APPENDIX

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Appendix A

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

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No. 21-13496

———

AMERICAN BUILDERS INSURANCE COMPANY,
Plaintiff-Appellee,

Versus

SOUTHERN-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

———

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-81357-WM

———

ON PETITION FOR REHEARING
(June 20, 2023)

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

Southern-Owners Insurance Company's motion for panel rehearing is granted, and we vacate our previous opinion, published at 56 F.4th 938 (11th Cir.

2023), and substitute the following opinion in its place. In this opinion, we change section II.C in light of the Supreme Court's recent decision in *Dupree v. Younger*, 143 S. Ct. 1382 (2023). We make no further changes to the opinion, and our holding remains the same.

Ernest Guthrie fell from a roof and became paralyzed from the waist down, never to walk again. Within months, his medical bills climbed past $400,000, and future costs projected into the millions. Three insurance companies potentially provided coverage for Guthrie. This appeal is a battle between two of them.

The primary insurer for Guthrie's company was Southern-Owners Insurance Company. At the time of the accident, Guthrie was performing subcontracting work for Beck Construction, which had a policy with American Builders Insurance Company and an excess policy with Evanston Insurance Company. American Builders investigated the accident, assessed Beck Construction's liability, and evaluated Guthrie's claim. Southern-Owners, in contrast, did little to nothing for months. When push came to shove, Southern-Owners refused to pay any amount to Guthrie to settle the claim, and American Builders and Evanston ponied up a million dollars apiece instead.

American Builders then sued Southern-Owners for common law bad faith under Florida's doctrine of equitable subrogation. Along the way, Southern-Owners moved for summary judgment, but the district court denied the motion. A federal trial jury heard the case and found in favor of American Builders. After the entry of final judgment, Southern-Owners sought judgment as a matter of law, or, in the

alternative, a new trial. The district court denied those motions, too. On appeal, Southern-Owners challenges the denials of its summary judgment and post-trial motions.

After thorough review of the record and with the benefit of oral argument, we affirm.

I.

A.

Ernest Guthrie, an employee of Ernest Guthrie, LLC performing work for Beck Construction, slipped from the roof of a house on April 1, 2019, and crashed to the ground. He became paralyzed from the waist down. Guthrie's lawyer, Stuart Cohen, wrote to Beck Construction to assert the company's liability and request insurance information. Beck Construction, in turn, put its insurer, American Builders on notice on May 8. American Builders had issued a general liability policy to Beck Construction, with a limit of $1 million for each occurrence. American Builders' claim specialist investigated the incident by meeting with the company and its outside investigator and collecting hospital records, rehabilitation facility records, and correspondences about the claim and injuries.

Cohen investigated his client's claim, too. He determined that Beck Construction instructed Guthrie to climb onto the roof without providing any fall protection, while two spotters focused on their phones. Guthrie had already sustained $400,000 in medical expenses, and Cohen calculated Guthrie's claim at $4 million to $5 million, even if Guthrie were partially liable. On September 5, Cohen demanded that American Builders pay its $1 million policy limit within

thirty days in exchange for a release of Beck Construction from liability. American Builders requested an extension, and Cohen granted ten days, placing the deadline on October 14.

Cohen conditioned that demand on the lack of other available insurance. But, as it turns out, there were two other relevant policies: Evanston provided an excess policy worth $1 million per occurrence to Beck Construction, and Southern-Owners -- which would become the defendant in the instant bad-faith case -- sold Ernest Guthrie, LLC a policy that covered $1 million. Southern-Owners' policy contained an endorsement naming Beck Construction as an additional insured for any work Ernest Guthrie, LLC performed for Beck Construction, and making its policy the primary insurer for claims arising from Beck Construction's work.

During American Builders' investigation, it discovered these additional policies. So, on September 12, it tendered the defense of and indemnity for Guthrie's claim to Southern-Owners. In its letter to Southern-Owners, American Builders attached the certificate of insurance listing Beck Construction as an additional insured on Ernest Guthrie, LLC's policy; the initial notice of the claim to American Builders; and Cohen's September 5 demand letter. A couple weeks later, on September 25, Southern-Owners' counsel sent letters to Cohen, American Builders, and Beck Construction, requesting additional incident reports, medical records, workers' compensation records, potentially applicable insurance policies, applicable construction contracts, and transcripts or recordings of statements by Guthrie and Beck Construction. She also asked Cohen for a forty-five-day extension on the September 5 demand.

Two days later, Cohen provided Southern-Owners with Guthrie's medical records and bills, American Builders' insurance policy, and correspondences from Cohen to American Builders in May and June that explained the accident. Cohen did not respond to the forty-five-day extension request, but, that same day, American Builders requested an extension for American Builders until November 4, which Cohen granted. In his letter granting the extension, Cohen explained that he recently became aware that Southern-Owners and Evanston might also provide coverage for the accident. Because of this new information, Guthrie would now only execute a release of American Builders that reserved his rights to pursue claims against either Evanston or Southern-Owners.

On October 10, American Builders retained counsel to address Cohen's new stipulation. Working quickly, the attorney concluded in a few days that Guthrie's claim was worth around $20 million to $30 million, far exceeding any applicable policy's coverage even if Beck Construction were largely not responsible. On October 14, he then informed Cohen that American Builders was prepared to pay its $1 million policy limit but that it could not accept Cohen's new stipulation because it provided only a partial release.

During the early weeks of October, the record does not reflect that Southern-Owners did anything, other than request extensions. But on October 18 -- over a month after receiving notice of Guthrie's injury -- Southern-Owners contacted the lawyer that American Builders had retained for Beck Construction to set up an interview with Russell Beck, the company's principal. Southern-Owners and the attorney spent

the rest of October and all of November trying to set up a time to talk.

On November 25, still struggling to set up a meeting with Beck, Southern-Owners wrote Cohen, describing the setback and noting that it had no written documentation on the claim. Southern-Owners also requested until December 20 to respond to the September 5 demand letter. That same day, Southern-Owners told American Builders that it would agree to a defense of Beck Construction under a reservation of rights, but only after it spoke with someone from Beck Construction and completed its investigation. The letter noted that Southern-Owners' policy included an employer liability exclusion, which might bar coverage. American Builders passed along the contents of that letter to Beck Construction the same day. Also on November 25, Beck Construction's lawyer offered November 26 or 27 for an interview with Beck, but Southern-Owners declined because this was not enough notice. He then proposed a telephone conference, but Southern-Owners demanded an in-person meeting.

Meanwhile, Cohen continued his attempts to secure payment for Guthrie. On November 18, he wrote to Evanston's claims manager, attaching the September 5 demand letter, the medical records, and other relevant documents, and made a new demand: a $2 million payout in exchange for a complete release of both American Builders and Evanston, with a decision due by December 18. American Builders received a copy of the November 18 demand letter two days later.

On December 10, nearly three months after it received notice of the claim, Southern-Owners finally met with Beck. Beck told Southern-Owners that

Ernest Guthrie, LLC employed Guthrie; Guthrie was performing subcontracting work for Beck Construction; the other people on site were not responsible for spotting Guthrie; Guthrie did not request fall protection; and Guthrie admitted that he "f*cked up" and "stepped off the roof." Based on that conversation, Southern-Owners believed it had a strong liability defense. One week later, Southern-Owners decided it should talk with the other two workers present. At that time, Southern-Owners' counsel was "in the process of reaching out" to them.

Also on December 10, Evanston told American Builders' counsel -- who was no longer involved in the case -- that it planned to tender its full policy to Guthrie, even though it was not the primary insurer. After reactivating his file, counsel saw the November 18 demand letter. With only eight days until that letter's deadline, he once again worked fast, reviewed the 2,700-page file, and concluded that American Builders should tender its policy limit to avoid a bad-faith claim.

On December 17, after internal discussions, American Builders decided to tender its limit. It then called Cohen to request a one-day extension and discuss the Southern-Owners policy. It learned that Guthrie did "not wish to pursue coverage under the [Southern-Owners] Policy and desire[d] to move forward with settlement without involving [Southern-Owners], directly." American Builders' counsel's understanding was that Cohen and Guthrie simply wanted the payout and did not care where the money came from.

The next day, American Builders' counsel notified Southern-Owners of the November 18 demand letter. Since Southern-Owners was listed as the primary

insurer, counsel believed that Southern-Owners had a primary obligation to pay, so he reached out to give Southern-Owners a chance to step up before American Builders did. Additionally, Southern-Owners' policy required an insured receive consent before accepting any settlement. Counsel did not want American Builders -- standing in the shoes of Beck Construction -- to breach Southern-Owners' contract by tendering payment without consent. Southern-Owners confirmed that it would not tender its coverage by the December 19 deadline. American Builders' counsel then told Southern-Owners that American Builders would be paying its policy limit. Later that day, he wrote to Southern-Owners' counsel to confirm that American Builders was forced to pay the policy because Southern-Owners would not, and that American Builders would seek equitable subrogation against Southern-Owners.

American Builders paid the policy on December 19, and Guthrie provided a release for Beck Construction, American Builders, and Evanston the next day. At that point, Southern-Owners -- having only conducted one interview with Beck -- ended its investigation.

B.

American Builders sued Southern-Owners in Florida state court for common law bad faith under Florida's doctrine of equitable subrogation. Southern-Owners removed the case to the United States District Court for the Southern District of Florida based on diversity jurisdiction. Southern-Owners later moved for summary judgment, in part because it claimed its policy did not cover Guthrie's injury. The district court denied the motion.

The parties then consented to the jurisdiction of a magistrate judge, who oversaw a three-day jury trial. After the close of American Builders' evidence, Southern-Owners moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Southern-Owners' only argument was that American Builders introduced no evidence that proved Guthrie attempted to settle with Southern-Owners. The court denied the motion. After the close of all evidence, the jury returned a verdict in favor of American Builders, and the district court entered final judgment for $1,091,240.82. Southern-Owners then filed a renewed motion for judgment as a matter of law under Rule 50(b), or, in the alternative, a motion for a new trial under Rule 59. This time, Southern-Owners argued that it could not have settled Guthrie's demand, and that American Builders, standing in the insured's shoes, breached Southern-Owners' contract by failing to receive its consent before settling with Guthrie. The district court denied those motions.

This timely appeal followed.

II.

"We review *de novo* the denial of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, viewing the evidence in the light most favorable to the non-moving party." *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1242 (11th Cir. 2021). "We review a ruling on a motion for a new trial for abuse of discretion," giving deference to the district court "where a new trial is denied and the jury's verdict is left undisturbed." *McGinnis v. Am. Home Mortg. Serv., Inc.*, 817 F.3d 1241, 1255 (11th Cir. 2016) (citation and quotation marks omitted). "We review a district court's decision on summary judgment *de novo*," viewing the evidence

and drawing all inferences in the light most favorable to the non-moving party. *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017).

A.

The first and most significant issue in this appeal is whether American Builders proved a bad faith claim. Taking the evidence in the light most favorable to American Builders, a reasonable jury could have found (as it did) both that Southern-Owners acted in bad faith and that its bad faith caused American Builders to pay its policy. Moreover, American Builders did not breach Southern-Owners' contract and relieve Southern-Owners of its good-faith duties. The district court did not err in denying Southern-Owners' Rule 50(b) motion.

1.

Under controlling Florida law, "the critical inquiry in a bad faith [action] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018). Additionally, any "damages claimed by an insured in a bad faith case 'must be caused by the insurer's bad faith.'" *Id.* (citation omitted). That is, the bad faith conduct must "directly and in natural and continuous sequence produce[] or contribute[] substantially to producing such [damage], so that it can reasonably be said that, but for the bad faith conduct, the [damage] would not have occurred." *Id.* at 11 (quoting Fla. Std. Jury Instr. (Civ.) 404.6(a)).

The bad faith inquiry "is determined under the 'totality of the circumstances' standard," *id.* at 7, and we focus "not on the actions of the claimant but rather

on those of the insurer in fulfilling its obligations to the insured," *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 677 (Fla. 2004). That said, a claimant's actions -- such as a decision not to offer a settlement -- remain relevant in assessing bad faith. *See Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991); *Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1254 (11th Cir. 2021). Insurers have obligations "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid [the] same," as well as to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." *Bos. Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). These "obligations . . . are not a mere checklist," however, and, as the Florida Supreme Court has explained, "[a]n insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment." *Harvey*, 259 So. 3d at 7.

Moreover, insurance companies occasionally have an affirmative duty to offer settlements. "Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." *Powell*, 584 So. 2d at 14. Thus, "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely," the insurer must "initiate settlement negotiations." *Id.* "In such a case, where '[t]he financial exposure to [the insured] [i]s a ticking financial time bomb' and '[s]uit c[an] be filed at any

time,' any 'delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith.'" *Harvey*, 259 So. 2d at 7 (alterations in original) (citation omitted).

At the end of trial, the district court properly and thoroughly instructed the jury on bad faith. The court charged the jury to consider "all of the circumstances" in determining whether the insurer "use[d] the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business," "investigate[d] the facts, . . . and "settle[d], if possible, where a reasonably prudent person faced with the prospect of paying the total recovery would do so." Moreover, the district court instructed the jury on causation, observing, among other things, that bad faith must "directly and in natural and continuous sequence produce[] or contribute[] substantially to producing" any damage, though it "need not be the only cause."

On this record, there was enough evidence to allow the jury to reasonably find that Southern-Owners acted in bad faith because it delayed acting on its duty to investigate and settle Guthrie's claim. American Builders notified Southern-Owners of the accident on September 12, and Cohen furnished the company with all relevant documents on September 27. Among those documents were proof of Guthrie's paraplegic status and medical bills already exceeding $400,000 and correspondences between Cohen and American Builders, laying out Cohen's theory of Beck Construction's liability. Right off the bat, Southern-Owners had little work left because the pertinent information landed in its lap. Those documents

painted a picture of "injuries so serious that a judgment in excess of the policy limits [was] likely." *Powell*, 584 So. 2d at 14. All that remained was a meeting with Beck, who could have helped inform Southern-Owners whether "liability [was] clear." *Id.* Instead of meeting with Beck, though, Southern-Owners dawdled. It did nothing for several weeks before finally reaching out to Beck Construction's lawyer. Then, when Southern-Owners finally did speak with counsel, it delayed reasonable offers to interview Beck for nearly two months, turning down an in-person meeting for being last-minute and a phone interview for not being in person. After finally meeting with Beck in early December, Southern-Owners decided it needed to follow up with the two other workers on site that day. But it delayed again, providing no evidence that it reached out to them for at least another two weeks. As of December 18, Southern-Owners still had not contacted them -- even though Southern-Owners had requested until December 20 to respond to Cohen's September 5 demand. With no time to spare, Southern-Owners was in essentially the same position it was in on September 27.

That body of evidence could lead a reasonable jury to conclude that Southern-Owners delayed its investigation instead of attempting "to resolve the coverage dispute promptly" or using "diligence and thoroughness." *Pozzi Window Co. v. Auto-Owners Ins.*, 446 F.3d 1178, 1188 (11th Cir. 2006) (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 63 (Fla. 1995)). And, in that delay, a jury could reasonably find that Southern-Owners completely neglected its "affirmative duty to initiate settlement negotiations," Powell, 584 So. 2d at 14, while Guthrie's hospital bills climbed due to his traumatic injury.

A reasonable jury could also find that Southern-Owners' bad faith caused American Builders' damages. *See Harvey*, 259 So. 3d at 7. When American Builders informed Southern-Owners of Cohen's November 18 demand, Southern-Owners refused to pay because it was still investigating the claims. Evanston had already tendered its $1 million policy on December 10, but the demand requested $2 million, so the next million needed to come from either Southern-Owners or American Builders. After Southern-Owners balked, American Builders had no choice but to tender payment. Southern-Owners' delay in investigating and settling led to its inability to tender an offer on December 18. As a result, a reasonable jury could find (as it did) that American Builders' damages stemmed directly and naturally from Southern-Owners' bad faith. *See id.* at 11.

In defense, Southern-Owners points the finger at Guthrie and Cohen. It focuses on their two settlement demands, neither of which named Southern-Owners, and on Cohen's statement that he and Guthrie had no interest in negotiating with Southern-Owners directly. However, "[t]he lack of a formal offer to settle does not preclude a finding of bad faith." *Powell*, 584 So. 2d at 14. Instead, under Florida law, it "is merely one factor to be considered." *Id.* A jury could find that even though Guthrie and Cohen never made an offer to Southern-Owners, this did not wipe Southern-Owners' hands clean. What's more, Southern-Owners was left to explain why *its own* actions were not in bad faith, rather than focusing on just *the claimant's* actions. *Harvey*, 259 So. 3d at 7. Of course, "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." *Pelaez*, 13 F.4th at 1254

(emphasis in original). In this case, though, Southern-Owners flipped Florida law on its head and exclusively focused on Guthrie and Cohen's actions.

2.

In the alternative, Southern-Owners argues that a reasonable jury should have found that it had no duty to act in good faith because American Builders breached Southern-Owners' contract by not receiving consent before settling the claim.[1] As we see it, this affirmative defense fails, for two separate reasons. For starters, a reasonable jury could find that American Builders' failure to receive consent did not substantially prejudice Southern-Owners. What's more, a reasonable jury could also find that Southern-Owners did not act diligently or in good faith in attempting to obtain consent.

Southern-Owners' contract with Beck Construction provided that "[n]o insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other

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[1] Southern-Owners argued that a reasonable jury would have found in its favor on this affirmative defense for the first time in its Rule 50(b) motion. But "[d]istrict courts lack authority to grant a Rule 50(b) motion on a ground not previously raised in a Rule 50(a) motion prior to the submission of the case to the jury." *Johnston v. Borders*, 36 F.4th 1254, 1270 n.31 (11th Cir. 2022). American Builders, however, did not raise this lack of authority in district court and thus "fail[ed] to raise the inadequacy of [the] Rule 50(a) motion in response to [the] Rule 50(b) motion." *Howard v. Walgreen Co.*, 605 F.3d 1239, 1243 (11th Cir. 2010). By not raising the argument in the trial court, American Builders "forfeited [its] right to raise waiver on appeal." *Id.* Moreover, none of the exceptions to forfeiture apply, and American Builders does not argue otherwise. Thus, we consider this argument forfeited, and turn to the merits of the affirmative defense.

than for first aid, without our consent." "[T]his language requires the insured to obtain the insurer's consent before settling." *Am. Reliance Ins. Co. v. Perez*, 712 So. 2d 1211, 1213 (Fla. 3d DCA 1998). That is, "while an insured is free to enter into a reasonable settlement when its insurer has wrongfully refused to provide it with a defense to a suit, . . . the insured is not similarly free to independently engage in such settlements where, as here, the insurer had not declined a defense to suit." *First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co.*, 695 So. 2d 475, 477 (Fla. 3d DCA 1997); *see also Am. Reliance Ins. Co.*, 712 So. 2d at 1212–13.

The Florida Supreme Court requires an insurer to establish three things in order to succeed on this affirmative defense: (1) a lack of consent; (2) substantial prejudice to the insurer; and (3) diligence and good faith by the insurer in attempting to receive consent. *See Ramos v. Nw. Mut. Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976); *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co.*, 601 F.3d 1143, 1149–50 (11th Cir. 2010). The first element has a few exceptions. The insured may settle without obtaining consent if the insurer "wrongfully refused to provide [the insured] with a defense to a suit," *First Am. Tit. Ins. Co.*, 695 So. 2d at 477, or offers a conditional defense that the parties cannot agree upon, *Taylor v. Safeco Ins. Co.*, 361 So. 2d 743, 746 (Fla. 1st DCA 1978). Moreover, even if the insured was obliged to obtain consent, the failure to do so is not an affirmative defense unless the insurer also establishes substantial prejudice and evinces good faith in bringing about the cooperation of the insured. *Ramos*, 336 So. 2d at 75. As the Florida Supreme Court put it:

> This Court . . . emphasized that to constitute the breach of a policy, the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by failure to cooperate. Furthermore, . . . the insurer must show that it has exercised diligence and good faith in bringing about the cooperation of its insured and must show that it has complied in good faith with the terms of the policy.

Id. (citations omitted).

We start with the first element: lack of consent. Over the objection of Southern-Owners, the district court instructed the jury to decide "whether American Builders Insurance Company voluntarily made a payment without obtaining Southern-Owners Insurance Company's prior consent, or whether American Builders Insurance Company was legally obligated to make such payment." Both parties agree that American Builders never received consent before paying. Instead, they debate only whether American Builders needed to obtain consent because its payment was not "voluntary."

American Builders argued to the jury that its payment was involuntary because Southern-Owners unreasonably withheld consent and forced American Builders to either pay without consent or face a bad faith suit itself. The theory went this way: when Southern-Owners told American Builders that it would not tender payment, American Builders "involuntarily" paid "because of circumstances beyond [its] control," since the "situation requir[ed]

immediate response to protect its legal interests." *See Rolyn Cos. v. R & J Sales of Tex., Inc.*, 412 F. App'x 252, 255 (11th Cir. 2011) (quotation marks and citation omitted). Southern-Owners responded that it could not have unreasonably withheld consent because American Builders had already decided to pay. The jury was told by Southern-Owners that American Builders made its decision voluntarily and before seeking any consent.

We need not settle whether American Builders made a voluntary payment under Florida law because Southern-Owners also bore the burden to prove two additional things -- substantial prejudice and good faith -- in order to sustain its affirmative defense, and the jury could reasonably have found that Southern-Owners failed to prove either.

Turning first to prejudice, the district court instructed the jury that Southern-Owners "must establish that [American Builders'] breach of the consent provision was material and caused defendant to suffer substantial prejudice." *See Ramos*, 336 So. 2d at 75. Southern-Owners provided no evidence of substantial prejudice. In fact, its claim adjuster (John Blaser) unambiguously testified that he did not know *how* Southern-Owners was prejudiced by American Builders' decision to pay. When first asked whether Southern-Owners suffered any prejudice, the claim adjuster responded "maybe." And when asked if he had any facts of prejudice, he simply replied, "Not that I'm aware of at this time."

We are unpersuaded by Southern-Owners' claim that it has been prejudiced. For starters, Southern-Owners argues it was "blindsided" by American Builders' decision to pay on December 18 because it was not aware of Cohen's November 18 demand. This

argument has several flaws. To begin, American Builders may have decided to pay before it called Southern-Owners, but it did not plan to tender payment until after learning whether Southern-Owners decided to pay instead. The evidence was sufficient to establish that American Builders' payment was contingent on Southern-Owners' decision. Moreover, this argument overlooks that, by the December 18 phone call with American Builders, Southern-Owners should have been ready to decide whether it would pay anyway because it had asked for an extension on its own investigation until December 20. Lastly, it ignores the company's long months of delay. An insurer must have a reasonable time to investigate the claim, *see Bos. Old Colony*, 386 So. 2d at 785, but the evidence adduced at trial strongly suggested that Southern-Owners largely sat on its thumbs.

Southern-Owners also says that the $1,091,240.92 judgment entered by the district court turned Southern-Owners into a judgment debtor in an amount greater than its policy limits, resulting in substantial prejudice. But Southern-Owners forfeited this argument by not raising it in district court. *See Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016). Regardless, a post-trial judgment does not affect "the rights of the insurer in defense of the cause." *Ramos*, 336 So. 2d at 75. The judgment could not have affected Southern-Owners' defense because it came after Southern-Owners decided not to provide coverage.

Finally, as we have already detailed at length, a reasonable jury could (and did) plainly find that Southern-Owners did not "show that it [had] exercised diligence and good faith." *Id.* American Builders did

everything when it came to investigating Guthrie's claim and deciding whether the insured should make a payment, all while Southern-Owners sat back and watched. The Florida Supreme Court has been clear on this point: without good faith, an insurer may not avail itself of an affirmative defense based on an insured's failure to cooperate. *See id.*

The long and short of it is that, on this record, the evidence is not "so overwhelmingly in favor of [Southern-Owners] that a reasonable jury could not" have ruled for American Builders on bad faith and against Southern-Owners on breach of contract. *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11th Cir. 2001). We see no error in the denial of Southern-Owners' Rule 50(b) motion.

B.

Next up is Southern-Owners' claim that the district court abused its discretion in denying the motion for a new trial. Southern-Owners offers four reasons: (1) it did not act in bad faith because it was not offered an opportunity to settle; (2) any bad faith did not cause American Builders' damages; (3) American Builders breached its contract; and (4) generally, it did not act in bad faith.

All four of these arguments are retreads of the arguments for judgment as a matter of law that we have already rejected. The district court did not abuse its discretion in denying a new trial. For a new trial, Southern-Owners must show "the verdict '[was] against the clear weight of the evidence or . . . result[ed] in a miscarriage of justice.'" *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 948 (11th Cir. 2018) (citation omitted). As we've already explained in some detail, sufficient evidence existed for a rational

jury to find that: (1) Southern-Owners delayed in its investigation and neglected to act on its affirmative duty to settle, *Powell*, 584 So. 2d at 14; (2) Southern-Owners' bad faith caused American Builders to suffer damages, *Harvey*, 259 So. 3d at 7, 11; and (3) American Builders did not breach because Southern-Owners did not establish substantial prejudice or good faith, *Ramos*, 336 So. 2d at 75. The limited evidence favoring Southern-Owners -- its multiple requests for extensions of time and the details from the Beck interview -- does not amount to "the clear weight of the evidence." *Chmielewski*, 890 F.3d at 948 (citation omitted).

The jury's verdict was not against the clear weight of the evidence, and the district court did not abuse its discretion in denying Southern-Owners' Rule 59 motion.

C.

The last issue we'll mention is whether the district court erred in denying Southern-Owners' summary judgment motion because its policy purportedly did not cover Guthrie's injuries. In the past, we would not have considered this argument at all because Southern-Owners did not re-raise it in its post-trial motions. *See, e.g.*, *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1286 (11th Cir. 2001). A recent Supreme Court decision has made clear, however, that arguments denied at summary judgment are appealable after a trial on the merits if they raise "purely legal issues." *See Dupree*, 143 S. Ct. at 1389 (holding that "[w]hile factual issues addressed in summary-judgment denials are unreviewable on appeal, the same is not true of purely legal issues -- that is, issues that can be resolved without reference to any disputed facts"). Purely legal issues raised at

the summary-judgment stage are "unaffected by future developments in the case," like the presentation of evidence at trial, so "there is no benefit to having a district court reexamine" them after a trial. *Id.* Thus, following *Dupree*, purely legal issues need only appear in a pretrial Rule 56 motion for this Court to consider them, while fact-bound arguments still must be preserved in a Rule 50 motion at trial. *Id.*

That said, we will not consider the district court's denial of summary judgment here. At every step along the way, Southern-Owners has neglected to make its case that its policy exclusion defense is a purely legal issue. And, needless to say, this is an argument that it should have squarely raised, especially since the distinction between a fact and legal question is "vexing," *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), and it is up to the appellate courts to decide on what side of the line an issue falls, *see Dupree*, 143 S. Ct. at 1390–91.

As the record reflects, Southern-Owners first argued that a policy provision excluded coverage for the bodily injury that Guthrie suffered at the summary judgment stage in district court. But in its memorandum in district court, Southern-Owners did not claim that this issue was purely legal. Instead, it relied on facts to establish that "Guthrie was an employee of Ernest Guthrie, LLC, acting in the course and scope of his employment with Ernest Guthrie, LLC" and that "Ernest Guthrie, LLC is the Named Insured on the" policy. In its response, American Builders disputed that the facts supported a finding that the exclusion precluded coverage, while also arguing that Florida precedent barred the defense as a matter of law. After summary judgment was denied, the case went to trial, and, notably, Southern-Owners

never re-raised the argument in its post-trial motions for a judgment as a matter of law or for a new trial. Because the issue potentially relied on facts in dispute at summary judgment, it was presumptively unappealable without being re-raised in district court in a Rule 50 motion. *See Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) (explaining that an order denying summary judgment after a full trial on the merits typically is not appealable because "the full record developed in court supersedes the record existing at the time of the summary-judgment motion").

On appeal, Southern-Owners raised the merits of the coverage defense, but it never offered any explanation for how the denial of the defense was appealable. By failing to adequately explain in its opening brief what made its defense a purely legal one, the argument that it is appealable "is deemed abandoned and its merits will not be addressed." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). Moreover, Southern-Owners did not raise the argument in its reply brief -- although we have long recognized that raising it at that time would have been too late anyway. *See, e.g.*, *Bank of Am., N.A. v. Mukamai (In re Egidi)*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments . . . raised for the first time in the reply brief are deemed waived.").

Then, Southern-Owners appeared before this Court at oral argument, and, once again, it failed to proactively assert that its coverage defense was appealable. Oral Argument at 0:16–13:53. Not until in its rebuttal argument did Southern-Owners maintain -- for the first time -- that its defense was a purely legal one. *Id.* at 24:50–27:45. And even then, it did so only after the panel pointed out that denials of summary judgment are usually not appealable after a

merits trial. *Id.* at 24:33–24:50. In any event, it did not preserve the issue by waiting to raise it at oral argument. *Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321, 1330 (11th Cir. 2021) ("We do not consider arguments raised for the first time at oral argument.").

Finally, in its motion for rehearing, Southern-Owners offered a fully developed argument for why the denial of summary judgment was appealable in this Court. This last-gasp attempt, however, came far too late. *United States v. Pipkins*, 412 F.3d 1251, 1253 (11th Cir. 2005) (per curiam) ("We have a long-standing rule that we will not consider issues that were argued for the first time in a petition for rehearing.").

All told, Southern-Owners failed to make the case that we should hear this issue. Without a timely argument that the defense raised an appealable legal issue, we decline to reach the merits.

AFFIRMED.

Appendix B

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

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No. 21-13496

———

AMERICAN BUILDERS INSURANCE COMPANY,
Plaintiff-Appellee,

Versus

SOUTHERN-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

———

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-81357-WM

———

(Jan. 4, 2023)

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

Ernest Guthrie fell from a roof and became paralyzed from the waist down, never to walk again. Within months, his medical bills climbed past

$400,000, and future costs projected into the millions. Three insurance companies potentially provided coverage for Guthrie. This appeal is a battle between two of them.

The primary insurer for Guthrie's company was Southern-Owners Insurance Company. At the time of the accident, Guthrie was performing subcontracting work for Beck Construction, which had a policy with American Builders Insurance Company and an excess policy with Evanston Insurance Company. American Builders investigated the accident, assessed Beck Construction's liability, and evaluated Guthrie's claim. Southern-Owners, in contrast, did little to nothing for months. When push came to shove, Southern-Owners refused to pay any amount to Guthrie to settle the claim, and American Builders and Evanston ponied up a million dollars apiece instead.

American Builders then sued Southern-Owners for common law bad faith under Florida's doctrine of equitable subrogation. Along the way, Southern-Owners moved for summary judgment, but the district court denied the motion. A federal trial jury heard the case and found in favor of American Builders. After the entry of final judgment, Southern-Owners sought judgment as a matter of law, or, in the alternative, a new trial. The district court denied those motions, too. On appeal, Southern-Owners challenges the denials of its summary judgment and post-trial motions.

After thorough review of the record and with the benefit of oral argument, we affirm.

I.
A.

Ernest Guthrie, an employee of Ernest Guthrie, LLC performing work for Beck Construction, slipped from the roof of a house on April 1, 2019, and crashed to the ground. He became paralyzed from the waist down. Guthrie's lawyer, Stuart Cohen, wrote to Beck Construction to assert the company's liability and request insurance information. Beck Construction, in turn, put its insurer, American Builders on notice on May 8. American Builders had issued a general liability policy to Beck Construction, with a limit of $1 million for each occurrence. American Builders' claim specialist investigated the incident by meeting with the company and its outside investigator and collecting hospital records, rehabilitation facility records, and correspondences about the claim and injuries.

Cohen investigated his client's claim, too. He determined that Beck Construction instructed Guthrie to climb onto the roof without providing any fall protection, while two spotters focused on their phones. Guthrie had already sustained $400,000 in medical expenses, and Cohen calculated Guthrie's claim at $4 million to $5 million, even if Guthrie were partially liable. On September 5, Cohen demanded that American Builders pay its $1 million policy limit within thirty days in exchange for a release of Beck Construction from liability. American Builders requested an extension, and Cohen granted ten days, placing the deadline on October 14.

Cohen conditioned that demand on the lack of other available insurance. But, as it turns out, there were two other relevant policies: Evanston provided an excess policy worth $1 million per occurrence to

Beck Construction, and Southern-Owners -- which would become the defendant in the instant bad-faith case -- sold Ernest Guthrie, LLC a policy that covered $1 million. Southern-Owners' policy contained an endorsement naming Beck Construction as an additional insured for any work Ernest Guthrie, LLC performed for Beck Construction, and making its policy the primary insurer for claims arising from Beck Construction's work.

During American Builders' investigation, it discovered these additional policies. So, on September 12, it tendered the defense of and indemnity for Guthrie's claim to Southern-Owners. In its letter to Southern-Owners, American Builders attached the certificate of insurance listing Beck Construction as an additional insured on Ernest Guthrie, LLC's policy; the initial notice of the claim to American Builders; and Cohen's September 5 demand letter. A couple weeks later, on September 25, Southern-Owners' counsel sent letters to Cohen, American Builders, and Beck Construction, requesting additional incident reports, medical records, workers' compensation records, potentially applicable insurance policies, applicable construction contracts, and transcripts or recordings of statements by Guthrie and Beck Construction. She also asked Cohen for a forty-five-day extension on the September 5 demand.

Two days later, Cohen provided Southern-Owners with Guthrie's medical records and bills, American Builders' insurance policy, and correspondences from Cohen to American Builders in May and June that explained the accident. Cohen did not respond to the forty-five-day extension request, but, that same day, American Builders requested an extension for American Builders until November 4, which Cohen

granted. In his letter granting the extension, Cohen explained that he recently became aware that Southern-Owners and Evanston might also provide coverage for the accident. Because of this new information, Guthrie would now only execute a release of American Builders that reserved his rights to pursue claims against either Evanston or Southern-Owners.

On October 10, American Builders retained counsel to address Cohen's new stipulation. Working quickly, the attorney concluded in a few days that Guthrie's claim was worth around $20 million to $30 million, far exceeding any applicable policy's coverage even if Beck Construction were largely not responsible. On October 14, he then informed Cohen that American Builders was prepared to pay its $1 million policy limit but that it could not accept Cohen's new stipulation because it provided only a partial release.

During the early weeks of October, the record does not reflect that Southern-Owners did anything, other than request extensions. But on October 18 -- over a month after receiving notice of Guthrie's injury -- Southern-Owners contacted the lawyer that American Builders had retained for Beck Construction to set up an interview with Russell Beck, the company's principal. Southern-Owners and the attorney spent the rest of October and all of November trying to set up a time to talk.

On November 25, still struggling to set up a meeting with Beck, Southern-Owners wrote Cohen, describing the setback and noting that it had no written documentation on the claim. Southern-Owners also requested until December 20 to respond to the September 5 demand letter. That same day,

Southern-Owners told American Builders that it would agree to a defense of Beck Construction under a reservation of rights, but only after it spoke with someone from Beck Construction and completed its investigation. The letter noted that Southern-Owners' policy included an employer liability exclusion, which might bar coverage. American Builders passed along the contents of that letter to Beck Construction the same day. Also on November 25, Beck Construction's lawyer offered November 26 or 27 for an interview with Beck, but Southern-Owners declined because this was not enough notice. He then proposed a telephone conference, but Southern-Owners demanded an in-person meeting.

Meanwhile, Cohen continued his attempts to secure payment for Guthrie. On November 18, he wrote to Evanston's claims manager, attaching the September 5 demand letter, the medical records, and other relevant documents, and made a new demand: a $2 million payout in exchange for a complete release of both American Builders and Evanston, with a decision due by December 18. American Builders received a copy of the November 18 demand letter two days later.

On December 10, nearly three months after it received notice of the claim, Southern-Owners finally met with Beck. Beck told Southern-Owners that Ernest Guthrie, LLC employed Guthrie; Guthrie was performing subcontracting work for Beck Construction; the other people on site were not responsible for spotting Guthrie; Guthrie did not request fall protection; and Guthrie admitted that he "f*cked up" and "stepped off the roof." Based on that conversation, Southern-Owners believed it had a strong liability defense. One week later, Southern-

Owners decided it should talk with the other two workers present. At that time, Southern-Owners' counsel was "in the process of reaching out" to them.

Also on December 10, Evanston told American Builders' counsel -- who was no longer involved in the case -- that it planned to tender its full policy to Guthrie, even though it was not the primary insurer. After reactivating his file, counsel saw the November 18 demand letter. With only eight days until that letter's deadline, he once again worked fast, reviewed the 2,700-page file, and concluded that American Builders should tender its policy limit to avoid a bad-faith claim.

On December 17, after internal discussions, American Builders decided to tender its limit. It then called Cohen to request a one-day extension and discuss the Southern-Owners policy. It learned that Guthrie did "not wish to pursue coverage under the [Southern-Owners] Policy and desire[d] to move forward with settlement without involving [Southern-Owners], directly." American Builders' counsel's understanding was that Cohen and Guthrie simply wanted the payout and did not care where the money came from.

The next day, American Builders' counsel notified Southern-Owners of the November 18 demand letter. Since Southern-Owners was listed as the primary insurer, counsel believed that Southern-Owners had a primary obligation to pay, so he reached out to give Southern-Owners a chance to step up before American Builders did. Additionally, Southern-Owners' policy required an insured receive consent before accepting any settlement. Counsel did not want American Builders -- standing in the shoes of Beck Construction -- to breach Southern-Owners' contract by tendering

payment without consent. Southern-Owners confirmed that it would not tender its coverage by the December 19 deadline. American Builders' counsel then told Southern-Owners that American Builders would be paying its policy limit. Later that day, he wrote to Southern-Owners' counsel to confirm that American Builders was forced to pay the policy because Southern-Owners would not, and that American Builders would seek equitable subrogation against Southern-Owners.

American Builders paid the policy on December 19, and Guthrie provided a release for Beck Construction, American Builders, and Evanston the next day. At that point, Southern-Owners -- having only conducted one interview with Beck -- ended its investigation.

B.

American Builders sued Southern-Owners in Florida state court for common law bad faith under Florida's doctrine of equitable subrogation. Southern-Owners removed the case to the United States District Court for the Southern District of Florida based on diversity jurisdiction. Southern-Owners later moved for summary judgment, in part because it claimed its policy did not cover Guthrie's injury. The district court denied the motion.

The parties then consented to the jurisdiction of a magistrate judge, who oversaw a three-day jury trial. After the close of American Builders' evidence, Southern-Owners moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Southern-Owners' only argument was that American Builders introduced no evidence that proved Guthrie attempted to settle with Southern-Owners. The court

denied the motion. After the close of all evidence, the jury returned a verdict in favor of American Builders, and the district court entered final judgment for $1,091,240.82. Southern-Owners then filed a renewed motion for judgment as a matter of law under Rule 50(b), or, in the alternative, a motion for a new trial under Rule 59. This time, Southern-Owners argued that it could not have settled Guthrie's demand, and that American Builders, standing in the insured's shoes, breached Southern-Owners' contract by failing to receive its consent before settling with Guthrie. The district court denied those motions.

This timely appeal followed.

II.

"We review *de novo* the denial of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, viewing the evidence in the light most favorable to the non-moving party." *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1242 (11th Cir. 2021). "We review a ruling on a motion for a new trial for abuse of discretion," giving deference to the district court "where a new trial is denied and the jury's verdict is left undisturbed." *McGinnis v. Am. Home Mortg. Serv., Inc.*, 817 F.3d 1241, 1255 (11th Cir. 2016) (citation and quotation marks omitted). "We review a district court's decision on summary judgment *de novo*," viewing the evidence and drawing all inferences in the light most favorable to the non-moving party. *Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017).

A.

The first and most significant issue in this appeal is whether American Builders proved a bad faith claim. Taking the evidence in the light most favorable

to American Builders, a reasonable jury could have found (as it did) both that Southern-Owners acted in bad faith and that its bad faith caused American Builders to pay its policy. Moreover, American Builders did not breach Southern-Owners' contract and relieve Southern-Owners of its good-faith duties. The district court did not err in denying Southern-Owners' Rule 50(b) motion.

1.

Under controlling Florida law, "the critical inquiry in a bad faith [action] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018). Additionally, any "damages claimed by an insured in a bad faith case 'must be caused by the insurer's bad faith.'" *Id.* (citation omitted). That is, the bad faith conduct must "directly and in natural and continuous sequence produce[] or contribute[] substantially to producing such [damage], so that it can reasonably be said that, but for the bad faith conduct, the [damage] would not have occurred." *Id.* at 11 (quoting Fla. Std. Jury Instr. (Civ.) 404.6(a)).

The bad faith inquiry "is determined under the 'totality of the circumstances' standard," *id.* at 7, and we focus "not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured," *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 677 (Fla. 2004). That said, a claimant's actions -- such as a decision not to offer a settlement -- remain relevant in assessing bad faith. *See Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991); *Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1254 (11th Cir. 2021). Insurers have

obligations "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid [the] same," as well as to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." *Bos. Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). These "obligations . . . are not a mere checklist," however, and, as the Florida Supreme Court has explained, "[a]n insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment." *Harvey*, 259 So. 3d at 7.

Moreover, insurance companies occasionally have an affirmative duty to offer settlements. "Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." *Powell*, 584 So. 2d at 14. Thus, "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely," the insurer must "initiate settlement negotiations." *Id.* "In such a case, where '[t]he financial exposure to [the insured] [i]s a ticking financial time bomb' and '[s]uit c[an] be filed at any time,' any 'delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith.'" *Harvey*, 259 So. 2d at 7 (alterations in original) (citation omitted).

At the end of trial, the district court properly and thoroughly instructed the jury on bad faith. The court charged the jury to consider "all of the circumstances" in determining whether the insurer "use[d] the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business," "investigate[d] the facts, . . . and "settle[d], if possible, where a reasonably prudent person faced with the prospect of paying the total recovery would do so." Moreover, the district court instructed the jury on causation, observing, among other things, that bad faith must "directly and in natural and continuous sequence produce[] or contribute[] substantially to producing" any damage, though it "need not be the only cause."

On this record, there was enough evidence to allow the jury to reasonably find that Southern-Owners acted in bad faith because it delayed acting on its duty to investigate and settle Guthrie's claim. American Builders notified Southern-Owners of the accident on September 12, and Cohen furnished the company with all relevant documents on September 27. Among those documents were proof of Guthrie's paraplegic status and medical bills already exceeding $400,000 and correspondences between Cohen and American Builders, laying out Cohen's theory of Beck Construction's liability. Right off the bat, Southern-Owners had little work left because the pertinent information landed in its lap. Those documents painted a picture of "injuries so serious that a judgment in excess of the policy limits [was] likely." *Powell*, 584 So. 2d at 14. All that remained was a meeting with Beck, who could have helped inform Southern-Owners whether "liability [was] clear." *Id.* Instead of meeting with Beck, though, Southern-Owners dawdled. It did nothing for several weeks

before finally reaching out to Beck Construction's lawyer. Then, when Southern-Owners finally did speak with counsel, it delayed reasonable offers to interview Beck for nearly two months, turning down an in-person meeting for being last-minute and a phone interview for not being in person. After finally meeting with Beck in early December, Southern-Owners decided it needed to follow up with the two other workers on site that day. But it delayed again, providing no evidence that it reached out to them for at least another two weeks. As of December 18, Southern-Owners still had not contacted them -- even though Southern-Owners had requested until December 20 to respond to Cohen's September 5 demand. With no time to spare, Southern-Owners was in essentially the same position it was in on September 27.

That body of evidence could lead a reasonable jury to conclude that Southern-Owners delayed its investigation instead of attempting "to resolve the coverage dispute promptly" or using "diligence and thoroughness." *Pozzi Window Co. v. Auto-Owners Ins.*, 446 F.3d 1178, 1188 (11th Cir. 2006) (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 63 (Fla. 1995)). And, in that delay, a jury could reasonably find that Southern-Owners completely neglected its "affirmative duty to initiate settlement negotiations," *Powell*, 584 So. 2d at 14, while Guthrie's hospital bills climbed due to his traumatic injury.

A reasonable jury could also find that Southern-Owners' bad faith caused American Builders' damages. *See Harvey*, 259 So. 3d at 7. When American Builders informed Southern-Owners of Cohen's November 18 demand, Southern-Owners refused to

pay because it was still investigating the claims. Evanston had already tendered its $1 million policy on December 10, but the demand requested $2 million, so the next million needed to come from either Southern-Owners or American Builders. After Southern-Owners balked, American Builders had no choice but to tender payment. Southern-Owners' delay in investigating and settling led to its inability to tender an offer on December 18. As a result, a reasonable jury could find (as it did) that American Builders' damages stemmed directly and naturally from Southern-Owners' bad faith. *See id.* at 11.

In defense, Southern-Owners points the finger at Guthrie and Cohen. It focuses on their two settlement demands, neither of which named Southern-Owners, and on Cohen's statement that he and Guthrie had no interest in negotiating with Southern-Owners directly. However, "[t]he lack of a formal offer to settle does not preclude a finding of bad faith." *Powell*, 584 So. 2d at 14. Instead, under Florida law, it "is merely one factor to be considered." *Id.* A jury could find that even though Guthrie and Cohen never made an offer to Southern-Owners, this did not wipe Southern-Owners' hands clean. What's more, Southern-Owners was left to explain why *its own* actions were not in bad faith, rather than focusing on just *the claimant's* actions. *Harvey*, 259 So. 3d at 7. Of course, "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." *Pelaez*, 13 F.4th at 1254 (emphasis in original). In this case, though, Southern-Owners flipped Florida law on its head and exclusively focused on Guthrie and Cohen's actions.

2.

In the alternative, Southern-Owners argues that a reasonable jury should have found that it had no duty to act in good faith because American Builders breached Southern-Owners' contract by not receiving consent before settling the claim.[1] As we see it, this affirmative defense fails, for two separate reasons. For starters, a reasonable jury could find that American Builders' failure to receive consent did not substantially prejudice Southern-Owners. What's more, a reasonable jury could also find that Southern-Owners did not act diligently or in good faith in attempting to obtain consent.

Southern-Owners' contract with Beck Construction provided that "[n]o insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." "[T]his language requires the insured to obtain the insurer's consent before settling." *Am. Reliance Ins. Co. v.*

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[1] Southern-Owners argued that a reasonable jury would have found in its favor on this affirmative defense for the first time in its Rule 50(b) motion. But "[d]istrict courts lack authority to grant a Rule 50(b) motion on a ground not previously raised in a Rule 50(a) motion prior to the submission of the case to the jury." *Johnston v. Borders*, 36 F.4th 1254, 1270 n.31 (11th Cir. 2022). American Builders, however, did not raise this lack of authority in district court and thus "fail[ed] to raise the inadequacy of [the] Rule 50(a) motion in response to [the] Rule 50(b) motion." *Howard v. Walgreen Co.*, 605 F.3d 1239, 1243 (11th Cir. 2010). By not raising the argument in the trial court, American Builders "forfeited [its] right to raise waiver on appeal." *Id.* Moreover, none of the exceptions to forfeiture apply, and American Builders does not argue otherwise. Thus, we consider this argument forfeited, and turn to the merits of the affirmative defense.

Perez, 712 So. 2d 1211, 1213 (Fla. 3d DCA 1998). That is, "while an insured is free to enter into a reasonable settlement when its insurer has wrongfully refused to provide it with a defense to a suit, . . . the insured is not similarly free to independently engage in such settlements where, as here, the insurer had not declined a defense to suit." *First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co.*, 695 So. 2d 475, 477 (Fla. 3d DCA 1997); *see also Am. Reliance Ins. Co.*, 712 So. 2d at 1212–13.

The Florida Supreme Court requires an insurer to establish three things in order to succeed on this affirmative defense: (1) a lack of consent; (2) substantial prejudice to the insurer; and (3) diligence and good faith by the insurer in attempting to receive consent. *See Ramos v. Nw. Mut. Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976); *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co.*, 601 F.3d 1143, 1149–50 (11th Cir. 2010). The first element has a few exceptions. The insured may settle without obtaining consent if the insurer "wrongfully refused to provide [the insured] with a defense to a suit," *First Am. Tit. Ins. Co.*, 695 So. 2d at 477, or offers a conditional defense that the parties cannot agree upon, *Taylor v. Safeco Ins. Co.*, 361 So. 2d 743, 746 (Fla. 1st DCA 1978). Moreover, even if the insured was obliged to obtain consent, the failure to do so is not an affirmative defense unless the insurer also establishes substantial prejudice and evinces good faith in bringing about the cooperation of the insured. *Ramos*, 336 So. 2d at 75. As the Florida Supreme Court put it:

> This Court . . . emphasized that to constitute the breach of a policy, the lack of cooperation must be material and the insurance company must show that it

> was substantially prejudiced in the particular case by failure to cooperate. Furthermore, . . . the insurer must show that it has exercised diligence and good faith in bringing about the cooperation of its insured and must show that it has complied in good faith with the terms of the policy.

Id. (citations omitted).

We start with the first element: lack of consent. Over the objection of Southern-Owners, the district court instructed the jury to decide "whether American Builders Insurance Company voluntarily made a payment without obtaining Southern-Owners Insurance Company's prior consent, or whether American Builders Insurance Company was legally obligated to make such payment." Both parties agree that American Builders never received consent before paying. Instead, they debate only whether American Builders needed to obtain consent because its payment was not "voluntary."

American Builders argued to the jury that its payment was involuntary because Southern-Owners unreasonably withheld consent and forced American Builders to either pay without consent or face a bad faith suit itself. The theory went this way: when Southern-Owners told American Builders that it would not tender payment, American Builders "involuntarily" paid "because of circumstances beyond [its] control," since the "situation requir[ed] immediate response to protect its legal interests." *See Rolyn Cos. v. R & J Sales of Tex., Inc.*, 412 F. App'x 252, 255 (11th Cir. 2011) (quotation marks and citation omitted). Southern-Owners responded that it could

not have unreasonably withheld consent because American Builders had already decided to pay. The jury was told by Southern-Owners that American Builders made its decision voluntarily and before seeking any consent.

We need not settle whether American Builders made a voluntary payment under Florida law because Southern-Owners also bore the burden to prove two additional things -- substantial prejudice and good faith -- in order to sustain its affirmative defense, and the jury could reasonably have found that Southern-Owners failed to prove either.

Turning first to prejudice, the district court instructed the jury that Southern-Owners "must establish that [American Builders'] breach of the consent provision was material and caused defendant to suffer substantial prejudice." *See Ramos*, 336 So. 2d at 75. Southern-Owners provided no evidence of substantial prejudice. In fact, its claim adjuster (John Blaser) unambiguously testified that he did not know *how* Southern-Owners was prejudiced by American Builders' decision to pay. When first asked whether Southern-Owners suffered any prejudice, the claim adjuster responded "maybe." And when asked if he had any facts of prejudice, he simply replied, "Not that I'm aware of at this time."

We are unpersuaded by Southern-Owners' claim that it has been prejudiced. For starters, Southern-Owners argues it was "blindsided" by American Builders' decision to pay on December 18 because it was not aware of Cohen's November 18 demand. This argument has several flaws. To begin, American Builders may have decided to pay before it called Southern-Owners, but it did not plan to tender payment until after learning whether Southern-

Owners decided to pay instead. The evidence was sufficient to establish that American Builders' payment was contingent on Southern-Owners' decision. Moreover, this argument overlooks that, by the December 18 phone call with American Builders, Southern-Owners should have been ready to decide whether it would pay anyway because it had asked for an extension on its own investigation until December 20. Lastly, it ignores the company's long months of delay. An insurer must have a reasonable time to investigate the claim, *see Bos. Old Colony*, 386 So. 2d at 785, but the evidence adduced at trial strongly suggested that Southern-Owners largely sat on its thumbs.

Southern-Owners also says that the $1,091,240.92 judgment entered by the district court turned Southern-Owners into a judgment debtor in an amount greater than its policy limits, resulting in substantial prejudice. But Southern-Owners forfeited this argument by not raising it in district court. *See Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016). Regardless, a post-trial judgment does not affect "the rights of the insurer in defense of the cause." *Ramos*, 336 So. 2d at 75. The judgment could not have affected Southern-Owners' defense because it came after Southern-Owners decided not to provide coverage.

Finally, as we have already detailed at length, a reasonable jury could (and did) plainly find that Southern-Owners did not "show that it [had] exercised diligence and good faith." *Id*. American Builders did everything when it came to investigating Guthrie's claim and deciding whether the insured should make a payment, all while Southern-Owners sat back and watched. The Florida Supreme Court has been clear

on this point: without good faith, an insurer may not avail itself of an affirmative defense based on an insured's failure to cooperate. *See id.*

The long and short of it is that, on this record, the evidence is not "so overwhelmingly in favor of [Southern-Owners] that a reasonable jury could not" have ruled for American Builders on bad faith and against Southern-Owners on breach of contract. *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11th Cir. 2001). We see no error in the denial of Southern-Owners' Rule 50(b) motion.

B.

Next up is Southern-Owners' claim that the district court abused its discretion in denying the motion for a new trial. Southern-Owners offers four reasons: (1) it did not act in bad faith because it was not offered an opportunity to settle; (2) any bad faith did not cause American Builders' damages; (3) American Builders breached its contract; and (4) generally, it did not act in bad faith.

All four of these arguments are retreads of the arguments for judgment as a matter of law that we have already rejected. The district court did not abuse its discretion in denying a new trial. For a new trial, Southern-Owners must show "the verdict '[was] against the clear weight of the evidence or . . . result[ed] in a miscarriage of justice.'" *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 948 (11th Cir. 2018) (citation omitted). As we've already explained in some detail, sufficient evidence existed for a rational jury to find that: (1) Southern-Owners delayed in its investigation and neglected to act on its affirmative duty to settle, *Powell*, 584 So. 2d at 14; (2) Southern-Owners' bad faith caused American Builders to suffer

damages, *Harvey*, 259 So. 3d at 7, 11; and (3) American Builders did not breach because Southern-Owners did not establish substantial prejudice or good faith, *Ramos*, 336 So. 2d at 75. The limited evidence favoring Southern-Owners -- its multiple requests for extensions of time and the details from the Beck interview -- does not amount to "the clear weight of the evidence." *Chmielewski*, 890 F.3d at 948 (citation omitted).

The jury's verdict was not against the clear weight of the evidence, and the district court did not abuse its discretion in denying Southern-Owners' Rule 59 motion.

C.

The last issue raised is whether the district court erred in denying Southern-Owners' summary judgment motion because its policy purportedly did not cover Guthrie's injuries. We will not consider this issue for two separate reasons.

First, during oral argument, Southern-Owners maintained for the first time that a purely legal issue denied at summary judgment is appealable after trial. Oral Argument at 24:00–27:45. Southern-Owners said nothing about this in its briefing to our Court. "We do not consider arguments raised for the first time at oral argument." *Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321, 1330 (11th Cir. 2021).

Second, and in any event, Southern-Owners is incorrect. Our circuit has no such legal-issue exception to the general rule that "a party may not appeal an order denying summary judgment after there has been a full trial on the merits." *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1339 (11th Cir. 2022) (quotation marks and citation omitted); *see also Ortiz*

v. Jordan, 562 U.S. 180, 183–84 (2011) ("May a party . . . appeal an order denying summary judgment after a full trial on the merits? Our answer is no."). In *Ortiz*, the Supreme Court left open the question whether an "issue of a 'purely legal nature' . . . is preserved for appeal by an unsuccessful motion for summary judgment." 562 U.S. at 190 (citation omitted). Other circuits are split on the answer to that question.[2] Both before and after *Ortiz*, however, we have repeatedly and broadly held that "this Court will not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits." *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1286 (11th Cir. 2001); *see also Akouri v. Fla. Dep't of Transp.*, 408 F.3d 1338, 1347 (11th Cir. 2005) ("[W]e have held that, after a full trial and judgment on the merits, we will not review the pretrial denial of a motion for

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[2] The Second, Third, Sixth, Seventh, Ninth, Tenth, D.C., and Federal Circuits allow appeals of purely legal arguments denied at summary judgment. *See, e.g.*, *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 149–55 (3d Cir. 1992); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719–20 (7th Cir. 2003); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994); *Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012); *United Techs. Corp. v. Chro-malloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999). The Eighth Circuit allows appeals of decisions "based on [the] resolution of a preliminary legal issue," like statute of limitations, estoppel, or standing. *Kirk v. Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 384 (8th Cir. 2018). The First, Fourth, and Fifth Circuits do not allow appeals of any denials of summary judgment after a trial on the merits, unless the issues are preserved in a Rule 50 motion. *See, e.g.*, *Ji v. Bose Corp.*, 626 F.3d 116, 127–28 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995); *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017).

summary judgment."); *Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC*, 684 F.3d 1211, 1219 (11th Cir. 2012) (same); *Scott v. United States*, 825 F.3d 1275, 1282 (11th Cir. 2016) (same); *St. Louis Condo. Ass'n.*, 5 F.4th at 1242 (same); *Carrizosa*, 47 F.4th at 1339 (same).

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-81357-CV-MIDDLEBROOKS/Brannon

AMERICAN BUILDERS INSURANCE COMPANY,

Plaintiff

v.

SOUTHERN-OWNERS INSURANCE COMPANY,

Defendant.
_____/

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon the Parties' Cross-Motions for Summary Judgment, filed on February 16, 2021. (DE 32; DE 35). The Motions are fully briefed. (DE 40; DE 43; DE 48; DE 51). For the following reasons, the Motions are denied.

BACKGROUND AND UNDISPUTED FACTS[1]

This lawsuit between insurance carriers arises out of a construction site accident. Plaintiff American

[1] Although I have carefully considered each Party's Statement of Material Facts, for judicial economy purposes, I have primarily relied on Plaintiff's Statement of Materials Facts to establish the agreed-upon factual basis of this lawsuit. Where Defendant

[Footnote continued on next page]

Builders Insurance Company ("Builders" or "Plaintiff") is suing Defendant Southern-Owners Insurance Company ("Southern" or "Defendant") for one count of "Common Law Bad Faith – Equitable Subrogation." (DE 1-1 at 3–9).

On April 1, 2019, Ernest Guthrie ("Mr. Guthrie") fell from the roof of a home that he was working on as a subcontractor and sustained severe injuries. (DE 34, Plaintiff's Statement of Material Facts ("Plaintiff's SOMF") ¶¶ 2–3, 8; DE 41, Defendant's Response to Plaintiff's Statement of Material Facts ("Response SOMF") ¶¶ 2–3, 8). Beck Construction of Central Florida, Inc. ("Beck"), also a subcontractor on the project, had hired Mr. Guthrie through his company, Ernest Guthrie LLC, to do the home's interior framing and carpentry. (Plaintiff's SOMF ¶¶ 1–3; Response SOMF ¶¶ 1–3).

Beck maintained a $1 million commercial general liability insurance policy with Builders, which was in effect on the date of the accident. (Plaintiff's SOMF ¶ 17; Response SOMF ¶ 17). Guthrie LLC had a $1 million commercial general liability insurance policy with Southern, also in effect on the date of the accident. (Plaintiff's SOMF ¶ 11; Response SOMF ¶ 11). Pursuant to an oral agreement between Guthrie LLC and Beck, Guthrie LLC's policy with Southern named Beck as an additional insured. (Plaintiff's SOMF ¶ 13; Response SOMF ¶ 13; DE 1-3 at 25). With respect to coverage, the Additional Insured Endorsement ("Endorsement") provides, in relevant part, that

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raises additional material, undisputed facts, I supplement this section with those or otherwise discuss Defendant's Statement of Material Facts, *infra*.

Beck "is an Additional Insured, but only with respect to liability arising out of 'your work' for that Additional Insured by or for you . . . ." (DE 1-3 at 25). With respect to priority of coverage, the Endorsement states

> This insurance is primary for the [Additional Insured], but only with respect to liability arising out of 'your work' for that person or organization by or for you. Other insurance available to the [Additional Insured] will apply as excess insurance and not contribute as primary insurance provided by this endorsement.

(*Id.*).

By letter dated April 29, 2019 and addressed to Beck, Mr. Guthrie, through his personal injury attorney, Stuart Cohen ("Mr. Cohen"), asserted a negligence claim against Beck. (DE 1-4 at 34–35). Beck notified Builders of the claim, and Builders initiated an investigation. (Plaintiff's SOMF ¶ 19; Response SOMF ¶ 19). Builders retained Attorney Geoff Lutz and an independent adjusting firm, Engle Martin, to represent Beck and assist with the investigation of the claim. (Plaintiff's SOMF ¶ 20; Response SOMF ¶ 20; DE 34-2 ¶ 6).

On September 5, 2019, Mr. Cohen sent a 30-day time-limited demand letter to Builders, offering to settle Mr. Guthrie's claim for the $1 million policy limits based on his understanding that there existed no other insurance policy that may provide coverage. (Plaintiff's SOMF ¶ 23; Response SOMF ¶ 23; DE 34-3). The demand letter indicated that as a result of the fall, Mr. Guthrie is wheelchair-bound with no bladder

or bowel control, or sexual function. (DE 34-3). As of the date of the demand letter, Mr. Guthrie's medical bills totaled approximately $400,000. (*Id.*).

Approximately five months after it received notice of Mr. Guthrie's claim, by letter dated September 12, 2019, Builders tendered the obligation to defend and indemnify Beck to Southern, the carrier of Guthrie LLC's policy, due to Beck's additional insured status under that policy. (Plaintiff's SOMF ¶ 25; Response SOMF ¶ 25). Builders attached the September 5, 2019 demand letter to this correspondence. (*Id.*). On September 25, 2019, counsel for Southern sent two letters to Mr. Cohen: One requested a list of information and documentation about the claim, while the other requested a 45-day extension until November 29, 2019 to respond to Mr. Guthrie's demand. (Plaintiff's SOMF ¶ 26; Response SOMF ¶ 26; DE 34-4). That same day, counsel for Southern sent letters to Builders and Beck acknowledging receipt of the tender and requesting the same information/ documentation regarding the claim. (Plaintiff's SOMF ¶ 27; Response SOMF ¶ 27; DE 34-5). Two days later, Mr. Cohen furnished Southern with the information he had previously supplied to Builders, including medical records and bills in his possession; a medical bill summary totaling more than $376,000; Builder's policy for Beck; and two emails Mr. Cohen had sent to Builders regarding the claim. (Plaintiff's SOMF ¶ 28; Response SOMF ¶ 28; DE 34-6).

In late September 2019, Beck advised Builders that it also maintained a $1 million excess umbrella liability policy with Evanston Insurance Company ("Evanston"). (Plaintiff's SOMF ¶ 29; Response SOMF ¶ 29). The Evanston policy identifies only Builders as Beck's underlying commercial general liability carrier

in the policy's Schedule of Underlying Insurance. (DE 33-4 at 13). It states that Evanston will

> pay those sums in excess of the limits shown in the Schedule of Underlying Insurance that [Beck] become[s] legally obligated to pay as damages because of injury to which this insurance applies, provided that the 'underlying insurance' also applies, or would apply but for the exhaustion of its applicable Limits of Insurance.

(*Id.* at 14).

On November 18, 2019, Mr. Cohen sent a revised settlement demand to Evanston wherein he stated

> Mr. Guthrie offers to execute a mutually agreeable complete release of Beck Construction in exchange for payment to Mr. Guthrie by both Evanston of its $1 million liability coverage limits and Builders of its $1 million liability coverage limits, for a total of $2 million, within thirty (30) days of this date, assuming that there are no other excess of umbrella coverages available to Beck Construction.

(Plaintiff's SOMF ¶ 32; Response SOMF ¶ 32; DE 34-8). Thus, the deadline for Evanston and Builders to respond to the demand was December 18, 2019. Although by the time of the November 18, 2019 demand, Mr. Cohen knew of Beck's additional insured status under the Southern policy, he did not direct any written or oral settlement demand to Southern.

(Defendant's SOMF ¶¶ 33– 34; Response to Defendant's SOMF ¶¶ 33–34).

On November 25, 2019, Southern agreed to provide Beck a conditional defense under a Reservation of Rights, stating that for several reasons, "there may not be coverage under the [Southern] Policy for some or all of the claims and/or damages alleged by Mr. Guthrie." (Plaintiff's SOMF ¶ 33; Response SOMF ¶ 33; DE 1-4 at 39–41). The letter conveyed that although Beck had additional insured coverage under the Southern policy for liability arising out of Mr. Guthrie's work for Beck, Southern had not yet been able to speak with Beck, despite five attempts, to determine "whether Beck's liability arises out of Guthrie's work" and "the extent of Beck's liability, if any, in the first place." (DE 1-4 at 40). Southern also indicated that the Wrap-Up Insurance Exclusion or the Employer's Liability Exclusion may preclude coverage. (*Id.*).

That same day, counsel for Southern requested an extension of time from Mr. Cohen until December 20, 2019 to respond to Mr. Guthrie's September 5, 2019 demand letter. (Plaintiff's SOMF ¶ 35; Response SOMF ¶ 35; DE 1-4 at 34–9). Apparently, Mr. Cohen did not respond to Southern's request for an extension. (Defendant's SOMF ¶ 36; Response to Defendant's SOMF ¶ 36). On December 10, 2019, counsel for Southern met with and interviewed Russell Beck in the presence of his personal lawyer. (Plaintiff's SOMF ¶ 36; Response SOMF ¶ 36).

On December 10, 2019, Evanston tendered its $1 million excess policy limits to Mr. Guthrie. (Plaintiff's SOMF ¶ 37; Response SOMF ¶ 37). And on December 18, 2019, Builders tendered its $1 million policy limits to Mr. Guthrie. (DE 34-2 ¶ 18). That same day,

Builders informed Southern that it had paid its policy limits to Mr. Guthrie and would "look to [Southern] for repayment of its policy limits under well-settled principles of equitable subrogation . . . based upon the primary additional insured coverage available to Beck Construction under the [Southern] Policy . . . ." (*Id.* ¶ 28).

Now, Builders seeks indemnity or reimbursement for the sum paid in the settlement of Mr. Guthrie's claim against Beck and attorney's fees and costs in connection with bringing the instant action. (DE 1-1 at 3–9).

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Cross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *Bricklayers, Masons & Plasterers Int'l Union of Am., Loc. Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975) (citations omitted). "A fact is material for the purposes of summary judgment only if it 'might affect the outcome of the suit under the governing law.'" *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record." *Ellis v. England*, 432 F.3d 1321, 1325–26 (11th Cir. 2005) (citation omitted).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment. Thus, [the Court] do[es] not determine the truth of the matter, but instead decide[s] only whether there is a genuine issue for trial." *Barnett v. PA Consulting Group, Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) (citation omitted).

Under the summary judgment standard, the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. If the non-moving party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial[,]" summary judgment is warranted. *Id.* at 322. The party moving for summary judgment bears the burden of establishing that there is insufficient evidence to support the non-moving party's case. *Id.* at 325. Moreover, "[t]he court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1557–58 (11th Cir. 1990) (citation omitted).

DISCUSSION

In this dispute between insurers, Builders asserts a common law bad faith equitable subrogation claim against Southern, seeking "damages . . . together with an award of attorney's fees and costs . . . ." (DE 1-1 at 7). Builders alleges that Southern acted in bad faith when it: (1) "failed to settle [Mr.] Guthrie's claim against [Beck] when it could and should have done so had it acted fairly and honestly toward" Beck and Builders; (2) failed "to promptly settle [Mr.] Guthrie's claim when the obligations to settle the claim became reasonably clear"; and (3) "failed to settle [Mr.] Guthrie's claim within its policy limits, thereby exposing [Beck and Builders] to an excess judgment." (*Id.* at 7–8 ¶¶ 32–34).

Florida common law recognizes a bad faith cause of action under a theory of equitable subrogation, by which an excess carrier may seek damages from a primary carrier for its "'bad faith refusal to settle the claim against their common insured.'" *See Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900 (Fla. 2010) (quoting *U.S. Fire Ins. Co. v. Morrison Assurance Co.*, 600 So. 2d 1147, 1151 (Fla. 1st DCA 1992)). The reasoning goes that "the primary insurer should be held responsible to the excess insurer for improper failure to settle, since the position of the latter is analogous to that of the insured when only one insurer is involved." *U.S. Fire Ins. Co.*, 600 So. 2d at 1151 (discussing *Ranger Ins. Co. v. Traveler's Indem. Co.*, 389 So. 2d 272 (Fla. 1st DCA 1980)). "Accordingly, when the primary insurer's bad-faith refusal to settle causes the excess insurer to pay an amount greater than it would have had to pay if the primary insurer had acted in good faith, the excess insurer is entitled to maintain a common law bad-faith claim against the

primary insurer." *Perera*, 35 So. 3d at 900. This cause of action thus requires the existence of "a causal connection between the primary insurer's bad-faith actions and the loss or damage suffered by the excess insurer." *Id.* at 900–01.

When an insurer is handling claims against its insured—or as in this case, when a primary insurer is handling a claim on behalf of an excess insurer—the insurer/primary insurer "has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Id.* at 898 (internal marks omitted). Such a

> good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.

Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla.1980) (citations omitted).

I. Duty to Defend

Builders first argues that it is entitled to summary judgment in its favor because Southern breached its duty to defend Beck by delaying in taking steps to provide a defense. (*See* DE 35 at 4–7). For instance, Builders asserts that between September 12, 2019 (the day Builders tendered the claim to Southern) and October 18, 2019, Southern failed to contact Beck, despite Mr. Guthrie's time-limited demand set to expire on October 4, 2019.[2] (*Id.* at 4; DE 33-23; DE 34-7). Builders also points out that between November 25, 2019 (the day Southern notified Beck that it would provide a conditional defense) and December 18, 2019 (the day that Builders settled the claim), Southern did not retain counsel for Beck. (Plaintiff's SOMF ¶ 39; Response SOMF ¶ 39).

Builders next argues that it is entitled to equitable subrogation for its defense and indemnity payments on behalf of Beck because Southern "failed to timely assume the defense and indemnity obligations owed to Beck." (DE 35 at 8–9).[3] As a result,

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[2] The record reflects, however, that Southern initially contacted Beck on September 25, 2019. (DE 33-9).

[3] After Plaintiff filed its Motion for Final Summary Judgment, Defendant moved to strike Plaintiff's claim for attorney's fees and costs incurred in defending Beck throughout the claim handling process and Plaintiff's Exhibit A (DE 35-1) to its Motion for Summary Judgment because Plaintiff did not include such bills in its Rule 26(a)(1) Initial Disclosures but rather presented them for the first time at the summary judgment stage. (DE 37). In its Response to the Motion to Strike, Defendant agreed to withdraw Exhibit A (DE 35-1) and "its claim for attorney's fees incurred in defending Beck against Guthrie's claim." (DE 46). I subsequently entered an Order striking the claim and exhibit the Parties agreed should be stricken. (DE 47). As such, I do not

[Footnote continued on next page]

Builders contends that it "was forced to continue with Beck's defense and ultimately indemnify Guthrie to protect itself and its insured from a certain judgment in excess of the policy limits." (*Id.* at 9). Builder's maintains that I should direct Southern to reimburse Builders for its $1 million indemnity payment due to Southern's failure to defend Beck. (DE 35 at 14–15).

In its Response, Southern contends that Builders' breach of contract/breach of duty to defend argument is not properly before the Court because Builders did not plead such a claim in its Complaint. (DE 40 at 3). Rather, Southern maintains that the Complaint only asserts one claim for "Common Law Bad Faith – Equitable Subrogation" that focuses on Southern's failure to settle, not its failure to defend. (*Id.* at 3–6; *see generally* DE 1-1). In its Reply, Builders argues that it did allege that Southern breached its duty to defend even though Builders was not required to do so, "as the Court may make findings regarding [Southern's] coverage obligations to the extent necessary to resolve Plaintiff's equitable subrogation claim." (DE 51 at 2).

Again, in its Complaint, Builders brings one claim: "Common Law Bad Faith – Equitable Subrogation." (DE 1-1 at 5–6). Careful consideration of each allegation in the Complaint reveals that Builder's theory of bad faith liability revolves around Southern's failure to settle. (*E.g.,* DE 11 ¶ 26 ("[T]he demand to settle for $1 million was reasonable, and a reasonably prudent person when faced with the prospect of paying a judgment in excess of that sum, would do so under all the circumstances."), ¶ 27

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consider Plaintiff's claim for reimbursement of its defense costs in ruling on its instant Motion.

("[Southern] never made any offer to settle [Mr. Guthrie's] claim."), ¶ 32 ("[Southern] acted in bad faith when it failed to settle [Mr. Guthrie's] claim against its insured when it could and should have done so had it acted fairly and honestly toward its insured . . . ."), ¶ 34 ("[Southern] did not act reasonably when it failed to settle [Mr. Guthrie's] claim within its policy limits . . . ."), ¶ 35.c. ("Failing to accept the demand to settle [Mr. Guthrie's] claim within [Southern's] limits pursuant to the offers conveyed by [Mr. Guthrie] on November 18, 2019"), ¶ 35.e. ("Failing to attempt in good faith to make any reasonable or sufficient settlement offers in an effort to resolve these claims"), and ¶ 35.f. ("Failing to attempt in good faith to enter into settlement negotiations in an effort to resolve this claim"). The only allegations relating even remotely to a failure to defend state that Southern acted in bad faith by "[a]sserting defenses to coverage with little or no legal or factual basis" and "[f]ailing to agree to unconditionally defend and indemnify [Beck] for [Mr. Guthrie's] claim." (*Id.* ¶ 35.a.–b.).

Despite its near-exclusive emphasis in its Complaint on Southern's purported bad faith *failure to settle*, Builders devotes almost all of its summary judgment briefing to arguing that it is entitled to repayment of its $1 million policy limits because Southern breached its *duty to defend* Beck under a claim of *equitable subrogation*. (DE 35 4–15). However, Builders pled a claim for *bad faith equitable subrogation*. In short, Builders is now arguing a claim that is absent from the Complaint. This misalignment between the Complaint and Plaintiff's Summary Judgment Motion is concerning.

Florida law recognizes a few different third-party common law bad faith claims in the insurance context, one of which is predicated on the doctrine of equitable subrogation. *Perera*, 35 So. 3d at 899–902. As explained above, under this type of bad faith claim, "an excess insurer has the right to 'maintain a cause of action . . . for damages resulting from the primary carrier's *bad faith refusal to settle* the claim against their common insured.'" *Id.* at 900 (emphasis added) (quoting *U.S. Fire Ins. Co. v. Morrison Assurance Co.,* 600 So. 2d 1147, 1151 (Fla. 1st DCA 1992)). "[W]hen the primary insurer's bad-faith *refusal to settle* causes the excess insurer to pay an amount greater than it would have had to pay if the primary insurer had acted in good faith, the excess insurer is entitled to maintain a common law bad-faith claim against the primary insurer." *Id.* at 900 (emphasis added). Thus, Florida common law conceives of a bad faith claim by an excess insurer against a primary insurer by virtue of equitable subrogation as arising due to the primary insurer's failure to settle when it could and should have done so under all of the circumstances had it acted fairly and honestly toward the excess carrier. Equitable subrogation, as opposed to bad faith equitable subrogation, is a distinct cause of action and/or basis for recovery under Florida law. *See, e.g.*, *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999). A claim for breach of contract for failure to defend is also a distinct cause of action. *See, e.g.*, *Lime Tree Village Community Club Ass'n, Inc. v. State Farm Gen. Ins. Co.*, 731 So. 2d 638, 646 (Fla. 1999); *see also Aaron v. Allstate Ins. Co.*, 559 So. 2d 275, 277 (1990) (acknowledging "refusal to defend" and "inadequate defense" as causes of action). Builders did not bring these theories of recovery forward until it filed its instant Motion for Final

Summary Judgment. Because plaintiffs may not raise new claims at the summary judgment stage, *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004), I find that Builders' equitable subrogation claim, minus bad faith, and/or its breach of duty to defend claim are not properly before the Court and thus are not appropriate subjects for summary disposition. As this litigation progressed, if Builders' theory of liability and recovery evolved such that it departed from, or grew broader than, the claims raised in its Complaint, the proper procedure would have been to amend its Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. *See id.* Because it did not, to the extent that Plaintiff's Motion for Summary Judgment seeks adjudication of claims that are not the subject of its pleading, I decline to rule on them.

However, because Builders, impermissibly in my view, fixates on Southern's failure to defend Beck, and Southern thus responds to such arguments, I will make two remarks about the duty to defend. First, Southern contends that it could not have breached a duty to defend because no such duty was ever triggered under the Southern policy based on its plain language that Southern will have "the right and duty to defend the insured against any 'suit'" seeking damages for bodily injury or property damage. (DE 40 at 6–8). The Southern policy defines "suit" as a "civil proceeding," "arbitration proceeding," or "[a]ny other alternative dispute resolution proceeding." (*Id.* at 7–8). Southern's position is that because Mr. Guthrie never brought a "suit" against Beck, Southern's duty to defend Beck never arose. Because clear and unambiguous insurance policy provisions must be enforced as written and are not subject to judicial interpretation, *Siegle v. Progressive Consumers Ins. Co.*, 788

So.2d 355, 359 (Fla. 4th DCA 2001), I am inclined to find that Southern's duty to defend Beck as defined in the Southern policy did not arise under same. However, the lack of triggering Southern's contractual duty to defend does not mean that Southern did not have a duty to investigate the claim brought against Beck in good faith. *See Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018) (requiring insurer to act "with the same haste and precision as if it were in the insured's shoes . . . to avoid an excess judgment").

Second, notwithstanding that the plain language of the Southern policy indicates that its duty to defend Beck did not arise, this point strikes me as irrelevant and moot, as Southern never refused to defend Beck but instead offered to conditionally defend Beck under a Reservation of Rights (DE 1-4 at 39–41), which is permissible under Florida law and does not equate to a breach of the duty to defend. *See First American v. Nat'l Union Fire Ins.*, 695 So.2d 475, 477 (Fla. 3d DCA 1997).

These findings bring us back to the heart of this lawsuit as pled, which is whether Southern handled Mr. Guthrie's claim against Beck in good faith and whether it could and should have settled Mr. Guthrie's claim against Beck but failed to do so. In essence, the relevant inquiry is whether Southern acted reasonably in evaluating and attempting to settle. *See Cruz v. Am. United Ins. Co.*, 580 So. 2d 311, 312 (Fla. 3d DCA 1991).

II. Bad Faith Equitable Subrogation

"[T]he gravamen of what constitutes bad faith is whether under all the circumstances an insurer failed to settle a claim against an insured when it had a reasonable opportunity to do so." *Contreras v. U.S.*

Sec. Ins. Co., 927 So. 2d 16, 20 (Fla. 4th DCA 2006). Accordingly, Florida courts have "generally reserve[d] the question of bad faith for the jury." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 672 (F1a. 2004); *see also Boston Old Colony*, 386 So. 2d at 785 ("The question of failure to act in good faith with due regard for the interests of the insured is for the jury."). The "critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey*, 259 So. 3d at 7. "The damages claimed by an insured in a bad faith case 'must be caused by the insurer's bad faith.'" *Id.* (quoting *Perera*, 35 So. 3d at 902).

Southern argues that it did not handle Mr. Guthrie's claim against Beck in bad faith by failing to settle because Southern never had a reasonable opportunity to settle the claim against Beck for its policy limits. (DE 32 at 9). Southern relies on two facts to support its position. First, Southern states that Mr. Guthrie, through his attorney Mr. Cohen, never made a settlement demand *to Southern*, even after he became aware of the Southern policy. (Defendant's SOMF ¶¶ 30–34; Response SOMF ¶¶ 30–34). Instead, Mr. Guthrie's September 5, 2019 demand was directed to Builders alone, contingent on no coverage being available to Beck through any other policy, and the November 18, 2019 demand was directed to Builders and Evanston. (Defendant's SOMF ¶¶ 13, 28; Response SOMF ¶¶ 13, 28). It is undisputed that Mr. Cohen never directed a settlement demand, either written or verbal, to Southern. (Defendant's SOMF ¶¶ 33–34; Response SOMF ¶¶ 33–34). Second, Southern asserts that it did not receive the November 18, 2019 demand from Builders until the December 18, 2019

response deadline. (Defendant's SOMF ¶¶ 45–46; Response SOMF ¶¶ 45–46). Correspondence from Builders to Southern dated December 18, 2019 advises that both Builders and Evanston had tendered their policy limits to Mr. Guthrie. (Defendant's SOMF ¶ 47; Response SOMF ¶ 47). In dispute, however, is whether Southern learned of and/or consented to Builders' $1 million tender before it occurred. (Defendant's SOMF ¶ 48; Response SOMF ¶ 48). Builders states that before tendering its policy limits on December 18, 2019, it notified Southern of its intention to do so if Southern refused. (Response SOMF ¶ 48; DE 43-1 ¶¶ 22–23). Southern contends that it did not consent to Builder's tender. (Defendant's SOMF ¶ 48; DE 33-22 ¶ 28).

The fact that Mr. Guthrie did not directly demand tender of Southern's policy limits does not necessarily mean that Southern handled Mr. Guthrie's claim in good faith. *See, e.g.*, *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991) ("Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations."). Even if no demand was directed to Southern itself, Southern knew of Mr. Guthrie's claim as of September 12, 2019 when Builders tendered the defense and indemnity obligation. Save for completion of its own investigation of the claim, there appears to have been nothing to preclude Southern from affirmatively engaging in settlement negotiations with Mr. Guthrie or making haste to respond to the September 5, 2019 settlement that it did know about. I find that whether under all of the circumstances of this case, Southern should have settled Mr. Guthrie's claim in advance of or by December 18, 2019 is a question best suited for a jury to decide after weighing

the evidence and resolving all relevant credibility determinations.

Moreover, I find that a factual dispute exists, the resolution of which is relevant to the determination of this ultimate question. For instance, the Parties dispute what Southern knew with respect to the November 18, 2019 demand in advance of Builders having tendered its policy limits. On the one hand, if Southern did not know of this opportunity to settle until after the fact, then Southern would not have had a reasonable opportunity to settle pursuant to that demand and thus could not be said to have made a decision in bad faith. On the other hand, if Southern *did* know of the November 18, 2019 demand in advance of Builders having accepted same but affirmatively declined to tender its policy limits or attempt to settle, then a reasonable jury might find that particular fact determinative of bad faith. I cannot resolve questions regarding what Southern knew and when at this summary judgment stage.

As to proximate causation, Southern contends that it is entitled to judgment because "there is no evidence that [Southern's] actions caused Builders to pay [Mr. Guthrie's] demand for Builders['] $1 million policy limits." (DE 32 at 4). Causation is a necessary element of a bad faith equitable subrogation claim—that is, the claimed damages must have been caused by the insurer's bad faith failure to settle, *Perera*, 35 So. 3d at 902. Southern maintains that Builders would have had to pay $1 million regardless of any action Southern took because Builders' policy was primary to Evanston's excess policy. (DE 32 at 10). Because Mr. Guthrie demanded $1 million from Evanston and $1 million from Builders, to satisfy the November 18, 2019 demand, Builder's would have had

to tender its limits before Evanston's payment obligation would have been triggered to satisfy the $2 million demand. (*Id.* at 11–12). Southern contends that Builder's failure to put forth any evidence that Mr. Guthrie would have accepted Southern's $1 million tender of its policy limits in addition to Evanston's policy limits is fatal to Builder's bad faith equitable subrogation action. I acknowledge these arguments but decline to determine causation, a question ordinarily reserved for a jury, on summary judgment based on speculation of what would or could have happened had the circumstances unfolded differently.

Because the Parties failed to demonstrate the absence of a genuine issue of material fact regarding whether Southern violated its duty of good faith, I will deny the cross-motions for Summary Judgment. The Florida Supreme Court has acknowledged that "the issue of bad faith is ordinarily a question for the jury." *See Berges*, 896 So. 2d at 672. Though courts have at times resolved the matter at the summary judgment stage, a factually disputed situation such as the present one does not allow me to determine whether under all the circumstances, Southern's conduct does or does not constitute bad faith as a matter of law. On this record, a jury should determine whether Southern's failure to settle before or on December 18, 2019 amounted to bad faith.

III. Consent and Employer Liability Exclusion

In addition to moving for summary judgment, Southern seeks resolution of two affirmative defenses in its Motion. Southern contends that Builder's is not entitled to repayment of its $1 million tender because it materially breached a term of the Southern policy

by entering into a settlement without Southern's consent. Because Builders, as the excess insurer, "stands in the shoes" of the insured with respect to its claim against Southern, the rights and obligations of the insured, Beck, inure to Builders. *See Vigilant Ins. Co. v. Cont'l Cas. Co.,* 33 So. 3d 734, 738 (Fla. 4th DCA 2010). The Southern policy provides in pertinent part that the insured must "immediately send [Southern] copies of any correspondence, demands, notices, summonses or papers in connection with any claim or 'suit'." (DE 33-1). It continues that "[n]o insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than first aid, without [Southern's] consent." (*Id.*). The Southern policy also states that "no person or organization has a right [t]o sue [Southern]" under the commercial general liability policy "unless all of [the] terms have been fully complied with." (*Id.*). As explained above, the Parties dispute whether Southern knew of or consented to Builders' tender of its policy limits. (Defendant's SOMF ¶ 48; Response to Defendant's SOMF ¶ 48; DE 43-1 ¶¶ 22–23; DE 33-22 ¶ 28). Accordingly, with this material fact in dispute, I cannot resolve on summary judgment whether this defense is viable.

Finally, Southern asserts a defense to coverage under the policy's Employer Liability Exclusion. (DE 32 at 17). The exclusion provides, in relevant part, that coverage does not apply to: "'Bodily injury' to [a]n 'employee' of *any insured* arising out of and in the course of employment by any insured. This exclusion applies: [w]hether any insured may be liable as an employer or in any other capacity." (DE 33-1 at 43–44 (emphasis added)). Pursuant to this exclusion, Southern argues that because Mr. Guthrie was an employee of Ernest Guthrie LLC, an insured under

the Southern policy, and suffered bodily injuries arising out of his employment by his LLC, this exclusion results in no coverage being available to Mr. Guthrie under the commercial general liability policy he obtained for his company. (DE 32 at 18).

Southern directs the Court to authorities holding that nearly identical Employer Liability Exclusion provisions did not bar coverage where a severability or separation of insureds provision exists, as such provisions "create separate insurable interests in each individual insured under a policy, such that the conduct of one insured will not necessarily exclude coverage for all other insureds." *Evanston Ins. Co. v. Design Build Interamerican, Inc.,* 569 F. App'x 739, 742 (11th Cir. 2014); *see also Taylor v. Admiral Ins. Co.*, 187 So. 3d 258 (Fla. 3d DCA 2016). I am persuaded by the reasoning in these authorities and thus decline to find that the Employer Liability Exclusion bars coverage for Mr. Guthrie's claim as a matter of law.

III. Request for Attorney's Fees under Fla. Stat. § 627.428

In its Motion for Summary Judgment, Builders contends that it is entitled to recover the attorney's fees incurred in this litigation pursuant to Fla. Stat. § 627.428. (DE 35 at 16–18). However, I find this request to be premature. "'The fundamental rule in Florida has been that an 'award of attorneys' fees is in derogation of the common law and that statutes allowing for the award of such fees should be strictly construed.'" *Ins. Co. of N. Am. v. Lexow*, 937 F.2d 569, 573 (11th Cir. 1991) (quoting *Roberts v. Carter*, 350 So. 2d 78, 78–79 (Fla. 1977)). As such, "[t]he trial court's jurisdiction to award an attorney fee to an insured is dependent upon the conditions imposed by

the [relevant] statute." *AIU Ins. Co. v. Coker*, 515 So. 2d 317, 318 (Fla. 2d DCA 1987). A precondition to an award of such fees is the entry of a judgment against the insurer. *See Travelers Indem. Co. v. Chisholm*, 384 So. 2d 1360, 1361 (Fla. 2d DCA 1980). Specifically, section 627.428 provides:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court . . . shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.
>
> . . .
>
> When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

Id. Further Rule 54(d)(3)(B)(i) provides that "[u]nless a statute or a court order provides otherwise, the motion [for attorney's fees] must be filed no later than 14 days *after the entry of judgment*." Rule 54(d)(3)(B)(i) (emphasis added). Here, the Court has not yet entered judgment. Thus, Builders' request for an award of attorney's fees and costs incurred in prosecuting this action is premature, and I thus will not address the request at this time.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

(1) Plaintiff's Motion for Final Summary Judgment (DE 35) is **DENIED**.

(2) Defendant's Motion for Final Summary Judgment (DE 32) is **DENIED**.

(3) Given that I did not rely upon Exhibit A to Defendant's Reply to Plaintiff's Additional Facts (Affidavit of Jessica Gregory, Esq.) (DE 49-1) in deciding these Motions, Plaintiff's Motion to Strike Exhibit "A" to Defendant's Reply to Plaintiff's Additional Facts in Response to Defendant's Statement of Undisputed Facts (DE 57) is **DENIED AS MOOT**.

SIGNED in Chambers at West Palm Beach, Florida, this 30th day of April, 2021.

s/ Donald M. Middlebrooks
Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record