IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D14-0685

L.T. CASE NO. 12-38540 CA 15

AMERICAN INTEGRITY
INSURANCE COMPANY
OF FLORIDA,

Petitioner,

v.

NORGE TORRES,

Respondent.

_______________________________/

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF ITS PETITION FOR CERTIORARI

I. American's payment of the appraisal award did not constitute a determination of liability for purposes of a bad faith action; hence Respondent is not entitled to "bad faith discovery"

When one peeks behind the veneer of Respondent's Response in opposition to American Integrity Insurance Company of Florida's Petition for Certiorari, it contains no substantive argument whatsoever that, on the facts of ***this*** case, Respondent is entitled to "bad faith" discovery. Rather, the Response simply states the obvious, engages in false generalizations, and mischaracterizes the difficult.

Respondent first mis-cites *Llerena v. Lumberman's Mut. Cas. Co.*, 379 So. 2d 166 (Fla. 3d DCA 1980) for the proposition that by paying the appraisal award,

American waived its defenses. (Resp., pp 3, 11).[1] *Llerena* held no such thing: it held that when an insurer admits liability by making some pre-litigation payments against the insured's claim, it thereby waives only the requirement that the insured serve a sworn proof of loss. *Id.* at 167 ("The law is well established that when an insurer admits liability in an unagreed amount, formal proof of loss is thereby waived[.]").

Respondent then spends eight (8) pages accusing American of trying to "engraft" a requirement onto the bad faith statute that an insured obtain a judgment against the insurer on the underlying insurance contract before the insured can file a bad faith action. (Resp., pp 5-12). In histrionics, Respondent claims that "[f]or American to prevail, this Court must hold there [sic] could never be a bad faith claim resulting from any type of first party claim without the insured first filing a lawsuit and obtaining a judgment against the insurer[.]" (Resp., p 10). American never made that argument, and readily acknowledges that, for bad faith purposes, there can be various forms of "resolution" of the underlying insurance claim other than a "judgment" which are sufficient to satisfy the requirement that the insurer be

[1] Petitioner has filed the Appendix required by Fla. R. App. P. 9.100(g) and Fla. R. App. P. 9.220. References to the Appendix appear as "(A, p __)." References to Respondent's Response to American's Petition for Certiorari will appear as "(Resp., p __)." Unless otherwise indicated, all emphasis in this Reply has been supplied by undersigned counsel.

determined to be liable on the insurance contract. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991) (stating that a bad faith cause of action "does not accrue before the conclusion of the underlying litigation" of the breach of contract claim); *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1234 (Fla. 2006) (recognizing that an arbitration award suffices as a determination of an insurer's liability); *Brookins v. Goodson*, 640 So. 2d 110, 112-13 (Fla. 4th DCA 1994) (holding that payment of the policy limits by the insurer was a sufficient determination of liability for the bad faith claim to accrue), *overruled on other grounds by State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). The distinguishing feature of all of these forms of resolution, however, is that they actually determine the insurer's liability on the contract. The appraisal in this case did not determine that American was liable for a breach of the insurance contract[2] - no one has ever made such a determination and, apparently, no one ever will. Without such a determination, there can be no cause of action for bad faith. "We continue to hold in accord with *Blanchard* that bringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on

[2] It was respondent who breached the contract by filing suit without first satisfying his post-loss obligations under the insurance contract.

the first-party insurance contract." *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275-1276 (Fla. 2000).

To counter its own straw argument that all bad faith suits require a judgment - a position never taken by American - Respondent posits the equally fallacious argument that ***any*** payment against the policy suffices to establish liability for purposes of a bad faith claim. (*See*, *e.g.*, Resp. at 9 ("Federal courts interpreting Florida law agree an [sic] insurer's payment after the 60-day cure period enables the insured to pursue a §624.155 bad faith action - a judgment is not required.")). None of Respondent's cited cases support that bald proposition. To the contrary, they make clear that whether or not a payment against the claim constitutes an admission of liability depends on the facts and circumstances of the given case:

> In order for a claim for bad faith under Fla. Stat. § 624.155 to accrue, a plaintiff must allege that a determination of the defendant's liability has been made. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991). Florida courts have recognized multiple methods for determining insurer liability, including litigation, arbitration, and payment by an insurer of the full policy limit. [***] ***The Eleventh Circuit effectively recognized yet another means of determining liability and damages when it held that "once an [appraisal] award has been made, the only defenses that remain for the insurer to assert are lack of coverage for the entire claim, or violation of one of the standard policy conditions," e.g., "fraud, lack of notice, failure to cooperate, etc." Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F. 3d 1317, 1319 (11th Cir. 2004); see also Muckenfuss v. Hanover Ins. Co., No. 5:05-cv-261-Oc-10GRJ, 2007 WL 1174098 (M.D. Fla. April 18, 2007).*** Thus, if a plaintiff establishes that the extent of its damages has been determined

> by an appropriate appraisal process, and the defendant neither contests liability as a whole, nor alleges that plaintiff violated any standard policy condition, an appraisal award ***may*** be a sufficient determination of liability and damages for its bad faith claim to proceed.

Tropical Paradise Resorts, LLC v. Clarendon America Ins. Co. 2008 WL 3889577, 2 (S.D. Fla. 2008) (cited by Respondent, Resp., p 9). American respectfully submits that the holdings of *Three Palms Pointe* and *Tropical Paradise* control here: Respondent violated several of the standard policy conditions providing a complete defense to liability for American. That defense to liability on the policy has not been decided and, because ***Respondent*** voluntarily dismissed the contract action, it never will; therefore Respondent has no claim for bad faith.

Respondent then presents a wild hypothetical in which an insurer who intentionally "attempts to save money by underpaying and delaying the claim" finally makes payment after the dispute has gone to appraisal. (Resp., pp 9-10). Obviously, the fact that the insurer was acting in bad faith is built into the hypothetical. In this case, however, American was at all times exercising its valid contractual rights to investigate Respondent's claim - it was Respondent who filed suit prematurely. The hypothetical does not even address the issue of whether the insured had, as in this case, committed violations of the insurance policy's post

loss conditions which legally preclude recovery in any amount.[3] If the insurer in the hypothetical simply made payment after "delaying and underpaying" without any defenses to coverage, then that would be a classic example of a payment that constitutes an admission of liability for bad faith purposes. In this case, however, it was the insured who was in breach of the policy when American settled the claim - and American therefore did have policy defenses. Respondent's hypothetical is as inapposite as it is extravagant.

Respondent next argues that by making payment against his claim American "confessed judgment", attempting to distinguish *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398 (Fla. 5th DCA 2007) on the basis that American paid Respondent's attorney's fees in the underlying action such that, in this case, the underlying claim was completely resolved. (Resp., pp 8, 13). Respondent knows, however - because it was briefed in the lower court (A, pp 256-57) - that the Second District recently held on strikingly similar facts that the confession of judgment doctrine does not apply merely because the underlying claim was "completely resolved." *State Farm Fla. Ins. Co. v. Colella*, 95 So. 3d 891 (Fla. 2d DCA 2012). In that case, the insurer initially denied a claim for sinkhole damage to the insured's home based upon an engineering report. A year-and-a-half later the

[3] Respondent has never, before this Court or the court below, contended that he had not violated the policy's post loss obligations.

insured obtained a contradictory engineering report, but instead of providing it to the insurer she simply filed suit. Once the insurer obtained a copy of the second report during the course of the litigation, it changed its position and paid its policy limits - as well as extra payments for attorney's fees and interest. Thus, the insurer resolved the entire claim. The insured obtained summary judgment against the insurer in the trial court by arguing that these payments constituted a confession of judgment. The Second District reversed, holding that the confession of judgment doctrine did not apply on these facts:

> [w]e emphasize[] that the rule is intended to penalize insurance companies for "wrongfully" causing an insured to resort to litigation. From this record, it is not apparent that [the insured] ever was required to "resort" to litigation. She appears to have opted to pursue litigation without ever attempting to discuss the disagreement with the insurance company. Certainly, as an issue for summary judgment, this record does not establish an undisputed factual basis to conclude that State Farm confessed judgment to the initial complaint when it decided to pay this claim in full.

Id. at 896 (citations omitted). *Colella* is directly applicable here: in this case it was the insured who raced to the courthouse, without need, instead of turning over required documents and otherwise fulfilling his obligations under the insurance policy. The confession of doctrine cannot apply on the facts of this case.

In an ironic move, Respondent tries to invoke public policy by arguing that requiring all insureds to obtain a judgment - a position not taken by American -

would waste judicial resources (Resp., p 7), while at the same time arguing that American should ***not*** have paid the appraisal award and should have instead litigated its defenses. (Resp., p 11). This argument is non-sensical: either Florida public policy promotes settlement and the avoidance of litigation, or it does not. "The law favors settlement of disputes and the avoidance of litigation." *Imhof v. Nationwide Mut. Ins. Co.,* 643 So. 2d 617, 618 (Fla. 1994). As American pointed out in its original Petition, the result urged by Respondent promotes the very type of "racing to the courthouse" and instigation of unnecessary and undeserved attorney's fees which the bad faith statute was itself designed to avoid.

> However, courts generally do not apply the [confession of judgment] doctrine where the insureds were not forced to sue to receive benefits; applying the doctrine would encourage unnecessary litigation by rewarding a race to the courthouse for attorney's fees even where the insurer was complying with its obligations under the policy.

Lorenzo, 969 So. 2d at 398. *Lorenzo* dealt with penalty attorney's fees, but clearly the same rational applies to the penalty of bad faith litigation. *See, e.g., Imhof,* 643 So. 2d at 618.

American did not waive its defenses or "confess judgment" by paying the appraisal award in this case. It was Respondent who breached the underlying contract by failing to fulfill his post loss obligations; it was Respondent who raced to the courthouse to file both the underlying contract action and this bad faith

litigation prematurely; and it was Respondent who dismissed the underlying action without awaiting resolution of American's defenses. As such American's liability for breach of the underlying insurance contract has never been and never will be determined. Respondent has no viable claim for bad faith as a matter of law and Respondent is therefore not entitled to bad faith discovery.

II. Respondent's assertion that there is no irreparable harm here is meritless - at best

American has petitioned for certiorari to quash an order of the trial court requiring it to respond to "bad faith" discovery. It is beyond argument that an insurer's claims files and like elements of "bad faith" discovery are privileged and immune from discovery in the absence of a viable bad faith suit. *See State Farm Florida Ins. Co. v. Aloni*, 101 So. 3d 412, 414-15 (Fla. 4th DCA 2012) ("In this case, where the coverage issue is in dispute and has not been resolved, the trial court departed from the essential requirements of the law in compelling disclosure of State Farm's claim file materials... . Because State Farm has shown that such disclosure would result in irreparable harm that cannot be adequately addressed on appeal, we grant the petition and quash the discovery order."); *Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 251-52 (Fla. 3d DCA 2002); *see also State Farm Mutual Automobile Insurance Co. v. Tranchese,* 49 So. 3d 809, 810 (Fla. 4th DCA

2010) (insured not entitled to production of materials related to insurer's business practices prior to accrual of bad faith claim). It is equally well established that being forced to produce privileged documents and information constitutes the type of irreparable harm which forms the foundation of certiorari jurisdiction. *Tumelaire v. Naples Estates Homeowners Ass'n, Inc.*, 137 So. 3d 596, 599 (Fla. 2d DCA 2014) ("In certiorari review, material protected by privilege or work product is the kind of information that 'may reasonably cause material injury of an irreparable nature.'" (quoting *Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 94 (Fla. 1995))); *Aloni, supra.* Respondent does not even address either such point, let alone refute them.

Rather, Respondent invokes a case which has absolutely nothing to do with either privilege or discovery, *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.* 104 So. 3d 344 (Fla. 2012). In that case, a governmental body, Citizens, moved to dismiss a case against it on the basis of sovereign immunity. The Florida Supreme Court held that Citizens had only partial immunity and that such a body does not suffer irreparable harm by being forced to defend litigation:

> [T]his Court has never held that requiring a party to continue to defend a lawsuit is irreparable harm for the purposes of invoking the jurisdiction of an appellate court to issue a common law writ of certiorari. In fact,.. we recognized that to establish the type of irreparable harm necessary in order to permit certiorari review, a party cannot simply claim that continuation of the lawsuit would damage

> one's reputation or result in needless litigation costs. To hold otherwise would mean that review of every non-final order could be sought through a petition for writ of certiorari.

Id. at 353. In the instant proceedings, American is not complaining that it has to defend this litigation; American seeks relief from an order requiring it to produce discovery of privileged materials. The distinction is vital. *See State Farm Florida Ins. Co. v. Seville Place Condominium Ass'n, Inc.*, 74 So. 3d 105, 109 (Fla. 3d DCA 2011) ("Premature bad faith discovery and an order granting a motion to compel production of an insurer's claims file (or denying a motion for a protective order directed to such documents) may demonstrate an irreparable harm, but an order merely permitting amendment to add an allegedly-premature bad faith claim does not."). *Citizens* is, once again, inapposite, and Respondent's argument is meritless.

III. Attorney's Fees

Respondent would be entitled to an award of attorney's fees if and only if he prevails in the action below.

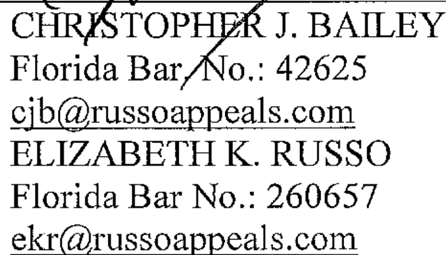
CONCLUSION

Based upon the foregoing facts and authorities, American respectfully requests this Court to issue a writ of certiorari which quashes the order under review and instructs the court below to deny Respondent's requests for bad faith discovery.

Respectfully submitted,

GUY E. BURNETTE, JR., P.A.
geb@gburnette.com
ceh@gburnette.com
3020 North Shannon Lakes Drive
Tallahassee, Florida 32309
Telephone (850) 668-7900
-and-
RUSSO APPELLATE FIRM, P.A.
e-service@russoappeals.com
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660
Facsimile (305) 666-4470

Counsel for Petitioner

By: 

CHRISTOPHER J. BAILEY
Florida Bar No.: 42625
cjb@russoappeals.com
ELIZABETH K. RUSSO
Florida Bar No.: 260657
ekr@russoappeals.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 9th day of July, 2014 by U.S. mail to The Honorable Jose M. Rodriguez, Circuit Court Judge, Miami-Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130; and by electronic mail to:

Kelly L. Kubiak, Esquire
Merlin Law Group, P.A.
777 S. Harbour Island Boulevard, Suite 950
Tampa, Florida 33602
kkubiak@merlinlawgroup.com
fbradley@merlinlawgroup.com

Raymond T. Elligett, Jr., Esquire
Buell & Elligett, P.A.
3003 W. Azelle Street, Suite 100
Tampa, Florida 33609
elligett@belawtampa.com
scalise@belawtampa.com

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Petitioner's Reply Memorandum in Support of Petition for Certiorari complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

Third District Court of Appeal

eFiling Confirmation

Your Document has been received.
The Clerk of the Court will process the document during regular business hours. Once processed you will be notified via email.
You may print this page for your records.

14-0685

AMERICAN INTEGRITY INSURANCE CO. OF FL
vs
NORGE TORRES

Mary Cay Blanks, Clerk

Filer:	Christopher Bailey
Bar No.:	0042625
EMail:	cjb@russoappeals.com
Type:	**Response**
Document:	**REPLY**
Title:	Petitioner's Reply Memorandum in Support of Its Petition for Certiorari
On Behalf of:	American Integrity Insurance Company of Florida, Petitioner
Date Filed:	07/09/2014
Time Filed:	02:33

NOTE: The clerk's office is not currently serving a copy of your document to the other parties. It is your responsibility to continue to serve a copy to all parties.

A copy of the filed document may be obtained from the 'Pending Filings' page for service to the other parties.