NO. 18-108

In the Supreme Court of the United States

DAVID DUNCAN,

Petitioner,

–v–

GEICO GENERAL INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Opinion from the Eleventh Circuit Court of Appeals affirming the District Court's grant of summary judgment in favor of GEICO is in accord with the U.S. Constitution and the established United States Supreme Court precedent of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel states that Respondent, GEICO GENERAL INSURANCE COMPANY, is a wholly-owned subsidiary of BERKSHIRE HATHAWAY, INC., a publicly traded corporation.

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JURISDICTION

The Eleventh Circuit Court of Appeals issued its opinion on May 1, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

The Opinion from the Eleventh Circuit Court of Appeals affirming the district court's Order granting summary judgment in favor of GEICO is a straightforward application of settled law in Florida. The Opinion does not conflict with any decision from another United States Court of Appeals, or any other court for that matter. Further, the Eleventh Circuit's

Opinion did not depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory powers. Moreover, this case does not raise an important question of either federal or state law. In reality, Petitioner is requesting this Court grant certiorari to correct what he believes to be an erroneous factual finding and/or misapplication of a rule of law. This is not a compelling reason to obtain review. Finally, even if the Court were to take up the issue in the question presented, this case is not appropriate to answer that question as the Eleventh Circuit properly applied Florida law. The petition should be denied.

STATEMENT OF THE CASE

The genesis of this case is an automobile accident that occurred on November 12, 2013, involving Isabel Gomez-Diego ("Diego") and David Duncan ("Duncan"). At the time of the accident, Duncan was insured under a GEICO liability policy, number 4265100992 ("the Policy"). The Policy provided Uninsured/Underinsured Motorist ("UM") coverage in the amount of $10,000 per person/$20,000 per occurrence.[1] The Policy required, *inter alia*, a "[p]ermanent injury within a reasonable degree of medical probability" before non-economic damages could be paid under the UM coverage. This provision of the Policy was incorporated

[1] Duncan's Policy also provided Personal Injury Protection ("PIP") coverage in the amount of $10,000. [*Id.*]. Diego did not carry bodily injury insurance coverage at the time of the accident.

from Florida Statute Section 627.737(2), which provides that a that a plaintiff may recover noneconomic tort damages for pain, suffering, mental anguish, and inconvenience because of injury arising out of the use of a motor vehicle only if that injury or disease consists in whole, or in part of: (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) significant and permanent scarring disfigurement; or (d) death. Fla. Stat. § 627.737(2).

Just over a week after the accident, GEICO received a letter of representation form attorney Karl Pansler ("Pansler") advising that he represented Duncan in connection with the accident. GEICO subsequently received a time limit demand from Pansler seeking payment of the full $10,000 UM policy limits. In accordance with its good faith duties under Florida law, GEICO reviewed the demand and concluded that Duncan's injuries appeared to be soft tissue in nature. Thus, pursuant to the terms of the Policy and clear Florida law, Duncan was only entitled to economic damages. GEICO made a good faith offer to settle Duncan's UM claim. Unfortunately, however, GEICO's offer was rejected and Duncan subsequently filed a lawsuit against GEICO ("the underlying action").[2] During discovery in the underlying action, new information regarding Duncan's injuries came to light that GEICO did not previously have; thus, in

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[2] There are several more facts pertaining to GEICO's good faith handling of Duncan's UM claim, however, they are simply not relevant to ruling on the petition and thus will not be stated in any greater detail at this time.

accordance with its good faith duties under Florida law, GEICO offered the full $10,000 UM policy limits to settle Duncan's claim. Duncan did not accept GEICO's offer and continued to litigate the underlying action, which resulted in a jury verdict of $300,000.

Duncan then initiated the present first-party bad faith litigation, which GEICO removed to the Middle District of Florida based on diversity jurisdiction. GEICO filed a Motion for Summary Judgment on September 15, 2017, on the basis that no reasonable jury could conclude, based on the undisputed material facts, that GEICO acted in bad faith in the handling of Duncan's UM claim. Specifically, GEICO pointed out that during settlement negotiations Duncan did not provide GEICO with proof that he suffered a permanent injury within a reasonable degree of medical probability, or that he suffered a permanent loss of an important bodily function and thus, did not meet the threshold requirement under Florida law for noneconomic damages. Accordingly, Duncan was only entitled to economic damages, which were indisputably less than the UM policy limits. Further, Duncan did not have any out-of-pocket expenses and still had approximately $6,400 left in PIP coverage benefits available for future medical care. Thus, GEICO moved for summary judgment on the basis that its offers to settle the claim were reasonable and that no reasonable jury could conclude that GEICO acted in bad faith. On October 14, 2017, the district court granted GEICO's Motion for Final Summary Judgment.

Duncan timely filed a Notice of Appeal to the Eleventh Circuit seeking review of the District Court's Order granting summary judgment in favor of GEICO.

In his Appellant Brief in the Eleventh Circuit Court of Appeals, Duncan argued that the district court violated his Seventh Amendment right to a jury trial by granting summary judgment in GEICO's favor. Duncan posited this argument based on the false premise that the decisions the district court relied on in reaching its decision ignored "the indoctrination of *Erie* and the contradictory precedent established in Florida state courts."

In its Appellee Brief, GEICO pointed out that the cases the district court relied on all appropriately applied Florida substantive law and did not ignore the *Erie* doctrine. Rather, the cases the district court relied on followed established Florida precedent and were in line with the clear mandate of the Florida legislature requiring a Plaintiff to establish a permanent injury within a reasonable degree of medical probability in order to be entitled to noneconomic damages. GEICO's appellee brief further explained that Duncan's argument regarding his right to a jury trial ignored clear precedent from the Florida Supreme Court establishing that bad faith can be decided as a matter of law.

On May 1, 2018, the Eleventh Circuit Court of Appeals issued its Opinion affirming the decision of the district court. The Eleventh Circuit specifically stated that "[u]nder Florida law, which was incorporated into Duncan's policy with GEICO, 'noneconomic damages are available under an insurance policy only if the plaintiff incurs a 'permanent injury,' which must be established 'within a reasonable degree of medical probability' within the cure period.'" *Citing* Fla. Stat. § 627.737(2)(b). The Eleventh Circuit went on to state

that because Duncan did not provide any evidence to GEICO establishing a permanent injury within a reasonable degree of medical probability, he was not entitled to noneconomic damages and thus, GEICO's offer to settle the claim were reasonable. Thus, the Eleventh Circuit affirmed the grant of summary judgment in favor of GEICO. The petition for certiorari, to which GEICO now responds, ensued.

REASONS FOR DENYING THE PETITION

I. THIS CASE FAILS TO MEET THE CRITERIA FOR REVIEW

Pursuant to Rule 10 of the Supreme Court of the United States:

> [r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another Untied States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. Rule 10 further notes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

The Opinion from the Eleventh Circuit Court of Appeals affirming the district court's Order granting summary judgment in favor of GEICO is a straightforward application of settled law in Florida. The Opinion does not conflict with any decision from another United States Court of Appeals, or any other court for that matter. Further, the Eleventh Circuit's Opinion did not depart from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory powers. Moreover, this case does not raise an important question of either federal or state law. The petition should be denied.

A petition for certiorari review to the United States Supreme Court is an extraordinary remedy that is rarely granted. Indeed, this Court grants review in less than one percent of all petitions for certiorari

that are filed. Certiorari review is reserved for cases that present the most compelling circumstances. Petitioner has failed to provide any compelling reasons for the granting of a writ of certiorari in this action. The primary basis that Petitioner posits for obtaining certiorari review is that the Eleventh Circuit Court of Appeals, as well as the district court, purportedly misapplied Florida law and, instead, applied "federal common law" that has developed through an apparent disregard of the *Erie* Doctrine.

In reality, however, Petitioner is really requesting this Court grant certiorari to correct what he believes to be an erroneous factual finding or misapplication of a rule of law. This is not a compelling reason to obtain review. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (explaining that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."). Even a cursory review of the petition makes it clear that Petitioner is simply not happy with the results from either the district court or the Eleventh Circuit Court of Appeals and is now seeking a third attempt to re-argue an area of law that is well settled in Florida. The petition should be denied.

II. THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT

Even if the Court were to take up the issue of whether federal courts are wrongfully developing "federal common law" in derogation of the *Erie* doctrine, this case is not appropriate to answer that question as the Eleventh Circuit properly applied Florida law.

Throughout the appeal in the Eleventh Circuit, Respondent went to great lengths to criticize the district court (as well as several other federal courts) by arguing that it ignored Florida law and posited that "[h]ad the lower court followed Florida law on this precise legal question, there is no way summary judgment would have been granted" In fact, Respondent went so far as to argue that the district court's decision to grant summary judgment in GEICO's favor "is unheard of in Florida legal history." The Eleventh Circuit properly rejected this hyperbolic argument. This Honorable Court should too.

Petitioner's assertion that the Eleventh Circuit Court of Appeals' Opinion is in derogation of the United States Constitution and violated the *Erie* doctrine rests squarely on a fundamental misunderstanding of Florida law and a mischaracterization of the Eleventh Circuit's ruling, which simply applied controlling Florida law to the facts of the case. In Florida, summary judgment in favor of an insurer is appropriately granted when a court determines that, as a matter of law, the insurer did not act in bad faith. *See e.g.*, *Berges v. Infinity Ins. Co.*, 896 So.2d at 680 (Fla. 2004); *Boston Old Colony v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980). Many Florida state courts have granted summary judgment in favor of

insurers after making such a determination. *See e.g.*, *Gutierrez*, 386 So.2d at 785; *State Farm Fire & Casualty Co. v. Zebrowski*, 706 So.2d 275 (Fla. 1997); *Cruz v. American United Ins. Co.*, 580 So.2d 311 (Fla. 3d DCA 1991); *Caldwell v. Allstate Ins. Co.*, 453 So.2d 1187 (Fla. 1st DCA 1984); *Clauss v. Fortune Ins. Co.*, 523 So.2d 1177 (Fla. 5th DCA 1988).

Petitioner cites to the Florida Supreme Court's Opinion in *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980) for the proposition that bad faith is sometimes a question of fact for a jury to decide. What Petitioner fails to point out, however, is that in *Gutierrez*, the Florida Supreme Court determined that, as a matter of law, Boston Old Colony did not act in bad faith. *Gutierrez*, 386 So.2d at 785-86. While this case was decided on a motion for directed verdict, rather than summary judgment, the analysis is the same. The *Gutierrez* court found that there was "no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer." *Id.* Thus, *Gutierrez* makes clear that a Florida court deciding-as a matter of law-the issue of whether an insurer acted in bad faith is certainly not "unheard of in Florida legal history."

Similarly, in *Clauss*, Florida's Fifth DCA held that summary judgment was appropriate because there was not sufficient evidence of bad faith conduct on the part of the insurer. *Clauss*, 523 So.2d at 1178. The holding in *Clauss* makes it clear that an insurer who acts reasonably in its efforts to settle a claim may not be found liable for bad faith even when the claim fails to settle. Similarly, in *Caldwell*, Florida's First DCA determined that, as a matter of law, an insurer

had not acted in bad faith and was entitled to summary judgment where it could not "reasonably be said that Allstate or its counsel was guilty of the kind of conduct which has typified those cases in which the courts have found the existence of bad faith." 453 So. 2d at 1190.

In addition to these cases, other Federal courts—applying Florida law—have also consistently held that summary judgment in favor of the insurer is proper where, as a matter of law, the insurer could not have acted in bad faith. *See e.g.*, *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113 (11th Cir. 2016) ("[w]here a judge concludes as a matter of law a plaintiff has not established her bad-faith case against an insurer, he must remove the case from the jury for decision."); *Wojciechowski v. Allstate Property & Casualty Ins.*, WL 10732584 (M.D. Fla. December 27, 2016); (granting summary judgment in insurer's favor in first party bad faith action); *Harris v. Geico Gen. Ins. Co.*, 961 F.Supp.2d 1223, 1232 (S.D. Fla. 2013), *aff'd*, 619 F. App'x 896 (11th Cir. 2015) (same); *See also Novoa v. GEICO*, 2013 WL 179213 (S.D. Fla. 2013), *aff'd* 542 Fed. Appx. 794 (11th Cir. 2013); *Cardenas v. GEICO Casualty Co.*, 760 F.Supp.2d 1305, 1310 (M.D. Fla. 2011); *Messinese v. USAA Cas. Ins. Co.*, 622 F. App'x 835 (11th Cir. 2015); *Johnson v. Geico General Ins. Co.*, 318 Fed.Appx. 847 (11th Cir. 2009). All of these cases applied Florida substantive law and any argument to the contrary is baseless. These Federal courts cannot be said to be ignoring the *Erie* doctrine and developing their own "federal common law" when Florida law clearly establishes that bad faith can be determined as matter of law. Petitioner is essentially arguing that Federal Rule of Civil Procedure 56 is in

derogation of the *Erie* doctrine and that any grant of summary judgment in a bad faith action is unconstitutional. That is obviously not the case. Petitioner's argument that "[h]ad the lower court followed Florida law on this precise legal question, there is no way summary judgment would have been granted" is simply incorrect. Both the district court and the Eleventh Circuit Court of Appeals applied clear Florida law.

The fact that the district court and Eleventh Circuit applied Florida law becomes even more apparent when considering that the Florida legislature has mandated that an insured may only recover economic damages, such as medical expenses or lost wages, where the injuries do not meet the threshold set forth in Fla. Stat. § 627.737(2). *Cadle*, 838 F.3d at 1113; *Harris*, 961 F.Supp.2d at 1223. That provision provides that a plaintiff may recover non-economic tort damages for pain, suffering, mental anguish, and inconvenience because of injury arising out of the use of a motor vehicle only if that injury or disease consists in whole, or in part of: (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) significant and permanent scarring disfigurement; or (d) death. Fla. Stat. § 627.737(2); *Id.* These threshold requirements are also incorporated in the Florida uninsured motorist statute. Specifically, Florida Statute § 627.727(7) provides in pertinent part that, "the legal liability of an uninsured motorist coverage insurer does not include damages in tort for pain, suffering, mental anguish and inconvenience unless the injury or disease described in one or more paragraphs (a)-(d) of 627.737(2)." *See* Fla. Stat. § 627.727(7). This threshold

requirement is also mandated by the Policy of insurance issued to Duncan by GEICO in this matter. [Doc. 27-4]. In the Exclusions section for the Underinsured Motorist Coverage the Policy specifically provides:

> 6. To any damages for pain and suffering that the insured may be legally entitled to recover against an uninsured motorist unless the injury or disease caused by the uninsured motorist accident resulted in:
>
> (a) Significant and permanent loss of an important bodily function; or
>
> (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; or
>
> (c) Significant and permanent scarring or disfigurement; or
>
> (d) Death.

GEICO's Policy and these statutes are unambiguous and clearly mandate that without a showing of a permanent injury, within a reasonable degree of medical probability, a plaintiff is not entitled to noneconomic damages. During the settlement discussions, Duncan did not provide any information to GEICO establishing a permanent injury within a reasonable degree of medical probability and failed to provide proof that he suffered a permanent loss of an important bodily function. Thus, Duncan was not entitled to noneconomic damages. This is not something left to the discretion of the court—this is the law in Florida.

The Florida Supreme Court has repeatedly and unequivocally held that "the plain meaning of statutory

language is the first consideration of statutory construction." *State v. Bradford*, 787 So.2d 811, 817 (Fla. 2001) (quoting *Capers v. State*, 678 So.2d 330, 332 (Fla.1996)) It is equally well settled in Florida jurisprudence that "[w]here the language of the statute is plain and unambiguous, there is no need for judicial interpretation." *Bradford*, 787 So.2d 811, 817 (quoting *T.R. v. State*, 677 So.2d 270, 271 (Fla.1996); *see also State v. Dugan*, 685 So.2d 1210, 1212 (Fla. 1996) ("If the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended."); *Stoletz v. State*, 875 So.2d 572, 575 (Fla. 2004) ("This Court has repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction."); *see also Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454 (Fla. 1992) ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.").

Thus, it is clear that the Petition should be denied. The decision from the Eleventh Circuit Court of Appeals appropriately applied Florida substantive law and is not in derogation of the U.S. Constitution nor is it in violation of the *Erie* doctrine. Rather, the decision to affirm the district court's grant of summary judgment in favor of GEICO was based on clear and unwavering precedent, was in accord with GEICO's Policy, and was also in line with the clear mandate of the Florida legislature requiring a Plaintiff to establish a permanent injury, within a reasonable degree of medical

probability, in order to be entitled to noneconomic damages. The district court and the Eleventh Circuit were not ignoring precedent, they were adhering to it.

CONCLUSION

For the reasons addressed herein, the petition for certiorari should be denied.

Respectfully submitted,

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