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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner respectfully submits this supplemental brief pursuant to this Court's Rule 15.8 to respond to the brief of GEICO General Insurance Company and provide new precedent authored by the Florida Supreme Court regarding issues directly related to this matter.

The brief of GEICO General Insurance Company argued in its introduction that "[t]he Opinion from the Eleventh Circuit Court of Appeals affirming the district court's Order granting summary judgment in favor of GEICO is a straight forward application of settled law in Florida[;]" however, as recently as September 20, 2018, no more than two weeks from the date of this brief, the Supreme Court of Florida directly criticized the Eleventh Circuit's interpretation of Florida's bad faith law and went so far as to state that "[f]ederal case law interpreting our bad faith precedent does not always hit the mark." *Harvey v. GEICO Gen. Ins. Co.*, No. SC17-85 (Fla. 2018).

I. THE STANDARD OF BAD FAITH LAW IN FLORIDA HAS RECENTLY BEEN REESTABLISHED BY THE FLORIDA SUPREME COURT.

In *Harvey*, the specific issue was whether the Fourth District Court of Appeal misapplied the Court's bad faith precedent and relied on inapplicable federal precedent from the Eleventh Circuit.[1] This issue arose

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[1] It should be noted that *Harvey v. GEICO Gen. Ins. Co.* involves the very same corporation, GEICO, which is the Respondent in this matter, as well as the same Counsel representing GEICO, B. Richard Young.

due to the Fourth District concluding, in relevant part, that "the evidence was insufficient as a matter of law to show that the insurer acted in bad faith[.]" *GEICO Gen. Ins. Co. v. Harvey*, 208 So. 3d 810, 812 (Fla. 4th DCA 2017). The Supreme Court of Florida disagreed with this ruling and held that the Fourth District's conclusion was a "misapplication of our bad faith precedent as set forth in *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), and, more recently, in *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2004)."[2] *Harvey*, No. SC17-85 (Fla. 2018). The Supreme Court of Florida identified that "[n]ot only did the Fourth District misapply our well-established bad faith precedent but it relied, in part, on nonbinding federal cases that cannot be reconciled with our clear precedent." *Id.* at 3. As a result, the Fourth District's decision was quashed and remanded with instructions to reinstate the final judgment.

In an effort to set the record straight with regards to bad faith, the Supreme Court of Florida explained in *Harvey* that "bad faith law was designed to protect insureds who have paid their premiums and who have fulfilled their contractual obligations by cooperating with the insurer in the resolution of claims." *Berges*, 896 So. 2d at 682. Thus, "bad faith jurisprudence merely holds insurers accountable for failing to fulfill their obligations, and our decision does not change this basic premise." *Id.* at 683. Amongst said obligations,

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[2] Both *Boston Old Colony* and *Berges* are Florida cases that Petitioner also argued the Eleventh Circuit did not follow.

the insurer "*must investigate the facts*[3], 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." (Emphasis added). *Boston Old Colony*, 386 So. 2d at 785.

With this, the Supreme Court of Florida emphasized that "the focus in a bad faith case is not on the actions of the claimant but rather those of the insurer in fulfilling its obligations to the insured." *Berges*, 896 So. 2d at 677. The Supreme Court of Florida galvanized that it is for the jury to decide whether the insurer failed to "act in good faith with due regard for the interests of the insured." *Id.*

II. THE ELEVENTH CIRCUIT, AS WELL AS FEDERAL COURTS AS A WHOLE, HAVE MISINTERPRETED AND MISCONSTRUED FLORIDA BAD FAITH LAW.

The Florida Supreme Court heavily criticized the Eleventh Circuit when they "cherry-picked a single clause from this Court's opinion" in *State Farm Mt. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995), yet "failed to consider our opinion in *Boston Old*

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[3] As the record in this case shows, this obligation was not fulfilled, as the adjuster for GEICO, Ms. Jessica Maslyn, did not even know what one of the injuries (brachial plexus injury) Duncan sustained was, nor did she bother to even look it up before assigning a value to his claim. Moreover, an additional adjuster that was assigned to Mr. Duncan's claim, Ms. Fawn Allen, testified that GEICO had the responsibility to determine whether or not Mr. Duncan's injuries were permanent.

Colony, where we made clear that there is far more to bad faith inquiry than whether the insurer acted in its own interest." *Harvey*, No. SC17-85 at 14-15. The Supreme Court of Florida also made clear that they have "never held or even suggested that an insured's actions can let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith in handling the insured's claim."[4] *Id.* at 25.

Lastly, and perhaps most importantly, regarding Florida's Fourth District Court of Appeal's reliance upon federal case law, it was observed by the Supreme Court of Florida that "[t]o the extent that the federal cases permit summary judgment based on Fed. R. Civ. P. 56 they are of limited precedential value in Florida summary judgment cases because Florida places a higher burden on a party moving for summary judgment in state court." *Id.* at 25. *See also Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 923-24 (Fla. 4th DCA 2007); *Visingardi v. Tirone*, 193 So. 2d 601 (Fla. 1966); *5G's Car Sales, Inc. v. Florida Dep't of Law Enforcement*, 581 So. 2d 212 (Fla. 3d DCA 1991); and *Green v. CSX Transp.*, 626 So. 2d 974 (Fla. 1st DCA 1993).

The Supreme Court of Florida has recognized the federal courts' misinterpretation of their bad faith legal precedent and has now, by way of *Harvey*, firmly reestablished what it entails. If the Eleventh Circuit were to correctly adhere to Florida law, as it is obligated to do according to the Erie Doctrine, as well

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[4] This is an important fact given that Respondent argues Duncan did not provide GEICO ample evidence to determine a permanent injury when, in fact, Duncan had, but GEICO failed to investigate.

as its own standards[5], there is no possible way summary judgment could have been granted to GEICO, based on the established facts of this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[5] A court ruling on a motion for summary judgment must "view all evidence and draw all reasonable inferences in favor of the nonmoving party." *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151 (11th Cir. 2012)