CASE NO. 16-14225

In the

UNITED STATES COURT OF APPEALS

For the

ELEVENTH CIRCUIT

JESUS CAMACHO, surviving spouse of Stacey Camacho,
and LeJEAN NICHOLS, as Administratrix of
the Estate of Stacey Camacho,

Plaintiffs/Appellees

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant/Appellant.

Motion for Leave to File *Amicus Curiae* Brief by The Georgia Defense Lawyers Association in Support of Defendant/Appellant Nationwide Mutual Insurance Company

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, the undersigned counsel of record for amicus curiae the Georgia Defense Lawyers Association hereby identifies the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular appeal, including subsidiaries, conglomerates, affiliates and parent corporations that own 10% of more of the party's stock, and other identifiable legal entities related to a party:

1. Alston & Bird, LLP (counsel for Defendant-Appellant)
2. Atkinson, David M. (counsel for Amicus Curiae)
3. Bryan Cave LLP (counsel for Amicus Curiae)
4. Bryant, R. Tyler (counsel for Defendant-Appellant)
5. Camacho, Jesus (Plaintiff-Appellee)
6. Cathey, Brandon (counsel for Plaintiffs-Appellees)
7. Custer, William V. (counsel for Amicus Curiae)
8. Darroch, Robert Malcolm (counsel for Defendant-Appellant)
9. Diamond, Jeffrey D. (counsel for Amicus Curiae)
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11. Georgia Chamber of Commerce (Amicus Curiae)
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14. Glickauf, Stephanie F. (counsel for Defendant-Appellant)
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25. Meader, Garret W. (counsel for Amicus Curiae)
26. Millender, Shukara Ingram (counsel for Defendant-Appellant)
27. Muller, Peter D. (counsel for Amicus Curiae)

28. Nationwide Mutual Insurance Company (Defendant-Appellant)
29. Nichols, LeJean (Plaintiff-Appellee)
30. Park, Seung Chun (Insured/Assignor of the Bad Faith Failure-to-Settle Claim)
31. Powers, Tiffany L. (counsel for Defendant-Appellant)
32. Sadd, James N. (counsel for Plaintiffs-Appellees)
33. Seymour, Adwoa Ghartey-Tagoe (counsel for Amicus Curiae)
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38. Tompkins, Jeffrey Emery (counsel for Defendant-Appellant)
39. Totenberg, Hon. Amy (United States District Judge)
40. Tuck, Andrew J. (counsel for Defendant-Appellant)
41. Turkheimer & Hadden, LLC (counsel for Amicus Curiae)
42. Tyrone Law Firm, P.C. (counsel for Plaintiffs-Appellees)
43. Tyrone, Nelson O, III (counsel for Plaintiffs-Appellees)
44. United Policyholders (Amicus Curiae)

45. Walker, Caleb F. (counsel for Amicus Curiae)

The Georgia Defense Lawyers Association is a non-profit corporation. It has no parent corporation, and no publicly-held corporation owns 10% of more of its stock.

The undersigned further certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person -- other than the amicus curiae, its members or its counsel – contributed money that was intended to fund preparing or submitting this brief.

s/ David M. Atkinson

David M. Atkinson

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE GEORGIA DEFENSE LAWYERS ASSOCIATION

Pursuant to Federal Rules of Appellate Procedure 26(b), 27, and 29(a) and Eleventh Circuit Rules 26-1, 27-1, and 29-1, The Georgia Defense Lawyers Association ("GDLA"), by and through its attorneys, respectfully requests leave of this Honorable Court to act as *amicus curiae* in this matter, and to file its brief as *amicus curiae* in support of Defendant-Appellant Nationwide Mutual Insurance Company. A copy of the proposed *amicus* brief is attached hereto.

As set forth in the attached proposed *amicus* brief, the GDLA respectfully submits that there is substantial doubt under Georgia law regarding the proper standard for a liability insurer's extra-contractual liability based on a its failure to settle a tort claim against its insured. Specifically, the District Court imposed liability on Appellant based on the tort of "negligent failure to settle," a cause of action which has never been explicitly adopted or recognized in Georgia. As discussed in more detail below, Georgia law remains uncertain as to whether an insurer may be held liable for the tort of "negligent failure to settle," as opposed to "bad faith" failure to settle. To resolve this uncertainty, this Court should certify a question to the Supreme Court of Georgia, asking the Court to clarify whether a

liability insurer may be held liable for failure to settle based on mere negligence, as opposed to bad faith.

I. THE GDLA'S INTEREST

The GDLA is an association of more than 860 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately.

In 1991, this Court recognized that Georgia law was unclear as to whether an insurance company could be liable for extra-contractual damages based on a negligent failure to settle tort claims against an insured. See Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536 (11th Cir. 1991). Indeed, in his dissenting opinion, Judge Clark began by noting that "[t]his case poses a question unanswered

by Georgia insurance law and should be certified to the Georgia Supreme Court." Id. at 1559 (Clark, J., dissenting). He noted that the majority opinion recognized that "'Georgia law is ambiguous… on whether an insured may recover for the insurer's negligent, as well as bad faith, failure to settle[,]'" but the majority opinion then "assume[d]… that a negligent as well as bad faith, failure to settle is actionable in Georgia.'" Id. Judge Clark concluded his dissenting opinion with the following admonition:

> When it faces the ultimate question posed by St. Paul's bad faith and negligent handling of the settlement of this case, the majority says: 'We have doubts, however, that such a rule of law is justified from a policy standpoint.' That flies in the face of the certification procedures which have been practiced over the past twenty years between our court and the Georgia Supreme Court. We have regularly honored the principle of comity by asking that court to decide cases presented to us involving yet undecided Georgia legal questions that we deem to involve policy questions which Georgia's highest court is best equipped to answer. ….
>
> I respectfully dissent from the majority's holdings and its failure to certify this case to the Georgia Supreme Court.

Id. at 1563 (Clark, J., dissenting).

Since that time, the Supreme Court of Georgia has decided cases involving claims against insurance companies for failing to settle tort claims against insureds. However, none of the cases decided since the Delancy Court expressed uncertainty regarding the proper standard for an insurer's extra-contractual liability addressed

that ambiguity in Georgia law, nor have the cases defined the appropriate standard to be applied. Rather, the cases have continued an unfortunate practice in the Georgia appellate cases in this area of the law of reciting dicta from earlier cases. The District Court's decision in this case continued this practice, citing dicta and non-binding decisions of the Georgia Court of Appeals to equate "bad faith" conduct with mere negligence. However, there are significant differences between a "bad faith" standard and simple negligence.

There is no question that insurance companies can be liable under Georgia law for extra-contractual damages for bad faith conduct, including bad faith failure to settle tort claims against insureds. But, the Georgia Supreme Court has never explicitly recognized a tort of "negligent failure to settle" under Georgia law. The GDLA does not seek to eliminate insurance company liability for extra-contractual damages for bad faith conduct, including bad faith failure to settle tort claims against insureds. Instead, the GDLA seeks clarification regarding the appropriate standard for extra-contractual liability against insurance companies so that individuals and businesses can shape their conduct accordingly.

II. THE GDLA REQUESTS LEAVE TO SUBMIT ITS AMICUS BRIEF OUTSIDE THE TIME PRESCRIBED BY FED. R. APP. P. 29(e).

The GDLA recognizes that it is submitting this brief outside the time prescribed by Rule 29(e) of the Federal Rules of Appellate Procedure. However,

the Rule states that a court may grant leave for a later filing. Fed. R. App. P. 29(e). The GDLA respectfully requests leave of the Court to submit its *amicus* brief at this time.

While the GDLA seeks leave to file its *amicus* brief in support of the appeal filed by Appellant Nationwide Mutual Insurance Company, the GDLA does not urge this Court to reach a particular outcome in the case. Rather, it is the GDLA's position, as set forth in its proposed *amicus* brief, that Georgia law remains unclear as to whether an insurance company may be held liable for the tort of "negligent failure to settle." While other *amici* have submitted briefs on this issue, including recent filings by the Georgia Trial Lawyers Association (GTLA) and the United Policyholders, the GDLA respectfully submits that it will be beneficial for the Court to have the additional perspective set forth in the GDLA's proposed brief, which includes a discussion of the history of Georgia case law in this area and the misapplication of prior decisions that led to the erroneous holding of the District Court in this case. Because Georgia law remains unsettled, the GDLA, as *amicus*, urges the Court to certify an unsettled question of Georgia law to the Supreme Court of Georgia.

CONCLUSION

For the foregoing reasons, the Georgia Defense Lawyers Association respectfully requests that its motion be granted and that the GDLA's brief attached

hereto as Exhibit "A" be accepted and considered by the Court as it determines this appeal.

Respectfully submitted this 4th day of May, 2017.

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CERTIFICATE OF COMPLIANCE

1, Type-Volume

This document complies with the word limit of FRAP 29(a)(5) and 32(a)(&)(B) because excluding the parts of the document exempted by FRAP 32(f) this document contains 1176 words.

2. Typeface and Type-Style

This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It was prepared using Times New Roman 14 point proportional type.

This 4th day of May, 2017.

/s/ David M. Atkinson
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CERTIFICATE OF SERVICE

Undersigned counsel for the Georgia Defense Lawyers Association certifies that he has this date filed the foregoing Motion for Leave to File *Amicus Curiae* Brief using the ECF filing system which will automatically send e-mail notification to all attorneys of record.

This 4th day of May, 2017.

/s/ David M. Atkinson
David M. Atkinson

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UNITED STATES COURT OF APPEALS

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Defendant/Appellant.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT NATIONWIDE MUTUAL INSURANCE COMPANY

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30. Park, Seung Chun (Insured/Assignor of the Bad Faith Failure-to-Settle Claim)

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35. Swift, Currie, McGhee & Hiers, LLC (counsel for Amicus Curiae)

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39. Totenberg, Hon. Amy (United States District Judge)

40. Tuck, Andrew J. (counsel for Defendant-Appellant)

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45. Walker, Caleb F. (counsel for Amicus Curiae)

The Georgia Defense Lawyers Association is a non-profit corporation. It has no parent corporation, and no publicly-held corporation owns 10% of more of its stock.

The undersigned further certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person -- other than the amicus curiae, its members or its counsel – contributed money that was intended to fund preparing or submitting this brief.

s/ David M. Atkinson
_____
David M. Atkinson

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Civil Procedure and Eleventh Circuit Rule 29-2, counsel for *amicus curiae* the Georgia Defense Lawyers Association ("GDLA") certifies the following:

(A) A party's counsel did not author this brief in whole or in part;

(B) A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief; and

(C) A person – other than the *Amicus Curiae*, its members, or its counsel – did not contribute money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUES

Whether Georgia law recognizes a tort claim against a liability insurance company for negligent, as opposed to bad faith, failure to settle a claim against its insured.

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Georgia Defense Lawyers Association ("GDLA") is an association of more than 860 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately. Furthermore, all defendants in civil cases in Georgia -- even insurance companies -- must be treated fairly and subjected to potential liability only where Georgia law allows it.

In the absence of clear guidance from the Supreme Court of Georgia, Georgia law remains substantially uncertain regarding the basis for an insurance company's liability if it fails to settle a tort claim against its insured. Specifically, the Supreme Court of Georgia has never explicitly recognized the tort of

"negligent failure to settle" or defined the parameters of such a claim. Because the GDLA's members regularly represent defendants and insurance companies in civil litigation (which regularly receive, respond to, or are otherwise impacted by settlement demands), the GDLA has a vested interest in having these questions resolved. As such, the GDLA respectfully submits that the continued uncertainty under Georgia law regarding the basis for an insurance company's potential liability if it fails to settle a claim against its insured should be resolved by way of certifying questions presented by this case to the Supreme Court of Georgia.

II. SUMMARY OF THE ARGUMENT

There is no question that insurance companies can be liable under Georgia law for bad-faith failure to settle tort claims against their insureds. See, e.g., Southern Gen Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992). However, substantial disagreement and uncertainty surrounding the standard for assigning such liability remains, despite this Court's recognition of this potential ambiguity over 25 years ago. This case demonstrates that disagreement and uncertainty.

As discussed below, it remains unclear whether an insurance company may be held liable for a negligent, as opposed to bad faith, failure to settle because Georgia courts have never definitively decided this issue or explicitly recognized a tort of "negligent failure to settle." Instead, case law has continued an unfortunate practice of reciting *dicta* from earlier cases regarding a negligence standard.

Because this uncertainty continues, this Court should certify the question of whether mere "negligent failure to settle" is sufficient to impose extra-contractual liability on insurance companies to the Supreme Court of Georgia.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard for Certifying Questions to Supreme Court of Georgia

This Court has repeatedly recognized that "'where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary Erie guesses and to offer the state court the opportunity to interpret or change existing law.'" Royal Capital Dev., LLC v. Md. Cas. Co., 659 F.3d 1050, 1054 (11th Cir. 2011) (quoting Colonial Props., Inc. v. Vogue Cleaners, Inc., 77 F.3d 384, 387 (11th Cir. 1996)). Likewise, this Court has explained that when a "case involves [] unsettled question[s] of Georgia law, [it] would rather certify the question … to the Georgia Supreme Court than speculate as to how the Georgia courts would resolve the issue." Id. See also Piedmont Office Realty Trust v. XL Specialty Ins. Co., 769 F.3d 1291, 1295 (11th Cir. 2014) ("We accept that 'substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court.' …. Pursuant to O.C.G.A. § 15-2-9, we may certify an unresolved question of state law to the Supreme Court of Georgia if the question is determinative of the case and no clear controlling precedent from the

Supreme Court of Georgia exists.") (internal citation omitted). Notably, this Court has routinely certified questions to the Supreme Court of Georgia in cases involving insurance law when a case presents a question that is not "squarely" resolved by Georgia case law. HDI-Gerling Am. Ins. Co. v. Morrison Homes, Inc., 701 F.3d 662, 663 (11th Cir. 2013) (certifying two questions involving interpretation of CGL insurance policy because "single Supreme Court of Georgia case touching upon the matter fails squarely to answer it"). See also Grange Mut. Cas. Co. v. Woodard, 826 F.3d 1289 (11th Cir. 2016) (certifying four questions involving interpretation of statute regulating offers of settlement in automobile accident cases); Piedmont, 769 F.3d at 1295 (certifying three questions involving consent to settle provision in insurance policy).

Here, certification is appropriate because "there are insufficient sources of state law to allow a principled rather than conjectural conclusion," regarding the appropriate standard of liability under Georgia regarding an insurer's liability for failing to settle a tort claim against an insured. Woodard, 826 F.3d at 1300. Specifically, the law is unsettled regarding whether Georgia law recognizes a cause of action for mere negligent, as opposed to bad faith, failure to settle. The uncertainty has persisted despite this Court's recognition of the issue over 25 years ago. See Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1547, 1551-53 (11th Cir. 1991); Butler v. First Acceptance Ins. Co., 652 F. Supp. 2d 1264,

1273-75 (N.D. Ga. 2009); Domercant v. State Farm Fire & Cas. Co., No. 1-11-cv-02655-JOF, 2013 U.S. Dist. LEXIS 191490, *14 (N.D. Ga. Mar. 5, 2013). Because a definitive ruling on the correct standard for holding an insurance company liable for failing to settle claims against insureds "will have far-reaching consequences," Woodard, 826 F.3d at 1300, "an authoritative statement from [the Georgia] [S]upreme [C]ourt is much better than a conjectural statement from this one." Royal Capital, 659 F.3d at 1055.

B. The Supreme Court of Georgia Should Determine the Appropriate Standard for Insurer Liability for Failing to Settle Tort Claims

In 1991, this Court recognized there was substantial uncertainty in Georgia law regarding whether mere negligence, as opposed to bad faith, is sufficient to hold an insurance company liable for failing to settle tort claims against its insured. Delancy, 947 F.3d at 1547. After noting that Georgia law was unclear as to various issues surrounding liability for failure to settle, the Court expressed doubt about whether some of the issues and proposed rules were justified from a policy standpoint. Id. at 1552-53. The Delancy Court ultimately affirmed summary judgment in favor of the defendant insurer because there was no evidence the case could have been settled within policy limits, and left the question unresolved. Id. at 1557-59.

In a dissenting opinion, Judge Clark began by noting that "[t]his case poses a question unanswered by Georgia insurance law and should be certified to the Georgia Supreme Court." 947 F.2d at 1559 (Clark, J., dissenting). Judge Clark further noted that the majority opinion recognized that "'Georgia law is ambiguous… on whether an insured may recover for the insurer's negligent, as well as bad faith, failure to settle[,]'" but the majority opinion then "assume[d]… that a negligent as well as bad faith, failure to settle is actionable in Georgia.'" Id. For that reason, Judge Clark dissented from the majority's holdings and its failure to certify the case to the Georgia Supreme Court. Id. at 1563.

This question still has not been definitively addressed by the Georgia Supreme Court, nor has Georgia ever explicitly recognized a tort claim for "negligent failure to settle." While there are certainly public policy reasons to encourage liability insurers to act reasonably and promptly settle meritorious claims, something more than simply negligence should be required before an insurer will be held liable in excess of the contractual policy limits. It is unreasonable to impose liability when an insurer rejects a claim due to legitimate questions regarding liability or the claimant's damages.[1] In the majority of

[1] For example, Holt, involved a situation where there was no question regarding liability and the claimant's damages clearly exceeded policy limits. 262 Ga. at 269, 416 S.E.2d at 276. A subsequent decision by the Georgia Court of Appeals questioned whether Holt would even apply when there was a lack of

American jurisdictions, any liability for failure to settle must be predicated on the insurer's bad faith, while a minority of jurisdictions permit such liability on the basis of mere negligence. See 1-2 New Appleman Insurance Bad Faith Litigation, (2d ed.) § 2.03 (2014). Although Georgia Court of Appeals precedent suggests that a finding of bad faith is required, the Supreme Court of Georgia has never clearly announced the rule in Georgia. Because the question raises significant public policy concerns under Georgia law, this Court should follow its historical practice of giving the Supreme Court of Georgia the opportunity to clarify the law of Georgia.

1. Historical Summary of "Negligent" Failure to Settle

It appears that the negligence standard crept into Georgia appellate decisions based on a simple repetition of dicta, without any real analysis. Indeed, when one considers the origin of the term negligence in the context of Georgia insurance law, it is clear that the Georgia appellate courts have never actually held that mere negligence is sufficient to hold an insurance company liable for an excess verdict against its insured in a tort suit.

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documentation to show that special damages exceeded the policy limits. See S. Gen. Ins. Co. v. Wellstar Health Sys., Inc., 315 Ga. App. 26, 31, 726 S.E.2d 488, 493 (2012).

Francis v. Newton

As the late-Judge Forrester explained in his historical overview of Georgia law regarding tortious failure to settle, the term "negligence" first appeared in the 1947 decision by the court of appeals in Francis v. Newton, 75 Ga. App. 341, 43 S.E.2d 282 (1947). See Butler, 652 F. Supp. 2d at 1273-74. Francis involved the dismissal of a garnishment action filed by the tort claimant against the insured's liability insurer based on the insurer having paid the limits of its policy to the tort claimant following entry of the tort judgment. 75 Ga. App. at 345, 43 S.E.2d at 285. While the court noted that there was no contention by the insured that the insurer was negligent or failed to exercise good faith in handling the plaintiff's claims against the insured, id., 43 S.E.2d at 285, the court began its opinion with the following statement:

> While an automobile liability insurance company may be held liable for damages to its insured for failing to adjust or compromise a claim covered by its policy of insurance, where the insurer is guilty of negligence or of fraud or bad faith in failing to adjust or compromise the claim to the injury of the insured (Cavanaugh Bros. v. General Accident Fire & Life Assurance Corp., 79 N.H. 186, 106 Atl. 604; Douglas v. U.S. Fidelity & Guaranty Co., 81 N.H. 371, 127 Atl. 708, 37 A.L.R. 1477; Tiger River Pine Co. v. Maryland Casualty Co., 163 S.C. 229, 161 S.E. 491; Tiger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346; J. Spang Banking Co. v. Trinity Universal Insurance Co. (Ohio App.) 68 N.E.2d, 122; American Mutual Liability Insurance Co. v. Cooper, 61 Fed. 2d, 446; Maryland Casualty Co. v. Elmira Coal

> Co., 69 Fed. 2d, 616); it does not follow that a person injured by the insured and who is not a party to the insurance contract may complain of the negligence or bad faith of the insurer towards its policyholder in failing to adjust or compromise a claim against such policyholder, for the duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship between the insurer and the insured created by the contract or policy of insurance, and there is no fiduciary relationship or privity of contract between the insurer and a person injured by one of its policyholders.

Id. at 343-44, 43 S.E.2d at 284. Because there was no contention by the insured in Francis that the insurer had been negligent or failed to exercise good faith, and because the case simply involved the dismissal of a garnishment action due to the insurer already paying its policy limits, the court's recitation of a negligence standard – based solely on foreign case law – was not the court's holding and was simply *dicta*. See, e.g., Corrugated Replacements Inc. v. Johnson, 340 Ga. App. 364, 370, __ S.E.2d __ (2017) ("It is axiomatic that 'the full text of judicial decisions is not law. Only the holdings of judicial decisions are law. And a decision's holding is limited to the factual context of the case being decided and the issues that context necessarily raises. Language that sounds like a holding – but actually exceeds the scope of the case's factual context – is not a holding no matter how much it sounds like one.'").

Cotton States Mut. Ins. Co. v. Fields

Fifteen years later, the court of appeals noted that Georgia law was in accord with the

> great number of jurisdictions in this country that… the *capricious* refusal of a liability insurance company to entertain an offer of compromise within the policy limits made on behalf of the injured party… constitutes an act of bad faith on the part of the insurer and subjects it to a suit for damages by the insured.

Cotton States Mut. Ins. Co. v. Fields, 106 Ga. App. 740, 741, 128 S.E.2d 358, 359 (1962) (emphasis added). Because the court could have used the word "negligent," but did not do so, it is reasonable to conclude that the use of the word "capricious" was purposeful and significant.

Cotton States Mut. Ins. Co. v. Phillips

Two years later, the court of appeals reiterated that "bad faith [i]s required to subject the insurance company to liability [for bad faith failure to settle]." Cotton States Mut. Ins. Co. v. Phillips, 110 Ga. App. 581, 584, 139 S.E.2d 412, 415 (1964). In Phillips, the court held that the trial court did not err in giving a jury charge that the insurance company is charged with "the duty to exercise ordinary care in investigating a case in the determination of whether to defend it or settle it." Id., 139 S.E.2d at 415. While the court concluded that the charge stated a correct principle of law, it explained that the charge "did not by itself negative the

proposition that *bad faith was required to subject the insurance company to liability*." Id., 139 S.E.2d at 415 (emphasis added). The court's explanation demonstrates that, while an insurer may have a duty of ordinary care, liability for failing to settle requires "bad faith." See Butler, 652 F. Supp. 2d at 1274 (noting that Phillips held that "bad faith, not merely negligence, must be proved if the insurer is to be held liable for damages over policy limits for refusing to settle").

USF&G v. Evans

Three years later, the court of appeals – in a five to four decision – discussed the appropriate standard for an insurer's liability for failing to settle in United States Fidelity & Guaranty Co. v. Evans, 116 Ga. App. 93, 156 S.E.2d 809 (1967). In Evans, the insured sued his insurer after a jury returned a verdict in excess of the policy limits, asserting that the insurer's refusal to accept two different settlement offers was capricious and in bad faith. Following a jury verdict in favor of the insured, the insurer appealed.

The court of appeals began its analysis by determining that the insured's claim sounded in contract rather than in tort, which led to the question: "[w]hat then is the duty?" 116 Ga. App. at 94, 156 S.E.2d at 811. According to the court,

> Many jurisdictions "have coupled in their discussions the terms 'bad faith' and 'negligence,' seeming to use them as disjunctive or alternative tests. (See Francis v. Newton, 75 Ga. App. 341 (43 SE2d 282)). It is partly on this account – also partly because the same states will

> occasionally refer to one test and upon other occasions to the other – that the conclusion must be drawn that mere terminology means little.

Id., 156 S.E.2d at 811. The court then explained, "if the insurer refuses to settle a claim because it believes that the insured is not liable, it is nevertheless answerable for such refusal if its belief was *arbitrary or capricious*." Id. (citing 7A Appleman, Insurance Law and Practice 553, § 4711) (other citations omitted) (emphasis added). The court adopted the "*predominant majority rule* [] that the insurer must accord the interest of its insured the same faithful consideration it gives its own interest." Id. at 96-97, 156 S.E.2d at 812 (emphasis in original). The court acknowledged that the "predominant majority rule" that it adopted was not simple to apply, but explained that the rule "states the duty owed by any prudent insurer to refrain from taking an unreasonable risk on behalf of its insured, e.g., where the chances of unfavorable results for the insured on appeal are out of proportion to the chances of favorable results." Id. at 97, 156 S.E.2d at 812.

Based on the adopted rule and the facts of the underlying tort case, the court concluded that it could not hold as a matter of law that the evidence demanded "a finding that the insurer gave equal consideration to the interest of the insured." Id. at 97, 156 S.E.2d at 812-13 (citation omitted).

As the four dissenting judge in Evans emphasized, the case was originally brought in two counts, one asserting negligence in failing to settle within the policy

limits, and the other asserting bad faith in failing to settle; however, the negligence claim was voluntarily dismissed, and, therefore, the court had no occasion to deal with that theory. Id. at 98 n.1, 156 S.E.2d at 813 n.1 (Eberhardt, J. dissenting). And in affirming the court of appeals' decision, the Supreme Court of Georgia concluded that the "finding that the defendant acted in *bad faith* was authorized, and the Court of Appeals did not err in affirming the judgment of the trial court for the plaintiff." U.S. Fid. & Guar. Co. v. Evans, 223 Ga. 789, 789, 158 S.E.2d 243, 244 (1967) (emphasis added). Thus, notwithstanding the discussion of negligence by the Georgia Court of Appeals, Evans did *not* adopt a negligence standard.

State Farm Mut. Auto. Ins. Co. v. Smoot

Shortly thereafter, the United States Court of Appeals for the former Fifth Circuit rejected an argument that an insurance company's alleged negligence in failing to settle should not have been submitted to the jury. See State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967). While the court acknowledged that the Georgia Court of Appeals in Phillips, supra, "held that bad faith, not merely negligence, must be proved if the insurer is to be held liable for damages over the policy limits for refusing to settle," the court concluded that "any doubt about this issue was settled by the Georgia Court of Appeals … decision in []Evans…." Id. at 336-37. However, as noted above, only the bad faith claim was at issue in Evans. 116 Ga. App. at 98 n.1, 156 S.E.2d at 813 n.1 (Eberhardt, J.,

dissenting). For that reason, any discussion of negligence in Evans was purely *dicta*. E.g., Corrugated Replacements, 340 Ga. App. at 370, __ S.E.2d __.

Continued discussion of "bad faith"

Over the next several years, Georgia courts repeatedly used the term "bad faith" in discussing an insurer's liability for failing to settle within policy limits, and routinely framed the issue in terms of whether the insurer gave "equal consideration" to the insured's interests. See, e.g., Great Am. Ins. Co. v. Exum, 123 Ga. App. 515, 518-19, 181 S.E.2d 704, 707-08 (1971); Shaw v. Caldwell, 229 Ga. 87, 91, 189 S.E.2d 684, 687 (1972). Notably, in Jones v. Southern Home Insurance Co., the court of appeals again noted that "as to an insured the test is that 'the insurer must accord the interest of the insured the same faithful consideration it gives its own interest' in determining whether to effect a settlement within policy limits." 135 Ga. App. 385, 389, 217 S.E.2d 620, 623 (1975) (citing Evans, supra and Shaw, supra). The court reiterated that "[i]t is not the mere refusal to settle, but the refusal *in bad faith* which subjects the insurer to a damage action." Id., 217 S.E.2d at 623 (emphasis in original). Interestingly, Judge Evans concurred specially in the decision in Jones, explaining that he would "go a step further than does the majority opinion by asserting that the insurance company is liable not only for *bad faith* in refusing to settle or enter in good faith into negotiations for

settlement, but it is also liable for *negligence* in such failure." Id., at 390, 217 S.E.2d at 624 (Evans, J., concurring specially) (emphases in original).

If Georgia law already recognized that an insurance company could be held liable for failing to settle based on mere negligence, as opposed to bad faith, there would have been no reason for Judge Evans' concurrence in Jones suggesting that the court should have gone "a step further."

GEICO v. Gingold

Then, in 1982, the Supreme Court of Georgia issued its decision in Government Employees Insurance Co. v. Gingold, 249 Ga. 156, 288 S.E.2d 557 (1982), which involved a claim against an insurer that had insisted on a release that would protect the insured from personal liability in return for paying policy limits. Reversing the court of appeals' decision, the Supreme Court concluded that the insurer was entitled to summary judgment on two grounds. First, the court concluded that, because the applicable insurance policy required the insured's consent to any settlement and the insured could not be located, no settlement was possible and the insurer could not be liable. Id. at 157-58, 288 S.E.2d at 558. The court then reasoned that "[t]here [wa]s a second and equally compelling reason why summary judgment in favor of [the insurer] [wa]s appropriate, regardless of whether settlement could have been effected without the consent of the insured." Id. at 158, 288 S.E.2d at 558. On this second ground, the court explained,

> "It is no longer open to question in this State that the claim of an insured under an automobile liability policy for damages on account of the bad faith tortious refusal of the insurer to settle a liability claim against him within the policy limits resulting in damage to him in the form of a judgment in excess of the policy limits being returned against him is a legitimate charge against the insurer upon which recovery may be had by the insured." Shaw v. Caldwell, 229 Ga. 87 91 (189 SE2d 684) (1972). It has also been held that "the insurer must accord the interest of its insured the same faithful consideration it gives its own interests. …." U.S. Fidelity & Co. v. Evans, 116 Ga. App. 93, 96-97 (156 SE2d 809) (1967). No issue of bad faith exists under the facts of this case.

Id., 288 S.E.2d at 558-59.

Notably, the Supreme Court went on to explain that, "even assuming, as respondent contends, that the law imposes a duty of 'due care' on the insurer with respect to the settlement of claims against its insured," the insurer acted reasonably under the circumstances. Gingold, 249 Ga. at 158-59, 288 S.E.2d at 559.

If prior cases had adopted a negligence standard, there would have been no reason for the Supreme Court to state, "even assuming…that the law imposes a duty of 'due care' on the insurer with respect to the settlement of claims against its insured." Rather, the Supreme Court would have referenced a more lenient "due care" or "negligence" standard imposed on insurers with respect to the settlement of claims. But the Supreme Court did not.

McCall v. Allstate Ins. Co.

Two years after Gingold, the Supreme Court of Georgia issued its opinion in McCall v. Allstate Insurance Co., 251 Ga. 869, 310 S.E.2d 513 (1984); a case that significantly contributed to the current confusion regarding the proper standard for an insurer's extra-contractual liability. In McCall, the court's opinion began as follows:

> This certiorari involves the rights of an insured injured by an uninsured motorist and the obligations of her insurance company. The issue in this case, and thus the question on which certiorari was granted, is "Whether, under an uninsured motorist policy provision, an insurer may be liable for recovery in excess of the policy limits or, alternatively, for bad faith refusal to pay a claim, where prior to trial the insured offered to settle for less than the policy limits, the insurer refused the offer and the jury returned a verdict in an amount well in excess of the policy limits?"

251 Ga. at 869-70, 310 S.E.2d at 514.

The Supreme Court's opening paragraph is significant, as it sets the factual context and issues raised by the case. Under black letter Georgia law, that factual context and the issues raised are what give a court's decision legal import. In other words, language that might sound like a holding, but is beyond the scope of the factual context and issues raised in a case are not a case's holding and, therefore, not the law, no matter how much the language might sound like a holding. See, e.g., Corrugated Replacements, 340 Ga. App. at 370, __ S.E.2d __. Thus, anything in McCall that exceeds the scope of whether an insurer under an uninsured

motorist policy may be liable in excess of the policy limits is not the court's holding and is not Georgia law. See, e.g., Metro. Prop. & Cas. Ins. Co. v. Crump, 237 Ga. App. 96, 98-99, 513 S.E.2d 33, 35 (1999) ("Statement and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.").

In McCall, the Supreme Court held that the uninsured motorist insurer could not be liable for amounts in excess of the policy limits based on a refusal to settle its insured's claim within policy limits. 251 Ga. at 870, 310 S.E.2d at 514. The court first considered "the liability, if any, of the insurance company to pay its insured the amount of the judgment recovered against the uninsured motorist over the policy limit." The court began its analysis as follows:

> An automobile liability insurance company may be liable for damages to its insured for failing to adjust or compromise the claim of a person injured by the insured and covered by its liability policy, where the insurer is guilty of negligence or of fraud or bad faith in failing to adjust or compromise the claim to the injury of the insured. See Francis v. Newton, 75 Ga. App. 341, 343 (43 SE2d 282) (1947). Hence, where a person injured by the insured offers to settle for a sum within the policy limits, and the insurer refuses the offer of settlement, the insurer may be liable to the insured to pay the verdict rendered against the insured even though the verdict exceeds the policy limit of liability. The reason for this rule is that the insurer "may not gamble" with the funds of its insured by refusing to settle within the policy

> limits. See U.S. Fidelity & Co. v. Evans, 116 Ga. App. 93, 95 (156 SE2d 809) (1967), quoting 7A Appleman, Insurance Law and Practice 533, § 4711; aff'd on certiorari, 223 Ga. 789 (158 SE2d 243) (1967). See generally annos., 40 ALR2d 168; 63 ALR3d 627; 85 ALR3d 1211.

Id. at 870-71, 310 S.E.2d at 514-15.

The court then distinguished the situation presented in the current case on the ground that here, the insured was making a claim against the insurance company for injuries to the insured under the uninsured motorist provisions of the policy. Thus, according to the court, the insurer, by refusing to settle with the insured, was not gambling with the funds of the insured. Id. at 871, 310 S.E.2d at 515. Thus, the court affirmed the court of appeals decision "insofar as it determined that the insurer was not liable to the insured for the amount of the judgment recovered against the uninsured motorist in excess of the policy limit." Id., 310 S.E.2d at 515. However, McCall did not adopt a negligence standard.

Home Ins. Co. v. North River Ins. Co.

The issue was mentioned again by the court of appeals a few years later in Home Insurance Co. v. North River Insurance Co., 192 Ga. App. 551, 385 S.E.2d 736 (1989), which involved an excess insurer suing a primary insurer for failure to settle. The court noted that while it had adopted the reasoning of a case from Ohio regarding equitable subrogation, it was not "alter[ing] the standard of care

applicable to negligent failure to settle cases in Georgia." Id. at 556, 385 S.E.2d at 741. According to the court,

> While there are Georgia cases which refer to a recovery predicated on a bad faith refusal to settle and make no reference to the availability of a recovery for a negligent refusal to settle, such should not be viewed as inferring that a mere negligent refusal is inadequate to support a recovery. See in this regard []Evans, 116 Ga. App. [at] 94 [], and McCall v. Allstate Ins. Co., 251 Ga. 869, 870 (1) (310 S.E.2d 513), a recent case stating that a recovery may be had where the insurer fails to settle because it is "guilty of negligence or of fraud or bad faith."

Id., 385 S.E.2d at 741. As detailed above, the Home Insurance court's reliance on Evans and McCall as supporting a negligence standard was misplaced, as any discussion of negligence in Evans or McCall was simply *dicta*.

Delancy v. St. Paul

Two years later, this Court issued its decision in Delancy, where it explicitly (and correctly) concluded that Georgia law was unclear "as to whether an insured may recover for the insurer's negligent, as well as bad faith, failure to settle." 947 F.2d at 1547-48. This Court further noted that it was not going to "attempt[ ] to clarify this issue of Georgia law, but [would] assume, as suggested by the 1989 decision in Home Insurance Company, that negligent, as well as bad faith, failure to settle is actionable in Georgia." Id. at 1548.

Due to the uncertainty under Georgia law regarding an insurer's liability for failure to settle, Judge Clark dissented in Delancy because he believed the case should be certified to the Supreme Court of Georgia. 947 F.2d at 1559-63 (Clark, J., dissenting). As Judge Clark aptly explained, "this cases poses a question unanswered by Georgia insurance law and should be certified to the Georgia Supreme Court." Id. at 1559. He also noted,

> When [the majority] faces the ultimate question posed by [the insurer]'s bad faith and negligent handling of the settlement of this case, the majority says: "We have doubts, however, that such a rule of law is justified from a policy standpoint." *That flies in the face of the certification procedures which have been practices over the past twenty years between our court and the Georgia Supreme Court. We have regularly honored the principle of comity by asking that court to decide cases presented to us involving yet undecided Georgia legal questions that we deem to involve policy questions which Georgia's highest court is best equipped to answer*.

Id. at 1563 (emphasis added).

Southern Gen. Ins. Co. v. Holt

One year later, the Supreme Court of Georgia decided Southern General Insurance Co. v. Holt, a case that is often referred to as "the seminal case in Georgia addressing an insurer's liability for failing to settle a claim within policy limits when faced with a time-limited settlement demand." Hulsey v.Travelers Indem. Co. of Am., 460 F. Supp. 2d 1332, 1334 (N.D. Ga. 2006). In Holt, the

court cited McCall for the proposition that an insurance company may be liable for failing to settle a tort claim against its insured "where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim." 262 Ga. at 268, 416 S.E.2d at 276. That quoted language came directly out of McCall. Because the only issue in McCall was whether an insurer under an uninsured motorist policy may be liable in excess of the policy limits, statements or legal propositions in McCall outside of that context are simply dicta and have no legal import. E.g., Crump, 237 Ga. App. at 98-99, 513 S.E.2d at 35.

Further, in 2009, after the Supreme Court of Georgia had again repeated the dicta from McCall in Cotton States Mutual Insurance Co. v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003), the late-Judge Forrester (after conducting a thorough survey of Georgia failure to settle case law) concluded as follows:

> [I]t appears that the unsettled nature of Georgia law in the tort of negligent or bad faith failure to settle persists, despite Judge Tjoflat's efforts at demonstrating the ambiguity in Georgia law in Delancy. The court notes, for example, that Delancy, while cited numerous times by federal courts, has not been addressed by any Georgia state court. No Georgia Court of Appeals cases since Brightman shed any additional light.

Butler, 652 F. Supp. 2d at 1273-75.

Fortner v. Grange Mut. Ins. Co.

Just two months after Butler was decided, the Supreme Court of Georgia issued its decision in Fortner v. Grange Mutual Insurance Co., 286 Ga. 189, 686 S.E.2d 93 (2009)[2], another case involving an insurer's failure to settle. Notably, the words "negligent" and/or "negligence" do not appear anywhere in the decision. Instead, the Supreme Court repeatedly referred to "bad faith" refusal to settle. See id. at 190, 686 S.E.2d at 94.

The issue remained unsettled, and, in 2013, Judge Forrester again noted the substantial uncertainty regarding tort claims for failure to settle:

> Georgia law has not defined precisely the contours of the action for tortious failure to settle. Several courts, including this one, have grappled with the question of whether an insured may recover for an insurer's negligent, as well as bad faith, failure to settle.

Domercant, 2013 U.S. Dist. LEXIS 191490 at *14.

C. The Supreme Court of Georgia Should Decide the Issue

As this historical overview demonstrates, the Supreme Court of Georgia has never explicitly held that a negligence standard applies to impose extra-contractual liability on an insurer for failing to settle tort claims against an insured. Nor has Georgia ever explicitly recognized the tort of "negligent failure to settle." Instead, the term "negligence" and other negligence terminology (e.g., "reasonably

[2] Buter was decided on August 17, 2009, and Fortner was decided on October 19, 2009.

prudent," "ordinarily prudent," etc.) have simply crept their way into Georgia jurisprudence by way of *dicta* and without the Georgia courts truly assessing whether such a standard actually makes sense from a public policy standpoint or is a correct statement of the law in Georgia. And while this Court and District Courts in Georgia have noted the uncertainty in the law, the issue has never been squarely addressed by the Supreme Court of Georgia. Because a determinative issue in this case is whether an insurer may be held liable for a negligent, as opposed to bad faith, failure to settle, and because such a definitive ruling has significant public policy implications and considerations, this Court should follow its prior practice and certify to the Supreme Court of Georgia the following question: whether an insurance company may be held liable for an excess judgment against its insured based on mere negligent, as opposed to bad faith, failure to settle tort claims against an insured.[3] Certifying this question will allow the Georgia Supreme Court to definitively set Georgia law in this area and give guidance to this Court in the instant appeal as well as future cases.

CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that substantial uncertainty remains regarding an insurance company's liability

[3] Or, put another way, whether Georgia law recognizes a tort claim against a liability insurer for "negligent," as opposed to "bad faith," failure to settle.

under Georgia law for failing to settle tort claims against insureds. As such, the GDLA, as *amicus curiae*, respectfully submits that this Court should certify to the Supreme Court of Georgia the question of whether an insurance company may be held liable under Georgia law for its negligent, as opposed to bad faith, failure to settle tort claims.

Respectfully submitted this 4th day of May, 2017.

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This 4th day of May, 2017.

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CERTIFICATE OF SERVICE

Undersigned counsel for the Georgia Defense Lawyers Association certifies that he has this date filed the foregoing *Amicus Curiae Brief of the Georgia Defendant Lawyers Association in Support of Defendant/Appellant Nationwide Mutual Insurance Company* using the ECF filing system which will automatically send e-mail notification to all attorneys of record.

This 4th day of May, 2017.

/s/ David M. Atkinson
David M. Atkinson