IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

JOSEPH AND JUDY CAMMARATA Case No.: 4D13-0185

Plaintiffs/Appellants,

v.

STATE FARM FLORIDA
INSURANCE COMPANY

Defendant/Appellee./

APPELLANTS' RESPONSE IN OPPOSITION TO APPELLEE'S MOTION FOR REHEARING AND/OR CERTIFICATION

The APPELLANTS, JOSEPH AND JUDY CAMMARATA, through undersigned counsel, and pursuant to Fla. R. App. P. 9.330, file their Response in Opposition to the Appellee's Motion for Rehearing and/or Certification, and state as follows:

On September 3, 2014, this Court issued its decision reversing the final summary judgment entered in favor of State Farm Florida Insurance Company ("State Farm"). The Court, En Banc, ruled that the Cammaratas' bad faith action was not premature because there had been a determination of State Farm's liability for coverage and the extent of the Cammaratas' damages. Based on its thorough examination of the precedent of the Florida Supreme Court, particularly Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289 (Fla. 1991) and

Vest v. Travelers Insurance Co., 753 So. 2d 1270 (Fla. 2000), this Court held 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 v. State Farm Florida Ins. Co., 2014 WL 4327948 *4 (Fla. 4th DCA Sept. 3, 2014).[1]

The Court also resolved the apparent conflict between its decision in Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co., 94 So. 3d 698 (Fla. 4th DCA 2012), the supreme court's opinion in Vest, and the Court's opinion Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co., 100 So. 3d 1155 (Fla. 4th DCA 2012), by receding "from Lime Bay to the extent it held that an insurer's liability for breach of contract must be determined before a bad faith action becomes ripe, even though the insurer's liability for coverage and the extent of the insured's damages already have been determined by an appraisal award favoring the insured." Cammarata v. State Farm Florida Ins. Co., 2014 WL 4327948 *7.

On September 29, 2014, State Farm filed its 30-page Motion for Rehearing claiming that the Court overlooked or misapprehended multiple points of fact and law, and asks the Court to rehear the matter to reconsider its En Banc ruling or,

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[1]State Farm infers there is something wrong with the decision because the Court felt "compelled" to follow Florida Supreme Court precedent. The Court did exactly what it was obligated to do; Florida Supreme Court precedent **is** the law of the land. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

alternatively, to certify direct conflict with North Pointe Ins. Co. v. Tomas, 999 So. 2d 728 (Fla. 3rd DCA 2008), or to certify a question of great public importance to the Florida Supreme Court. State Farm's claims of error are wholly without merit, and for the most part merely re-argue the points exhaustively addressed in its Answer Brief and at oral argument. Therefore, State Farm's post-opinion motion should be denied.

Florida Rule of Appellate Procedure 9.330(a) pertains to motions for rehearing, and states, in part, that a motion for rehearing "shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision." Motions for rehearing "are strictly limited to calling an appellate court's attention-without argument-to something the appellate court has overlooked or misapprehended." Cleveland v. State, 887 So. 2d 362, 364 (Fla. 5th DCA 2004) (emphasis added). A motion for rehearing "is not a vehicle for counsel or the party to continue its attempts at advocacy." Id. (quoting Goter v. Brown, 682 So. 2d 155 (Fla. 4th DCA 1996)). That is precisely what State Farm has done in its Motion for Rehearing.[2]

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[2]State Farm makes a point of noting that the appraisal award was less than what the Cammaratas were claiming. (Motion p. 1-2) However, as it has done throughout these proceedings, State Farm ignores its own misconduct and the fact that the appraisal award far exceeded what it had offered to pay--$0.00 (VR 2, 357-58)

Collateral Estoppel does not apply to this case.

State Farm claims the Court overlooked its collateral estoppel argument. (Motion p. 6-7)[3] It apparently believes that because the subject was not mentioned in the opinion it must have been ignored by the Court. Not surprisingly, State Farm cites no authority standing for the remarkable proposition that the Court, in its opinion, must reference every argument raised by the parties. There is, quite simply, no such requirement. Moreover, collateral estoppel does not apply to this case. As the Cammaratas explained in their Reply Brief, the Florida Supreme Court very clearly announced that collateral estoppel prevents the same parties from re-litigating the issues that were litigated and actually decided in a second suit involving a different cause of action. Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 433 (Fla. 2013).

State Farm misapprehends the law regarding first party bad faith claims.

State Farm continues to urge the same error it argued previously in its Brief and at oral argument. It complains about what it perceives as the Court's erroneous interpretation of Florida bad faith law. State Farm's entire motion is predicated on **its** failure to apply the actual holdings of the cases it cites, and its persistent refusal

[3] Generally, collateral estoppel is an affirmative defense which must be raised in an answer. Norwich v. Global Financial Associates, LLC, 882 So. 2d 535, 536 (Fla. 1st DCA 2004). State Farm moved for summary judgment before it filed an answer and affirmative defenses to the Cammaratas' complaint for bad faith.

to recognize that the Florida Supreme Court has ruled on these issues. State Farm refuses to even acknowledge Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 618 (Fla. 1994), and mischaracterizes what other Florida Supreme Court decisions hold. In Imhof, the Court specifically allowed the insured to prosecute a bad faith claim where the insured had gone to arbitration (in accordance with the policy and UM statute in effect at the time), and received less than policy limits. The Court unmistakably ruled that the arbitration award satisfied the requirement that there had been a determination of the extent of the damages covered under underlying insurance contract. In Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216 (Fla. 2006), the Court once again ruled that an arbitration award showed the insured had valid claim. A judgment in a breach of contract action is not required.

State Farm also mischaracterizes Brookins v. Goodson, 640 So. 2d 110, 112-15 (Fla. 4th DCA 1994), overruled on other grounds, State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995). (Motion p. 15-16)[4] In Brookins, this Court recognized that Imhof did not require that the insured's damages be determined in litigation. The Court explained that engrafting a judicial requirement that a determination of damages by litigation must precede a first-party bad faith claim "would foster no legislative purpose, would lead to an absurd result and would

[4] The insurers in Vest and Brookins settled the UM claim, not the "breach of contract claim." (Motion p. 15)

needlessly increase the cost of litigation to both sides by requiring the insured to litigate the underlying action to conclusion."

Curiously, State Farm also refuses to acknowledge the Second District's decision in Hunt v. State Farm Florida Ins. Co., 112 So. 3d 547, 549 (Fla. 2nd DCA 2013). The Second District quite clearly ruled, as this Court did in Trafalgar, that an appraisal award established the validity of Mr. Hunt's claim and, therefore, satisfied the condition precedent for bringing the bad faith action. State Farm's sweeping pronouncement that there can be no bad faith action when the insurer does not breach the contract (Motion p. 8-10) is absolutely false and was been soundly and specifically rejected twenty years ago in Imhof, and thereafter in Hunt and Trafalgar.[5] That State Farm continues to maintain that an appraisal award is not a "favorable resolution" (Motion p. 20 n. 4), is because it does not understand or simply refuses to accept that is all the law requires.

To proceed with a §624.155, Fla. Stat., claim the insured needs only to have determination of liability and the extent of damages. The appraisal award determines the extent of the damages. If the insurer pays the award, and has not raised coverage defense (or has abandoned them), then liability (entitlement to some benefit under the policy) is determined and there is no additional determination to be made in the

[5] State Farm's continued complaints about the Court's decision in Trafalgar are thoroughly addressed throughout the Cammaratas' Initial (p. 17-20) and Reply Briefs (p. 1-4, 8). They will spare the Court from unnecessary repetition here.

contract action. Nowhere in §624.155 does the statute require a finding that the insurer "breached" the contract before the insured proceeds with the statutory claim. An insurer can be guilty of bad faith by its delay in paying the damages it owes in the absence of a lawsuit.

State Farm also fails to recognize that prior to 1982, there were no first party bad faith actions. Wronged insureds were limited to suing their insurers for breach of contract.[6] If the insurance company did not technically breach a provision in the contract, the insured was left without a remedy. In 1982, the Florida Legislature adopted section 624.155, Florida Statutes, which authorizes first-party bad-faith actions. Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1281 (Fla. 2000); McLeod v. Continental Ins. Co., 591 So. 2d 621, 623 (Fla. 1992). The Florida Legislature has mandated that insurance companies act in good faith and deal fairly with its insureds regardless of the nature or the amount of the claim presented. Vest v. Travelers Insurance Co., 753 So. 2d 1270, 1275 (Fla. 2000). As such, section 624.155, Fla. Stat., "obligates an insurer to act 'in good faith and with due respect for the interests of the insured.'" Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 483 F.3d 1265, 1276 (11th Cir. 2007) (internal citation omitted).

Section 624.155, Fla. Stat., was specifically enacted to address those situations where the insurer did not breach the insurance contract, but nevertheless

[6] No such limitation existed in third party claims.

mistreated the insured. Foot-dragging, low-balling and claim delay may not rise to the level of a breach of contract, but they, along with other enumerated offenses in §624.155, Fla. Stat., **do** amount to bad faith. The bad faith statute: (1) recognizes the severe economic disparity between insurance companies and their insureds; (2) recognizes the vastly superior ability of the insurance company to leverage that disparity; (3) seeks to prevent insurance companies from doing so to the detriment of its insureds; (4) allows the insured to fight back when the insurance company tries to do so; and (5) gives the insured the ability to remove the heel of the insurer's financial boot from his or her throat. State Farm would like nothing more than for this Court to issue a decision that renders the bad faith statute meaningless, and return to the days where a toothless breach of contract remedy was a mistreated insured's only option.

This case perfectly illustrates the mischief that can occur in the absence of a bad faith remedy. State Farm determined the damage to the Cammaratas' home was minor and less than the insurance policy's deductible. The Cammaratas obtained a repair estimate that was significantly higher than State Farm's estimate. They then had to drag State Farm to appraisal (and incur additional expenses) in order to compel it to pay more than its nonexistent offer. The appraisal resulted in an award to the Cammaratas of $26,000, far more that what State Farm ever offered the Cammaratas—nothing. If the Cammaratas had not pursued their claim, it would not

have been examined further, and they would have suffered a covered loss that would have remained unpaid. State Farm would have pocketed the money. Now multiply the Cammaratas' recovery by the millions of policies issued by State Farm, and the windfall to State Farm, at the expense of its insureds, is enormous. Under State Farm's view of the law, it could continue to act with impunity and low-ball their insureds' claims without any negative consequences. As Vest and the cases cited in the Cammaratas' Initial and Reply Briefs demonstrate, that it not the law.

Contrary to State Farm's repeated refrains, this Court has not misapplied Vest or any other aspect of the law. It is State Farm that has contorted and twisted the law in order to support its otherwise unsupportable arguments.[7] State Farm's continued reliance on QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541 (Fla. 2012), is a prime example. (Motion p. 8-9) Chalfonte simply does **not** stand for the proposition that a bad faith cause of action under section 624.155, Fla. Stat., cannot exist in the absence of an action and/or judgment for breach of the insurance contract. The language relied upon by State Farm addresses the implied covenant of

[7] State Farm mischaracterizes Shuster v. South Broward Hops. Dist. Physicians' Prof. Liability Ins. Trust, 591 So. 2d 174 (Fla. 1992). (Motion p. 9-10) The case addresses a medical malpractice insurance carrier's ability to settle a claim against the insured within policy limits without acting in bad faith. It does not establish that a breach of contract action must precede a statutory bad faith action. The issue in Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985) (Motion p. 10), was the insurer's potential liability for intentional infliction of emotional distress. It also does not establish that a breach of contract action must precede a statutory bad faith action.

good faith and fair dealing in contracts. The Chalfonte court was not expressing a limit on statutory bad faith claims. Any discussion of §624.155, Fla. Stat., in Chalfonte is irrelevant because the court found it did not apply to the case. There is no conflict.[8]

The parade of imaginary horribles State Farm envisions are pure fiction. (Motion p. 24-26) The Florida Supreme Court decided Imhof in 1994, Hunt was decided in 2013, and this Court decided Trafalgar in 2012. To date, none of State Farm's prophecies of doom have come to pass. State Farm still has the option to prove with competent substantial evidence that it did not act in bad faith. Indeed, there is nothing preventing State Farm from defending the bad faith claim in this case by claiming it did everything right. State Farm also has another remedy—act in conformity with the goals behind the bad faith statute.

State Farm's tiresome refrain that every appraisal will result in a bad faith claim is unfounded. (Motion p. 23-25)[9] As the Cammaratas previously explained, a bad faith claim will not result every time an insurer pays a claim any more than a lawsuit results from every first party insurance claim. It is only when insurers like

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[8] State Farm's claim that the Court's En Banc decision somehow misapplies or undermines the purposes of the confession of judgment rule is also false. (Motion p. 15-17) If anything, the principles of paying policy proceeds and encouraging settlements are well-served by the Court's opinion.

[9] Section 57.105, Fla. Stat., exists as a remedy to the "frivolous" actions State Farm complains about. (Motion p. 24)

State Farm refuse to adjust and pay what they should pay, and an insured recovers more after filing a CRN, that the insured meets the minimum legal threshold to be able to bring a claim as the courts in Hunt, Trafalgar, and other cases cited in Cammaratas' Briefs have held, consistent with Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000).

The Court's En Banc decision does not conflict with North Pointe v. Thomas.

State Farm also continues to claim the Court's decision directly conflicts with the Third District's decision in North Pointe Ins. Co. v. Tomas, 999 So. 2d 728 (Fla. 3rd DCA 2008). It does no such thing. The Cammaratas explained in both their Initial (p. 22-24) and Reply Briefs (p. 3) why North Pointe has no application to this case—there was still a pending breach of contract claim after the appraisal. State Farm's "conflict" argument is simply a repeat of the arguments made in its brief. (Answer Brief p. 19-20, 35) Moreover, if the Court's decision actually did conflict with North Pointe (which it does not), State Farm could seek supreme court review without certification pursuant to Fla. R. App. P. 9.030(2)(A)(iv). It is precisely because State Farm knows there is **no** conflict that it asks this Court to issue a certificate.[10]

[10] State Farm made the exact same "conflict" argument in its motion for rehearing and certification in Hunt. The Second District denied the motion. State Farm must have recognized the lack of conflict with North Pointe because it never sought further review of the Hunt decision.

Certification of a Question of Great Public Importance is unwarranted.

There also is no compelling reason to certify a question of great public importance. The Florida Supreme Court has already ruled on the issue State Farm complains about in Imhof v. Nationwide Mutual Ins. Co., 643 So. 2d 617 (Fla. 1994), Vest and Blanchard. The Second District also ruled on this issue in Hunt v. State Farm Florida Ins. Co., 112 So. 3d 547 (Fla. 2nd DCA 2013), as did this Court in Trafalgar at Greenacres, Ltd v. Zurich American Ins. Co., 100 So. 3d 55 (Fla. 4th DCA 2012). As Trafalgar and Hunt hold, an appraisal award also establishes a favorable resolution of the underlying claim. Rather remarkably, references to Imhof and Hunt, continue to be completely absent from State Farm's post-opinion motion. Perhaps State Farm recognizes that the "new "law it claims the Court has created, already exists. The Florida Supreme Court has spoken repeatedly on the issue; there is no reason for it to do so again.

WHEREFORE, the Appellants, JOSEPH AND JUDY CAMMARATA, respectfully request the Court to deny the Appellee's Motion for Rehearing and/or Certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail to the following individuals on this 20th day of October, 2014.

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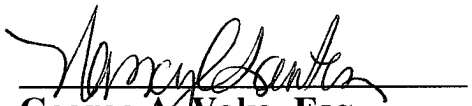

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