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IN THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA
INSURANCE COMPANY,

Petitioner,

vs.

S. Ct. Case No.: SC15-288
L. T. Case No.: 5413-0185

JOSEPH CAMMARATA and
JUDY CAMMARATA

Respondents.
______________________________________/

RESPONDENTS' BRIEF ON JURISDICTION JOSEPH CAMMARATA and JUDY CAMMARATA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Mr. and Mrs. Cammaratas' home was damaged in 2005 by Hurricane Wilma. They reported the damage to State Farm Florida Insurance Company ("State Farm") in September 2007. State Farm inspected the home and determined that damages were less than the policy's deductible, so it paid nothing. The Cammaratas disagreed with State Farm's damage assessment and requested appraisal in April 2008. State Farm refused to agree to appraisal until it received the Cammaratas' estimate of damages. The Cammaratas submitted their proof of loss, estimate of damages, as well as photos, in early June 2008. The matter was ultimately submitted to appraisal. The appraisal panel determined that the Cammaratas' roof needed to be replaced, and entered an appraisal award exceeding the insurance policy deductible. State Farm paid the award, minus the deductible in late December 2009. Cammarata v. State Farm Florida Ins. Co., 152 So. 3d 606, 607 (Fla. 4th DCA 2104).

During the course of the appraisal, the Cammaratas filed a notice of insurer violations pursuant to §624.155, Fla. Stat. (2011). State Farm responded that it had acted appropriately in adjusting and handling the claim. The Cammaratas filed a complaint for Unfair Methods of Competition and Unfair or Deceptive Acts or Practices (bad faith) in October 2011. The complaint alleged that the conditions precedent to filing the suit had been satisfied. Id. at 608.

State Farm moved for summary judgment, claiming that a bad faith action could not exist where there was no accompanying action for breach of an express term of the insurance policy. State Farm maintained that an appraisal award did not satisfy Blanchard[1]; there had to be an underlying breach of contract determination in order to give rise to a bad faith claim, and since that never occurred here, summary judgment was appropriate. State Farm maintained that the Fourth District's decision in Lime Bay Condominium Inc. v. State Farm Florida Ins. Co., 94 So. 3d 698 (Fla. 4th DCA 2012) was on point, and controlled the outcome of the case.

The Plaintiffs maintained the Fourth District's decision in Trafalgar at Greenacres, Ltd. v, Zurich American Ins. Co., 100 So. 3d 1155 (Fla. 4th DCA 2012), was on point and controlled the outcome of the case. They also contended that liability did not have to be determined in a breach of contract action or by a jury verdict; rather, per Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000), payment equaled liability for purposes of bringing a bad faith suit. 153 So. 3d at 608-09.

The lower court granted State Farm's motion for summary judgment. The court agreed with State Farm that the bad faith claim was premature because there had been no determination of liability for a breach of contract. The court rejected the Cammaratas contention that the appraisal award constituted a determination of

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[1]Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289 (Fla. 1991)

liability on the part of State Farm and a determination of the extent of their damages. The Cammaratas appealed the final summary judgment to the Fourth District. Id.

On September 3, 2014, the Fourth District issued its en banc decision reversing the final summary judgment entered in favor of State Farm. The Court 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 this Court, particularly Blanchard v. State Farm Mutual Automobile Insurance Co., supra, and Vest v. Travelers Insurance Co., supra, the 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, 152 So. 3d at 610.

The court also resolved the apparent conflict between its decision in Lime Bay, this Court's decision in Vest, and the court's opinion Trafalgar, 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, 152 So. 3d at 613. State Farm filed a Motion for Rehearing and/or Certification on September 29,

2014, making many of the same arguments it makes in this Court. The Motion was denied on January 12, 2015.

SUMMARY OF THE ARGUMENT

There is no constitutional conflict between the result reached here and the cases cited to support conflict, North Pointe Ins. Co. v. Tomas, 999 So. 2d 728 (Fla. 3rd DCA 2008), QBE Ins. Corp. v. Chalfonte Condo Apt. Assn., 94 So. 3d 541 (Fla. 2012), and Shuster v. South Broward Hosp. Dist., 591 So. 2d 174 (Fla. 1992). When the purported conflict cases are analyzed closely, it can easily be seen there is no direct and express conflict because they do not provide a conflicting point of law and address matters factually and legally different than those involved here. Accordingly, this Court should decline to exercise its discretionary constitutional jurisdiction.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DID NOT ANNOUNCE A RULE OF LAW THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH ANY OTHER REPORTED DECISIONS OF THIS COURT OR THE DISTRICT COURTS OF APPEAL SO AS TO AUTHORIZE EXERCISING THIS COURT'S DISCRETIONARY CONFLICT JURISDICTION.

Pursuant to Article V, §3(b)(3), Fla. Const., this Court may only exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law. An express and direct conflict on the same point of law must exist

on the face of the two different opinions before jurisdiction may arise. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980). This Court has subject matter jurisdiction to hear any petition arising from an opinion that establishes a point of law. The Florida Star v. B.J.F., 539 So. 2d 286, 288 (Fla. 1988). However, the Court refuses to exercise its discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court of appeal. Id.

A. There is no Conflict with a Decision of the Third District.

As it did below, State Farm claims the Fourth District's decision directly and expressly 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. In North Pointe there was still a pending breach of contract claim when the bad faith claim was filed. Contrary to State Farm's naked assertion, the Third District did not "necessarily" hold that an appraisal award and its payment did not constitute "the necessary determination to give rise to a bad faith claim under Blanchard and its progeny." (Brief p. 7) Nowhere does the opinion state, expressly, directly, or otherwise, that a breach of contract claim is the sole method for determining the insurer's liability for coverage and the extent of the insured's damages as a prerequisite to pursuing a statutory bad faith claim. Here, State Farm did not dispute liability; rather, it

acknowledged coverage and paid the appraisal award thereby waiving any coverage defenses. Thus, the Cammaratas' bad faith action was not premature.[2]

B. There is no Conflict with Decisions of this Court.

State Farm's reliance on QBE Ins. Corp. v. Chalfonte Condo. Apartment Assn., Inc., 94 So. 3d 541 (Fla. 2012), as a conflict case also is misplaced. (Brief p. 8) 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 good faith and fair dealing in all contracts. The Chalfonte court merely held that in the insurance context, there is no claim for breach of such an implied duty outside the parameters of §624.155, Fla. Stat. If this Court intended to overrule the multitude of cases holding that a judgment on a breach of contract claim is not a prerequisite to an action pursuant to section 624.155, it undoubtedly would have clearly said so. It did not. There simply is no conflict.

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[2] Remarkably, State Farm refuses to acknowledge the Second District's decision in Hunt v. State Farm Florida Ins. Co., 112 So. 3d 547 (Fla. 2nd DCA 2013). Like the Fourth District in this case, the Second District quite clearly ruled 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 unquestionably has not shown that the Fourth District's decision in this case expressly and directly conflicts with a decision of another District Court of Appeal.

State Farm both misconstrues and mischaracterizes Shuster v. South Broward Hosp. Dist. Physicians' Prof. Liability Ins. Trust, 591 So. 2d 174 (Fla. 1992), in an effort to create an express and direct conflict. (Brief p. 9) That case merely addresses a medical malpractice insurer's ability to settle a claim against the insured within policy limits without being exposed to a common law bad faith claim. The insurance policy at issue granted the insurer the "exclusive authority to decide whether to settle or defend the claim based on its own self-interest." Id. at 176-77. The case does not hold nor establish that a successful 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) (Brief p. 9), was whether the insurer's denial of benefits under a policy was sufficiently outrageous conduct to be considered intentional infliction of emotional distress. McCarson does not even mention §624.155, much less establish a rule that a breach of contract action must precede a statutory bad faith action.

State Farm's sweeping pronouncement that there can be no bad faith action when the insurer does not breach the contract is, quite simply, false. The foundation of this bald assertion was specifically rejected twenty years ago by this Court in Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617, 618 (Fla. 1994), yet another case State Farm still refuses to acknowledge, and thereafter in Hunt and Trafalgar. That State Farm continues to argue that an appraisal award is not a "favorable resolution" is because it simply refuses to accept that is all the law requires.

In Imhof, supra, this 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 the underlying insurance contract. In Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216 (Fla. 2006), this 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's multiple references to Judge Gerber's concurring opinion are puzzling. First, a concurring opinion has no precedential value in establishing conflict. See Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980). Second, unlike State Farm, Judge Gerber explicitly recognized that the decision reached by the majority was mandated by "Vest's controlling nature." Cammarata, 152 So. 3d at 613. He also recognized that it was up to the legislature, not the court, to amend §624.155, Fla. Stat., "to require an insured to establish an insurer's liability for breach of contract, or to obtain a settlement amount which is at least a certain percentage above the insurer's initial offer to settle, as a condition precedent to suing an insurer for bad faith." 152 So. 3d at 613-14.

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

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. Any concern that a bad faith claim will result any time an insurance company challenges the amount claimed due is unfounded. (Brief p. 10) 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 a property insurer refuses to further adjust and pay what it 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 Fourth District and other District Courts have held, consistent with Vest v. Travelers Ins. Co., supra. If State Farm properly handled the case in the first instance, it will prevail on the merits. If it did not, it will be held accountable for its actions, which is the precise result intended by the Legislature as articulated in the statute. 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 Court decided Imhof in 1994, Hunt v. State Farm Florida Ins. Co., was decided by the Second District in 2013, and the Fourth District decided Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co., 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

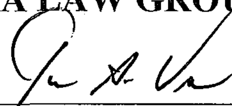
competent substantial evidence that it did not act in bad faith. Alternatively, State Farm can conform its conduct to satisfy the goals of the statute. Judicially engrafting a requirement for insureds to be involved in more litigation will only empower insurers like State Farm to engage in even more behavior the statute was intended to prevent.

CONCLUSION

The decision of the Fourth District Court of Appeal does not announce a rule of law that expressly and directly conflicts with any other existing decision from any other district court of appeal or this Court. Nor does it apply a rule of law to a set of similar facts to produce a conflicting result. As such, there is no basis for this Court to exercise its constitutional discretion, and the Petition for Review should be denied.

Respectfully submitted,

VAKA LAW GROUP



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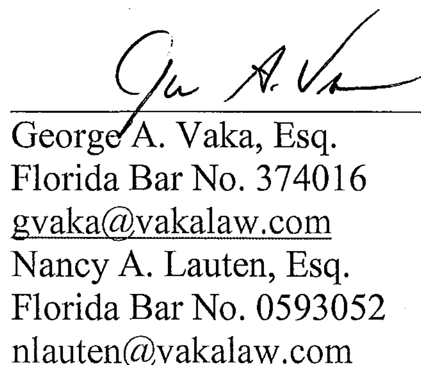

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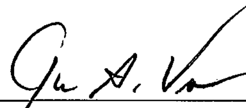
I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a) (2).



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APPENDIX

152 So.3d 606
District Court of Appeal of Florida,
Fourth District.

Joseph CAMMARATA and Judy Cammarata,
Appellants,
v.
STATE FARM FLORIDA INSURANCE
COMPANY, Appellee.

No. 4D13–185. | Sept. 3, 2014. | Rehearing Denied
Jan. 12, 2015.

Synopsis

Background: Insureds brought action against homeowners insurer to recover for attempting in good faith to settle their claim which resulted in appraisal award. The Seventeenth Judicial Circuit Court, Broward County, Eileen O'Connor, J., entered summary judgment that bad faith claim was not ripe before determination of liability for breach of contract. Insureds appealed.

Holdings: The District Court of Appeal, en banc, held that:

[1] liability for coverage and extent of damages, and not insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe, receding from *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So.3d 698, and

[2] settlement in appraisal process determined existence of liability and extent of damages.

Reversed and remanded.

Gerber, J., concurred specially with opinion in which Conner, Forst, and Klingensmith, JJ., concurred.

West Headnotes (5)

[1] **Insurance**
Prerequisites for Claim of Breach or Bad Faith

217Insurance
217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3342In general

Liability for coverage and extent of damages, and not insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe; receding from *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So.3d 698.

Cases that cite this headnote

[2] **Insurance**
Prerequisites for Claim of Breach or Bad Faith
Insurance
Notice, proof, and demand by insured

217Insurance
217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3342In general
217Insurance
217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3343Notice, proof, and demand by insured

Determination of the existence of liability and the extent of the insured's damages are the conditions precedent to a bad faith action, along with statutory notice requirement. West's F.S.A. § 624.155(3)(a).

1 Cases that cite this headnote

[3] **Insurance**
Prerequisites for Claim of Breach or Bad Faith

217Insurance

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217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3342In general

Settlement may determine existence of liability and the extent of the insured's damages, as conditions precedent to bad faith action.

1 Cases that cite this headnote

[4] **Insurance**
Prerequisites for Claim of Breach or Bad Faith

217Insurance
217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3342In general

Settlement of insureds' claim against homeowners insurer in the appraisal process, which determined existence of liability and extent of damages, established conditions precedent for a bad faith action, and, thus, a determination of liability for breach of contract was not necessary to make the action ripe; the appraisal award satisfied the necessary prerequisite to filing a bad faith claim.

1 Cases that cite this headnote

[5] **Insurance**
Prerequisites for Claim of Breach or Bad Faith

217Insurance
217XXVIIClaims and Settlement Practices
217XXVII(C)Settlement Duties; Bad Faith
217k3341Prerequisites for Claim of Breach or Bad Faith
217k3342In general

Where the insurer's liability for coverage and the extent of damages have not been determined in any form, an insurer's liability for the underlying claim and the extent of damages must be determined before a bad faith action becomes ripe.

Cases that cite this headnote

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Paul L. Nettleton of Carlton Fields, P.A., Miami, for appellee.

607** ***EN BANC.

PER CURIAM.

The insureds appeal a final summary judgment finding that their bad faith action was not ripe. They argue that because the insurer's liability for coverage and the extent of their damages has been determined, their bad faith action was ripe. The insurer argues that because the insurer's liability for *breach of contract* has not been determined, the insureds' bad faith action was not ripe. Based on Florida Supreme Court case law, we are compelled to agree with the insureds' argument. We hold that an insurer's liability for coverage and the extent of damages, and not necessarily an insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe. Thus, we reverse and remand for reinstatement of the insureds' bad faith action in this case.

In this opinion, we first present the policy claim's chronology. Second, we present the bad faith action's history, including discussion of our case law. Third, we examine Florida Supreme Court precedent which compels our reversal and our need to recede from one of our recent opinions.

The Policy Claim's Chronology

October 2005—The insureds sustained damages to their home as a result of Hurricane Wilma.

September 2007—The insureds filed a claim for benefits under their homeowners' policy.

October 2007—The insurer notified the insureds that it had inspected their home, estimated the amount of their damages to be lower than the policy deductible, and owed no payment to them as a result.

April 2008—The insureds requested the insurer to participate in the policy's appraisal process. The insureds' request identified their appraiser.

May 2008—The insurer identified its appraiser and requested the insureds' appraiser's damage estimate.

June 2008—The insureds' appraiser submitted a damage estimate which was higher than the policy deductible.

July 2008—The insurer's appraiser submitted a damage estimate which was lower than the policy deductible.

August 5, 2008—The insurer filed a petition requesting the circuit court to appoint a neutral umpire pursuant to the policy.

August 15, 2008—The insureds filed a petition requesting the circuit court to appoint a neutral umpire pursuant to the policy.

October 2008—The circuit court appointed a neutral umpire.

October 16, 2009—The umpire issued a damage estimate in an amount lower than the insureds' appraiser's estimate but higher than the insurer's appraiser's estimate. The estimate was higher than the policy deductible.

October 27, 2009—The insurer's appraiser agreed to the umpire's damage estimate.

December 2009—The insurer paid the insureds the umpire's damage estimate minus the policy deductible.

April 2010—The circuit court entered an agreed order dismissing with prejudice the parties' petitions to appoint a neutral umpire.

The Bad Faith Action's History

After the circuit court entered the agreed order dismissing with prejudice the parties' petitions to appoint a neutral umpire, the insureds filed their action against the insurer for not attempting in good faith to settle their claim. *See* § 624.155(1)(b) 1., Fla. Stat. (2011) ("Any person may bring a civil action against an ***608** insurer when such person is damaged .... [b]y ... [the insurer's] [n]ot attempting in good faith to settle claims when, under all the circumstances, [the insurer] could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests[.]"). The bad faith action alleged that, before the umpire was appointed, the insureds filed a notice of violation pursuant to section 624.155, Florida Statutes (2011). *See* § 624.155(3)(a), Fla. Stat. (2011) ("As a condition precedent to bringing an action under this section, the [Department of Financial Services] and the authorized insurer must have been given 60 days' written notice of the violation."). The bad faith action further alleged that the insurer did not pay the damages or correct the alleged violation. *See* § 624.155(3)(d), Fla. Stat. (2011) ("No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.").

The insurer filed a motion for summary judgment, and the insureds responded. In support of their positions, the insurer and the insureds each cited a different opinion from this court. We will discuss the motion, the response, and the cited opinions in detail because of the apparent discrepancy between our opinions' holdings.

The insurer's motion argued, among other things, that because the insurer's liability for *breach of contract* had not been determined, the insureds' bad faith action was not ripe. In support, the insurer relied on this court's opinion in *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So.3d 698 (Fla. 4th DCA 2012).

In *Lime Bay,* a dispute arose between the insured and the insurer over the amount of a claim for property damage suffered during Hurricane Wilma. The insured filed a complaint for breach of contract against the insurer. The breach of contract action later was abated when the parties engaged in the appraisal process. The appraisal process resulted in an award closer to the amount of the insured's damage claim. The insurer paid the appraisal award to the insured. The insured then filed an action against the insurer for not attempting in good faith to settle the claim. The insurer filed a motion to dismiss the bad faith action, arguing that there had not been a final determination of liability and maintaining that it intended to dispute liability in the breach of contract action. The

circuit court agreed with the insurer and dismissed the bad faith action as prematurely filed.

We affirmed. *Id.* at 699. We reasoned that the insured "did not, and could not, allege that there had been a final determination of liability since the [insured's] breach of contract case was still pending." *Id.* (citation omitted). We directed the circuit court to "first resolve the issue of [the insurer's] liability for breach of contract, as well as the significance, if any, of the appraisal award." *Id.* (citation omitted).

In response to the insurer's reliance on *Lime Bay* in this case, the insureds argued that only an insurer's liability for coverage and the extent of damages, and *not* for breach of contract, must be determined before a bad faith action becomes ripe. In support, the insureds relied on this court's more recent opinion in *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co.,* 100 So.3d 1155 (Fla. 4th DCA 2012).

In *Trafalgar,* a dispute arose between the insured and the insurer over the amount of a claim for property damage suffered during Hurricane Wilma. The insured filed a complaint for breach of contract against the insurer. The insurer invoked the appraisal provision of the contract. The appraisal process resulted in ***609** an award closer to the amount of the insured's damage claim. The insurer paid the appraisal award to the insured and moved for summary judgment on the breach of contract claim. Meanwhile, the insured moved to amend its complaint to state an action against the insurer for not attempting in good faith to settle. The circuit court granted both the insurer's motion for summary judgment on the breach of contract claim and the insured's motion to amend to state a bad faith action. The insurer then moved for summary judgment on the bad faith action. The insurer argued that because the court granted the insurer's motion for summary judgment on the breach of contract action, the insured failed to obtain a favorable resolution on the breach of contract claim. The circuit court agreed with the insurer and granted summary judgment on the bad faith action. The court rested its decision on a finding that the insured's ability to assert a bad faith action was dependent upon the insured having obtained a favorable resolution or determination of liability in the underlying breach of contract action. The court reasoned that because the insured lost on summary judgment on the breach of contract action, the insured failed to satisfy that prerequisite and, therefore, was precluded from proceeding with a bad faith action.

We reversed. *Id.* at 1157–58. We held that an appraisal award which occurred after the insured filed suit for breach of contract, "constitute[d] a 'favorable resolution' of an action for insurance benefits, so that [the insured] ... satisfied the necessary prerequisite to filing a bad faith claim." *Id.* at 1158. We reasoned that the circuit court's summary judgment in the insurer's favor on the breach of contract action was based on the insurer's compliance with the contract after the appraisal process. *Id.* at 1157. Thus, we concluded that "the appraisal award was tantamount to a 'favorable resolution' necessary to proceed with a bad faith action." *Id.* at 1157–58 (citation omitted). We rejected the insurer's argument that the summary judgment in its favor on the breach of contract action precluded the insured's ability to pursue the bad faith action. *Id.* at 1158. Citing our supreme court's precedent, we reasoned that "[a] judgment on a breach of contract action is not the only way of obtaining a favorable resolution" necessary to proceed with a bad faith action. *Id.* (citing *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.,* 945 So.2d 1216 (Fla.2006) (an arbitration award establishing the validity of an insured's claim satisfies the condition precedent required to bring a bad faith action)). However, our opinion in *Trafalgar* did not mention its apparent discrepancy with *Lime Bay.*

After considering the parties' arguments in this case, the circuit court granted the insurer's motion for summary judgment. In support of its decision, the circuit court relied on *Lime Bay.*

After the circuit court entered a final judgment, this appeal followed. As in the circuit court, the insureds argue that because the insurer's liability for coverage and the extent of their damages has been determined, their bad faith action was ripe. The insurer again argues that because the insurer's liability for *breach of contract* has not been determined, the insureds' bad faith action was not ripe.

Our review is de novo. *See Major League Baseball v. Morsani,* 790 So.2d 1071, 1074 (Fla.2001) ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo.") (footnote omitted).

Supreme Court Precedent Compelling Our Reversal

[1] Based on our supreme court's precedent, we are compelled to agree with the ***610** insureds' argument. We 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. Our holding is based on the evolution of

our supreme court's holdings from *Blanchard v. State Farm Mutual Automobile Insurance Co.,* 575 So.2d 1289 (Fla.1991), to *Vest v. Travelers Insurance Co.,* 753 So.2d 1270 (Fla.2000). We address each case in detail.

In *Blanchard,* the insureds filed a breach of contract action against their insurer in state court. The insureds won a verdict against the insurer. The insureds then filed an action against the insurer in federal court for bad faith failure to settle. The insurer moved to dismiss the bad faith action. The insurer argued that the insureds had to assert their bad faith action along with the breach of contract action in state court. The federal district court granted the motion to dismiss.

On review, the Eleventh Circuit Court of Appeals certified to our supreme court the following question: "Does an insured's claim ... under section 624.155(1)(b) 1., Florida Statutes, for allegedly failing to settle the ... claim in good faith accrue before the conclusion of the underlying litigation for the contractual ... benefits?" *Blanchard v. State Farm Mut. Auto. Ins. Co.,* 903 F.2d 1398, 1400 (11th Cir.1990).

In response, our supreme court answered:

> [A]n insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue. It follows that an insured's claim ... for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual ... benefits. Absent a determination of the existence of liability ... and the extent of the [insured's] damages, a cause of action cannot exist for a bad faith failure to settle.

Blanchard, 575 So.2d at 1291.

Reading *Blanchard* 's certified question and answer in a vacuum, without the knowledge of the procedural context in which it arose—the pre-existence of a breach of contract action—the reader logically might assume that an insured must have filed a breach of contract action, and then obtained a favorable resolution of the breach of contract action, before a bad faith action accrues. However, no language in *Blanchard* expressly states that an insured must have filed any breach of contract action before a bad faith claim accrues. Rather, another interpretation of *Blanchard* is that: (1) the insured need only obtain a "determination of the existence of liability ... and the extent of the [insured's] damages" on the underlying claim "before the cause of action for bad faith in settlement negotiations can accrue"; and (2) *Blanchard* 's references to the "underlying first-party action for insurance benefits" and "underlying litigation for the contractual ... benefits" being "resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue" related only to the procedural context under which *Blanchard* arose.

The latter interpretation of *Blanchard* appears to have been articulated by our supreme court's later opinion in *Vest.* In *Vest,* the insured demanded her insurer to pay its policy limits on her claim. After the insurer did not pay its policy limits, the insured filed an action claiming that the insurer refused to settle and acted in bad faith in failing to pay its policy limits. The insurer later paid its policy limits to the insured. The insurer then filed a motion for summary judgment on the bad faith ***611** action. The circuit court granted the motion because the insurer had paid its policy limits to the insured. On appeal, the district court affirmed. *Vest v. Travelers Ins. Co.,* 710 So.2d 982, 984 (Fla. 1st DCA 1998).

However, our supreme court quashed the district court's decision with direction that the insured's bad faith action be allowed to proceed. *Vest,* 753 So.2d at 1276. The supreme court reasoned:

> We understand that [*Blanchard* 's] language, "Absent a determination of the existence of liability ... and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle," ... may be so broadly stated that our holding could be read as the district court has read it. For that reason we will here clarify.
>
> First, we point out that *Blanchard* arose in the context of a certified question arising out of an issue as to whether the failure to pursue a bad-faith action for violation of section 624.155(1)(b) 1[.] in an action for breach of the underlying insurance contract for nonpayment of benefits was the improper splitting of a cause of action. We held that it was not. Our decision in that case had to do with the timing of the bringing of causes of actions and not as to what claims could be pursued when a claim for bad faith ripened.
>
> Second, we expressly state that *Blanchard* is properly read to mean that the "determination of the existence of liability ... and the extent of the [insured's] damages"

are elements of a cause of action for bad faith. Once those elements exist, there is no impediment as a matter of law to a recovery of damages for violation of section 624.155(1)(b) 1[.] dating from the date of a proven violation.

Therefore, in this case, the trial court erred in ruling as a matter of law that there was no claim for bad faith for acts which occurred prior to the approval of the settlement .... An action prior to that settlement was premature and was subject to dismissal without prejudice. However, upon that settlement, the claim for bad-faith damages accrued from the date the violation of section 624.155(1)(b) 1[.] ripened because at that time the final element of the cause of action occurred.

In sum, we expressly hold that a claim for bad faith pursuant to section 624.155(1)(b) 1[.] 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. This obligation on the part of an insurer requires the insurer to timely evaluate and pay benefits owed on the insurance policy. 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. Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder.

....

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 the first-party insurance contract.

Id. at 1275–76 (emphasis added).

In reaching the foregoing holding in *Vest,* the supreme court cited with approval ***612** our decision in *Brookins v. Goodson,* 640 So.2d 110 (Fla. 4th DCA 1994). The supreme court described the issue in *Brookins* as "whether a settlement constituted the 'determination of damages' required by *Blanchard* ...." *Vest,* 753 So.2d at 1273. The supreme court then quoted from *Brookins* the following excerpt of our holding and reasoning:

The supreme court has recently held that to state a cause of action for first party bad faith there must be an allegation that there has been a determination of the insured's damages. *Imhof v. Nationwide Mut. Ins. Co.,* 643 So.2d 617 (Fla.1994). *The court did not, however, require that the damages be determined by litigation,* that there be an allegation of a specific amount of damages or that the damages be in excess of the policy limits. The court was not faced with the circumstance presented here where the policy limits are subsequently tendered by the insurer. The insured in *Imhof* received an award of damages through arbitration of an amount less than the policy limits. The amount or extent of damages was held not to be determinative of whether an insured could bring a first party bad faith claim; the purpose of the allegation concerning a determination of damages was to show that "Imhof had a valid claim." *Id.* at 618.

We hold that the payment of the policy limits by the insurer here is the functional equivalent of an allegation that there has been a determination of the insured's damages. It satisfies the purpose for the allegation—to show that the insured had a valid claim.

....

Neither in Blanchard nor more recently in Imhof does the supreme court suggest that the required resolution of the insured's underlying claim must be by trial or arbitration .... However, as noted in Blanchard, a resolution of some kind in favor of the insured is a prerequisite. There was a favorable resolution here.

Vest, 753 So.2d at 1273–74 (quoting *Brookins,* 640 So.2d at 112–13) (emphasis added).

[2] [3] Based on *Vest* 's clarification of *Blanchard* and reliance on *Brookins,* 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. To paraphrase *Vest,* the determination of the existence of liability and the extent of the insured's damages are the conditions precedent to a bad faith action, along with the notice requirement of section 624.155(3)(a), Florida Statutes (2011). Those first two conditions may be established when a settlement determines the existence of liability and the extent of the insured's damages. As stated in *Brookins,* and as approved in *Vest,* that settlement does not require the damages to be determined by litigation.

[4] Applying the foregoing principles here, the parties' settlement via the appraisal process, which determined the existence of liability and the extent of the insured's damages, established the first two conditions precedent of a bad faith action. Put another way, the appraisal award

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"constitute[d] a 'favorable resolution' of an action for insurance benefits, so that [the insured] ... satisfied the necessary prerequisite to filing a bad faith claim." *Trafalgar,* 100 So.3d at 1158. Thus, the circuit court erred in finding that, because the insurer's liability for breach of contract had not been determined, the insureds' bad faith action was not ripe.

We have considered the insurer's arguments for affirmance. We conclude, without ***613** further discussion, that those arguments lack merit.

Based on the foregoing, we reverse and remand for reinstatement of the insureds' bad faith action. We take no position on whether the bad faith action has merit.

Because of the conflict between this court's opinion in *Lime Bay* versus (1) the supreme court's opinion in *Vest,* (2) this court's opinion in *Trafalgar,* and (3) today's opinion, we are compelled to recede 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.

[5] However, we stand by our numerous prior opinions holding that, where the insurer's liability for coverage and the extent of damages have *not* been determined in any form, an insurer's liability for the underlying claim and the extent of damages must be determined before a bad faith action becomes ripe. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Tranchese,* 49 So.3d 809, 810 (Fla. 4th DCA 2010) (quashing order denying motion to abate bad faith action "because the final determination of coverage and damages for the underlying claim has not been made, which must precede a statutory bad faith action").

Reversed and remanded.

DAMOORGIAN, C.J., STEVENSON, GROSS, TAYLOR, MAY, CIKLIN, GERBER, LEVINE, CONNER, FORST, and KLINGENSMITH, JJ., concur.

WARNER, J., recused.

GERBER, J., concurs specially with an opinion, in which CONNER, FORST, and KLINGENSMITH, JJ., concur.

GERBER, J., concurring specially.

Based on *Vest* 's controlling nature, I am compelled to concur in the majority opinion. I write separately to express my concern regarding the possible effect of the majority opinion.

In theory, the majority opinion would 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 either to: (1) establish an insurer's liability for breach of contract as a condition precedent to suing an insurer for bad faith; or (2) obtain a settlement amount which is at least a certain percentage above the insurer's initial offer to settle. However, any such requirement is one which the legislature must impose through an amendment to section 624.155, Florida Statutes (2011). This court is unable to impose any such requirement because of *Vest* 's controlling nature. *But see State Farm Mut. Auto. Ins. Co. v. Brewer,* 940 So.2d 1284, 1286 n. 3 (Fla. 5th DCA 2006) ("To obtain a determination regarding liability and the extent of damages owed on the insurance contract [to allow a statutory bad faith claim to proceed], ***614** [the insured] *would need to bring an action on the contract* ....") (emphasis added).

The policy claim history in this case provides a good example of why the legislature may wish to require an insured to establish an insurer's liability for breach of contract, or to obtain a settlement amount which is at least a certain percentage above the insurer's initial offer to settle, as a condition precedent to suing an insurer for bad faith. Here, after the insureds took two years to file their Hurricane Wilma claim, the insurer took only one month to inspect their home and estimate the amount of their damages. Then, after the insureds took six more months to request the insurer to participate in the policy's appraisal process, the insurer took only one month to agree to the appraisal process. When the parties' appraisers did not agree on a damage estimate, it was *the*

insurer, and not the insureds, which first filed a petition requesting the circuit court to appoint a neutral umpire. Within two months of the neutral umpire issuing its own damage estimate, the insurer paid the insureds the neutral umpire's damage estimate minus the policy deductible.

In sum, the 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 (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. Thus, except under the most extraordinary of circumstances, we do not envision fees for such work to be recoverable.... Instead, the fees should normally be limited to the work associated with filing 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.*

Id. at 961 (emphasis added). *See also Nationwide Prop. & Cas. Ins. v. Bobinski,* 776 So.2d 1047, 1049 (Fla. 5th DCA 2001) ("[I]t maintains the better policy of this state to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention. Arbitration and appraisal are alternative methods of dispute resolution that provide quick and less expensive resolution of conflicts."). *Cf. State Farm Fla. Ins. Co. v. Silber,* 72 So.3d 286, 289–90 (Fla. 4th DCA 2011) (after insurer paid appraisal award, insureds had no cause of action against insurer to recover attorney's fees under section 627.428, Florida Statutes, because the purpose of the appraisal process is to resolve disputes without litigation).

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