own protection.”) (quoting Hilker v. Western Auto. Ins. Co., 204 Wis. 12, 235 N.W. 413, 414 (1931)). Expanding upon Shaw, the court in Powell held that when liability is clear and injuries so serious that a judgment in excess of policy limits is likely, a jury question regarding the insurer’s duty to advise is presented even though the claimant never makes a settlement offer. See Powell, 584 So. 2d at 14.

In this case, Infinity knew by April 30, 1990, before Taylor submitted his settlement offer, that its insured was “100%” at fault and that Taylor’s damages greatly exceeded the insured’s minimum policy limits. (R-37 263). At that point, the insurer owed Berges the duty to inform him concerning his potential exposure and advise him

regarding measures he might take to protect himself from financial harm. See Shaw, 184 So. at 858. Nevertheless, Infinity did not advise Berges about the possibility of an excess judgment until after the deadline for accepting Taylor’s settlement offer had expired. (R-31 E85-87; R-38 495-96; R-39 656).

### **Policy Limits Settlement Offer**

The district court erred further when it determined that “since the ‘offer’ contemplated settling within policy limits (i.e. the settlement would have included a release without any obligation to Berges), the duty to involve Berges in the discussion did not apply.” Berges, 806 So. 2d at 510. First, as mentioned previously, when coverage is limited, liability is clear and damages are severe, the insurer’s duty to advise may arise before a valid opportunity to settle is presented. Further, the court’s decision on this point overlooks the fact that the insured is not protected from an excess judgment merely because the claimant submits an offer to settle for policy limits and the insurer ostensibly accepts the offer. For example, in Higgs, supra, the insurer agreed to pay policy limits but delayed forwarding payment, resulting in the claimant filing suit and obtaining an excess judgment against the insured. Although the insurer offered to settle for policy limits, the Higgs court held that it still could be found guilty of bad faith and liable for the excess judgment for failing to timely consummate the settlement as agreed. Similarly, in Odom, the court held that the insurer may be found guilty of bad faith for failing to discharge its separate duty to advise the insured of a settlement offer even when the insurer has agreed to pay policy limits. See Odom, 582 So. 2d at 1205 (“Canal has not referenced any authority for its argument that because it offered the policy limits to the [claimants] with a ‘reasonable condition’ attached, it

cannot be guilty of bad faith for failing to advise its insured of the offer.”).

The district court also misapprehended the scope of the insurer’s duty to advise as explained by Shaw and Boston Old Colony when it cited A.W. Huss Co. v. Continental Cas. Co., 735 F.2d 246 (7th Cir. 1984), and Shuster v. S. Broward Hosp. Dist. Physicians’ Prof’l Liab. Ins. Trust, 591 So. 2d 174 (Fla. 1992), as authority for its ruling. See Infinity, 806 So. 2d at 510. Both of those decisions involve claims which were actually settled by the insurer within policy limits, and the insureds, therefore, were insulated from an excess judgment. Here, the claims were not settled and Berges has suffered an excess judgment which remains outstanding. Neither A.W. Huss nor Shuster holds that an insurer is relieved of its duty to advise the insured of a settlement opportunity within policy limits merely because the insurer plans to accept the offer.

**III. THE DISTRICT COURT ERRED BY AFFIRMING THE PARTIAL SUMMARY JUDGMENT FOR THE INSURER ON THE ISSUE WHETHER THE INSURER BREACHED ITS DUTY OF GOOD FAITH BY FAILING TO ACCEPT A CUNNINGHAM PROPOSAL WHEN ACCEPTANCE OF THE PROPOSAL WOULD HAVE PROTECTED THE INSURED FROM AN EXCESS JUDGMENT.**

In the event this court quashes the district court decision with directions to reinstate the final judgment, the Cunningham issue will be moot. However, if this court sustains the district court’s decision on the issues previously argued, it should quash the portion of the district court decision which affirms the trial court’s summary judgment ruling in Infinity’s favor on the Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994), this court approved a procedure for expeditiously resolving bad faith cases which allows the parties to decide the bad faith issue by declaratory judgment before adjudication of the underlying tort claim. Under the terms

of a “Cunningham agreement,” the parties stipulate that if the insurer is exonerated from bad faith in the declaratory judgment action, the claimant accepts policy limits and releases the insured from any personal liability. If, however, the insurer is found liable for bad faith, the insurer agrees to pay all the claimant’s damages irrespective of policy limits. Under either outcome, the insured is fully protected from an excess judgment. This court noted that Cunningham agreements promote settlement and shorten litigation and should be enforced, especially because the agreement “result[s] in a full release of the insured if no bad faith were found, thereby avoiding a time consuming and expensive trial on negligence and damages.” Cunningham, 630 So. 2d at 182.

#### **A. THE TRIAL COURT’S DECISION**

In this case, the trial court committed reversible error by rejecting Berges’ contention that Infinity’s failure to accept Taylor’s Cunningham proposal was additional evidence of bad faith. First, a Cunningham proposal is a settlement offer that operates exactly like a policy limits settlement demand because it gives the insured a complete release and protects him from excess liability. Accordingly, the insurer’s decision whether to accept a Cunningham settlement offer implicates its fiduciary responsibility to protect its insured from an excess judgment and therefore should be considered by the trier of fact in evaluating the insurer’s conduct in the same manner as any other policy limits settlement offer.

Further supporting Berges’ position, “[a]n insurance company acts in bad faith in failing to settle a claim against its insured within its policy limits when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly

toward its insured and with due regard for his interests.” Fla. Std. Jury Instr. (Civ.) MI 3.1 (emphasis supplied). In this same vein, this court has held that bad faith should be determined from the “totality of the circumstances.” State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62-63 (Fla. 1995). “All of the circumstances” and the “totality of the circumstances” in this case should include evidence regarding Infinity’s acceptance or rejection of the Cunningham proposal. Cf. Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 530-31 (Fla. 1974) (evidence of bad faith for insurer to reject post-trial settlement offer to release insured from excess judgment in return for payment of policy limits plus an assignment of the insured’s bad faith action).

The trial court based its partial summary judgment on the following analysis of contract law (R-18 3545-46):

Because an action for bad faith is based on the contract, the insurer’s duty to act in good faith must be considered in light of the express provisions of the contract. Id.

Moreover, the implied covenant of good faith may not be invoked to override the express terms of an agreement between the parties. See Barnes v. Burger King Corp., 932 F. Supp. 1420, 1438 (S.D. Fla. 1996). A claim for breach of the implied covenant of good faith cannot be maintained when a party to the contract cannot claim breach of any express term of the contract. Id.; see also Burger King v. Holder, 844 F. Supp. 1528, 1530 (S.D. Fla. 1993) (citing Alan’s of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1429 (11th Cir. 1990)).

In the case at bar, the insurance policy issued by the Defendant to the Plaintiff expressly limited the Defendant’s obligation to settle for the insurance policy monetary limits. There was no duty, expressed or implied, within the insurance policy which required the Defendant to agree to litigate a claim which sought to impose additional, extra-contractual liability on the Defendant.

The trial court was incorrect in its conclusion that Berges cannot claim breach of an express contract term. An action for bad faith under Florida law is derived from the express policy provisions which require the insurer to defend the insured and which compel the insured

to relinquish control of settlement decisions to the insurer.<sup>7</sup> See Allstate Ins. Co., 680 So. 2d at 1116. The breach of these contractual provisions creates a cause of action under Florida law for bad faith and exposes the insurer to liability for the excess judgment. See Baxter, 285 So. 2d at 656. Thus, Berges' bad faith claim, whether based on the insurer's failure to settle within policy limits, failure to advise the insured or failure to settle by accepting a Cunningham proposal, is based on express contract terms, not merely the implied covenant of good faith and fair dealing inherent in every contract.

Further, the insurance policy's monetary limits do not preclude a bad faith action based on the insurer's failure to accept a Cunningham proposal. Although every liability insurance policy contains a monetary coverage limit, Florida law recognizes liability in bad faith cases for damages above that limit when the insurer breaches its fiduciary obligation. See Swamy v. Caduceus Self Ins. Fund, Inc., 648 So. 2d 758, 759 (Fla. 1st DCA 1994). If the trial court is correct that bad faith-excess liability impermissibly collides with an insurer's policy limits provision, sixty-five years of Florida bad faith jurisprudence must be discarded.

## **B. THE DISTRICT COURT'S DECISION**

The district court never addressed the merits of the Cunningham argument because the court determined that Taylor submitted his proposal before the Cunningham case was decided at a time when district court decisions established that the parties could not try the bad faith case before litigating the underlying tort claim because a cause of action for bad faith does not accrue until entry of an excess judgment. See Infinity,

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<sup>7</sup> The policy in this case requires the insurer "to defend any suit or settle any claim we [Infinity] think appropriate." (R-34 E789).

806 So. 2d at 510 (citing Dixie Ins. Co. v. Gaffney, 582 So. 2d 64 (Fla. 1st DCA 1991)). The district court thus concluded that “it was not bad faith on the part of Infinity to follow the law as it existed at that time and reject the proposal.” Infinity, 806 So. 2d at 810.

The district court erred by analyzing Infinity’s decision based on case law prevailing at the time Taylor submitted the proposal. Although the status of the case law existing in 1990 is relevant to the question whether Infinity acted in bad faith by refusing to accept Taylor’s Cunningham proposal, “[a]n appellate court is generally required to apply the law in effect at the time of its decision.” Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986).

The district court also erred when it cited Dixie Insurance for the proposition that “[a]t the time Taylor made his offer, the law required that an excess judgment exist before a bad faith claim could be brought.” Infinity, 806 So. 2d at 510. Dixie Insurance was not decided until June 14, 1991, more than seven months after Infinity rejected the offer. (R-15 2966). See Infinity, 806 So. 2d at 510 n.7 (acknowledging that Dixie Insurance and similar cases were decided after Infinity rejected Taylor’s proposal but holding that Infinity’s refusal was not bad faith). Additionally, Taylor actually submitted a second Cunningham proposal after the Cunningham case was decided. (R-15 2893 at Tab 40). Berges acknowledges that this second offer was not argued in the district court until Berges filed his motion for rehearing; however, the document was submitted to the trial court in opposition to Infinity’s motion for summary judgment. (R-15 2893 at Tab 40).

**CONCLUSION**

The district court’s decision should be quashed and the cause remanded with directions to reinstate the final judgment and the orders awarding attorney’s fees and costs. Alternatively, this court should reverse the trial court’s summary judgment on the Cunningham issue and order a new trial based on that theory of recovery.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Elizabeth C. Wheeler, P.O. Box 2266, Orlando, FL 32802-2266; Charles W. Hall, P.O. Box 210, St. Petersburg, FL 33731; Tracy Raffles Gunn, P.O. Box 1438, Tampa, FL 33601; James Kaplan, 100 Southeast Second Street, Miami, FL 33131; David M.

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**CERTIFICATE OF TYPE SIZE AND STYLE**

The undersigned attorney hereby certifies that this brief was prepared using a  
14-point Times New Roman proportionally spaced font in accordance with Rule  
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