

In the  
Supreme Court of the United States

---

RAUL A. PELAEZ,  
AS LIMITED GUARDIAN OF THE PERSON AND  
PROPERTY OF JOHN POUL PELAEZ, WARD,

*Petitioner,*

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,  
*Respondent.*

---

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

---

**BRIEF IN OPPOSITION**

---

JORDAN M. THOMPSON  
*COUNSEL OF RECORD*  
YOUNG, BILL, BOLES, PALMER, DUKE & THOMPSON, P.A.  
401 E. JACKSON ST., SUITE 2950  
TAMPA, FL 33602  
(813) 603-3006  
JTHOMPSON@FLALAWYER.NET

**QUESTION PRESENTED**

Whether the Opinion from the Eleventh Circuit Court of Appeals affirming the District Court's grant of summary judgment in favor of GOVERNMENT EMPLOYEES INSURANCE COMPANY exhibited "pervasive bias" or prejudice such that RAUL A. PELAEZ AS LIMITED GUARDIAN OF THE PERSON AND PROPERTY OF JOHN POU L PELAEZ ("Pelaez" or "Petitioner") Fourteenth Amendment Due Process Rights were violated?

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, undersigned counsel states that Respondent, GOVERNMENT EMPLOYEES INSURANCE COMPANY, is a wholly-owned subsidiary of Berkshire Hathaway, Inc., a publicly-traded corporation (NYSE: BRK.A).

**TABLE OF CONTENTS**

	Page
QUESTION PRESENTED .....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION.....	1
INTRODUCTION .....	2
STATEMENT OF THE CASE.....	3
I. The Accident, Insurance Coverage, and GEICO's Initial Investigation.....	3
II. GEICO's Proactive and Prompt Tender of the \$50,000 BI Policy Limits. ....	6
III. Gordon's Rejection of the BI Policy Limits and GEICO's Response. ....	8
IV. The Underlying Negligence Action and Stipulated Judgment. ....	12
V. Pelaez' Bad Faith Action Against GEICO....	13
VI. Pelaez' Appeal to the Eleventh Circuit Court of Appeals.....	14
THE PETITION SHOULD BE DENIED.....	16
I. THIS CASE FAILS TO MEET THE CRITERIA FOR CERTIORARI REVIEW.....	16
II. THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT AND DID NOT EXHIBIT ANY EVIDENCE OF PERVERSIVE BIAS OR PREJUDICE TOWARDS PETITIONER. ....	19
CONCLUSION.....	36

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986).....	20
<i>Baranowski v. GEICO Gen. Ins. Co.</i> , 385 F.Supp. 3d 1267 (M.D. Fla. 2019) .....	33
<i>Barry v. GEICO Gen. Ins. Co.</i> , 938 So. 2d 613 (Fla. 4th DCA 2006) .....	29
<i>Berges v. Infinity Co.</i> , 896 So. 2d 665 (Fla. 2004).....	26, 27, 32
<i>Boston Old Colony v. Gutierrez</i> , 386 So. 2d 783 (Fla. 1980).....	29
<i>Byrne v. Nezhat</i> , 261 F.3d 1075 (11th Cir. 2001) .....	21
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868 (2009) .....	20, 22
<i>Cardenas v. GEICO Ins. Co.</i> , 760 F.Supp.2d 1305 (M.D. Fla. 2001).....	29
<i>Cawthorn v. Auto-Owners Ins. Co.</i> , 791 F. App'x 60 (11th Cir. 2019) .....	13
<i>Cone v. United States</i> , 2011 WL 940356 (M.D. Fla. 2011).....	24
<i>Cousin v. GEICO Gen. Ins. Co.</i> , 719 F.Appx. 954 (11th Cir. 2018).....	29
<i>Davis v. Board of School Comm'r's of Mobile County</i> , 517 F.2d 1044 (CA5 1975) .....	22
<i>Deems v. CIR</i> , 426 Fed.Appx. 839 (11th Cir. 2011).....	21

## TABLE OF AUTHORITIES – Continued

	Page
<i>Del Fuoco v. O'Neill</i> , 2010 WL 454930 (M.D. Fla. 2010) .....	23, 24
<i>Eres v. Progressive Am. Ins. Co.</i> , 998 F.3d 1273 (11th Cir. 2021) .....	passim
<i>FTC v. Cement Institute</i> , 33 U.S. 683 (1948).....	20
<i>FuQua v. Massey</i> , 615 F.Appx 611 (11th Cir. 2015) .....	24
<i>Hamm v. Members of Bd. of Regents of State of Fla.</i> , 708 F. 2d 647 (11th Cir. 1983).....	20, 21, 22
<i>Harvey v. GEICO Gen. Ins. Co.</i> , 259 So. 3d 1 (Fla. 2018).....	26, 27, 28
<i>Johnson v. Monaco</i> , 350 F.Appx. 324 (11th Cir. 2009).....	24
<i>Liteky v. United States</i> , 510 U.S. 540 (1994) .....	passim
<i>Martin v. Allstae Prop. &amp; Cas. Ins. Co.</i> , 794 F. Appx. 883 (11th Cir. 2019).....	29
<i>Matsushita Elec. Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	31
<i>McWhorter v. City of Birmingham</i> , 906 F.2d 674 (11th Cir. 1990) .....	22
<i>Mesa v. Clarendon Nat'l Ins. Co.</i> , 799 F.3d 1353 (11th Cir. 2015) .....	25
<i>Moore v. GEICO Gen. Ins. Co.</i> , 633 F.Appx. 924 (11th Cir. 2016) .....	33, 34, 35
<i>N.L.R.B. v. Pittsburgh S.S. Co.</i> , 340 U.S. 498 (1951).....	18

**TABLE OF AUTHORITIES – Continued**

	Page
<i>Parker v. Connors Steel Co.</i> , 855 F.2d 1510 (11th Cir. 1988).....	22
<i>Pelaez v. Government Employees Ins. Co.</i> , 13 F.4th 1243 (11th Cir. 2021).....	1
<i>Pelaez v. Government Employees Ins. Co.</i> , 460 F.Supp.3d 1259 (M.D. Fla. 2020).....	1
<i>Riguad v. Broward Gen. Med. Ctr.</i> , 404 Fed.Appx. 372 (11th Cir. 2010).....	21
<i>RLI Ins. Co. v. Scottsdale Ins. Co.</i> , 691 So. 2d 1095, (Fla. 4th DCA 1997).....	29
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974) .....	18
<i>Scott v. Harris</i> , 550 U.S. 372 (2007) .....	31
<i>State Farm Fire &amp; Casualty Co. v. Zebrowski</i> , 706 So. 2d 275 (Fla. 1997).....	15
<i>Taylor v. Bradshaw</i> , 742 F.Appx. 427 (11th Cir. 2018) .....	23
<i>Thomas v. American Home Products, Inc.</i> , 519 U.S. 913 (1996) .....	19
<i>United States v. Izurieta</i> , 710 F.3d 1175 (11th Cir. 2013) .....	33
<i>United States v. Merkt</i> , 794 F.2d 950 (5th Cir. 1986) .....	23
<i>United States v. Mitchell</i> , 2002 WL 35649475 (M.D. Fla. 2002) .....	24
<i>Williams v. Pennsylvania</i> , 579 U.S. 1 (2016) .....	20

**TABLE OF AUTHORITIES – Continued**

Page

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. XIV.....i, 18, 19

**STATUTES**

28 U.S.C. § 144.....23  
28 U.S.C. § 455.....20, 23  
28 U.S.C. § 455(a) .....20, 22  
28 U.S.C. § 1254(1) .....1  
Fla. Stat. § 627.4137 .....5, 7

**JUDICIAL RULES**

11th Cir. R. 36-1.....33  
Fla. Stnd. Jury Instr. 404.4 .....25  
Sup. Ct. R. 10 .....16, 17



## OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, *Pelaez v. Government Employees Ins. Co.*, 13 F.4th 1243 (11th Cir. 2021), affirming the district court's grant of summary judgment in favor of GOVERNMENT EMPLOYEES INSURANCE COMPANY ("GEICO") is included in Petitioner's Appendix. (Pet.App.A at 1-21). The district court's Order granting summary judgment in favor of GEICO, *Pelaez v. Government Employees Ins. Co.*, 460 F.Supp.3d 1259 (M.D. Fla. May 15, 2020), is also included in Petitioner's Appendix. (Pet.App.B at 22-41).



## JURISDICTION

The Eleventh Circuit Court of Appeals issued its Opinion on September 20, 2021. 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 Florida law. The Opinion does not conflict with any decision from any Florida court or United States Court of Appeals. Contrary to the Petitioner’s allegations, the Opinion correctly applied the undisputed material facts, in the light most favorable to Pelaez and Florida law, to find that no reasonable jury could conclude that GEICO acted in bad faith and, thus, affirmed final summary judgment in GEICO’s favor. There is simply no evidence to support an allegation of “pervasive bias” or prejudice by the panel of honorable Circuit Court Judges. The Eleventh Circuit’s well-reasoned Opinion did not depart from the accepted and usual course of judicial proceedings or demonstrate prejudice such as to invoke the exercise of this Court’s supervisory powers. This case does not raise an important federal or state law question despite Petitioner’s hyperbole. In reality, Petitioner requests this Court grant certiorari to correct what he believes to be an erroneous factual finding and/or misapplication of a rule of law. Petitioner’s attempt to characterize his disagreement with the Opinion as “pervasive bias” is unsupportable and without merit. Put simply, Petitioner’s fanciful disagreement with the well-reasoned Opinion is not a compelling reason to obtain review. Finally, even if the Court were inclined to take up the issue in the question presented, this case is not appropriate to answer the question presented as there is no evidence of pervasive

bias or prejudice because the Eleventh Circuit Court correctly applied Florida law. The Petition should be denied.



## **STATEMENT OF THE CASE**

### **I. The Accident, Insurance Coverage, and GEICO's Initial Investigation.**

The facts of this matter are undisputed. The genesis of this case is an automobile accident that occurred on April 13, 2012, when Michael Conlon (“Conlon”), in his mother’s Hyundai Accent, collided with the motorcycle being operated by Pelaez. At the time of the accident, GEICO issued an automobile insurance policy, bearing Policy No.: 4218462077, to Conlon’s mother, Vivian Cubero (“Cubero”), which provided bodily injury (“BI”) coverage in the amount of \$50,000 per person and \$100,000 per occurrence (“the Policy”). The Policy also provided separate property damage (“PD”) coverage in the amount of \$50,000. Conlon was identified as an additional driver under the Policy.

GEICO received first notice of the loss when Conlon phoned GEICO from the scene of the accident. However, Conlon did not report any injuries that resulted from the accident. On April 16, 2012, GEICO determined that the accident was a covered loss under the Policy. Also, on April 16, 2012, GEICO called Conlon and Cubero to investigate the accident. GEICO spoke with Cubero and advised her of the available coverage under the Policy and that GEICO was investigating liability. Later that day, GEICO received a

telephone call from Pelaez' fiancée, Brianna Niemann ("Niemann"), who advised the accident was being investigated by two detectives and provided their contact information.<sup>1</sup> The loss was assigned to GEICO claims examiner Robert Sundean ("Sundean") on April 16, 2012.

On April 17, 2012, Sundean called Conlon and left a message that requested he provide GEICO a recorded interview. Sundean then called Pelaez and left him a message. Also, on April 17, 2012, Sundean phoned detective Sarff and left a message that requested a call back to discuss the investigation. Later that day, Conlon provided a recorded interview. Conlon informed GEICO that Pelaez may have been speeding at the time of the impact because the accident caused the vehicle to spin 180 degrees and the motorcycle had created sixty-seven feet of skid marks. Conlon also disclosed for the first time that Pelaez lost consciousness and was airlifted to the hospital with unknown injuries. Conlon further advised that he was not cited for the accident.

On April 18, 2012, Sundean sent letters to Cubero and Pelaez that advised he was the adjuster assigned to handle the claim. That same day, Sundean continued his investigation and learned that the posted speed limit at the scene of the accident was thirty-five (35) miles per hour. Based on GEICO's investigation and Conlon's report, GEICO concluded that Pelaez may have been speeding and there could be some compar-

---

<sup>1</sup> Niemann was insured by GEICO under a separate automobile liability policy that provided, *inter alia*, \$200,000 in stacked Uninsured/Underinsured Motorist ("UM") coverage.

ative negligence for the accident. Later that day, Sundean left a message for detective Sarff.

Ten days after the accident, on April 23, 2012, GEICO received a letter from attorney Jeffrey “Jack” Gordon, Esq., at Maney & Gordon, P.A. (“Gordon”), dated April 20, 2012. In the letter, Gordon stated he represented Conlon in connection with the April 13, 2012, accident. Gordon’s letter requested that GEICO provide statutory insurance disclosures pursuant to Florida Statute § 627.4137. Also, on April 23, 2012, Cubero emailed Sundean photos of the accident and Niemann faxed Sundean a copy of the police report. The police report showed that Conlon had failed to yield the right of way and that a witness reported that Pelaez did not appear to be speeding, which contradicted the information GEICO had obtained from Conlon. The police report further indicated that Pelaez sustained head injuries and confirmed that he was airlifted from the accident to St. Joseph’s Hospital.

On April 24, 2012, based on GEICO’s investigation to date, GEICO made the decision to proactively tender the full BI policy limits of \$50,000 to Pelaez to settle his BI claim.

On April 25, 2012, GEICO sent a letter to Cubero that advised her of her coverage limits under the Policy, the possibility that the claim could exceed her coverage limits, that she would be liable for any judgment against her in excess of the policy limits, her right to obtain personal counsel, and her right to contribute towards settlement. Further, on April 25, 2012, Sundean called Gordon and left a message with his assistant, Heather Austin (“Austin”). During the call, Sundean informed Austin that GEICO determined it would tender the \$50,000 BI policy limits and that

a GEICO field adjuster would deliver the settlement check to Gordon's office. Importantly, Sundean also advised that GEICO required the location of Pelaez' motorcycle to obtain an estimate and photos so GEICO could investigate and adjust Pelaez' PD claim. Following the phone call, Austin sent Gordon an email that advised him GEICO would like to tender the \$50,000 BI policy limits and that GEICO had requested the location of the motorcycle to adjust the separate PD claim. It is an undisputed fact that as of April 25, 2012, Gordon, knew, or should have known, that GEICO was going to tender the \$50,000 BI policy limits to settle Pelaez' BI claim and that GEICO was also attempting to adjust and settle Pelaez' separate PD claim.

## **II. GEICO's Proactive and Prompt Tender of the \$50,000 BI Policy Limits.**

On April 26, 2012, thirteen (13) days after the accident, a GEICO field adjuster hand-delivered a BI tender package to Gordon's office. The tender package included a cover letter, a coverage limits disclosure letter, a proposed release, and a check for \$50,000 representing tender of the per person policy limit under Bodily Injury Liability coverage. (emphasis added). of note, the check for the \$50,000 stated that it was in payment of "[t]ender of the per person BI policy limits." The coverage limits disclosure letter unequivocally stated that the policy provided BI coverage in the amount of \$50,000 per person and provided \$50,000 in separate PD coverage. The letter from Sundean to Gordon specifically advised, *inter alia*, that:

[n]ot all release forms precisely fit the facts and circumstances of every claim. Should you have any questions about any aspect of the release, please call me immediately. You

may also send me any suggested changes additions or deletions with a short explanation of the basis for any changes you suggest; or if you have a release that you desire to use please forward it to me.

(emphasis added).<sup>2</sup>

Further, on April 26, 2012, GEICO sent a letter to Conlon that advised him of the available coverage limits under the Policy, the possibility that the claim could exceed his available coverage limits, that he would be liable for any judgment against him in excess of the policy limits, his right to obtain personal counsel, and his right to contribute towards settlement. Sundean also left a message for Conlon to advise him of the status of the claim.

On April 30, 2012, GEICO received a letter from Gordon dated April 27, 2012. The letter requested GEICO send statutory insurance disclosure pursuant to Florida Statute § 627.4137 and, importantly, acknowledged GEICO's request to inspect the motorcycle. Gordon agreed to cooperate with the inspection but stated he couldn't give GEICO unilateral access to the motorcycle because he was evaluating a product liability action. The letter did not disclose the motorcycle's location. Notably, Gordon's letter did not respond to, or even mention, GEICO's tender package and offer of settlement for his client's BI claim.

On May 1, 2012, GEICO noted its repeated attempts to contact Gordon to ascertain the location for the motorcycle to adjust the PD claim. However,

---

<sup>2</sup> Conlon and Cubero were copied on this correspondence.

Pelaez' attorney steadfastly did not disclose where the motorcycle was.

On May 2, 2012, Sundean responded to Gordon's April 27, 2012, letter and provided Gordon with a notarized affidavit of coverage and a certified copy of the policy. The letter went on to say that:

[p]lease note, our auto damage adjuster has tried multiple times to get in touch with Heather to ascertain the location of your client's motorcycle to complete an estimate to no avail. Please contact my auto damage adjuster Angela Canalungo at 813-601-8045 and disclose where your client's motorcycle is being kept.

On May 4, 2012, Sundean again called and left a message for Gordon as to the location of the motorcycle.

### **III. Gordon's Rejection of the BI Policy Limits and GEICO's Response.**

On May 4, 2012, Gordon sent GEICO a letter that rejected its proactive tender of the \$50,000 BI policy limits to settle Pelaez' injury claim. Gordon stated that the letter was in response to "GEICO's efforts to take advantage of [his] clients." Specifically, while implicitly acknowledging GEICO's invitation to revise the proposed release or send an alternative, Gordon stated in pertinent part:

[t]hese materials included a check for the \$50,000.00 bodily injury limits and a release of 'all claims'. There was no reservation for property damage within what appears to be a GEICO approved form release . . . . Conse-

quently, the only logical conclusion is that GEICO purposefully allows for its adjusters to use a release of 'all claims' form, even where only part of the coverage GEICO owes is paid.

\* \* \*

My clients have expressed their scorn, opprobrium, and contempt for GEICO in making worse the tragedy they have suffered by trying to take advantage of them. We suspect that this must be a widespread practice of GEICO to increase profits by compromising the rights of consumers. How many tragically injured people have signed away their rights, or believed they did, by signing the release of all claim when property damages were still due and owing?

\* \* \*

But, rather than issuing the proper insurance benefits that my clients are rightfully and legally entitled to, GEICO has attempted to take advantage of my clients by requiring them to execute a release of all claims in exchange for payment of less than all of the insurance benefits owed. It is for this reason that my clients reject the 'proposed' settlement offer.

\* \* \*

The fact that, with my counsel, they know better than to sign GEICO's release does not solve the problem. Settling on a more limited release would merely allow GEICO

to prey on the next accident victim who may not have a lawyer at all when signing away all claims. As such, my clients have instructed me to proceed to suit and to take every action necessary to hold GEICO's insureds fully liable and to bring to light the way that GEICO unfairly does business.

On May 8, 2012, Sundean sent Cubero a letter that informed her that GEICO's efforts to settle Pelaez' BI claim were unsuccessful and that, as a result, she may be served with a lawsuit.

On May 9, 2012, Sundean responded to Gordon's rejection of the BI tender.<sup>3</sup> In the letter, Sundean stated, in relevant part, as follows:

[i]t is unfortunate that your client, as well as yourself, believe the proposed Bodily Injury release also includes Property Damage. Not only is it our practice to keep the Bodily Injury claim separate from the Property Damage claim in each and every claim, but our policy contract also outlines this. A certified copy of the policy has been provided to your office. I am confused as to why both your client and yourself, as an attorney, would assume our tender offer of our insured's \$50,000.00 Bodily Injury limits also includes the Property Damage when GEICO has made multiple attempts by phone and by written correspondence to ascertain the location of your client's motorcycle to complete an estimate. We have yet to have received a call back with

---

<sup>3</sup> Conlon and Cuero were copied on this correspondence.

the motorcycle's location, let alone receive acknowledgement of our communication attempts.

As you should know, GEICO's release is a proposed release. Should you have any additional language or changes, please present the proposed changes for our review.

We will still be awaiting the location of your client's motorcycle to complete an estimate and resolve the Property Damage claim.

Further, on May 9, 2012, Gordon sent Sundean a letter that demanded the \$50,000 BI limits to settle Pelaez' BI claim against Cubero only. Gordon gave GEICO a ten (10) day deadline in which to accept the demand, which expressly excluded Conlon. Gordon enclosed a proposed release of "all claims" that included a reservation for PD.

On May 10, 2012, Sundean responded to Gordon's May 9, 2012, letter. Therein, Sundean expressed confusion as to why Gordon's proposed release did not release Conlon and Cubero. Sundean also again advised GEICO was awaiting the location of Pelaez' motorcycle so that it could adjust his PD claim.

Over the next three (3) weeks, Sundean made multiple attempts to communicate with Gordon in a continued attempt to settle Pelaez' separate BI and PD claims. Gordon never returned any of Sundean's phone calls and never worked with GEICO to settle his client's pending claims against GEICO's insureds.

On May 30, 2012, Gordon sent a letter to Sun-dean that stated “[p]resently, there is no offer of settlement by my clients to discuss.”<sup>4</sup>

#### **IV. The Underlying Negligence Action and Stipulated Judgment.**

On or about September 21, 2012, the Pelaez family sued Conlon and Cubero for negligence in Florida state court.<sup>5</sup> GEICO assigned the defense of the lawsuit to attorney T.R. Unice at Unice, Salzman, P.A. (“Unice”).

On December 14, 2017, during trial of the negligence action, Pelaez entered into a stipulated settlement agreement with Conlon and Cubero. Based on the agreement, Pelaez settled his claim against Cubero in exchange for the \$50,000 BI limits and Pelaez and Colon agreed that a judgment would be entered against him in the amount of \$14,900,000. But, Pelaez and Conlon stipulated that Conlon would not be personally liable for the judgment, nor would the judgment be collectible against his personal assets or his bankruptcy estate; instead, Pelaez would seek satisfaction of the judgment solely from insurance proceeds, including from claims of “bad faith” or extra-contractual damages. Pursuant to the agreement a stipulated Final Judgment was entered against Conlon. It is undisputed that GEICO was not a party to the stipulated agree-

---

<sup>4</sup> Pelaez’ PD claim was ultimately settled for \$7,283.06 in May of 2013.

<sup>5</sup> Because John Pelaez is a ward, the lawsuit was filed by John’s mother Patricia and by his father Raul. Patricia and Raul Pelaez sued Conlon and his mother, and Raul also sued Conlon and his mother as limited guardian of John’s person and property.

ment or the stipulate Final Judgment and did not agree to be bound by the stipulated Final Judgment.

## **V. Pelaez' Bad Faith Action Against GEICO.**

On March 20, 2019, Pelaez and Conlon, as co-plaintiffs, filed a two-count Amended Complaint for common law bad faith against GEICO in Florida state court. GEICO removed the case to the District Court of the Middle District of Florida. GEICO filed a Motion for Summary Judgment. The district court granted GEICO's Motion for Summary Judgment on two grounds, one of which was that no reasonable jury could conclude GEICO had acted in bad faith.<sup>6</sup> Specifically, the Honorable James S. Moody Jr., after consideration of the parties' filings, record evidence and relevant law, aptly noted that:

Plaintiffs' main argument is that the release was intentionally overly broad because it attempted to release all claims when the PD claim was still outstanding. The Court disagrees that this fact is enough to turn this matter over to the jury, especially under the totality of the circumstances. Notably, the letter from Sundean to Gordon specifically advised Gordon that the release GEICO included was proposed and that Gordon could send any changes, additions, or deletions, or

---

<sup>6</sup> For its other grounds the district court held that the stipulated judgment did not qualify as an excess judgment, or its functional equivalent, which is a required element of a bad faith claim. *See Cawthorn v. Auto-Owners Ins. Co.*, 791 F. App'x 60 (11th Cir. 2019). This argument was not addressed by the Eleventh Circuit in affirming summary judgment in favor of GEICO.

send his own proposed release for GEICO to consider. In other words, GEICO stated a willingness to accept revisions to its proposed release, as well as a release drafted entirely by Gordon. As a matter of law, GEICO did not act in bad faith in sending the unsolicited proposed release with the tender of the \$50,000 BI policy limits under the circumstances of this case.

A Final Judgment was entered against Pelaez and Conlon and in favor of GEICO on May 18, 2020. Pelaez appealed the Final Judgment to the Eleventh Circuit Court of Appeals.<sup>7</sup>

## **VI. Pelaez' Appeal to the Eleventh Circuit Court of Appeals.**

In the appeal, Pelaez argued that the district court erred in granting final summary judgment, in relevant part, because a question of fact existed whether GEICO acted in bad faith by sending an overbroad release and that the district court ignored the Plaintiff's expert evidence of purported bad faith. The exact arguments that were considered and rightly rejected by the District Court. GEICO filed its brief in opposition. The Eleventh Circuit then held oral arguments before Circuit Judge Ed Carnes, Circuit Judge Elizabeth Branch, and Circuit Judge Kevin Newsom.

On October 19, 2021, the Eleventh Circuit affirmed the final summary judgment in favor of GEICO in a published opinion. The well-reasoned and detailed opinion discussed the undisputed facts, provided an

---

<sup>7</sup> Conlon did not file an appeal.

analysis of applicable Florida law, assessed the parties' filings, and correctly found that:

The district court agreed with GEICO that the overbroad release did not create a fact question under the totality of the circumstances of this case, and we agree with the well-reasoned holding of the district court.

\* \* \*

In *Eres* when we rejected an argument that an overbroad release created a jury question on bad faith, we explained that the argument's 'singular focus on the allegedly overbroad release language ignore[d] the 'totality of the circumstances'—both what came before it and, perhaps even more importantly, what came after.' 998 F.3d at 1279. The same is true here. As the district court convincingly explained, what came before and after GEICO sent Pelaez's attorney the overbroad release demonstrates that the company fulfilled its duty to act in good faith.

\* \* \*

Because no reasonable jury could conclude that GEICO acted in bad faith before, during, or after sending the proposed release to Pelaez, summary judgment was appropriately entered for it. *See, e.g., Eres*, 998 F.3d at 1278; *Zebrowski*, 706 So. 2d at 277.

Based on the totality of the circumstances and the application of Florida law, the Eleventh Circuit affirmed the grant of summary judgment in favor of

GEICO. The Petition for Certiorari, to which GEICO now responds, followed.



## **THE PETITION SHOULD BE DENIED**

### **I. THIS CASE FAILS TO MEET THE CRITERIA FOR CERTIORARI REVIEW.**

Rule 10 of the Supreme Court of the United States, Considerations Governing Review on Certiorari, provides:

[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 states 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.* (emphasis added).

The Opinion from the Eleventh Circuit affirming the District Court’s Order granting summary judgment in favor of GEICO is a straightforward application of Florida law. The Opinion does not conflict with any decision from any Florida court or any United States Court of Appeals. The Opinion correctly applied the undisputed material facts and Florida law to find that no reasonable jury could conclude that GEICO acted in bad faith in handling the claim and affirm final summary judgment in GEICO’s favor. Contrary to the Petitioner’s allegations, there is simply no evidence to support an allegation of “pervasive bias” or prejudice by the panel of Circuit Court Judges. The Eleventh Circuit’s well-reasoned Opinion did not depart from the accepted and usual course of judicial proceedings, and it certainly did not demonstrate a clear inability to render fair judgment, evidence any inappropriate favoritism or antagonism, or an unwillingness to rationally consider arguments, so as to invoke the exercise of this Court’s supervisory powers. Under the facts of this matter, and despite Petitioner’s hyperbole, this

case does not raise an important question of federal or state law as Petitioner’s constitutional rights have not been infringed upon. Rather, Petitioner seeks to involve this Court because he did not like the result of the Eleventh Circuit’s well-reasoned Opinion. The petition should be denied.

A petition for certiorari review to the United States Supreme Court is an extraordinary remedy that is rarely granted. Certiorari review is a right reserved for cases that present the most compelling circumstances. In this case, the Petitioner has failed to provide any compelling reason for the grant of a writ of certiorari in this action. The primary basis that Petitioner posits for obtaining certiorari review is that the Eleventh Circuit Opinion purportedly exhibited “pervasive bias” that infringed on Petitioner’s Fourteenth Amended Due Process Rights by misapplication of Florida law and a failure to view the facts in the light most favorable to Pelaez. Petitioner’s characterization of the Eleventh Circuit Opinion as exhibiting “pervasive bias” such that his constitutional rights were violated is unsupportable and without merit. Petitioner’s allegation of “pervasive bias” is nonexistent and thus, cannot serve as a basis to grant certiorari.

In reality, Petitioner is asking this Court to 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.”); *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 916-917 (1996) (“[t]his Court’s function, generally speaking, is not to correct federal courts’ misapplication of state law, except, perhaps, in exceptional cases with importance beyond the parties’ particular dispute.”) (Rehnquist, J., dissenting). Notably, four (4) separate federal judges have held, after reviewing the record facts and applying those facts to well-settled Florida law, that GEICO did not act in bad faith. A cursory review of the petition shows 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 and re-litigate the merits of his case before this Court. Petitioner’s displeasure with the Opinion is not a compelling basis to grant certiorari. The petition should be denied.

## **II. THE ELEVENTH CIRCUIT’S DECISION WAS CORRECT AND DID NOT EXHIBIT ANY EVIDENCE OF PERVERSIVE BIAS OR PREJUDICE TOWARDS PETITIONER.**

While verbose, the petition fails to provide a scintilla of evidence that the Eleventh Circuit’s Opinion exhibited “pervasive bias” or prejudice in violation of Petitioner’s Fourteenth Amended Due Process Rights. That is because the Eleventh Circuit correctly applied well-settled Florida law and the facts, in the light most favorable to Pelaez, to affirm summary judgment in favor of GEICO. Stripped down to its core, Petitioner’s

allegation of prejudice amounts to mere displeasure and disagreement with the Opinion. Petitioner's disagreement with the Opinion is not a basis for certiorari review. To quote William Shakespeare, the petition is "much ado about nothing."

This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("Due process guarantees 'an absence of actual bias on the part of the judge.'") (citation omitted). The traditional common-law rule was that disqualification of a judge for bias or prejudice was not permitted. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). Since then, statutes have been adopted that would permit disqualification for bias or prejudice. *See e.g.*, 28 U.S.C. § 455(a); *Liteky v. U.S.*, 510 U.S. 540 (1994) (providing a history of 28 U.S.C. § 455).<sup>8</sup> This Court has held that "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 33 U.S. 683, 702 (1948). As a general rule, bias sufficient to disqualify as a judge must stem from extra-judicial sources. *See Liteky*, 510 U.S. 540; *Hamm v. Members of Bd. of Regents of State of Fla.*, 708 F. 2d 647, 651 (11th Cir. 1983). Historically, recusal has been required in two instances: 1) where a judge had a financial interest in the outcome of the case and 2) conflict arising from a judge's participation in an earlier proceeding. *Caperton*, 556 U.S. at 877-881.

---

<sup>8</sup> 28 U.S.C. 455(a) states "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

This Court in *Liteky* explained that “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,” nor do “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases,” and that “only in the rarest of circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extra-judicial sources is involved.” *Liteky*, 510 U.S. at 555-556. The *Liteky* Court went on to say that “Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.” *Id.* “Neither a trial judge’s comments on lack of evidence, rulings adverse to a party, nor friction between the court and counsel constitutes pervasive bias.” *Hamm*, 708 F.2d at 651. *Riguad v. Broward Gen. Med. Ctr.*, 404 Fed.Appx. 372, 374 (11th Cir. 2010) (“Adverse rulings do not constitute a pervasive bias.”); *Deems v. CIR*, 426 Fed.Appx. 839, 842-43 (11th Cir. 2011) (same); *Byrne v. Nezhat*, 261 F.3d 1075, 1103 (11th Cir. 2001) (“[A]dverse rulings alone do not provide a party with a basis for holding that the court’s impartiality is in doubt.”). However, the *Liteky* Court noted that:

A favorable or unfavorable predisposition can also deserve to be characterized as “bias” or “prejudice” because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the “pervasive bias” exception to the “extra-judi-

cial source” doctrine. *See, e.g., Davis v. Board of School Comm’rs of Mobile County*, 517 F.2d 1044, 1051 (CA5 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).)

510 U.S. at 551. In his concurring opinion, Justice Kennedy stated that disqualification under § 455(a) is a “high standard” and that “a judge should be disqualified only if it appears he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute.” *Id.* at 557-58; *see also Hamm*, 708 F.2d at 651 (“An exception to [the extra-judicial] rule is made when a judges remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party.”). Thus, “pervasive bias” only exists if the bias is “so extreme as to display a clear inability to render fair judgment.” *Liteky*, 510 U.S. at 551. To establish bias, the Court applies an objective standard that “asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Caperton*, 556 U.S. at 881; *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) (The test under § 455(a) is “whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge’s impartiality.”). Under this test, the “judge’s bias must be personal and extra-judicial; it must derive from something other than that which the judge learned by participating in the case.” *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990).

As shown above, an adverse ruling alone does not constitute “pervasive bias.” In *Taylor v. Bradshaw*, 742 F.Appx. 427, 434 (11th Cir. 2018), the Eleventh Circuit rejected allegations of judicial bias stating “[t]hat the magistrate judge and district court sometimes ruled against her during this case is not enough to establish judicial bias.” Further in *Del Fuoco v. O’Neill*, 2010 WL 454930, \*2-3 (M.D. Fla. Feb. 9, 2010) the plaintiff moved to disqualify the judge under 28 U.S.C. § 144 and 28 U.S.C. § 455 based on the judge’s commentary in three (3) court orders which the plaintiff alleged exhibited a “pervasive bias” against him. The *Del Fuoco* court rejected the plaintiff’s allegation of bias, finding that “any perceived bias is judicial rather than personal,” and explained that:

Plaintiff’s reliance on an order in this case and on the orders in *Spellissiy* is misplaced. First, judicial rulings alone, under either statute, ‘almost never constitute a valid basis for a bias or partiality motion.’ *Liteky v. United States*, 510 U.S. 540, 555 (1994). An adverse ruling supplies no independent basis for disqualification. *United States v. Merkt*, 794 F.2d 950, 960–61 (5th Cir. 1986). Further, judicial remarks or opinions formed on the basis of events occurring in the course of current or prior proceedings ‘do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’ *Liteky*, 510 U.S. at 555. Considered in the context in which these orders were entered, and the italicized explanations and reasons for striking the described

pleadings and documents, these rulings do not objectively demonstrate a ‘pervasive bias’ mandating recusal.

*Id. see also FuQua v. Massey*, 615 F.Appx 611, 613 (11th Cir. 2015) (denying the plaintiff’s recusal request because the alleged bias based on the denial of a motion was judicial rather than personal); *Johnson v. Monaco*, 350 F.Appx. 324, 327 (11th Cir. 2009) (same); *Cone v. U.S.*, 2011 WL 940356, \*2 (M.D. Fla. Mar. 17, 2011) (holding that a challenge as to the propriety of the court’s ruling is not a sufficient basis to mandate recusal); *United States v. Mitchell*, 2002 WL 35649475, \*2 (M.D. Fla. May 10, 2002) (holding “the alleged bias, based on only the Court’s denial of Defendant’s motions, also does not meet the pervasive bias exception to the extra-judicial source doctrine.”).

In this case, the Petitioner, undoubtedly recognizing that his request for certiorari to re-litigate the merits of his case would be rejected, alleges that the Eleventh Circuit panel, and specifically Judge Carnes, exhibited such bias as to violate his constitutional right to a fair and impartial tribunal. As evidence of bias, the Petitioner claims that the Opinion failed to view the facts in the light most favorable to Pelaez and incorrectly applied Florida law by focusing on the actions of Pelaez’ attorney and failing to consider the opinions of Pelaez’ expert witness. Petitioner’s arguments are without merit and should be rejected.

Specifically, the Opinion stated that “We review the district court’s grant of summary judgment *de novo*, viewing all facts and drawing all inferences in the light most favorable,” to Pelaez, and that “In diversity cases, we are required to apply the substantive law of the forum state; here, Florida.” (*citing Eres*

*v. Progressive Am. Ins. Co.*, 998 F.3d 1273, 1278 n. 3 (11th Cir. 2021); (*Mesa v. Clarendon Nat'l Ins. Co.*, 799 F.3d 1353, 1358 (11th Cir. 2015)). The Opinion then went into a detailed analysis of Florida law regarding Florida insurance bad faith actions. Thus, the Opinion identified and articulated the correct standard and applicable Florida law. The Opinion also correctly noted that “[a]lthough bad faith is ordinarily a question for the jury, both this Court and Florida Courts have granted summary judgment where there is no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer.”

Interestingly, the Petitioner acknowledges the same in his petition. Yet, the Petitioner claims that the Eleventh Circuit ignored favorable evidence and focused primarily on his counsel’s actions to affirm summary judgment in favor of GEICO. Petitioner’s assertion ignores the record and should be rejected. In the Opinion, the Eleventh Circuit, in reliance on its opinion in *Eres*, determined that “As the district court convincingly explained, what came before and after GEICO sent Pelaez’ attorney the overbroad release demonstrates that the company fulfilled its duty to act in good faith.” *See e.g., Eres*, 998 F.3d 1273. The Opinion went on to analyze the case under the totality of circumstances and in the light most favorable to Pelaez. This naturally included a discussion and analysis of the course of dealings between GEICO and Pelaez’ counsel regarding Pelaez’ BI claim settlement. *See e.g., Fla. Stnd. Jury Instr.* 404.4 (“Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances it could and should have done so, had it acted fairly and honestly

towards its insured and with due regard for [his] interests.”). A quick review of the Opinion shows that it correctly, and repeatedly, notes that the “focus in a bad faith action is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligation to the insured.” (*citing Berges v. Infinity Co.*, 896 So. 2d 665,677 (Fla. 2004) and (*Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 11 (Fla. 2018).

However, the Eleventh Circuit panel, in a detailed and careful discussion, went on to explain as follows:

After receiving the attorney’s rejection of its tender of the full bodily injury policy amount, purportedly because of the overbroad language of the release, GEICO immediately responded that the proposed language was only a starting point and once again invited Pelaez’s attorney to send “additional language or changes” for the release. He never did so. Nor did he ever make any kind of counteroffer to settle the claims against Conlon before filing the negligence lawsuit. By contrast, GEICO earnestly attempted to settle all the claims.

What the before, during, and after facts show here is that, as the district court aptly concluded, GEICO “did not act in bad faith in sending the unsolicited proposed release with the tender of the \$50,000 BI policy limits under the circumstances of this case.” In *Eres* the insurer sent the claimant an overbroad release, which she contended established bad faith. *See* 998 F.3d at 1279. In rejecting that contention, we stated that “given [the insurer]’s offer to ‘strike’ the offending lan-

guage, it's not clear to us that there would be a jury question regarding bad faith even if [the insurer]'s release contained [problematic] language." *Id.* We explained: "[W]hen federal courts have found a fact issue regarding bad faith based on overbroad release language; they have relied on the insurers' refusal to remove the release's" problematic language. *Id.* (alteration adopted and quotation marks omitted). In this case GEICO not only offered to change any problematic language but to let Pelaez' attorney re-draft the release if he preferred. It would have been a simple thing for the attorney to do, but it is also the last thing he wanted to do.

\* \* \*

All of the facts we have recounted are part of the totality of the circumstances that go into the decision of whether GEICO did act in bad faith when handling Pelaez' claims against Conlon and his mother. We heed, as we must, the Florida Supreme Court's recent reminder that the "focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." *Harvey*, 259 So. 3d at 11 (quoting *Berges*, 896 So. 2d at 677). But we don't understand that principle to mean the actions of a claimant—or a claimant's attorney—are irrelevant. In a bad faith action, there's a difference between focusing on a claimant's actions, which would be improper, and factoring a claimant's actions into

the totality of the circumstances analysis, which is not improper.

The Florida Supreme Court implicitly recognized this kind of difference in *Harvey* when it held that an insurer should not be allowed to “escape liability merely because the [claimant]’s actions could have contributed” to a failure to settle. *See id.* (emphasis added). and it made clear that a “[claimant]’s actions can[not] let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith in handling the insured’s claim.” *See id.* (emphasis added). But we aren’t absolving GEICO of liability by faulting Pelaez and his attorney’s conduct or by questioning their motives. And we are taking it as a given that they’ve “identified some ways” GEICO “might improve its claims-processing practice.” *Eres*, 998 F.3d at 1281.

We aren’t allowing GEICO to “escape liability merely because” Pelaez and his attorney’s actions “could have contributed” to the failure to settle. *Harvey*, 259 So. 3d at 11. As they clearly did. Instead, we have discussed Pelaez and his attorney’s actions because they show how, in the totality of these circumstances, GEICO did fulfill its good faith duty to Conlon and his mother. They show how the failure to settle the lawsuit against the insureds did not result from bad faith of the insurer.

As shown above, the Opinion did not improperly focus on Pelaez’ counsel’s actions. The Petitioner asserts that the Opinion’s discussion of Pelaez’ counsel’s

actions during GEICO’s attempt to settle the claim was an “improper focus” that supports that the panel was basis against Petitioner. As clearly stated in the Opinion, the Eleventh Circuit did not permit GEICO to “escape liability” because of the actions of Pelaez’ attorney. Instead, in accord with Florida law, Pelaez’ attorney’s conduct was relevant under the totality of the circumstances. Florida law has consistently held that “[a]lthough a bad-faith claim derives from and emphasizes the duty of the insurer to the insured, the conduct of a claimant and the claimant’s attorney are relevant to determining the ‘realistic possibility of settlement within the policy limits.’” *Cousin v. GEICO Gen. Ins. Co.*, 719 F.Appx. 954, 960 (11th Cir. 2018)(citing *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla 4th DCA 2006); *RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095, 1096 (Fla. 4th DCA 1997) (finding that an insurer who has no opportunity to settle the claim cannot be found to have acted in bad faith); *Cardenas v. GEICO Ins. Co.*, 760 F.Supp. 2d 1305, 1309 (M.D. Fla. 2001)(reasoning that the “conduct of a claimant and the claimant’s attorney is relevant to determining the ‘realistic possibility of settlement.’”); *Martin v. Allstae Prop. & Cas. Ins. Co.*, 794 F. Appx. 883 (11th Cir. 2019) (discussing the claimant’s counsel’s actions in response to a proposed release); *Boston Old Colony v. Gutierrez*, 386 So. 2d 783, 785-86 (Fla. 1980) (noting the relevance of the insured’s own actions in finding the insurer did not act in bad faith as a matter of law).

Under the Petitioner’s framework, the mere fact his counsel’s actions were discussed at all amounts to evidence of an impermissible bias. That is not the standard under Florida law. While Pelaez may take

issue with the Opinion's discussion of his attorney's actions, it simply does not amount to a "high degree of favoritism or antagonism as to make fair judgment impossible." *See Liteky*, 510 U.S. at 555-556. Despite Petitioner's assertions otherwise, a clear and dispassionate review of the Opinion shows that the basis for the Eleventh Circuit affirming summary judgment in favor of GEICO was not the conduct of Pelaez' counsel. Instead, as the Opinion stated:

we have discussed Pelaez and his attorney's actions because they show how, in the totality of these circumstances, GEICO did fulfill its good faith duty to Colon and his mother. They show how the failure to settle the lawsuit against the insureds did not result from bad faith of the insurer. Because no reasonable jury could conclude that GEICO acted in bad faith before, during, or after sending the proposed release to Pelaez, summary judgment was appropriately entered for it. (emphasis added).

Accordingly, the Petitioner's allegation of "pervasive bias" is without merit and not supported by a fair reading of the Opinion. Further, giving consideration to the conduct of a claimant and the claimant's attorney in determining bad faith is correct under Florida law.

The Petitioner also argues a purported "pervasive bias" through the Opinion's alleged "contempt" of the testimony of Pelaez' counsel and "impermissibly inferring an undisclosed ulterior motive for rejecting GEICO's tender, rather than crediting the reason specifically provided by Pelaez's attorney in the testimony itself." The Court's analysis of Pelaez' attorney's

testimony does not support the asserted claim and is not evidence of “pervasive bias.” Rather, the testimony was discussed in connection with Petitioner’s rejection of the BI policy limits, which is relevant under the totality of the circumstances. *See supra*. As stated in the Opinion, but conveniently ignored by Petitioner, “[a]ll of the facts we have recounted are part of the totality of the circumstances that go into the decision of whether GEICO did act in bad faith when handling Pelaez’s claims against Conlon and his mother.” The Petitioner’s characterization of the Opinion as exhibiting “incredulity and even contempt for the sworn testimony of Pelaez’s attorney,” is simply Petitioner’s hyperbole.

Further, this Court has held that a court is not required to accept testimony that is blatantly contradicted by the record for purposes of ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (stating, “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.”). In the context of this case, and under this Court’s precedent, it is important to recall that “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,” nor do “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases.” *Liteky*, 510 U.S. at 555-56. When viewed under this framework, there is simply no support for any alleged bias, as Petitioner’s argument utterly ignores the clear language of the Opinion and its application of well-settled Florida law. Accordingly, Petitioner’s depiction

of the Opinion as exhibiting “pervasive bias” should be rejected.

Petitioner further alleges the Opinion runs contrary to Florida law because it created a “new standard” for insurance bad faith actions by imposing a burden on an injured party’s attorneys to discover potential waivers that are not expressly set forth in the release but that are known to the insurance company. This argument is wholly without merit. A cursory review of the Opinion shows it is not articulating a new standard. Specifically, the Opinion relied on, in part, the Eleventh Circuit’s prior opinion in *Eres*, which also involved allegations of bad faith based on the use of an overbroad release. *Eres*, 998 F. 3d at 1273. The Opinion went on to say that:

The district court agreed with GEICO that the overbroad release did not create a fact question under the totality of the circumstances of this case, and we agree with the well-reasoned holding of the district court. While we have recognized that an overbroad release can create a jury question about bad faith, we’ve also recognized that it “doesn’t necessarily do so.” *Eres*, 998 F.3d at 1279. That’s true because “the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the ‘totality of the circumstances’ standard,” *Berges*, 896 So. 2d at 680, and the scope of a release is one of the circumstances courts consider, but only one.

In *Eres* when we rejected an argument that an overbroad release created a jury question on bad faith, we explained that the argument’s

‘singular focus on the allegedly overbroad release language ignore[d] the ‘totality of the circumstances’—both what came before it and, perhaps even more importantly, what came after.’ 998 F.3d at 1279. The same is true here. As the district court convincingly explained, what came before and after GEICO sent Pelaez’s attorney the overbroad release demonstrates that the company fulfilled its duty to act in good faith.

As shown above, rather than creating a new standard, the Opinion was adhering and applying well settled Florida precedent.

Lastly, the Petitioner attempts to create evidence of purported bias by alleging that the Eleventh Circuit ignored the testimony of his expert witness, Susan Kaufman, and in doing so disregarded prior Eleventh Circuit precedent in *Moore v. GEICO Gen. Ins. Co.*, 633 F.Appx. 924 (11th Cir. 2016) in violation of the “prior panel precedent rule.” From the outset, Petitioner’s “prior panel precedent rule,” argument is without merit because *Moore* is not a published opinion. Thus, *Moore* is not binding authority. *U.S. v. Izurieta*, 710 F.3d 1175, 1179 (11th Cir. 2013) (“Unpublished opinions are not binding precedent.”); 11th Cir. R. 36-1.

Further, multiple other Middle District of Florida and Eleventh Circuit Courts have held that a plaintiff’s expert opinions do not create a genuine issue of material fact that precludes summary judgment in favor of the insurer in a bad faith action, as the opinions are either factually incorrect, immaterial, based on an incorrect analysis of Florida law, or simply echo the plaintiff’s argument. *See e.g., Baranowski v. GEICO Gen. Ins. Co.*, 385 F.Supp. 3d 1267, n. 7 (M.D. Fla.

2019), *aff’d* 806 F.Appx. 971 (11th Cir. 2020) (“The underling facts material to a resolution of the question of bad faith control, not the opinion of an expert.”); *Eres*, 998 F.3d at 1281 (rejecting the argument that the testimony of Plaintiff’s “insurance-industry expert” created an issue of material fact to overcome summary judgment for an insurer in a bad faith action). Kaufman’s opinions and testimony were referenced throughout Pelaez’ s Initial Brief to the Eleventh Circuit and GEICO’s Answer Brief, which was then considered by the Eleventh Circuit at oral arguments and the resulting published Opinion. According, Kaufman’s *ipse dixit* opinions were not ignored by the Eleventh Circuit. Kaufman’s opinions also do not create a disputed issue of material fact as to whether GEICO acted in bad faith. For example, Kaufman’s opinion that GEICO allegedly breached its duty of good faith because it purportedly “required” its adjuster to use an overbroad release ignores the undisputed material facts of this case which, as outlined in the Opinion, clearly establish that GEICO’s proposed release was not a requirement to settlement. Simply put, Kaufman ignores the totality of GEICO’s good faith actions in attempting to settle the claim, and her opinions do not warrant reversing the district court and Eleventh Circuit’s well-reasoned decisions.

Petitioner’s reliance on *Moore* is also factually and legally misplaced. Specifically, in *Moore*, the Court found there to be a question of fact as to whether the insurer’s conduct could be viewed as proof that it did not act in good faith when it allegedly “did not heed [the plaintiff’s attorney’s] demand for a precisely worded release of his clients’ claims.” 633 Fed.Appx. at 929. More importantly, based on the specific facts of

*Moore*, the Court, under the totality of the circumstances, concluded that the “record contains factors both supporting and contradicting” the allegation of bad faith and therefore presented “a genuine dispute that requires resolution by a jury.” *Id.* In contrast, under the facts of this case, it was GEICO that offered to settle the BI claim by tendering the full BI policy limits before any settlement request, offer, or demand to resolve the BI claim from Pelaez and/or his counsel. It is undisputed that GEICO included a proposed release with its unsolicited settlement offer, and it is undisputed that Pelaez and his counsel rejected GEICO’s unsolicited settlement offer without discussion. GEICO was never advised by Pelaez or Gordon that GEICO needed to provide a specific type of release prior to its tender of the BI policy limits were rejected.

In summary, the decision from the Eleventh Circuit Court of Appeals correctly applied Florida substantive law and the facts in the light most favorable to Pelaez to determine that “Because no reasonable jury could conclude that GEICO acted in bad faith before, during or after sending the proposed release to Pelaez, summary judgment was appropriately entered for it.” The Eleventh Circuit’s Opinion does not exhibit any evidence of “pervasive bias.” Contrary to Petitioner’s allegations, the Opinion is bereft of any evidence that would show a clear inability to render fair judgment, evidence of inappropriate favoritism or antagonism, or an unwillingness to rationally consider arguments. Rather, the Opinion shows a careful and detailed analysis of the Petitioner’s bad faith claim as applied to Florida law. What Petitioner alleges as “pervasive bias” amounts to nothing more than a

request for this Court to re-litigate a case that has already been rejected by four (4) federal judges. The Petitioner's disagreement and displeasure with the Eleventh Circuit's Opinion is not a basis for certiorari review. The Petition should be denied.



## CONCLUSION

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

Respectfully submitted,

JORDAN M. THOMPSON  
*COUNSEL OF RECORD*  
YOUNG, BILL, BOLES, PALMER,  
DUKE & THOMPSON, P.A.  
401 E. JACKSON ST., SUITE 2950  
TAMPA, FL 33602  
(813) 603-3006  
[JTHOMPSON@FLALAWYER.NET](mailto:JTHOMPSON@FLALAWYER.NET)

*COUNSEL FOR RESPONDENT*

MARCH 11, 2021