IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC15-288
DISTRICT COURT CASE NO. 4D13-0185

STATE FARM FLORIDA
INSURANCE COMPANY,

Petitioner,

v.

JOSEPH CAMMARATA and
JUDY CAMMARATA,

Respondents. /

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review From a Decision
of the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

The facts set forth here are found within the four corners of the decision below, *Cammarata v. State Farm Fla. Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2015) (*en banc*), which is attached as an Appendix.

In October 2005, the home of Plaintiffs/Respondents, Joseph and Judy Cammarata ("Plaintiffs"), was damaged as a result of Hurricane Wilma. In September 2007, two years later, Plaintiffs first filed a claim for benefits under their homeowners policy with Defendant/Petitioner, State Farm Florida Insurance Company ("State Farm"). In October 2007, State Farm notified Plaintiffs that it had inspected their home, estimated the amount of damages to be lower than the policy deductible, and, therefore, owned no payment under the policy. *Id.* at 607.

Six months later, in April 2008, Plaintiffs requested State Farm proceed to appraisal pursuant to the appraisal process agreed to in the insurance policy to determine the amount of the loss. State Farm agreed and the appraisal process proceeded. An appraisal award determining the amount of the loss, which was below Plaintiffs' estimate but above State Farm's estimate and the policy deductible, was issued in October 2009. In December 2009, State Farm timely paid the appraisal award in accordance with the terms of the policy. *Id.*

Thereafter, Plaintiffs filed a statutory bad faith action pursuant to section 624.155, Florida Statutes, alleging State Farm did not attempt in good faith to

settle their claim. State Farm filed a motion for summary judgment arguing, among other grounds, that Plaintiffs' bad faith action was at least premature because State Farm had not breached the contract and there had been no determination of State Farm's liability for any breach. State Farm relied upon the then-controlling Fourth District decision in *Lime Bay Condo., Inc. v. State Farm Fla. Ins. Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012), among other authorities. 152 So. 3d at 607-08.

In *Lime Bay*, after being dissatisfied with State Farm's payments on a Hurricane Wilma claim two years after the loss, the insured sued State Farm for breach of the insurance contract. Two years into the litigation, the parties engaged in the appraisal process, resulting in an appraisal award in excess of $1 million, which was promptly paid by State Farm. The insured then filed an action for statutory bad faith against State Farm, which the trial court dismissed as premature because there had been no determination of State Farm's liability for breach of contract. 94 So. 3d at 698-99. In affirming that dismissal, the Fourth District noted that, notwithstanding State Farm's payment of the appraisal award during the pendency of the breach of contract action, State Farm continued to dispute liability for any breach, and held:

> [The insured] did not, and could not, allege that there had been a final determination of liability since the breach of contract case was still pending. . . . The trial court [in the contract action] must first resolve the issue of [the insurer's] *liability for breach of contract* . . . .

Id. at 699 (citations omitted; emphasis added); *see also Cammarata*, 152 So. 3d at 608.

Following a hearing on State Farm's motion in this case, the trial court entered summary judgment for State Farm, relying on *Lime Bay.* Plaintiffs appealed and the Fourth District reversed in an *en banc* opinion in which it receded from *Lime Bay*. The Fourth District found it was compelled to do so by its view of this Court's clarification in *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000), of the decision in *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991). *Cammarata*, 152 So. 3d at 609-613.

The Fourth District held that the "determination of liability" of the insurer required before a bad faith action accrues under *Blanchard* and its progeny is merely a determination of "liability for coverage" and not a determination of "liability for breach of contract." *Id.* at 607, 610. 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 prerequisites to filing a bad faith claim." *Id.* at 612 (citing *Trafalgar at Greenacres, Ltd v. Zurich American Ins. Co.,* 100 So. 3d 1155 (Fla. 4th DCA 2012)). This, notwithstanding there was no "action for insurance benefits" or for breach of contract ever filed against State Farm. *See id.* at 607 (recounting the history of the claim).

Judge Gerber, in a concurrence joined by Judges Conner, Forst and Klingensmith, recognized the slippery slope created by the majority's opinion:

> [T]he majority opinion w[ill] 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.*
>
> 753 So. 2d at 1275 (emphasis added).
>
> 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. . . .

Id. at 613 (Gerber, J., concurring). Judge Gerber went on to note:

> [T]he record here provides no basis indicating that the insurer breached the contract, much less failed to act in good faith to settle the claim. On the contrary, the 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. As our sister court stated in *Hill v. State Farm Florida Insurance Co.*, 35 So. 3d 956[, 961] (Fla. 2d DCA 2010):
>
> > 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.

Id. at 614.

State Farm filed a motion for rehearing and certification, which the Fourth District denied. State Farm timely filed its notice of invoking this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

The decision below conflicts with the Third District's decision in *North Pointe Ins. Co. v. Tomas*, 999 So. 2d 728 (Fla. 3d DCA 2008). In *North Pointe*, the Third District held that a determination of an insurer's liability for breach of contract is necessary before a bad faith action accrues and that an insurer's payment of an appraisal award (which establishes liability for "coverage" and the amount due) is insufficient. Here, the Fourth District held the opposite.

The decision below conflicts with this Court's decision in *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541 (Fla. 2012). In *Chalfonte*, this Court held that the bad faith action created by section 624.155 is a codification of the common law action for breach of the covenant of good faith and fair dealing implied in contracts generally, which does not exist "where there is no accompanying action for breach of an express term of the agreement." Here, the Fourth District held a bad faith claim could proceed without a determination that the insurer breached any term of the contract.

The decision below similarly conflicts with this Court's decision in *Shuster v. South Broward Hosp. Dist.*, 591 So. 2d 174 (Fla. 1992). In *Shuster,* this Court

held that a bad faith action does not lie against an insurer who merely exercises its rights under the contract (i.e., does not breach the contract). Here, the Fourth District held a bad faith claim could proceed notwithstanding the insurer did no more than exercise its rights in conformance with the contract.

Accordingly, this Court has jurisdiction, Fla. R. App. P. 9.030(a)(2)(A)(iv); art. V. § 3(b)(3), Fla. Const., and should accept review to resolve the conflicts and to prevent the injustice of allowing an insured to sue an insurer for bad faith absent a determination (in some form) that the insurer breached the insurance contract.

ARGUMENT

I. THIS COURT SHOULD EXERCISE JURISDICTION BECAUSE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT AND DECISIONS OF THIS COURT.

A. Conflict With Decision Of Third District.

The Fourth District's decision below expressly and directly conflicts with the Third District's decision 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) (en banc).[1] In *North Pointe*, the insureds made a claim under a homeowners policy. The

[1] In *Seville Place*, the Third District receded from *North Pointe* only to the extent it held that certiorari lies to review an order allowing amendment of a pleading to assert a premature bad faith claim where no irreparable harm is shown. *Seville Place*, 74 So. 3d at 108.

parties could not agree on the amount of the loss and the matter proceeded to appraisal. An appraisal award was entered and the insurer paid the award. The insureds then filed a second amended complaint, adding a statutory bad faith claim against the insurer to its previously filed breach of contract claim. 999 So. 2d at 728. The Third District held the trial court erred in denying the insurer's motion to dismiss the bad faith claim because the record did not reflect and the insureds did not allege that damages had been ascertained for the alleged breach, necessarily holding the appraisal award and its payment (thus, a determination of liability for "coverage" and the amount due) did not constitute the necessary determination to give rise to a bad faith claim under *Blanchard* and its progeny. *Id.* at 729.

The Fourth District's decision in this case cannot be squared with the Third District's decision in *North Pointe*. Here, the Fourth District held that a determination of breach was not necessary and only a determination of coverage as established by State Farm's payment of the appraisal award was needed to allow a bad faith claim to proceed. The identical factual circumstances were present in *North Pointe* as well as *Lime Bay*, where the courts held the exact opposite: that a determination of breach was necessary and mere payment of the appraisal award was not sufficient to allow a bad faith claim to proceed. The Fourth District's receding from *Lime Bay* necessarily establishes that its decision is in direct conflict with *North Pointe* and the cases are not distinguishable.

B. Conflict With Decisions of This Court.

The Fourth District's decision in this case expressly and directly conflicts with this Court's decision in *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541, 548 (Fla. 2012). In *Chalfonte*, this 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 contracts generally. *Id.* at 547-49. This Court also reaffirmed 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.* (citations omitted).

The Fourth District's decision here, holding that a determination of breach by the insurer is not necessary to proceed with a bad faith action, cannot be squared with this Court's decision in *Chalfonte*. In *Chalfonte*, this Court reaffirmed the well-established law that such a claim cannot proceed absent a breach of an express term of the contract. In contrast, the Fourth District in this case held that such a claim could proceed without a breach of any term of the contract.

The Fourth District's decision is also in conflict with this Court's decision in *Shuster v. South Broward Hosp. Dist.*, 591 So. 2d 174 (Fla. 1992). In *Shuster*, this Court held 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). *Id.* at 177-78 (addressing third-party bad faith action), *approving Shuster v. South Broward Hosp. Dist.*, 570 So. 2d 1362, 1367-68 (Fla. 4th DCA 1990) (affirming dismissal of bad faith action, holding, "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"); *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"). The Fourth District's decision, allowing a bad faith claim to proceed notwithstanding the insurer did not breach the insurance contract, cannot be squared with these decisions. *See Cammarata*, 152 So. 3d at 614 ("[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).

C. The Court Should Accept Jurisdiction To Resolve These Conflicts.

In light of the express and direct conflicts between the decision below and the decisions of the Third District and this Court discussed above, this Court has jurisdiction in this matter. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv); art. V. § 3(b)(3), Fla. Const. The Court should exercise that jurisdiction to resolve these conflicts and prevent the injustice that will result if insurers are subject to bad faith actions notwithstanding they have met all of their obligations under the insurance contract. *Blanchard* and *Vest* do not require, or even support, the conclusion reached by the Fourth District. *Cammarata* represents a significant broadening of insurers' exposure to bad faith actions in Florida and will lead to virtually certain bad faith actions any time an insurer, while conceding coverage, questions the amount claimed due by an insured and later pays the insured, in complete compliance with the contract, a penny more than what it originally estimated the loss to be. *See Cammarata*, 152 So. 3d at 613 (Gerber, J., concurring).

CONCLUSION

Because the decision under review conflicts with the decisions in *North Pointe*, *Chalfonte* and *Shuster*, this Court should accept jurisdiction, review the decision on the merits, and resolve the conflicts.

Respectfully submitted,

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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 via e-mail this 5th day of March, 2015, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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