IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D13-0185
LT CASE NO.: 11-27972 (14)

JOSEPH AND JUDY CAMMARATA,

Appellants,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.
_____ /

APPELLEE'S MOTION FOR REHEARING AND/OR CERTIFICATION

Appellee, State Farm Florida Insurance Company ("State Farm"), pursuant to Florida Rule of Appellate Procedure 9.330, hereby seeks rehearing on this Court's *en banc* opinion entered on September 3, 2014, as well as certification of conflict and a question of great public importance to the Supreme Court of Florida.

INTRODUCTION

Appellants, Plaintiffs below, Joseph and Judy Cammarata ("Plaintiffs"), reported a property damage claim from Hurricane Wilma two years after the storm. State Farm promptly investigated the claim and, when the parties did not agree on the amount of the loss, State Farm agreed to proceed to appraisal at Plaintiffs' request and as called for in the insurance contract to establish the amount of the

loss owed. Upon issuance of the appraisal award, which was well below the amount Plaintiffs were claiming, State Farm promptly paid the award in complete compliance with the insurance contract. Plaintiffs' first bad faith action was dismissed because State Farm did not breach the insurance contract. Plaintiffs chose not to appeal that final order of dismissal, but rather filed a new, identical bad faith action (the instant action), which was again dismissed because there was no determination that State Farm had breached the contract in any way.

On September 3, 2014, this Court issued an *en banc* opinion reversing and reinstating Plaintiffs' first-party statutory bad faith action notwithstanding State Farm fully complied with all its obligations under the insurance contract. This Court found it was "compelled" to do so by the Florida Supreme Court's clarification in *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000), of its decision in *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991). Purportedly "compelled" by these supreme court precedents, this Court held that the "determination of liability" required before a bad faith action accrues is merely a "determination of liability for coverage" and not a "determination of liability for breach of contract." *Cammarata v. State Farm Fla. Ins. Co.*, No. 4D-185, ___ So. 3d ___, 2014 WL 4327948 (Fla. 4th DCA Sept. 3, 2014). Somewhat inconsistently or at least unnecessarily given the Court held no breach was required, the Court further held that "the appraisal award 'constitute[d] a

"favorable resolution" of an action for insurance benefits, so that [the insureds] . . . satisfied the necessary prerequisite to filing a bad faith claim.'" *Id.* at * 6 (quoting *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 100 So. 3d 1155 (Fla. 4th DCA 2012)). Thereupon, the Court receded from *Lime Bay Condo., Inc. v. State Farm Fla. Ins. Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012), in which this Court had held, just two years ago, that *Blanchard* required a determination of an insurer's liability for breach of contract as a condition precedent to accrual of a bad faith action.

As observed by Judge Gerber in his concurring opinion:

> [T]he majority opinion [will] open the door to allow an insured to sue an insurer for bad faith any time the insurer dares to dispute a claim, but then pays the insured just a penny more than the insurer's initial offer to settle, without a determination that the insurer breached the contract. Such a slippery slope would appear to conflict with the supreme court's own warning in *Vest:*
>
> > We hasten to point out that the denial of payment does not mean an insurer is guilty of bad faith as a matter of law. *The insurer has a right to deny claims that it in good faith believes are not owed on a policy.* [Even when it is later determined by a court or arbitration that the insurer's denial was mistaken, there is no cause of action if the denial was in good faith.]
>
> 753 So. 2d at 1275 (emphasis added [by Judge Gerber]).
>
> This slippery slope may be avoided if an insured was required . . . to . . . establish an insurer's liability for breach of contract as a condition precedent to suing an insurer for bad faith . . . .

> [T]he record here provides no basis indicating that the insurer breached the contract, much less failed to act in good faith.

Id. at *7-8 (Gerber, J., concurring; joined by Conner, Forst, and Klingensmith, JJ.) (additional language from the *Vest* opinion quoted and added in brackets).

While Judge Gerber's observation that the legislature could level this slippery slope due to which insurers will be sliding out of the Florida market, legislative action is not necessary to do so. The slippery slope has been created by this Court's opinion and its misapprehension that it is compelled to reach its holding by the Florida Supreme Court's decisions in *Blanchard* and *Vest*. The slippery slope this Court has created is also the result of this Court's overlooking of other precedents of the Florida Supreme Court that compel the conclusion that the "determination of liability" required for accrual of a bad faith action is a "determination of liability for breach." Accordingly, the slippery slope and opinion of this Court can be and should be leveled and corrected by this Court through reconsideration, not by the legislature.

For the reasons discussed herein, this Court should grant the instant motion for rehearing and vacate its September 3, 2014 opinion, hold that no bad faith action accrues unless and until there is a determination of the insurer's liability for breach of the insurance contract, and affirm the disposition below. Alternatively and/or in addition, this Court should grant the instant motion for certification and certify that its decision (if rehearing is not granted) conflicts with the decision of

the Third District in *North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d DCA 2008), *receded from in non-relevant part, State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n*, 74 So. 3d 105 (Fla. 3d DCA 2011), and passes on a question of great public importance. Given this Court feels "compelled" to reach the conclusion it has reached by precedents of the Florida Supreme Court, it would be appropriate for that court to determine whether this Court's interpretation of its precedents is correct.

MOTION FOR REHEARING

Following oral argument to a three-judge panel of this Court, the Court *sua sponte* considered and decided this appeal *en banc*, expressly addressing only one of the issues raised on appeal in its *en banc* opinion. Specifically, on that issue, this Court held:

> Based on *Vest's* clarification of *Blanchard* and reliance on *Brookins* [*v. Goodson*, 640 So. 2d 110 (Fla. 4th DCA 1994)], we are compelled to hold that an insurer's liability for coverage and the extent of damages, and not an insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe.

Cammarata, supra, at *6. In so holding, this Court receded from its decision in *Lime Bay* (which held a determination of liability for breach is required before a bad faith claim accrues), and adhered to its decision in *Trafalgar* (which held an appraisal award paid by the insurer was a favorable resolution for the insured of a pending breach of contract action, satisfying the determination of liability

requirement for accrual of a bad faith action). It appears, however, that the Court overlooked or misapprehended significant aspects of State Farm's arguments as well as precedents of the Florida Supreme Court both addressed and not addressed in the opinion, which, when properly considered, should compel this Court to reconsider and vacate its September 3, 2014 opinion and affirm the disposition below.

A. Collateral Estoppel Bars Plaintiffs' Argument, Accepted By This Court, That Their Bad Faith Claim Is Ripe.

In considering the issue addressed in the opinion *en banc* to resolve the conflict between *Lime Bay* and *Trafalgar* as to the ripeness of Plaintiffs' bad faith claim, the Court apparently overlooked that Plaintiffs were collaterally estopped from even pursuing the argument in this case. In *Cammarata v. State Farm Fla. Ins. Co.*, Case No. 10-19163 (Fla. 17th Jud. Cir. Broward County) (*Cammarata I*), the trial court dismissed Plaintiffs' bad faith action, which was identical to the action filed here, holding in its final order of dismissal that the action was premature because there had been no determination of State Farm's liability for breach of the insurance contract, notwithstanding State Farm had paid the appraisal award. Plaintiffs did not appeal from the court's final order of dismissal in *Cammarata I*. Thus, Plaintiffs are collaterally estopped from raising the same claim and pursuing the same argument as to the ripeness of their bad faith claim in this action, which was rejected in a final order of dismissal in *Cammarata I*. *See*

Zikofsky v. Marketing 10, Inc. 904 So. 2d 520, 525 (Fla. 4th DCA 2005) (collateral estoppel bars relitigation of the same issue between the same parties which has already been determined by a valid final order in a previous proceeding); *Terminello v. Alman*, 710 So. 2d 728, 729 (Fla. 3d DCA 1998) (plaintiff's second action filed six weeks after the first action was dismissed was barred by collateral estoppel and res judicata where plaintiff took no appeal from the final order in the first action and the second complaint was based on the same set of facts, sought the same relief, and asserted essentially the same cause of action).

In recounting the history of Plaintiffs' bad faith action in its opinion, this Court entirely omitted any reference to *Cammarata I* and the fact that the very argument presented to this Court as to the ripeness of Plaintiffs' bad faith claim based on the appraisal award was rejected in *Cammarata I* in a final order of dismissal that was never appealed by Plaintiffs. Had the Court not overlooked these facts, State Farm submits that the Court would have affirmed the disposition below without even reaching the merits of the issue addressed in the Court's *en banc* opinion. Accordingly, this Court should reconsider and vacate its opinion in this case and affirm the trial court's disposition of this action.

B. There Can Be No Liability Or Action For Bad Faith Absent A Breach Of The Insurance Contract By The Insurer.

In holding that *Vest*'s clarification of *Blanchard* "compelled" this Court to hold that an insurer's mere "liability for coverage," and not liability for breach of

contract, must be determined before a bad faith action ripens, the Court overlooked other precedents from the Florida Supreme Court and misapprehended the decisions in *Vest* and *Blanchard*. When properly construed, the supreme court's precedents compel the conclusion that there can be no liability or action for bad faith absent a breach of the insurance contract by the insurer. Accordingly, this Court should reconsider its holding in this regard.

Most notably, this Court entirely overlooked the Florida Supreme Court's decision in *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 548 (Fla. 2012), which involved a bad faith action arising from a property damage claim resulting from a hurricane as in the present case (as opposed to uninsured motorists claims as were involved in *Vest* and *Blanchard*). In *Chalfonte*, the supreme court held that the statutory bad faith action pursued by Plaintiffs here under section 624.155, Florida Statutes, is a codification of the common law claim for breach of the covenant of good faith and fair dealing implied in every contract. *Id.* at 547-49. In so holding, the supreme court also acknowledged the well-settled Florida law that such a claim does not exist "where there is no . . . breach of an express term of the agreement." *Id.* at 548. As the court explained, "[a] duty of good faith must 'relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract

requirements.'" *Id.* (quoting *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001), and *Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998)). The Court's September 3, 2014 opinion in this case, holding that a determination of breach by the insurer is not necessary to proceed with a bad faith action, cannot be squared with the Florida Supreme Court's decision in *Chalfonte*. *See also North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d DCA 2008) (holding denial of motion to dismiss bad faith claim was a departure from essential requirements of law when there had not been a determination of the insurer's liability for breach of contract, notwithstanding the insurer's payment of an appraisal award); *Landmark American Ins. Co. v. Studio Imports, Ltd.*, 76 So. 3d 963 (Fla. 4th DCA 2011) (holding trial court erred in denying motion to dismiss bad faith action and allowing it to proceed before resolution of breach of contract claim, noting, "[i]f a determination regarding liability [on the breach of contract claim] is not made, a cause of action for bad faith can never ripen," citing *Blanchard*).

The Court also overlooked the Florida Supreme Court's decisions that hold, as a corollary to the foregoing, that there can be no bad faith action when an insurer merely exercises its rights under the insurance contract (or, in other words, does not breach the contract). *See Shuster v. South Broward Hosp. Dist.*, 591 So. 2d 174, 177-78 (Fla. 1992) (bad faith claim will not lie when insurer merely

exercises its rights under the insurance contract); *see also Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985) (insurer doing no more than asserting its legal rights under the insurance contract, even when done in reckless disregard for a potential tragedy that occurs, gives rise to no cause of action because the insurer's actions are "privileged under the circumstances"). As this Court has itself held in an opinion approved by the supreme court, "where a party to a contract is merely exercising its clear right under the contract, whether it acts in good faith or bad faith is irrelevant." *Shuster v. South Broward Hosp. Dist. Physicians' Prof. Liability Ins. Trust*, 570 So. 2d 1362, 1367-68 (Fla. 4th DCA 1990) (affirming dismissal of bad faith action), *approved*, 591 So. 2d 174 (Fla. 1992). This Court's September 3, 2014 opinion is inconsistent with these decisions of the Florida Supreme Court. *See Cammarata, supra*, at *8 ("[T]he record here indicates that the insurer merely exercised its rights under the contract's agreed-upon dispute resolution process of appraisal. The insurer's exposure should be at an end.") (Gerber, J., concurring).

The Court has also misapprehended *Vest*'s clarification of *Blanchard* and its actual holding. In *Vest*, plaintiff filed a complaint against the insurer, asserting claims for breach of contract and statutory bad faith arising out of plaintiff's uninsured motorists ("UM") claim. *See Vest v Travelers Ins. Co.*, 710 So. 2d 982, 983 (Fla. 1st DCA 1998), *quashed*, 753 So. 2d 1270 (Fla. 2000). The issue actually

presented to the supreme court in *Vest* was "whether an insured's damages incurred by reason of a violation of [the bad faith statute] are recoverable *from the date that the conditions for payment of benefits under the policy have been fulfilled* even though those damages are incurred prior to the determination of liability or the extent of damages," restated by the court as "whether . . . *Blanchard* preclude[s] recovery . . . for bad-faith damages allegedly incurred *from the date when all the conditions precedent for payment of the contractual policy benefits had been fulfilled* because these damages were incurred prior to the [determination of liability and damages required by *Blanchard* for accrual of a bad faith action]. 753 So. 2d at 1274 (emphasis added; emphasized language discussed further below). The *Vest* court held *Blanchard* did not preclude recovery of such damages in a bad faith action later accruing upon the necessary determinations of liability and damages. *Id.* at 1274-75.

It was in this context that the supreme court in *Vest* "clarified" *Blanchard*. *Id.* That is, the court adhered to *Blanchard*'s holding "that bringing a cause of action in court for violation of section 624.155. . . is *premature until there is a determination of liability* and extent of damages owed on the first-party insurance contract," *id.* at 1276 (emphasis added), but further held that *Blanchard*'s holding does not preclude recovery of damages caused by the bad faith conduct prior to the determination of liability and damages owed on the contract, the latter being

simply (but importantly here) prerequisites to accrual of the bad faith action. *Id.* at 1274-76. In no sense did the supreme court in *Vest* (or *Blanchard* or any other case) hold that the requisite "determination of liability" means only "liability for coverage" as opposed to "liability for breach of the contract" as this Court holds in its September 3, 2014 opinion.

Moreover, a close reading of *Vest* indicates that the court actually determined that the insurer had breached the contract in that case. The insurer in *Vest* took the position, contrary to Florida law, that it did not owe UM benefits under the policy until plaintiff's action against the uninsured tortfeasor was resolved through settlement or judgment and refused to make payment when it was actually due under the policy; that is, the insurer breached the policy as a matter of law.[1] *Id.* at 1272. There is nothing in the *Vest* opinion that supports the holding of this Court in its September 3, 2014 opinion that there is no need for a determination of liability for breach of the insurance contract in order for a bad faith action to ripen.

The *Vest* decision is, however, compelling on another point as emphasized in the issues presented and quoted above. As this Court quoted from *Vest* in its

[1] To the extent *Vest* can be read as applying or supporting a confession of judgment analysis by its recitation from the *Brookins* case and the similar facts in *Vest* (the insurer's settlement of the pending breach of contract claim by payment of the policy limits), it is discussed in the following section of this motion.

September 3, 2014 opinion, "a claim for [statutory] bad faith . . . is founded upon the obligation of the insurer to pay *when all conditions under the policy would require an insurer* exercising good faith and fair dealing towards its insured *to pay*." *Cammarata, supra,* at *5 (quoting *Vest,* 753 So. 2d at 1275) (emphasis added). In addressing an insurer's ability to cure and avoid bad faith litigation, the supreme court held that the insurer has 60 days in which to respond to a civil remedy notice of insurer violation and, "*if payment is owed on the contract,* to cure the claimed bad faith by paying the benefits owed on the insurance contract." 753 So. 2d at 1275 (emphasis added). In this regard, the court further held that "[w]hat is owed on the contract is in turn governed by *whether all conditions precedent for payment contained within the policy have been met*." *Id.* (emphasis added). *See also Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*¸ 753 So. 2d 1278, 1283 (Fla. 2000) ("[T]he contractual amount due the insured [that can be paid to cure] is the *amount owed pursuant to the express terms and conditions of the policy after all of the conditions precedent of the insurance policy in respect to payment are fulfilled*. Section 624.155(1)(b) . . . is correctly read to authorize a civil remedy for extra contractual damages if a first-party insurer does not pay the contractual amount due the insured *after all the policy conditions have been fulfilled*.") (emphasis added).

In its September 3, 2014 opinion, this Court overlooked the undisputed evidence of record that establishes that, because the parties here disagreed on the amount of the loss, nothing was owed under the terms and conditions of the policy until the appraisal award was issued, which was a condition precedent to State Farm's payment obligation under the policy. (1/29, 170) *See State Farm Fla. Ins. Co. v. Silber*, 72 So. 3d 286 (Fla. 4th DCA 2011) (loss payment provision in State Farm policy establishes when payment is due). There is no dispute that State Farm promptly paid the award when issued in accordance with the terms and conditions of the policy. (1/3; 2/300-02) Thus, there was no breach of the policy and State Farm's proceeding through the appraisal process, *demanded by Plaintiffs*, before paying the amount determined owed by that process, was simply an exercise of its rights under the policy. Under the Florida Supreme Court's decisions in *Chalfonte* and *Shuster*, therefore, no bad faith action can lie in this case. *See Cammarata*, *supra*, at *8 (State Farm "merely exercised its rights under the contract's agreed-upon dispute resolution process of appraisal [and its] exposure should be at an end") (Gerber, J., concurring). Accordingly, this Court should reconsider and vacate its September 3, 2014 opinion, adhere to *Lime Bay* and recede from *Trafalgar*, and affirm the disposition below.

C. A "Confession Of Judgment" Analysis Is Inapplicable Or At Least Should Be Applied Consistently With How It Is Applied In Fees Cases Where The Rule Was Developed.

This Court also based its holding in the September 3, 2014 opinion on *Vest*'s reliance on *Brookins* and this Court's decision in *Trafalgar*. In doing so, however, the Court overlooked that these cases involved "confession of judgment" scenarios and analyses that cannot be applied to this case. Plaintiffs in this case never sued State Farm for breach of contract and State Farm never settled any such claim. Thus, there was no claim on which State Farm's payment of the appraisal award (which was not the settlement of a claim for breach or anything else) could be deemed a "confession of judgment" under *Trafalgar* or otherwise.

In *Vest* and *Brookins*, both of which cases involved bad faith actions arising out of UM claims, the insurers settled pending breach of contract actions by paying plaintiffs the UM policy limits. *See Vest*, 783 So. 2d at 1272; *Vest*, 710 So. 2d at 983; *Brookins*, 640 So. 2d at 112. In *Brookins*, the Court stated that the insured's bad faith claim was ripe when the insurer settled the pending breach of contract action by payment of the policy limits, expressly analogizing the situation to application of the confession of judgment rule in cases involving fees awarded under section 627.428. *Id.* at 114 ("When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a

confession of judgment or a verdict in favor of the insured.") (quoting *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983) (adopting "confession of judgment" rule for awarding statutory fees under section 627.428)). State Farm did not settle any breach of contract claim here. It merely paid the appraisal award in accordance with the terms and conditions of the policy in the normal course of handling the claim.

In *Trafalgar*, this Court extended the analysis in *Brookins* beyond settlement of a breach of contact action to the insurer's payment of an appraisal award during the pendency of a breach of contract action. In *Trafalgar*, applying a confession of judgment analysis, the Court held that an insurer's payment of "an appraisal award pursuant to an insurance contract constitutes *a 'favorable resolution' of an underlying breach of contract dispute* for purposes of filing a bad faith cause of action." 100 So. 3d at 1156 (emphasis added); *see also id.* at 1158 (finding "*the underlying action was resolved favorably* to the insured;" and an "appraisal award constitutes a *'favorable resolution' of an action* for insurance benefits") (emphasis added). Even assuming *Trafalgar* were correctly decided, its holding could not be applied here because there was no "underlying breach of contract dispute" as to

which the appraisal award payment could be deemed a "favorable resolution" for Plaintiffs.[2]

But, of course, State Farm maintains that *Trafalgar* was not correctly decided and improperly extended the confession of judgment rule, developed for purposes of awarding statutory fees under section 627.428, to the issue of "determination of liability" under *Blanchard* and its progeny and, then, misapplied it by treating an insurer's mere payment of an appraisal award in complete compliance with the insurance contract the same as an insurer's settlement of a breach of contract action. By its September 3, 2014 opinion in this case, the Court extends *Brookins* and *Trafalgar* even further, and well beyond any of the principled policy bases for development of the confession of judgment rule in the first place,[3] by holding that payment of an appraisal award in accordance with the insurance contract is a "determination of liability" for purposes of accrual of a bad faith action under *Blanchard* and its progeny. In effect, this Court has held that

---

[2] The majority's opinion in this case appears to overlook this fact in stating "the appraisal award 'constitute[d] a "favorable resolution" of *an action for insurance benefits*, so [the insured] . . . satisfied the necessary prerequisite to filing a bad faith claim.'" *Cammarata, supra*, at *6 (quoting *Trafalgar*) (emphases added).

[3] The confession of judgment rule was developed to allow an award of attorneys' fees to an insured under section 627.428, which requires a judgment against the insurer, when the insurer unreasonably (i.e., wrongfully) withholds payment due under a policy, necessitating the insured to file suit on the contract, which the insurer thereafter settles, precluding entry of a formal judgment. The public policies underlying the rule are encouragement of payment of amounts due under a policy and of settlement. *See Wollard*, 439 So. 2d at 218-19 and n. 2.

any payment by an insurer on an insurance claim, whether in compliance with the contract or not, is a "determination of liability" for purposes of accrual of a bad faith claim. *See Cammarata*, *supra*, at *7 (Gerber, J., concurring).

Even if some form of the confession of judgment rule could be properly applied to an insurer's payment of an appraisal award for purposes of establishing the requisite "determination of liability" for accrual of a bad faith action, the Court should at least apply the rule consistently with how it is applied in the statutory fees cases in which the rule was developed. There, the courts have held that an insurer's mere payment of an appraisal award (even during the pendency of a breach of contract action) does not constitute a confession of judgment so as to give rise to a right to fees under section 627.428, but rather a court must determine that the insurer has "wrongfully," i.e., by breach or otherwise, precipitated litigation, i.e., by refusing payment due under the policy, before fees are appropriately awarded under the rule. *See, e.g.*, *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628, 632-33 (Fla. 2d DCA 2011); *see also Hill v. State Farm Florida Ins. Co.*, 35 So. 3d 956, 960 (Fla. 2d DCA 2010) (it is only when the insurer is "actually taking steps to breach the contract, that the insured may be entitled to an award of fees" under the confession of judgment rule); *see generally Federated Nat'l Ins. Co. v. Esposito*, 937 So. 2d 199, 201-02 (Fla. 4th DCA 2006).

Appraisal is not a process to resolve a breach of contract claim, but rather is simply a method of adjusting a claim *within the terms of the insurance contract* to determine the amount payable for the covered claim. *Hill*, 35 So. 3d at 959. Judge Gerber aptly recites in his concurring opinion the applicable law concerning application of the confession of judgment rule to entitlement to fees when an insurer pays an appraisal award (even during the pendency of a breach of contract action):

> The appraisal process is not legal work arising from an insurance company's denial of coverage or breach of contract; it is simply work done within the terms of the contract to resolve the claim. Thus, except under the most extraordinary of circumstances, we do not envision fees for such work [associated with the appraisal process] to be recoverable. . . . Instead, the fees should normally be limited to the work associated with the filing of the lawsuit after the insurance carrier *has ceased to negotiate or has breached the contract and the additional legal work [is] necessary and reasonable to resolve the breach of contract*.

Cammarata, supra, at *8 (Gerber, J., concurring) (quoting *Hill*, 35 So. 3d at 961) (emphasis by Judge Gerber). Thus, the confession of judgment rule authorizes an award of fees to an insured following an insurer's payment of an appraisal award only if it is determined that the insurer has breached the contract or otherwise wrongfully withheld payment to the insured earlier.

In the Court's September 3, 2014 opinion in this case (as in *Trafalgar*), the Court has applied a confession of judgment analysis inconsistent with the holdings in the cases in which the confession of judgment rule was developed (statutory fees

under section 627.428). The Court has held that an insurer's mere payment of an appraisal award, without any determination that the insurer "wrongfully" withheld payment earlier or otherwise breached the contract, constitutes a "determination of liability" for purposes of allowing a bad faith action to proceed. If the Court continues to hold that a confession of judgment analysis can be applied at all to an insurer's payment of an appraisal award for deciding if there has been a "determination of liability" for purposes of allowing a bad faith claim to proceed, it should at least require some determination that the insurer "wrongfully" withheld payment earlier before concluding the payment of the appraisal award constitutes a "favorable resolution" for the insured.[4] Of course, there has been no determination that State Farm wrongfully withheld payment from Plaintiffs prior to its payment of the appraisal award in this case, requiring affirmance of the disposition below under any proper application of a confession of judgment analysis. *See Cammarata, supra,* at *8 ("the record here provides no basis indicating that the insurer breached the contract, much less failed to act in good faith") (Gerber, J., concurring). Paraphrasing the Fifth District, "[t]here is a fundamental due process

[4] State Farm continues to maintain that an appraisal award is not a "favorable resolution" for either party, but simply a determination of the amount of the loss that the parties have, by contract, put in the hands of the appraisal panel. If the amount of the appraisal award were relevant, the award here could just as easily be characterized as favorable to State Farm and unfavorable to Plaintiffs since it came in well below the amount Plaintiffs' claimed was owed under the policy. (2/187-89, 206-12, 284, 297-98)

concern finding that an insurance company which appropriately pays a valid claim according to the Policy terms must still [be subjected to a bad faith claim], because a claimant sued it to do what it was already in the process of doing," and such a concern is heightened here where Plaintiffs never even sued State Farm for breach of the contract. *See State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398-99 (Fla. 5th DCA 2007).

WHEREFORE, based on the foregoing discussion and authorities, State Farm requests that the Court reconsider and vacate its September 3, 2014 opinion in this case and affirm the disposition below for the reasons stated above. In conjunction therewith, State Farm requests that the Court reaffirm its decision in *Lime Bay* and recede from its decision in *Trafalgar* or, alternatively, limit *Trafalgar* to its facts involving payment of an appraisal award during the pendency of a breach of contract action that was necessitated by the insurer's breach of or other wrongful refusal to negotiate or pay amounts due under the insurance contract.

MOTION FOR CERTIFICATION

If the Court does not grant the relief requested in State Farm's motion for rehearing, State Farm requests that the Court certify that its September 3, 2014 opinion: (1) is in direct conflict with the Third District's decision in *North Pointe*

Ins. Co. v. Tomas, 999 So. 2d 728, 729 (Fla. 3d DCA 2008); and (2) passes upon a question of great public importance.

A. Conflict With *North Pointe v. Tomas*.

In its September 3, 2014 opinion, this Court holds that a determination of the insurer's liability for breach of contract is not necessary for a bad faith action to accrue. In so holding, this Court recedes from its holding in *Lime Bay* that an insurer's liability for breach of contract must be determined before a bad faith action becomes ripe. In *North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d DCA 2008), the Third District was confronted with a case in the exact procedural posture as was the case presented to this Court in *Lime Bay* and held, consistent with this Court's holding in *Lime Bay*, that a determination of the insurer's liability for breach of contract is necessary before a bad faith action accrues. Accordingly, by receding from *Lime Bay* on this point, this Court has already implicitly acknowledged conflict with the Third District's decision in *North Pointe* and, therefore, should certify this direct conflict to the Florida Supreme Court for resolution.

B. Question of Great Public Importance.

This Court's September 3, 2014 opinion will "open the door to allow an insured to sue an insurer for bad faith any time the insurer dares to dispute a claim [or the amount due on an admittedly covered claim], but then pays the insured just

a penny more than the insurer's initial offer to settle, without a determination that the insurer breached the contract." *Cammarata, supra,* at *7 (Gerber, J., concurring). Although this case involves payment of an appraisal award, the effect of the Court's opinion is that a bad faith claim will accrue against an insurer not only whenever an insurer makes any payment on a claim, but also whenever the insurer concedes coverage exists (i.e., admits "liability for coverage") – even when its payment or admission of coverage is in complete compliance with the contract. As Judge Gerber has pointed out, such a "slippery slope" is in conflict with the Florida Supreme Court's warning that an insurer has a right to decline payment on claims for amounts it does not believe are owed under the policy and the mere fact that it is later determined the insurer is wrong does not mean it is guilty of bad faith. *Id.* (citing *Vest*, 753 So. 2d at 1275)

This Court's opinion tells insurers that, even if they fully comply with their contracts and pay claims in accordance with the terms and conditions of their policies, that very conduct will open the door for insureds to sue them for bad faith. No longer needing to show an insurer breached the contract or otherwise wrongly denied payment under the contract when due, insureds and the plaintiffs' bar will be encouraged to roll the dice and file bad faith actions once paid on their insurance claims to threaten recovery of additional compensatory and punitive damages (without regard to policy limits), and, of course, attorneys' fees. Insureds

and their counsel well know that the *in terrorem* effect of such frivolous suits often leads to unjustified settlements and windfalls to them.

At best, this means insurers who comply with their contracts will necessarily have to incur significant expenses in the nature of attorneys' fees and costs to successfully defend themselves from baseless bad faith claims, which require very little to create "factual issues" mandating defense through trial. At worst, and no doubt most likely, this means insurers will be extorted by the *in terrorem* effect of such claims into settling them and paying significant attorneys' fees to those bringing the cases to avoid even the remote risks of unlimited compensatory and punitive damages and even higher attorneys' fees. This Court's opinion encourages such *in terrorem* tactics and frivolous litigation and is, therefore, contrary to any semblance of good public policy. *See Smith v. Viragen, Inc.*, 902 So. 2d 187, 190 n. 3 (Fla. 3d DCA 2006) (Florida courts should discourage frivolous litigation filed for *in terrorem* effect to intimidate defendants and force them into settlements).

Although resort to appraisal instead of litigation and payment of amounts actually due should be encouraged as good public policy,[5] this Court's opinion

[5] *See Esposito*, 937 So. 2d at 201-02 (the laudable goal of appraisal – to resolve disputes as to the amount of the loss without litigation – should be encouraged); *Fla. Ins. Guar. Ass'n Inc. v. Olympus Ass'n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010) (noting that appraisal clauses are preferred because they can make lawsuits unnecessary); *see also Cammarata*, *supra*, at *8 ("the better policy of this

encourages the opposite. Under this Court's holding in this case (and *Trafalgar*), an insurer's mere payment of an appraisal award is a "determination of liability" that gives rise to a bad faith action, notwithstanding the insurer has complied with all the terms and conditions of the policy. That holding will lead to (and already has following *Trafalgar*) some insurers removing appraisal provisions from their policies or not invoking appraisal when they should. This Court's holding also encourages payment of illegitimate claims to avoid the risk of bad faith actions when appropriate claim handling would call for invocation of appraisal or additional investigation to determine the legitimate amount owed under the policy.[6]

---

state [is] to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention [and] appraisal [is an] alternative method[] of dispute resolution that provide[s] quick and less expensive resolution of conflicts") (Gerber, J., concurring) (quoting *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001)).

[6] This will result because lawyers and public adjusters who regularly represent policyholders in first-party insurance claims long ago adopted the practice of filing civil remedy notices of insurer violation (triggering the 60-day cure period) at the near inception of insurance claims (often coupled with delaying tactics), knowing proper investigation and handling, and appraisal if invoked, will often take longer than the 60-day cure period provided by section 624.155 and insurers will be unable to take advantage of the cure provisions of the statute unless they pay what are often grossly inflated estimates of loss. When the bad faith actions are later filed, they are quick to assert that Florida law does not recognize "comparative bad faith" and argue the insureds' actions in setting up the bad faith claims are irrelevant because the focus of a bad faith claim is on the actions of the insurer, citing *Nationwide Prop. & Cas. Ins. v. King*, 568 So. 2d 990 (Fla. 4th DCA 1990), and *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004), for these propositions.

The ultimate effect of the Court's opinion in this case will be to discourage property insurers from continuing to do business in Florida, leading to a further shortage of property insurance for Florida citizens and making those insurance choices that remain available more expensive. At best, the Court's opinion will lead to substantial increases in the costs of property insurance for Florida citizens given it encourages payment of illegitimate claims and increased litigation as discussed above. As such, the Court's opinion passes on a question of great public importance that should be certified to the Florida Supreme Court for resolution.

Review of the issue by the Florida Supreme Court is appropriate for other reasons as well. In its September 3, 2014 opinion, this Court holds that it is "compelled" by the Florida Supreme Court's clarification of *Blanchard* in *Vest* to hold that the "determination of liability" necessary for accrual of a bad faith action is simply a "determination of coverage" and not a "determination of breach of contract." That holding is directly contrary to the Third District's holding in *North Pointe* (citing *Blanchard*) and this Court's holding in *Lime Bay* just two years ago (citing *Blanchard*), both issued well after *Vest* provided clarification of *Blanchard* 14 years ago. Although not discussed in the majority opinion, the Court's holding is also at odds with, if not directly conflicting with, this Court's previous decision in *Landmark American Ins. Co. v. Studio Imports, Ltd.*, 76 So. 3d 963 (Fla. 4th DCA 2011) ("[i]f a determination regarding liability [on breach of contract claim]

is not made, a cause of action for bad faith can never ripen," citing *Blanchard*). The Court's holding is further contrary to the holdings of numerous federal and state trial courts interpreting *Blanchard* and its progeny. *See, e.g., O'Rouke v. Provident Life & Accident Ins. Co.*, 48 F. Supp. 2d 1383, 1384 (S.D. Fla. 1999) (citing *Blanchard* and holding that "a first-party bad faith action by an insured against an insurer does not accrue until it is established that the insurer breached its duties under the insurance contract"). It follows from the foregoing that there is significant room for disagreement as to this Court's holding, which will continue to play out in the trial courts within other District Courts of Appeal in Florida and in the federal courts unless and until the Florida Supreme Court resolves that disagreement. Accordingly, certification of the issue as a question of great public importance is appropriate here.

In addition, both the majority and concurring opinions issued in this case make a point of saying the Court felt "compelled" by the Florida Supreme Court's precedents in *Blanchard* and *Vest* to reach the conclusion that a determination of breach is not necessary for accrual of a bad faith action. Notably, neither *Blanchard* nor *Vest* expressly so holds. *See Cammarata, supra,* at *4 (the Court's interpretation of *Blanchard* "*appears to have been articulated* by our supreme court's later opinion in *Vest"*) (emphasis added). In addition, such an interpretation of those decisions, which arose out of UM claims, is at odds with the

Florida Supreme Court's more recent discussion of first-party statutory bad faith claims in *Chalfonte*, involving a bad faith claim arising out of a property insurance claim similar to the one here. In *Chalfonte*, the supreme court indicated that such a claim does not exist absent an accompanying breach of an express term of the contract. Given this Court's holding is based, at best, on ambiguous language in opinions of the Florida Supreme Court as to the need for a "determination of liability" before a bad faith action accrues, it would be appropriate to have the supreme court clarify that ambiguity in its opinions in answer to a certified question.

Consequently, it would be appropriate and State Farm requests that this Court certify to the Florida Supreme Court the following (or a similar) question of great public importance:

> UNDER *BLANCHARD V. STATE FARM MUT. AUTO. INS. CO.*, 753 SO. 2D 1270 (FLA. 1991), AND ITS PROGENY, IS A DETERMINATION OF AN INSURER'S LIABILITY FOR BREACH OF THE INSURANCE CONTRACT NECESSARY BEFORE AN ACTION FOR FIRST-PARTY BAD FAITH UNDER SECTION 624.155, FLORIDA STATUTES, ACCRUES, OR IS A MERE DETERMINATION OF LIABILITY FOR COVERAGE SUFFICIENT?

WHEREFORE, based on the foregoing discussion and authorities, State Farm requests that this Court certify that its opinion is in direct conflict with the Third District's opinion in *North Pointe v. Tomas*, 999 So. 2d 728, 729 (Fla. 3d

DCA 2008) and certify the foregoing question of great public importance to the Supreme Court of Florida for resolution.

Respectfully submitted,

CARLTON FIELDS JORDEN BURT, P.A.
Counsel for Appellee State Farm
Miami Tower
100 Southeast Second Street
Suite 4200
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

s/ Paul L. Nettleton
PAUL L. NETTLETON
Florida Bar No. 396583
E-mail: pnettleton@cfjblaw.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal and is being served on this 29th day of September, 2014, on counsel of record listed below via transmission of notices of electronic filing generated by the Florida Courts eFiling Portal and via e-mail to:

George A. Vaka
Nancy A. Lauten
Vaka Law Group
777 S. Harbour Island Blvd.
Suite 300
Tampa, FL 33602
Tel: (813) 549-1799
Fax: (813) 549-1790
E-mail: gvaka@vakalaw.com
E-mail: nlauten@vakalaw.com
E-mail: pbeaumia@vakalaw.com

Appellate Counsel for Appellants

Kelly L. Kubiak
Merlin Law Group
777 S. Harbour Island Blvd.
Suite 950
Tampa, FL 33602
Tel: (813) 229-1000
Fax: (813) 229-3692
E-mail: kkubiak@merlinlawgroup.com

Trial Counsel for Appellants

s/ Paul L. Nettleton
PAUL L. NETTLETON
Florida Bar No. 396583

36377125.2