

DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No.: 4D22-2969

L.T. Count Court Case Nos.: CACE 07-008440

SAFECO INSURANCE COMPANY
OF ILLINOIS,

Appellant,

vs.

REBECA L. HEIKKA, et al.,

Appellee.

_____ /

ANSWER BRIEF OF APPELLEE, REBECCA L. HEIKKA et al.,

JOSEPH R. DAWSON, ESQUIRE
LAW OFFICES OF JOSEPH R. DAWSON, P.A.
Attorney for the Appellee
The One Ten Tower
110 Southeast Sixth Street; Suite 110
Fort Lauderdale, Florida 33301
Pleadings@DawsonLawFirm.com
Telephone: (954) 467-2100

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PREFACE

This action was commenced as an appeal of a Final Judgment entered in favor of Appellee on October 22, 2022, following the entry of a directed verdict in favor of the Plaintiff following a jury trial on Plaintiff's action for insurance bad faith. The Appellant/Defendant, **SAFECO INSURANCE COMPANY OF ILLINOIS**, who will be identified as "Safeco," "Defendant," or "Appellant." The insured of Safeco, Joseph Anthony Hernandez, the original defendant below, will be identified as "Hernandez" or "the insured." This is the Answer Brief of Plaintiff/Appellee, **REBECCA L. HEIKKA**, will be identified as "Heikka," or "Appellee." Appellee will use the citing references of the Transcript of the Record on Appeal along with the assigned page number. ("R") Given the age of this case, and the record that was prepared starting with the Amended Complaint, Appellee has filed an Appendix, and references will be made as Appendix followed by the document number on the Index and page number.

STATEMENT OF THE FACTS AND OF THE CASE

This is not the first appeal by Safeco, or the insured, as this case has had a tumultuous procedural history including a series of appeals to this Court that ultimately culminated with Safeco's appeal of the final judgment for bad faith entered on October 22, 2022. ("R" 4105-4107) This judgment for bad faith followed a directed verdict at the conclusion of a four day jury trial on the amended complaint seeking bad faith filed on July 10, 2019. ("R" 117-123). Previously, a Partial Final Judgment had been entered following a jury trial wherein Heikka was awarded \$1,169,292 in compensatory damages against Hernandez. ("R" 116).

Introduction

Because Appellant has improperly introduced argument into its Statement of the Case and Facts, the inaccurate assertions of facts will be briefly addressed preliminarily. At page 1, the Appellant asserts that because of the trial court found that Safeco's purported tender of the policy limits, which required the waiver of a claim for punitive damages and the execution of general release, which deviated

from the terms Heikka's attorney had clearly articulated would be necessary for Heikka to accept the \$25,000 offer on behalf of Hernandez, that no meeting of the minds occurred regarding acceptance of the offer. Given these undisputed facts, the trial court found that reasonable minds could not differ in that Safeco's offer to settle contained terms unacceptable to Heikka and which contradicted the conditions under which Heikka would agree to accept the policy limits. Therefore, the delivery of the \$25,000 check by Safeco was not a tender of the policy limits.

At page 2 of its Initial Brief, Safeco states that, in delivering a check of \$25,000 it also "even allowed Heikka's counsel, Kenneth Cooper ("Cooper"), to make changes to the language of the release." This is a complete misrepresentation of the position assiduously and disingenuously argued by Safeco in this case, and in a separately filed action for declaratory relief, including numerous appeals by Safeco arguing that the changes to the General Release by Cooper were not acceptable. This position was taken despite the adjuster notes

reflecting that Cooper's changes had been invited by the adjuster prior to the delivery of the purported settlement check.¹ The letter to Cooper from the adjuster dated January 25, 2007, acknowledged this fact. ("R" 3847-48).

In its Initial Brief, at page 2, and for the very first time, Safeco alleges that the trial court erred in permitting Heikka to amend her complaint, post-judgment, against Hernandez, to allege a third-party complaint against Safeco which allegedly impacted "Safeco's statutory right to remove the action to federal court." This is an argument which is being raised for the first time on appeal given it was not raised in Defendant's Motion to Dismiss the Amended Complaint ("R" 137-143), or in the Answer and Affirmative Defenses

¹See Safeco's Answer and Affirmative Defenses, at ¶ 8, filed on May 18, 2007 (Appendix 2, pgs. 3-5), in which Safeco alleges "the Plaintiff settled the above lawsuit with this Defendant's insurance carrier for the benefits of the Defendant and executed a valid Release, releasing both the Defendant and SAFECO Insurance Company from any and all claims and therefore the above lawsuit is barred as the case has been previously settled and the Release executed." This defense reflects the fact that Safeco attempted to enforce the Release as drafted and rejected the modifications of Cooper, its perfidious statement in its Initial Brief notwithstanding.

("R" 171-175). In fact, Safeco never sought to remove the action to federal court even after the Mandate affirming the final judgment was entered on December 4, 2020. Because the issue was not properly raised with the trial court, it was waived. *See Lloyd v. State*, 876 So. 2d 1227, 1228 (Fla. Dist. Ct. App. 2004)("We conclude that the argument on appeal was not preserved either by being raised before sentencing or by a post-sentencing motion under rule 3.800(b).

The Settlement Negotiations

Shortly after the crash of January 7, 2007, and while still hospitalized, Heikka retained Kenneth Cooper ("Cooper") as her attorney and he undertook legal representation of her on her claim against Hernandez. Given the horrific injuries and the vast expenses for hospitalization, it became obvious to Cooper that the policy limits of \$25,000 for compensatory damages ("R" 3177-3713) would be woefully inadequate to compensate Heikka for her injuries. Significantly, not only did the policy limit compensatory damages to \$25,000 to a single claimant, but the policy also excluded from

coverage any claim for punitive damages which is consistent with Florida's public policy of excluding coverage for such egregious conduct.²

Several weeks after the accident, on January 25, 2007, telephonic settlement discussions occurred between Christine Payne, ("Payne") the initial adjuster for Safeco, and Cooper, which were documented by Payne's allegedly contemporaneous computer notes.³ An adjuster field note from January 25 at 11:16 am, chronicles that Cooper insisted that any release should state that the settlement must exclude any limitation to pursue a claim for punitive damages as Cooper insisted that would be as follows: "[For] Any and all claims accept [sic] for punitive damages[.]" ("R" 3839) Thereafter, on January 25 at 11:20 am, Payne noted that she "tendered" the policy limits for

²The subject insurance policy was entered into evidence at the trial. ("R" 3714-3770) Specifically, under ¶11 of Exclusions, claims for punitive or exemplary damages are excluded. ("R" 3738).

³The claim notes and correspondence between Payne and Cooper were entered into evidence at the trial. ("R" 3708-3710, 3771-3853).

Hernandez to Heikka of \$25,000. ("R" 3842) Thereafter, and in complete defiance of Cooper's clearly articulated position that Heikka would not agree to settle the case for the policy limits unless the potential claim for punitive damages was not included in the settlement, Safeco mailed a settlement draft to Cooper in the amount of \$25,000 which stated "FULL AND FINAL SETTLEMENT OF ALL CLAIMS." (caps in original).

The language on the settlement draft, which was mailed from a different location than from where Payne, was located, conflicted with Cooper's insistence that the claim for punitive damages was not a part of the settlement. On January 25, 2007, at 11:16 a.m., Payne noted that the "[r]elease should state "Any and all claims accept [sic] for punitive damages[.]" ("R" 3839)

Later that same day, Payne sent a facsimile transmission to Cooper which contained a cover letter ("R" 3847-48) and a form "General Release, the language of which appeared to require a "full and final release of all claims arising out of the above captioned

accident."⁴ ("R" 3846-3849). The letter memorialized the verbal understanding that Cooper could modify the release to, among other things, exclude punitive damages. However, the language of the "form release" contained terms (i.e., the release of all claims which would include the punitive damage claim) expressly rejected by Cooper who had consistently and assiduously represented that the settlement for the bodily injury insurance coverage would be accepted only if the punitive damage claim was not a part of the settlement.

At trial, Cooper testified that after receiving the facsimile and release, he had called and spoken with Payne about the overly inclusive language of the release which was unacceptable and contrary to his clearly articulated insistence that punitive damages not be included in the release. (Trial Tr. Vol. 2, p. 423, lines 4-18) *See also*, Joint Exhibit 26 ("R" 3845-49). The adjuster had told Cooper he could change the release to make it acceptable given the insistence that punitive damages not be waived.

⁴Payne letter dated January 25, 2007. ("R" 3847)

(Trial Tr. Vol. 2, p. 423, lines 4-18).

Thereafter, on January 31, 2007, Payne called Cooper, at which time Cooper informed Payne that, as she wrote in her claim file notes, "he [Cooper] changed the release." ("R" 3852) The note by Payne further noted that "[t]he release is pretty good. He will fax the release for me to review." ("R" 3852)⁵ Cooper modified the "full release" language on the release to state that Heikka accepted the \$25,000, and released Hernandez for all claims:

Except punitive damages and any other pertinent policies of insurance that may cover Rebecca Heikka including but not limited to any uninsured motorist policies.

In a separate portion of the modified release, Cooper added the following:

This release releases **only** Safeco and Joseph Hernandez for the policy limits state above.⁶

⁵On January 31, 2007, at 11:05 a.m., an adjuster note by Payne reflects that Cooper told her he changed the release and that once the UM permission to accept the tender is received, he will negotiate the settlement check.

⁶In Safeco's Motion for Summary Judgment filed on March 10, 2022 ("R" 2355-2455), it strains to semantically modify the plain

(emphasis added)(See ¶¶ 23 and 24 of Safeco's Motion for Summary Judgment - "R" 2360).

The complaint for damages on behalf of Heikka was filed against Hernandez on April 18, 2007, well-after Coop had testified that he mailed the modified release to Safeco. As testified by Cooper, the complaint was filed only for negligence consistent with the Florida legal requirement⁷ that a trial court ruling permitting a claim for punitive damages first be established by a competent factual proffer. It was the intent of Cooper, given his belief that he had settled the case for the bodily injury limits of \$25,000, to singularly prosecute a claim for punitive damages given the alleged egregious and intentional

meaning of this modification of the General Release to mean that Hernandez was not being fully released for all compensatory damages for the payment of \$25,000 leaving open only the claim for punitive damages and the right to sue any other potentially liable entity other than Hernandez or Safeco.

⁷Fla. Stat. § 768.72(1)(2006) states, in pertinent part that "no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."

conduct of Hernandez⁸ which included driving while intoxicated.

However, after Hernandez was served with the Complaint, Safeco took the position that the claim had been completely settled which it alleged was consistent with the "all-inclusive" terms contained in the pre-modified General Release mailed to Cooper. It then sought dismissal of the lawsuit with prejudice. The Motions for Summary Judgment and to Enforce Settlement filed by Hernandez were denied on May 22, 2008. (Appendix 9, pg. 98) This summary judgment was affirmed by this Honorable Court.⁹

Reflecting demonstrable sophistry with regard to the ruling of the trial court on Safeco's motion for summary judgment, Safeco thereafter filed a new and separate action seeking declaratory relief on July 10, 2009. (Appendix 11 and 12). After considerable and

⁸On June 16, 2008, after the denial of Safeco's Motion to Enforce Settlement was denied, Heikka filed her Motion for Punitive Damages against Hernandez. (Appendix 10, pgs. 99-100)

⁹Hernandez filed a Notice of Appeal of the denial of its Motion for Summary Judgment on June 18, 2008. (Appendix 10, pgs. 99-100).

protracted litigation and appeals on this issue, as is outlined above, with two different trial court case numbers, the cases were consolidated and the trial court ultimately denied Safeco's efforts to compel the settlement Safeco (and Hernandez) had perfidiously sought to compel. The baseless litigation efforts of the attorneys for Hernandez and Safeco resulted sanctions in the amount of \$361,775 being awarded against Safeco pursuant to Fla. Stat. § 57.105, the findings of the trial judge as contained in the Order Awarding fees contained very specific findings of wrongdoing justifying the sanctions. (Appendix 16, pgs. 277-283).

A trial on the underlying damages of Heikka resulted in a Partial Final Judgment being entered in 07-8440 in the amount of \$1,169,292.83 as compensatory damages on July 10, 2019, after a jury verdict in her favor. ("R" 116). However, the jury rejected the claim by Heikka for punitive damages. An order denying Hernandez' Motion for New Trial was entered on August 21, 2019. ("R" 146). This judgment and order was appealed on September 6, 2019. ("R" 154-

58). The judgment was affirmed on October 1, 2020, with the Mandate being entered on December 4, 2020 in case number 4D19-2820.

On July 10, 2019, Heikka filed her amended complaint seeking a bad faith judgment against Safeco. ("R" 117-123). On August 19, 2019, Safeco filed its Motion to Dismiss the Amended Complaint ("R" 137-143) arguing that the bad faith claim was not ripe as the appeal of the judgment was not yet resolved, and should be dismissed rather than abated. On September 25, 2019, the trial court considered the Motion to Dismiss ("R" 164) but abated the bad faith claims rather than dismissing them pending resolution of the appeal of the underlying final judgment. This Court affirmed the final judgment with the mandate being issued on December 4, 2020. ("R" 169-170). On December 23, 2020, Safeco filed its Answer and Affirmative Defenses. ("R" 171-175). Safeco took no effort to remove the case to federal court, and no affirmative defense alluding to an inability to remove the case was asserted.

At trial, Safeco did not call any employees of Safeco, and relied totally upon the adjuster notes and litigation adjuster correspondence placed into evidence, and their expert. (Joint Trial Exhibits 1-42, 49-53 -"R" 3711-3920; 3939-3953) The evidence deduced at trial included Cooper's testimony that he understood that Safeco, through its adjuster, Payne, had agreed to pay the policy limits for which Hernandez and Safeco would be completely released for all compensatory damage claims against them. But this purported agreement would not preclude Heikka from pursuing her claim for punitive damages against Hernandez and any other entity that might be liable, such as a dram shop claim, or uninsured motorist coverage. This point was made clear through the trial testimony of Cooper, who testified that during his telephone conversations with Christine Payne (Payne), adjuster with Safeco, the possibility of offering the policy limits of \$25,000 was raised by her, but Cooper testified that, since Hernandez was impaired by alcohol at the time of the accident, left the scene of the accident, and caused further injury by doing so, Cooper

would not agree to include the right to seek punitive damages in any release. (Tr. pages 415-16, lines 17-2). Payne indicated that Cooper could modify the release to exclude punitive damages. (Tr. page 423, lines 10-18). But Cooper made it clear that he would accept the \$25,000 if Safeco agreed to the carve out of from the release of the punitive damage claim. (Tr. Page 424, lines 19-21).

This testimony of Cooper was corroborated by the notes of Payne which were apparently made contemporaneously with the events, although Payne did not testify at the trial and no testimony, other than that of Cooper was offered at trial. Believing a meeting of the minds had occurred with Payne regarding the “punitive damage carve out,” and having modified the release, Cooper deposited the check into his trust account, and filed the lawsuit against Hernandez (Appendix 1, pgs. 1-2) on April 18, 2007,¹⁰ Thereafter, Hernandez, and Safeco, took the position that a settlement for \$25,000 had

¹⁰The Complaint stated a cause of action for negligence, as Florida law requires that no claim for punitive damages can be filed until leave of court is granted with legally sufficient evidence of conduct warranting such damages.

occurred and that the General Release ***without the modifications*** was enforceable. See Answer to the Complaint (Appendix 2, pgs. 3-5), wherein, as its Ninth Affirmative Defense, it alleged that:

[T]he Plaintiff settled the above lawsuit with this Defendant's insurance carrier for the benefit of Defendant and executed a valid Release, releasing both the Defendant and SAFECO Insurance Company from any and all claims and therefore the above lawsuit is barred as the case has been previously settled and the Release executed.

This assertion was the first time Heikka became aware of the fact that the attorneys for Hernandez were attempting to enforce a settlement that precluded the prosecution of a claim for punitive damages against Hernandez in consideration of the payment of the policy limits of \$25,000 under the bodily injury liability portion of the policy. This assertion was being made despite the fact that the record reflects that Cooper had clearly represented to Safeco (Payne) that the bodily injury policy limits would ***not be accepted unless Heikka could pursue her punitive damage claim*** and that other potential claims against other parties could be pursued. See Joint Exhibits 4-27 ("R" 3775-3853) which are the adjuster notes created by Payne

regarding the discussions between Payne, who did not testify at the trial, and Cooper.

Ultimately, the trial court in the '09 case recognized that the trial court in the '07 case had properly determined that the no settlement had occurred despite the cashing of the settlement draft¹¹ because Safeco had argued that there was no agreement regarding the ability of Heikka to modify the release and still accept the \$25,000 for the compensatory damages. As such, Heikka's Motion for Summary Judgment on the Declaratory Relief action was granted. (Appendix 13, pg. 130).

Once the issue disputed by Hernandez and Safeco of whether there had been a meeting of the minds on all material terms sufficient to create a settlement was fully and completely resolved in the negative, the compensatory and punitive damage case went to trial and verdict in favor of Heikka was returned on June 20, 2019, which was converted to a Final Judgment on July 10, 2019 in the

¹¹Cooper placed the funds in the Court registry pursuant to a Court Order granting Heikka's own motion. (Appendix 8, pg. 97).

amount of \$1,169,292.83 in compensatory damages, but awarded no punitive damages. ("R" 116) The Court reserved jurisdiction to allow the pleadings to be amended for bad faith and issues related to attorney fees and costs. *Id.*

On June 24, 2019, Heikka filed her Motion for Leave to File and Amended Complaint. ("R" 84-93) On July 10, 2019, the trial court entered an Order granting the Motion for Leave to Amend. ("R" 115) On August 19, 2019, Safeco filed its Motion to Dismiss the Amended Complaint asserting that the bad faith claims were not ripe as the appeal of the final judgment was yet resolved and the given the lack of finality, the amended complaint should be dismissed and not abated. ("R" 137-143). The Motion to Dismiss failed to argue any procedural prejudice arising out of an alleged inability to remove the amended complaint to Federal Court. *Id.* On September 25, 2019, the trial court granted Safeco's Motion to Dismiss ("R" 164) by abating the bad faith claims of Counts II and III of the Amended Complaint until after the appeal has been resolved through a final disposition in

favor of Heikka.

On December 4, 2020, this Court entered its Mandate affirming the final judgment entered on July 10, 2019. ("R" 169-170). Thereafter, Safeco filed its Answer and Affirmative Defenses on December 23, 2020 ("R" 171-175), but no defense was raised addressing any issues regarding federal jurisdiction and Safeco did not attempt to remove the case to Federal court.

The parties each filed competing Motions for Summary Judgment. The Plaintiff filed Motions for Summary Judgment on August 20, 2021 ("R" 1304-1316), on November 10, 2021 ("R" 1546-1564), which were denied on April 5, 2022 due to the existence of factual disputes including the question of whether "Safeco tendered that [sic] policy limits after the accident" ("R" 2486-2488). Thereafter, on May 30, 2022, Heikka filed a Renewed Motion for Summary Judgment. ("R" 2659-2674) In that motion, Heikka argued that because Safeco was not obligated to defend an action for punitive damages, it insistence on tethering the acceptance of the coverage of

\$25,000 (the covered loss) on the waiver of punitive damages (the uncovered loss), Safeco breached its duty of care to Hernandez. Simply stated, it was the position of Heikka that by refusing to pay the policy limits for the covered loss unless Heikka waived her claim for punitive damages, an uncovered loss, Safeco breached its duty of care to Hernandez by exposing him to compensatory damages far in excess of the policy limits, which is exactly what happened in the underlying jury trial.

To support that position, Heikka relied upon *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16 (Fla. 4th DCA 2006). *Contreras* was an automobile wrongful death case with liability coverage of \$10,000 per person and \$20,000 per accident. The named insured had granted permission to a friend operate the insured vehicle. That driver struck the decedent while impaired by alcohol. The plaintiff's attorney offered to settle with the owner of the vehicle if the \$10,000 was timely tendered, but given the severity of the injuries, would not agree to settle with the driver, who, as a permissive user, had become

a putative insured. The insurer took the position that it could not settle only with the owner because it had a duty of good faith to the driver. The case was tried and a resulted in a verdict against the owner and driver for \$1,000,000, and punitive damages against the driver for \$5,000. The judgment was affirmed and, after some procedural issues were resolved,¹² the Plaintiff filed a lawsuit for bad faith against the insurer.

At trial, the trial court entered a directed verdict for the insurer. The appellate court reversed, finding the trial court's conclusion that the insurer was placed in a "Hobson's choice" of having committed bad faith if it settled the claim for only the owner and not the driver, was "not well founded." *Id.*, at 22. In reversing the directed verdict, the *Contreras* court concluded that:

The argument that U.S. Security, as a matter of law, could not settle the claim only against [the owner] because it would expose itself to a claim of bad faith by [the driver] is an illusory one. U.S. Security attempted to settle for both [owner and driver]and get a complete release for both of

¹²The owner had filed for bankruptcy, and the owner's trustee assigned the bad faith claim against U.S. Security to the Plaintiff.

them. A release was unattainable due to Contreras's adamant refusal to settle with [the driver]. Contreras's refusal is understandable. The horrific nature of the accident and [the driver's] misconduct of drinking and driving and leaving the scene of an accident could easily account for the animus directed toward [the driver]. ***In any event, the focus in a bad faith case is not on the actions of the claimant, but rather on those of the insurer in fulfilling its obligation to the insured.***

Id., at 22. (emphasis added)(citation omitted).

Despite this argument, the trial court denied Heikka's Renewed Motion for Partial Summary judgment on August 10, 2022¹³ finding that there existed:

competing evidence as to the substance/existence of claim settlement communications between Plaintiff's counsel and Defendant's adjuster, the parties' differing understandings as to the terms of any such purported settlement discussions and disputes as to whether Safeco complied with its good faith claim handling obligations owed to its insured regarding Plaintiff's bodily injury claim against the insured under the totality of the circumstances.

("R" 3580-3581).

¹³The Defendant had stipulated that portions of Heikka Renewed Motion for Summary Judgment were meritorious as it related to some of the affirmative defenses plead by Safeco and agreed to withdraw those affirmative defenses was entered.

Safeco filed its own Motion for Summary Judgment on March 10, 2022, ("R" 2355-2455) in which it argued, generally, that the undisputed facts entitled it to summary judgment pursuant to Fla. R. Civ. P. 1.510. More specifically, in that motion, it argued that Safeco properly protected the interests of its insured, Hernandez, by refusing to settle for the bodily injury liability coverage of \$25,000 unless Heikka would agree to forgo her claim for punitive damages. ("R" 2368-2369) This position was asserted despite the fact that the subject insurance policy specifically excluded claims for punitive damages. ("R" 3738, **Exclusions** at § A, ¶ 11) The Motion was denied on April 5, 2022. ("R" 2486-2488)

The case was tried before a jury between August 15 and 18, 2022. At the conclusion of the trial, each party moved for a directed verdict. The trial court denied Safeco's motion and granted Heikka's which was memorialized in an Order dated August 25, 2022. ("R" 4015-4017) Based upon the evidence deduced at trial, the Plaintiff argued that Safeco's insistence on tethering the offer to settle for

\$25,000 policy limits with a waiver of the uncovered punitive damage claim was a breach of Safeco's duty of good faith owed to Hernandez and which exposed him to a verdict for compensatory damages far in excess of those limits. Additionally, the Plaintiff argued that the offer to settle was not a tender of its policy limits because the offer included terms (waiving the punitive damage claim) that were rejected during the negotiations. Because the modifications to the release by Heikka were rejected by Safeco, no tender of the policy limits was actually made. *See Ismark v. Mills, Inc.*, 899 So. 2d 1213, 1214 (Fla. 2d DCA 2005)(Rejecting the claim that a "tender" had occurred where "the evidence was undisputed that the tender was conditioned upon the signing of a release as to all claims and not merely a release of the claim for the amount offered to be paid under the stock redemption agreement.") As the trial court stated, the General Release provided to Cooper by Safeco "contained additional terms than were negotiated by Cooper." ("R" 4015-4016).

Prior to the entry of the Final Judgment, which was entered

on October 2, 2022 ("R" 4105-4107), Safeco filed a Motion to Disqualify the trial judge ("R" 4037-4048) which it supplemented on September 16, 2022. ("R" 4068-4096) Heikka responded to that Motion on September 9, 2022. ("R" 4053-4065) On September 17, 2022, the Motion to Disqualify was denied as being legally insufficient. ("R"4097-98) On October 31, 2022, Safeco filed its timely Notice of Appeal. ("R" 4127-4131)

SUMMARY OF THE ARGUMENT

Because Safeco insisted on a waiver of the right to seek punitive damages from Hernandez in order for Safeco to agree to pay Heikka the full amount of the liability coverage afforded Hernandez of \$25,000, no tender of the policy limits was ever made. Heikka, through her lawyer Cooper, had communicated clearly that, while the \$25,000 would be acceptable as a settlement of the claim for compensatory damages, the right to seek punitive damages would not be waived as a part of that settlement.

Since the Release remitted by Safeco included a waiver of punitive damages, as well as other potential claims not related to Hernandez, no true meeting of the minds occurred and no settlement was therefore effectuated. The refusal of Safeco to accept the terms in the hand-written modified Release supported the position by the trial court, which was affirmed on appeal, that no settlement of this claim occurred. Further, because Safeco failed to advise Hernandez that Heikka was willing to accept the policy limits as full settlement of the compensatory damage claim, but that the claim for punitive

damages would survive. and the legal effect of that offer, Safeco further breached its duty to Hernandez by failing to advise him regarding the probable outcome of a lawsuit for compensatory damages, the consequences of an excess verdict and to otherwise act in his best interests. Safeco confused its obligation to settle the loss for the covered damages with an imagined duty to protect Hernandez from a non-covered loss, i.e., punitive damages. By so doing, Safeco committed bad faith in failing to failing to settle for the policy limits when it could have by wrongfully tethering the demand for a waiver of the punitive damages with the offer to settle the compensatory damages.

The testimony deduced at trial supported the conclusion of the trial court that no tender of the policy limits occurred because the offer to settle included the delivery of a Release which contained terms that materially differed from the terms Cooper had indicated, and the Payne notes corroborated, would be acceptable. Given that the purported tender included clearly unacceptable terms, reasonable

minds could not differ that no tender had occurred. Since Safeco failed to properly and effectively tender its policy limits, it unreasonably exposed Hernandez to the excess judgment which was ultimately entered. ("R" 4105-4107). Safeco never produced testimony from Payne or any other witness that there was any communication between Safeco (Payne) and Hernandez other than that contained in the adjuster notes and correspondence. As such, the directed verdict was providently entered.

As to the remaining arguments of Safeco, the trial court properly permitted Heikka to amend her complaint post-judgment to consider the issue of statutory and common law bad faith. The arguments of Safeco that this precluded it from removing the case to Federal court were not asserted at the trial level in a motion to dismiss, nor was any effort to remove the case ever filed. The raising of this issue occurred for the first time in the appeal of this action and it was waived because no effort to remove the case was ever made.

The attempt to disqualify the trial court, post-verdict and

prior to the entry of a final judgment, even in its amended version, was legally insufficient. The trial court properly, and within the limitations of its ability to respond, denied the motion.

ARGUMENT

Introduction

After considerable protracted litigation emanating from Safeco's abstruse insistence on arguing that Heikka had agreed to both settle the bodily injury claim for \$25,000 and waive her claim for punitive damages, it became clear at the trial that no meeting of the minds existed as to the settlement terms and therefore no settlement was reached. By refusing to settle the compensatory damage claim for the policy limits of \$25,000 unless Heikka would waive the punitive damage claim, which was not a covered loss, Safeco breached its statutory duty to act in Hernandez' best interests because it exposed him to a judgment for compensatory damages far in excess of the policy limits, which was the highly predictable final result.

The claim by Safeco that it could not settle for the policy limits without the waiver of punitive damages due to the exposure it created for Hernandez is a prevarication obscuring a duty to defend for a covered loss with a misguided position that Safeco had a duty to defend for a claim for punitive damages, which is a a non-covered

loss. Moreover, the evidence and testimony deduced at trial reflected that this issue was never explained to Hernandez.

Because Cooper adamantly and steadfastly represented to Payne that he could not and would not waive Heikka's claim for punitive damages but would accept the \$25,000 policy limits to release Hernandez (and Safeco) from the covered losses, the insistence that Heikka sign the General Release provided by Payne and Safeco was the creation of terms categorically rejected by Cooper, his belief that he was permitted to modify the release notwithstanding. Cooper's assertion that modification of the release was consensual was corroborated by that letter from Payne dated January 25, 2007, where she stated that "[i]f you want to make any changes to this proposed Release Agreement, please forward the changes to my attention and I will have the changes reviewed." Joint Exhibit 26 ("R" 3844-3850).

The trial court was eminently correct in concluding, after having received all of the testimony and evidence, that the purported

offer to settle for the policy limits was not a tender because the General Release that was provided by Safeco for execution contained unacceptable terms which had been rejected by Cooper during the settlement negotiations.

Subsequently, in a facile attempt to justify its rejection of the modified release, Safeco argued that the sentence "[t]his release releases only Safeco and Joseph Hernandez for the policy limits stated above" exposed Hernandez to a judgment for compensatory damages above the policy limits. This interpretation is risible, and strains the plain meaning of that sentence. Rather, read in *pari materia* with the other modification, it is clear that Cooper was intending to preserve the ability to make claims against other given the typed statement that:

this is a FULL AND FINAL RELEASE in full compromise settlement of all claims of every nature and kind whatsoever, **and releases all claims whether known or unknown; suspected or unsuspected.**

(emphasis added)

Given the broad and expansive nature of that provision,

which could be easily interpreted to act as a waiver of an uninsured motorist claim, dram shop claim, or even a medical malpractice claim, Cooper's modification would appear appropriate to avoid a potential claim by a third-party defendant that the claim against it was waived by that release. The trial court granted Plaintiff's Motion for Directed Verdict at the conclusion of all of the evidence on August 18, 2022, and on August 26, 2022, entered its written Order Granting Plaintiff's Motion for Directed Verdict and Denial of Defendant's Motion for Directed Verdict ("R" 4015-4017) finding that the lack of mutual assent between the parties as to whether the offer to pay the policy limits of \$25,000 required a waiver of any claim to punitive damages negated that a "tender" of the policy limits had occurred and vitiated any understanding by either party that a settlement had been effectuated.

I.

THE TRIAL COURT PROPERLY GRANTED PLAINTIFF'S MOTION FOR DIRECTED VERDICT AS REASONABLE MINDS COULD NOT DIFFER AS TO WHETHER THE APPELLANT COMMITTED INSURANCE BAD FAITH IN FAILING TO TENDER THE POLICY LIMITS OF THE COVERED LOSS DUE TO THE REFUSAL TO WAIVE PUNITIVE DAMAGES WHICH WAS NOT COVERED BY THE POLICY AND PUBLIC POLICY PROHIBITS COVERAGE FOR PUNITIVE DAMAGES

The Appellant misconstrues the factual and legal basis for the granting of the directed verdict by the trial court which is clearly articulated in the passage of the Order quoted above. ("R" 4015 - 4017) Moreover, the body of applicable bad faith decisional law cited by Appellant is heretical and inapposite of its position that Safeco had not breached its duty to Hernandez to act in good faith.

For example, Appellant argues that Safeco "diligently and with the same haste and precision as if it were in the insured's shoes, work on the insured's behalf to avoid an excess judgment." (Initial Brief, p. 27, citing to *Harvey v. Geico Gen. Ins. Co.*, 259 So. 3d 1 (Fla. 2018)). However, the evidence clearly establishes the sophistry of the argument supporting the conduct of Safeco regarding its duty to its

insured, Hernandez. The analysis begins with the clear demarcation of how the subject insurance policy defines a covered loss, and what is excluded. Damages for negligence are a covered loss ("R" 3714-3770, 3736, Liability, Part A) and claims for punitive damages are excluded as a covered loss (3738, Exclusions at ¶ 11).

Because of the insistence of the lawyers for Safeco¹⁴ that settlement of the Heikka claim for the payment of the policy limits of \$25,000 required Heikka to waive any possible punitive damage claim against Hernandez, Safeco breached its duty to Hernandez as articulated by the Florida Supreme Court in *Harvey*. In tethering a

¹⁴Interestingly, while Safeco's adjuster appeared to understand that carving out the punitives from the settlement was acceptable as is reflected in her adjuster note dated January 25, 2007 at 11:16 am ("R" 3839), the attorney's for Safeco persisted in making settlement for the policy limits totally contingent on including the claim for punitive damages in a settlement for the policy limits of \$25,000, as is evidenced by Hernandez' Motion to Enforce Settlement filed on June 1, 2007 (Appendix 3, pgs. 6-13), July 12, 2007 Motion for Summary Judgment (Appendix 7, pgs. 58-96) and Safeco's Amended Complaint seeking a declaratory judgment that Heikka's bodily injury claim was settled inclusive of the waiver of the punitive damage claim, in CACE 09-39965. (Appendix 12, pgs. 113-129).

settlement of the covered damages to a requirement that Heikka waive a claim for non-covered (punitive) damages, Safeco failed to avoid the possibility of an excess judgment for bodily injury damages against Hernandez. Safeco took this position despite the fact that it was obvious that Heikka's damages were clearly in excess of those policy limits and that general "compensatory" damages are subject to a much lower threshold than are "punitive" damages. Because of its refusal to tender the policy limits despite the insistence by Heikka's attorney that her ability to seek punitive damages remain viable, Safeco exposed Hernandez to an easier path to a significant judgment, and it failed to advise Hernandez of the settlement opportunity that was presented, with advice regarding the probable outcome of litigation, the possibility of an excess judgment and to advise the insured of any steps he might take to avoid an excess judgment. See *Boston Old Colony Ins. Co., v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

This failure to advise Hernandez of the settlement

opportunity to which Heikka had agreed, and to expose him to a significant verdict in excess of his policy limits reflected a heretical position regarding an insurer's duty of good faith toward its insured when a claim exists for both covered and non-covered damages. The Fourth District Court of Appeal's decision in *Contreras, supra*, addressed a similar claimed conundrum by a Florida insurance company. In that case, the estate of a decedent killed in a horrific automobile accident where the owner of the automobile had granted permission to another, who operated the vehicle at a high rate of speed and while impaired by alcohol. The estate agreed to accept the tender of the policy limits of \$10,000 for the owner of the vehicle, and to release the insurance company, but would not agree to include the driver in the release because of the "gravity of the [driver's] misconduct." *Id.*, at 18.

Similar to the position taken by Safeco in this case, the attorney for U.S. Security stated in a letter to the estate that the insurer was "obligated to act in good faith to the named

insured/owner . . . and to the insured driver" *Id.*, at 19. A jury trial resulted in compensatory damages of \$1,000,000 and punitive damages against the driver in the amount of \$110,000, which was later remitted to \$5,000. This judgment was affirmed on appeal, and a trial for bad faith against the insurer commenced. At the conclusion of the estate's case against the insurer, the trial court directed a verdict in favor of the insurer incorrectly agreeing with the insurer that it "could not enter into a settlement agreement and release which operated to totally exonerate [the owner of the automobile] without releasing [the driver]" *Id.*, at 19. In reversing the directed verdict, the appellate court ruled that the trial judge incorrectly framed the issue as placing the insurer in a "Hobson's choice" where it was forced to choose between settling for the owner or not, but not for the driver either of which created potential bad faith.

However, the Fourth District Court of Appeal recognized that the trial court's acceptance of the Hobson's choice argument was error in that it was a fallacious argument because the insurer had

created a false choice. The insurer could have settled for the owner, and because it offered to settle for the driver, no bad faith would have resulted. This is exactly the dynamic which confronted Safeco. It falsely concluded that it could not settle the bodily injury claim without getting a release for the potential (and non-covered) punitive damage claim. As a result of this sophistry, Safeco created a false choice that unreasonably exposed Hernandez to an excess verdict for compensatory damages -- a result which predictably did occur resulting in a judgment against Hernandez in the amount of \$1,169,292.83. ("R' 116).

In *Contreras*, the appellate court held that an insurer could be held liable for bad faith arising out of a refusal to accept an offer to settle with the owner but not the driver of an insured motor vehicle provides guidance as to Safeco's breach of its duty of care to Hernandez in this case. As in *Contreras*, Safeco could and should have settled the "covered" part of the claim (the compensatory damage claim) but not the possible, but "non-covered as excluded"

punitive damage claim. Since Safeco did not cover claims for punitive damages, that claim was for a non-covered loss and it had no duty to settle that as a condition to settle the covered bodily injury claim. An insurer has no duty to neither indemnify or defend a claim for punitive damages. *Morgan Int'l Realty, Inc., v. Dade Underwriters Ins. Agency, Inc.*, 617 So. 2d 455 (Fla. 1993).

In failing to tender its policy limits for the covered loss, which would have been accepted by Heikka provided her claim for the non-covered loss was permitted to be explored and potentially litigated, Safeco exposed Hernandez to an excess judgment for compensatory damages, despite the fact that compensatory damages are much easier to obtain than punitive damages and without having advised Hernandez of the steps that could be taken to avoid such a judgment and the settlement opportunity offered by Heikka in that regard.¹⁵

¹⁵Compare the adjuster notes and lack of correspondence in January 2007 during the time of the communications between Payne (adjuster) and Cooper ("R" 3835-3853) which failed to include any correspondence with Hernandez and ("R" 3854-3903) none of

A similar scenario resulted in the affirmation of a trial court's rejection of a purported settlement where the insurer inserted into a release form language specifically rejected by the plaintiff's offer in *Gonzalez v. Claywell*, 24 So. 3d 260 (Fla. 1st DCA 2009). In that case, the attorney for the injured party offered to settle the case for \$26,336.16, which was the policy limits for bodily injury plus property damage, and to release the owner and driver of the vehicle only. The insurer sent a release which added the insurer (Geico) as a named releasee. The plaintiff's lawyer rejected the release "because it deviates for the terms of [the] offer." *Id.*, at 1261. Geico argued that including the insurer was customary, and there was no good reason to insist that Geico be excluded from the release, those facts did not negate the fact that no settlement agreement was reached. That court further stated that:

These observations may be accurate, but neither of them

which explains that Heikka was willing to accept the sum of \$25,000 for a full release of compensatory damages but excluded a release for punitive damages and the effect of the respective exposure as to each.

would support a conclusion that the parties made an enforceable contract. It is not the prerogative of this court to question the reasons a party has given for refusing to sign a contract. Nor is it proper for the court to rewrite a contract by including terms that one of the parties expressly rejected.

* * *

The only logical conclusion to be drawn from this sequence of events is that the parties did not enter into a settlement agreement. As the trial judge stated, GEICO's proposal to add itself to the release was a counteroffer, not an acceptance of the original offer. Because the plaintiff immediately rejected the counteroffer by sending the check back and declining to sign the proposed release, there was no agreement.

Id., at 1261-62.

This is the precise situation presented the trial court. Cooper had made clear that settlement was conditioned upon a carve out of the additional potential claims, including a potential claim for punitive damages. The adjuster notes and letter of January 25, 2007, ("R" 3844-3850) reflected this position and clearly permitted Cooper to modify the release. However, the modified release was rejected by Safeco, as is evidenced by their efforts to compel settlement, which clearly establishes a total lack of mutual assent as to the terms of the

potential settlement.

Even if Safeco had assumed that it had a duty to protect Hernandez on a claim for punitive damages, much like the misplaced sense of duty to the driver in *Contrares* that it could not settle the claim against the owner of the vehicle without settling with the driver, Safeco should have avoided exposing Hernandez to a verdict for compensatory damages far in excess of the policy limits by agreeing to the terms offered by Cooper for Heikka which would have fully absolved Hernandez of any further liability for compensatory damages. At that point, after having limited the compensatory damages to the policy limits, Safeco could then have provided a gratuitous defense of Hernandez on the punitive damage claim which would have limited the exposure of Hernandez and been in his best interests.

A. A trial court is permitted to enter a summary judgment or directed verdict providing the evidence supports the motion and, in this case, the Appellant also sought both a summary judgment and directed verdict

While bad faith cases most often present a factual dispute not appropriate for summary judgment, no court has ever concluded

that a bar on summary judgment in bad faith cases precludes summary judgment. *See e.g., Talat Enterprises, Inc., v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278 (Fla. 2000)(affirming the trial courts granting of a summary judgment on a claim for bad faith). It must be noted that, its argument that a bad faith case is "unsuitable for summary judgment in most cases" (Initial Brief at p. 26), failed to preclude Safeco from pursuing its own Motion for Summary Judgment on March 10, 2022 ("R" 2355-2455), and moving for a directed verdict in favor of Safeco at the conclusion of the evidence on August 18, 2022 and which was denied on that date, and in a written Order entered on August 26, 2022. ("R" 4015-4017). To make those arguments for summary judgment and directed verdict, Appellant was taking the position that the facts are not in dispute and reasonable minds could not differ, but drew a conclusion rejected by the trial court. This is obviously inconsistent with the position that Safeco is now taking, which is a prevarication that this case is unsuitable for summary disposition.

Given the undisputed facts, the trial court properly weighed the respective arguments regarding the application of the law to those undisputed facts when concluding that Safeco did not tender its policy limits because its offer to settle contained terms rejected by Heikka's attorney during the negotiations, and which included a requirement to waive a claim for damages which were excluded by the policy and for which no duty to indemnify or defend existed.

B. The trial court's granting of a directed verdict in favor of Appellee utilized an appropriate analysis and proper application of applicable case law

Safeco quarrels with the trial court's reliance on *Ismark supra*, 899 So. 2d 1213 (Fla. 2d DCA 2005) to support Heikka's directed verdict arguing that the holding in *Ismark* "bears no relation to an insurer's obligations to its insured in general and to the facts of this in case in particular." (Initial Brief, p. 31). *Ismark* does, however, address the precise issue of whether a qualified offer becomes the equivalent of a tender to create an enforceable settlement, which was a significant issue in this case. In that case, the dispute addressed a

former employee's right to recover under a stock option-redemption agreement.

Prior to trial the employer offered a sum as settlement to the employee, but the offer was conditioned upon the employee signing a full release of all claims. A "tender" of the amount owed, if rejected, would preclude prejudgment interest. So the issue was whether the amount offered, which included a requirement that the employee sign a full release of all claims, was a "tender." The *Ismark* court stated that the "offer of payment did not qualify as a tender because it was conditioned upon . . . [a] release of all claims" *Id.*, 1214.

"Settlement agreements are generally governed by the laws of contract." *Pena v. Fox*, 198 So. 3d 61, 63 (Fla. 2d DCA 2015)(citing to *Gira v. Wolfe*, 115 So. 3d 414, 417 (Fla. 2d DCA 2013). See also 28 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* §§ 72:27, 72:29 (4th ed. 2003) (defining tender in part as "an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation" and

setting forth the essential elements of a valid tender)(cited by *Ismark* at 1214.

In *Pena*, the Second District Court of Appeal synthesized the requirement for a valid and binding settlement agreement to contain mutual assent when it stated that:

Like any contract, a settlement agreement is formed when there is mutual assent and a “meeting of the minds” between the parties—a condition that requires an offer and an acceptance supported by valid consideration. The parties must mutually assent to each of the terms and conditions of both the offer and the acceptance in order to be a meeting of the minds and the closing of a lawful and binding contract. We start with the basic premise that no person or entity is bound by a contract absent the essential elements of offer and acceptance ... supported by consideration. ***Florida law further requires that “an acceptance of an offer must be absolute and unconditional, identical with the terms of the offer.”*** That is, the acceptance must be a “mirror image” of the offer in all material respects, or else it will be considered a counteroffer that rejects the original offer determining that insurer's inclusion of a proposed hold harmless agreement and subrogation waiver release constituted a separate additional requirement that conditioned the settlement on the submission of the requested documents, which acted as a counteroffer and rejection of plaintiff's original settlement offer). An attempted acceptance can become a counteroffer either by adding additional terms or not meeting the terms of the original offer.

Pena at 63. (emphasis added) (citations omitted).

See also *Trout v. Apiceella*, 78 So. 3d 681 (Fla. 2012)(holding that the insurance company did not properly accept plaintiff's settlement offer conditioned upon the insurer providing certain documentation within fifteen days.)

The decisions in *Penas, supra, Trout, supra, and Gonzalez, supra*, fully corroborate the conclusions of the trial court in this case that no settlement occurred because the proposed release did not mirror the clear and unambiguous offer of Cooper to accept the policy limits only if the punitive damage claim was excluded from the release. As such, given the additional provisions in the release furnished to Cooper by Safeco, which included the required waiver of the non-covered and excluded punitive damage claim, the policy limits were not tendered because Safeco provided a poison pill in the negotiations. While it purported to tender its policy limits, this was illusory because of Safeco's inclusion of terms in the release which the adjuster knew were expressly rejected. As a result, the purported tender was not a legally sufficient tender because it fatally included

additional terms expressly rejected at the time Cooper agreed to accept the \$25,000.

A similar conclusion regarding the legal effect of a "qualified tender" was reached based upon the same analysis by the Alabama Supreme Court in *Safeway Ins. Co. of Alabama v. Amerisure Ins. Co.*, 707 So. 2d 218, 220–21 (Ala. 1997). In that case the issue concerned an insurance contract's obligation to pay prejudgment interest where the insurer offered its policy limits. Because the insurer conditioned payment of the policy limits on the execution of a release of all claims, that court concluded that the insurer did not offer its policy limits, when that court stated that:

every prejudgment and post-judgment offer made by Safeway was expressly conditioned on the Actons and the Williamses' releasing all claims against Dunn in excess of the policy limits. ***Safeway, thus, did not offer its policy limits, but instead offered something substantially less—its policy limits minus all claims for damages in excess of those limits.***

Id., at 220-21 (citations omitted).

In seeking reversal of the trial court, Safeco presents a mendacious and fallacious argument that "[a] jury could easily have

concluded that it was in Hernandez best interest for Safeco to not exhaust its policy limits and leave him exposed to punitive damages and compensatory damages in excess of the policy limits." (Initial Brief at p. 32). As is argued *supra*, Safeco breached its duty to act in Hernandez' best interests by failing to properly tender its bodily injury liability limits without tethering that tender to an insistence on a release of the excluded punitive damage claim.

Safeco's duty to its insured, as defined by Fla. Stat. 624.155(1)(b)(1), statutorily emanates from its contractual duty to defend and indemnify for covered losses, and not its imagined duty to protect against excluded non-covered losses. Therefore, its assertion that a jury could conclude that it was in Hernandez' best interest for Safeco to not tender its policy limits of \$25,000 unless Heikka agreed to waive her claim for punitive damages (and other potential claims for uninsured motorist coverage and dram shop liability) breached its duty owed to Hernandez regarding the covered losses. At the very least, Safeco had a duty, which it breached, to inform him of the exposure for the compensatory damages he was being exposed to, the

comparative burdens of proof for compensatory and punitive damages, the probable outcome of a trial for compensatory damages, and the steps which should be taken to avoid an excess judgment. *See Boston Old Colony, supra.*

As the Florida Supreme Court stated in *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 682 (Fla. 2004):

Bad faith law was designed to protect insureds who have paid their premiums and who have fulfilled their contractual obligations by cooperating fully with the insurer in the resolution of claims. ***The insurance contract requires that the insured surrender to the insurance company control over whether the claim is settled. In exchange for this relinquishment of control over settlement and the conduct of the litigation, the insurer obligates itself to act in good faith in the investigation, handling, and settling of claims brought against the insured.*** Indeed, this is what the insured expects when paying premiums. Bad faith jurisprudence merely holds insurers accountable for failing to fulfill their obligations, and our decision does not change this basic premise.

As a consequence of this sacred duty to its insured, given that Hernandez had contractually relinquished control of the claims settlement process to Safeco, it had a duty to appreciate the exposure to an excess verdict in which it would place Hernandez by refusing to

fully tender the policy limits for the covered loss. This duty was not diminished because of Heikka's insistence on seeking damages for the non-covered, and excluded, punitive damage claim.

Safeco's argument that the hand-written modification by Cooper to the general release "eliminated from the release any liability by Safeco for compensatory damages above the \$25,000 policy limits" is a facile one. (Initial Brief, p. 35). First this level of analysis is rendered moot, because the release submitted by Safeco, sans Cooper's modifications, deviated from the specific terms offered by Cooper, and therefore there was no settlement. *Gonzalez, supra*. Application of the law of the case doctrine is clear. There was a denial of Safeco's motion for summary judgment. It unsuccessfully prosecuted a collateral action for declaratory relief on that issue. The appellate decisions in both the '07 and '09 cases affirmed the lack of settlement which established with finality that there was no settlement between Heikka, Hernandez and Safeco, which became the law of the case. Where an appeal is taken on an issue in a case, that ruling becomes the law of the case. *See Woolin v. Bernay*, 920 So.

2d 1151, 1153 (Fla. 3d DCA 2006).

The trial court ruled, and this Honorable Court upheld the findings that no settlement occurred arising out of the lack of the meeting of the minds. As such, Cooper's efforts modify the release submitted by Safeco to render it consistent with the his demands to settle the case are of no consequence. Safeco submitted a proposed release which deviated from Cooper's offer to settle with a carve out for the punitive damages. Safeco would not settle with the carve out, and Cooper would not settle without it. Therefore no settlement was reached which exposed Hernandez to the excess judgment for compensatory damages.

II.

THE TRIAL COURT DID NOT DEVIATE FROM THE ESSENTIAL REQUIREMENTS OF LAW IN PERMITTING APPELLEE TO AMEND HER COMPLAINT FOR BAD FAITH GIVEN THE FINAL JUDGMENT RENDERED AFTER A JURY TRIAL IN APPELLEE'S FAVOR WHICH WAS IN EXCESS OF THE POLICY LIMITS AND THE SERVING OF A CIVIL REMEDIES NOTICE PURSUANT TO FLA. STAT. § 624.155

Safeco seeks reversal of the final judgment on the action for bad faith claiming a "procedural anomaly" arising out of the trial court

permitting Heikka to amend her complaint after the partial final judgment was entered following the jury verdict on the tort action which resulted in a \$1,169,292 verdict for Heikk'a compensatory damages.¹⁶ (Initial Brief, p. 42-43). Safeco further claimed that "Safeco unsuccessfully opposed Heikka's request for leave to amend because, among other reasons, such amendment would adversely impact its ability to remove the case to federal court." (*Id.*, at 43).

This position is not well-founded because, Safeco failed to raise the issue of removal to federal court as a basis to dismiss the amended complaint and it is foreclosed from raising it for the first time on appeal. "As a general rule, an appellate court cannot address claims raised for the first time on appeal." *Manning v. Tunnell*, 943 So. 2d 1018, 1020 (4th DCA 2006)(citations omitted). Moreover, after amendment, Safeco made no effort to actually remove the case to federal court.¹⁷

¹⁶The jury found that no punitive damages were awardable.

¹⁷Safeco would have been permitted to seek removal of the amended complaint pursuant to 28 USC § 1441(e)(1)(b) and 28 USC 1446 § (a)(3) within 30 days of being served.

This is the chronology regarding the amending of the complaint to prosecute a claim for bad faith. After the verdict, but prior to the entry of the Partial Final Judgment against Hernandez in the amount of \$1,169,292, Heikka moved to file an amended complaint for bad faith against Safeco, consistent with Fla. Stat. § 627.4136(4)(2018). ("R" 84-93). On July 10, 2019, the trial court granted Heikka's Motion for Leave to Amend the Complaint to state a cause of action against Safeco for bad faith. ("R" 115). On that same day, Heikka filed her Amended Complaint against Safeco. ("R" 117-123). On August 19, 2019, Safeco filed a Motion to Dismiss the Amended Complaint. ("R" 137-143). In that motion, Safeco argued (1) that the bad faith claims are not ripe because the appeal of the underlying Partial Final Judgment was pending; and that the unripe claims should be dismissed and not abated. Removal was not attempted or addressed as a basis for dismissal.

On September 25, 2019, the trial court entered an order on Safeco's Motion to Dismiss abating the bad faith action until the appeal was resolved favorably for Heikka. ("R" 164). The abatement

was lifted on October 23, 2020 by Agreed Order after Heikka prevailed on the appeal of the Partial Final Judgment for Heikka's damages. ("R" 167-68). On December 23, 2020, Safeco filed its Answer and Affirmative Defenses ("R" 171-175). In that filing, Safeco plead no defense related to removal to federal court nor had it attempted to remove the amended complaint to federal court. Accordingly, Safeco waived that claim, which is raises here for the first time. *See Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098, 1104 (Fla. 5th DCA 2006)("The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right.")(citations omitted).

Interestingly, Safeco cites this court to *Geico Gen. Ins. Co. v. Harvey*, 109 So. 3d 236 (Fla. 4th DCA 2013)(*cf.*, *Safeco Ins. Co. of Ill. v. Radar*, 132 So. 3d 941 (Fla. 1st DCA 2014) to support its position regarding the amended complaint. The facts of *Harvey* reflect that the estate of a deceased motorcyclist was awarded \$8 million in damages against an insured which exceed coverage. The complaint

was amended by the estate to add Geico as a defendant for purposes of obtaining a judgment against it. The insured then filed a bad faith cross-claim against Geico for bad faith. Geico attempted to remove the bad faith action to federal court, but the notice of removal was found to be untimely and the case was remanded.¹⁸ Following the remand, Geico filed a motion to dismiss or sever the bad faith cross-claim arguing that the claim was not part of the same transaction or occurrence as the wrongful death action. The trial court denied the motion which resulted in a petition for a writ of certiorari which quashed the denial of the Motion to Dismiss.

The *Harvey* writ case is clearly distinguishable. First, in moving to dismiss Heikka's amended complaint ("R"137-143), Safeco never addressed the issue of removal as a basis for dismissal, nor did it attempt to remove Heikka's bad faith complaint to federal court. At the time Safeco filed its Motion to Dismiss on September 25, 2019, the *Harvey* writ case had already been decided. Having failed to make

¹⁸The order by the federal trial judge is contradicted by other federal court rulings. See e.g. *Lahey v. State Farm Mut. Auto. Ins. Co.*, WL 2029334 (M.D. Fla. July 11, 2007).

any attempt at removal, which could have been successful as it was in *Lahey, supra*, or to raise the issue in its Motion to Dismiss, Safeco has waived this argument and cannot be permitted to raise it for the first time in this appeal.

Additionally, as to the procedural anomaly, Heikka had standing to seek a bad faith judgment against Safeco directly, given the lack of an assignment of the of the cause of action against Safeco by Hernandez and Heikka was permitted to file the claim against Safeco for bad faith on her own. *Progressive Exp. Ins. Co. v. Scoma*, 975 So. 2d 461, 465 (Fla. 2d DCA 2007)("In Florida, a bad faith action against an insurance company may be brought not only by the insured to whom the duty of good faith was owed or his or her formal assignee, but also by a third party whose claim against the insurance policy was the subject of alleged bad faith. This cause of action is permitted both by case law and by section 624.155(1)(b)(1).)(citations omitted.) *See also Fridman v. Safeco Ins. Co. of Ill.* 185 So. 2d 1214 (Fla. 2016).

Heikka could not have brought her action for bad faith

against Safeco until her damages were determined by verdict and judgment. *Geico Gen. Ins. Co. v. Martinez*, 240 So. 3d 43 (Fla. 3rd DCA 2018). Accordingly, Heikka, who had standing to bring the bad faith claim against Safeco, was precluded from doing so until such time as her judgment for damages against Hernandez, as a Safeco insured, was finalized.

III.

THE TRIAL COURT DID NOT DEVIATE FROM THE ESSENTIAL REQUIREMENTS OF LAW IN EXCLUDING THE PURPORTED SETTLEMENT CHECK FOR \$25,000 FROM EVIDENCE GIVEN THAT JURY WAS TOLD THAT APPELLANT DELIVERED THE CHECK TO APPELLEE'S COUNSEL AND THE CHECK CONTAINED EXTRA-NEGOTIATED TERMS AS THOSE TERMS COULD CONFUSE THE JURY AND WERE NOT PROBATIVE OF ANY MATERIAL ISSUE GIVEN THAT IT IS THE LAW OF THE CASE THAT NO SETTLEMENT OF THE UNDERLYING CLAIM OCCURRED

Safeco makes an additional argument suggesting error by the trial court in excluding the proposed settlement draft from the jury as it contained "full and final settlement" language on the check. The

obvious rationale for excluding the check as evidence¹⁹ was the that the probative value of the check being placed in evidence was outweighed by the prejudice to Heikka given that the issue of whether a settlement had been reached through a meeting of the minds was rejected by the trial court which resolved by in favor of Heikka and affirmed on appeal.

Safeco's argument notwithstanding, the jury was aptly informed of the fact that Heikka agreed to accept the settlement offer of \$25,000 if the claim for punitive damages was not included in the release. This point was presented though the trial testimony of Cooper. (Tr. 424, lines 19-21; 453, lines 9-21; 490-91, lines 18-2 and 532, lines 5-19).

Cooper's testimony illustrated with crystal clarity that Safeco's argument that it was precluded from proving that "it attempted to obtain a complete release of its insured in exchange for

¹⁹The jury was told that a check for \$25,000 was mailed to Cooper separate and apart from the delivery of the release to Cooper which was faxed.

the policy limits”²⁰ was an irrelevant and illusory argument. The jury was fully advised that Safeco offered to tender the policy limits contingent upon Heikka agreeing to waive her punitive damage claim. Aside from Cooper’s testimony, this fact is also supported by the claim adjuster’s notes. However, because there was a failure to find consensus on material terms, the mailing of the settlement draft with the submission of an incompatible release rendered the offer to settle for the policy limits by Safeco as a nullity. Therefore, the cashing of the check on the mistaken belief that the release could be modified was an inconsequential fact of no probative value. *See Pena, Gonzalez, and Trout supra.* This argument is a false premise, because whether the purported settlement check delivered along with a unacceptable release could never form the basis for a legally enforceable settlement so whether the check was negotiated fails to provide competent relevant evidence that Safeco failed to act in good faith towards it insured.

²⁰Safeco’s Initial Brief, at page 47.

IV.

THE TRIAL COURT DID NOT DEVIATE FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING APPELLANT'S MOTION FOR NEW TRIAL OR REHEARING

Safeco submits that the trial court erred in denying its Motion for New Trial or Rehearing. (“R” 4110-4126). To support this position, Safeco presents a series of unsupported and feckless arguments wholly lacking in merit. First, Safeco claims “[t]he trial court did not analyze or address any facts regarding Safeco’s investigation of the claim, communications with its insured, attempts to settle the case in the insured’s best interest or why the revised release was not a release at all.” (Initial Brief, page 50). The transcript, and the trial court’s Order granting Heikka’s Motion for Directed Verdict (“R” 4015-17), clearly reflected the trial court’s analysis that Safeco’s insistence that an offer to pay the policy limits, which was acceptable to Heikka, but which required a waiver of the punitive damage claim, which was not acceptable, created an unacceptable offer. This position exposed Hernandez to a judgment

for compensatory damages far in excess of the policy limits, an exposure which came to fruition as is reflected in the Partial Final Judgment for \$1,169,292 (“R” 116). The record of all pre-suit communications between Safeco, its insured Hernandez and Cooper (“R” 3775-3853– Joint Exhibits 4-27), reflect that Safeco never advised Hernandez that Cooper would accept the policy limits only if the right to prosecute a claim for punitive damages was not waived in the release. This renders Safeco’s reliance on *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3rd DCA 1991) to be misplaced given the its conclusions following an exceedingly thorough analysis of the obligations of an insurer to attempt to settle when the relationship between the often limited policy limits and the obvious extent of the injured parties damages when that court stated that:

Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. 46 *C.J.S. Insurance* § 1408 (1946). Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977) (duty to initiate settlement negotiations arises if carrier would initiate settlement negotiations on its own behalf were its

potential liability equal to that of its insured); *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 323 A.2d 495 (1974) (where substantial injuries and potential liability of insured are obvious, failure to offer policy limits constitutes bad faith even where there is no assurance that action can be settled).

Id., at 14.

In applying that logic to this case, it is clear that Hernandez had limited liability coverage (\$25,000), that Heikka damages were considerable,²¹ that Safeco recognized the limited coverage and extensive damages but still insisted on rejecting Heikka's offer to accept the policy limits only if it could pursue the punitive damage claim was excluded from coverage. The joint exhibits evidencing all of the communications between Safeco's adjuster (Payne) and Hernandez do not reflect that Hernandez was ever advised of this settlement offer by Heikka, the probable outcome of a lawsuit for compensatory and/or punitive damages, advising Hernandez of the respective evidentiary burdens for compensatory and punitive

²¹Joint Exhibit #24 dated January 25, 2007, reflected that Safeco was aware that Heikka was still in the hospital 18 days after the accident. ("R" 3838-39).

damages, as well as the consequences of an excess judgment. This complete failure to provide Hernandez with a choice of resolving the compensatory claim, given its much lower standard of proof resulted in the Partial Final Judgment to which Hernandez remains exposed.

The *Powell* case is also procedurally inapposite to the point for which it was cited by Safeco, that the granting of the directed verdict was error. The *Powell* case reversed a directed verdict for the insurer where the evidence supported that the insurer failed to inform the insured of the offer to settle within policy limits. Here, the record was devoid of any evidence to support any communication with Hernandez regarding the nature of the settlement negotiations, the legal ramifications of the choices presented by Heikka, and the risks to which Hernandez would be exposed. There was no dispute as to any of the facts outlined above, and each party argued that the application of the law to these facts entitled it to a summary judgment and, at the conclusion of the evidentiary portion of the trial, a directed verdict. The trial court's analysis that because the offer to settle was contingent upon the execution of a General Release that contained

terms Heikka had rejected, that no legally sufficient tender of the policy limits had occurred, which exposed Hernandez to the excess judgment.

Heikka further argued that Safeco breached its duty to Hernandez by improperly refusing to pay its policy limits which were a covered loss, unless Heikka would agree to not pursue a claim for punitive damages, which was an excluded, and therefore non-covered loss given the exposure to an excess judgment that position created. This breach of its duty of good faith owed to Hernandez was exacerbated by the complete and total failure of Safeco to explain the potential repercussions of the rejection of Heikka's offer to settle so that Hernandez could make an informed decision giving consideration to the consequences of an excess judgment and steps which could have been taken necessary for his own protection. While Safeco argued at that trial that, by refusing to offer to pay the policy limits unless punitive damages were waived, it was looking out for Hernandez's best interests, is a fallacious argument. Safeco could have limited the compensatory damages and offered a gratuitous defense

to the punitive damages thereby limiting exposure to the compensatory damages which were obvious and significant. By choosing the path of trial on all damages, the strategy exposed Hernandez unnecessarily to the judgment that was ultimately obtained by Heikka.

V.

THE TRIAL COURT DID NOT DEVIATE FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DENYING APPELLANT'S MOTION TO DISQUALIFY HIM AS THE MOTION WAS LEGALLY INSUFFICIENT AND NOT SUPPORTED BY THE FACTS

On September 7, 2022, Safeco filed a baseless Motion to Disqualify the trial court, (“R” 4037-38) which it supplemented on September 16, 2022 with a Factual Citation Supplement. (“R” 4097-98). A response was filed by Heikka on September 9, 2022. (“R” 4053-65). The trial court, given the prohibition upon commenting on the merits, timely found the motion and supplement to be “legally insufficient” on September 17, 2022. (“R” 4097-98). Since the Notice of Appeal was not filed until October 31, 2022 (“R” 4127-4131), the appeal of this denial was untimely.

Procedurally, the Motion to Disqualify was substantively defective as the specific factual allegations, and the cumulative basis of those allegations, failed to meet its burden of establishing that a reasonably prudent party would be in fear of not receiving a fair trial. *Lowman v. Racetrac Petroleum, Inc.*, 220 So. 3d 1282, 1284 (Fla. 1st DCA 2017)("Under the applicable standard, a motion to disqualify based on prejudice or bias is legally sufficient if the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.")(citations omitted).

To support its position for disqualification, the Motion merely suggests that the trial court failed to act within the scope of its proper authority to "be faithful to the law and maintain professional competence in it." Canon 3(B)(2) of the *Code of Judicial Conduct*. By asking the lawyers trying the case to explain why Heikka was bringing the claim for bad faith instead of Hernandez, the trial court was merely attempting to help the jury understand the legal issue it would be deciding. The judge clearly asked both lawyers to provide an explanation which cannot support a claim for judicial bias or

prejudice.

Safeco also cites this Court to questions asked of Daniel Doucette, Safeco's expert, during his trial testimony. Although Safeco fails to recite the question, it is clear that these questions fail to reflect bias on the part of the trial judge. In the first, the trial court inquired regarding the purpose of placing a tax ID number on a insurance checks. (Tr. 760-61, lines 25-24). The questions appear benign, and if any inference could be gleaned, it would be that a settlement had been assumed by Safeco because a check for \$25,000 was sent with Cooper's tax ID on it, which is a point they were trying to make.

At the conclusion of the expert's testimony, the trial court asked the expert a some questions regarding his testimony that it is a common saying in the insurance industry that, if the adjuster did not put something in the adjuster notes, it did not happen. The questions were benign and sought to have the expert elaborate on the source for the "common saying. Safeco's reliance on *Gonzalez v. Mercy Hosp. Inc.*, 738 So. 2d 955 (Fla. 3d DCA 1999) is misplaced. In that case, and in the presence of the jury, the trial court participated

in cross-examination, offered comments on what the evidence had shown, and the court objected to questions of the plaintiff's lawyer when none had been offered by the defense counsel. *Id.*, at 956. The trial court in this case merely sought to clarify testimony regarding non-substantive issues from witness called by both parties. The trial court is permitted to interrogate witnesses when required by the interests of justice. Fla. Stat. § 90.615(2)(2020). *See also Jones v. State*, 54 So. 3d 503, 505 (Fla. 1st DCA 2010) (“While it is permissible for a trial judge to ask questions deemed necessary to clear up uncertainties the trial judge should not depart from a position of neutrality.”)(citations omitted). Here, the trial court's limited involvement did not rise to the level of departing from a position of neutrality and was exceedingly helpful in providing insight into a case with complex legal and factual disputes. The trial court in this case, with vast experience as an insurance defense and plaintiff attorney provided a balanced approach to the orderly presentation of evidence adroitly navigating the prior litigation regarding Safeco's efforts to compel settlement as is discussed above.

CONCLUSION

For the foregoing reasons this Honorable Court should affirm the trial court's granting of the Directed Verdict and Final Judgment in favor of Appellee, and if so affirmed, should grant the Appellee's Motion for Attorney Fees.

Respectfully submitted this 26th day of October, 2023.

By /s/ Joseph R. Dawson
JOSEPH R. DAWSON, ESQUIRE

LAW OFFICES OF JOSEPH R. DAWSON, P.A.
500 East Las Olas Boulevard; Suite 2801
Fort Lauderdale, Florida 33301-3151
Telephone: (954) 467-2100
Email: Pleadings@Dawsonlawfirm.com
Florida Bar #347450

JRD/mc

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), Fla. R. App. P., the undersigned hereby attests that this attached brief for the Appellee is printed using proportionally spaced 14 point Bookman Old Style typeface. This brief also complies with the word count limit requirements of Fla. R. App. P. 9.210(a)(2)(B), excluding the parts exempted by Fla. R. App. P. 9.045(e).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via E-File and copies disbursed by electronic mail to those person listed herein at the e-mail address(es) listed, on this 26th day of October, 2023.

By /s/ Joseph R. Dawson
JOSEPH R. DAWSON, ESQUIRE

LAW OFFICES OF JOSEPH R. DAWSON, P.A.
500 East Las Olas Boulevard; Suite 2801
Fort Lauderdale, Florida 33301
Telephone: (954) 467-2100
Florida Bar #347450
Email: Pleadings@Dawsonlawfirm.com

SERVICE LIST

Copies to:

Mihaela Cabulea, Esquire

Gary Guzzi, Esquire

Kenneth Cooper, Esquire