DISCUSSION:
FLORIDA GOLF CART OWNERS SHOULD BEWARE OF HUGE POTENTIAL LIABILITY

By Cassandra S. Nelson

Presented to:
Asset Protection Committee Meeting
The Real Property, Probate & Trust Law Section of the Florida Bar
Coral Gables, FL
September 5, 2024

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REAL PROPERTY, PROBATE AND TRUST LAW

by Barry Nelson and Cassandra S. Nelson

Florida Golf Cart Owners Should Beware of Huge Potential Liability

A Miami-Dade County trial court awarded over $50 million in damages in a personal injury lawsuit brought on behalf of a 12-year-old passenger (Bennar) who sustained catastrophic head injuries after he was thrown from a golf cart negligently driven by a 16-year-old (Acuna).[1] The golf cart's owner (Chiong) was Acuna's step-uncle.[2] Chiong authorized Acuna to drive the golf cart, and, on July 4, 2016, Acuna drove Chiong's son and three other children, including Bennar, in the neighborhood where Chiong and Bennar resided.[3] While operating the golf cart, Acuna failed to stop at a stop sign, causing the cart to be struck by an automobile and roll over onto one side, ejecting and injuring everyone in the golf cart.[4] Bennar had the most severe injuries.[5] His parents brought a personal injury lawsuit against Chiong as the person "in possession and control" of the golf cart and Acuna as the driver of the golf cart.[6] The authors assume, but are not certain, that the personal injury lawsuit was brought against Chiong as the person "in possession and control" of the golf cart because it was unknown or unclear whether Chiong was the owner of the golf cart (since golf carts often lack title and registration).

After a bench trial, the court concluded that Chiong was the golf cart owner, owed Bennar and his parents a duty of reasonable care, breached his duty of care, and was negligent in entrusting the golf cart to Acuna, who negligently operated it, causing the crash and resulting injuries to Bennar.[7] The court awarded Bennar $23,051,632 for his past and future economic damages and $23,051,632 for his past and future noneconomic damages, including his pain and suffering, and each of his parents $2 million for loss of consortium, for a grand total of $50,103,264.[8]

Prior to the trial, Acuna entered into an $18 million consent judgment with Bennar's parents.[9] Acuna was covered under her parents' GEICO General Insurance Company liability insurance policy for bodily injury and property damage arising from the use of a "non-owned auto."[10]

GEICO filed a separate declaratory action in the U.S. District Court for the Southern District of Florida seeking a ruling that the insurance policy it issued to Acuna's parents did not cover Acuna's golf cart accident.[11] GEICO contended that it was not required to defend or indemnify Acuna or her parents for the accident because the golf cart did not meet the definition of a "private passenger auto."[12] The district court granted GEICO's motion for summary judgment,[13] and Acuna's parents appealed its decision to the U.S. Court of Appeals for the 11th Circuit.[14] The 11th Circuit determined that the golf cart was covered under the GEICO policy, reversed the district court's summary judgment order, and remanded the case for further proceedings.[15]

This article describes the potential financial exposure under Florida law for golf cart owners when injury is caused either by the golf cart owner's negligent driving or the negligent driving of another authorized person. This article also addresses the need for golf cart owners to carefully review their auto insurance, homeowners insurance, and general liability (aka, excess risk or umbrella) policies to confirm that adequate insurance coverage exists for the operation of their golf carts.

A person with a golf cart-related injury has at least two potential defendants to sue for damages: the golf cart owner and, if different from the owner, the golf cart driver. In all instances, insurance coverage must be determined. For example, if the driver is insured then the question is whether the insured driver's auto or other insurance policy insures the operation of golf carts. If the golf cart driver is a minor or an adult living full time at his or her parents' residence and is listed as an additional insured under the parents' auto insurance policy, then it is critical to determine whether the golf cart driver is insured under his or her own auto or other insurance policy, or the auto or other insurance policy of his or her parents, as was the case with Acuna. Two separate insurers (*i.e.*, the golf cart owner's insurance carrier and the golf cart driver's insurance carrier) may have obligations to defend against the claims filed by injured golf cart passengers.

Liability as Golf Cart Owner

As described above, *Gonzalez v. Chiong*, No. 2017-010063-CA-01 (Fla. 11th Jud. Cir. Sept. 19, 2023), addressed whether a golf cart owner is liable for damages if he or she loans a golf cart and its driver negligently causes injuries. The court's 13-page findings of fact and conclusions of law provided a detailed analysis, includ-

ing the following conclusions of law relevant to this article:

1) "Chiong owed the plaintiffs a duty of reasonable care. [Chiong] breached that duty of care and was negligent in entrusting the golf cart to…Acuna who negligently operated it, causing the crash at issue and the resulting damages."[16]

2) "The Florida Supreme Court has held that a golf cart is a dangerous instrumentality."[17]

3) "Chiong was the legal owner of the golf cart, and…the golf cart was a dangerous instrumentality."[18]

4) "The Dangerous Instrumentality doctrine imposes vicarious liability upon the owner of a motor vehicle who voluntarily entrusts it to an individual whose negligent operation of it causes damage to another."[19]

5) "Acuna was negligent and 100% responsible for causing the subject crash."[20]

6) "[U]nder the dangerous instrumentality doctrine…Chiong is liable and responsible for the negligent operation of the golf cart by…Acuna at the time of the crash and for the damages in this case."[21]

7) "Damages were not disputed or challenged in any way…Bennar's injury left him totally and permanently physically and mentally disabled."[22]

The authors reached out to Paul Jon Layne of Silva & Silva, P.A., attorney for the Bennars, and were advised that the decision was not appealed and the time for appeal has passed.

• *Theories of Liability* — Although the *Chiong* court concluded that Chiong owed the plaintiffs a duty of care and breached that duty when he negligently entrusted the golf cart to his 16-year-old step-niece, whose negligent operation caused the crash and resultant damages, it is important to note that other cases have applied the dangerous instrumentality doctrine and imposed vicarious liability upon the motor vehicle owner who voluntarily, but not negligently, entrusted a motor vehicle to another and the driver injured another person.[23] Accordingly, it appears there are two theories that could create liability exposure for a golf cart owner who lends his or her golf cart to another: 1) negligent entrustment (*e.g.*, the golf cart owner entrusted the golf cart to a minor or someone intoxicated or otherwise incapable of safely operating the golf cart); and 2) Florida's dangerous instrumentality doctrine, which does not require the golf cart owner to be negligent in loaning the golf cart, but which holds the golf cart owner liable for damages caused by the negligent operation by an authorized user.

• *Dangerous Instrumentality Doctrine — Saullo v. Douglas,* 957 So. 2d 80 (Fla. 5th DCA 2007), provides an excellent summary of the application of Florida's dangerous instrumentality doctrine, which is based on common law principles governing master and servant relationships. It stated:

> At common law the master was liable for his or her servant's negligence when the servant was entrusted with and had the custody and control of a dangerous instrumentality at the time of the injury… We generally see the dangerous instrumentality doctrine applied to impose strict vicarious liability on the owner of a motor vehicle who voluntarily entrusts it to a person whose negligent operation causes injury to another.[24]

In *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984), the Florida Supreme Court considered whether a country club's rental of a golf cart to a golfer would subject the country club to the dangerous instrumentality doctrine, in which event the country club could be held vicariously liable for injuries sustained in a golf cart accident. The court concluded:

> A golf cart is clearly a motor vehicle. The legislature has recently specifically so defined it in [§]316.003(68), Florida Statutes (1983), which states:
>
> (68) GOLF CART.-A motor vehicle designed and manufactured for operation on a golf course for sporting or recreational purposes.[25]

The *Meister* opinion addressed whether a vehicle must be operated on public highways before the dangerous instrumentality doctrine could come into play and found that "it was never the intention of this [c]ourt to so limit the doctrine."[26] It quoted *Reid v. Associated Engineering of Osceola, Inc.,* 295 So. 2d 125, 129 (Fla. 4th DCA 1974), as follows:

> We see neither reason nor logic in the view that a motor vehicle in operation, which is a dangerous instrumentality while being operated upon the public highway, somehow ceases to be a dangerous instrumentality the instant the driver causes it to turn off the public street or highway onto a private drive or other private property. Although it is most probable that a motor vehicle being operated on private property would be moving at a slower speed than one being operated upon the public street or highway, common sense tells us that in all other respects such vehicle while in motion is equally dangerous to persons and property no matter where it is operated.[27]

The *Meister* opinion also addressed whether golf carts pose a sufficient danger to the public to impose vicarious liability, stating:

> We have no difficulty in determining that they do…Florida's tremendous tourist and retirement communities make golf carts and golf courses extremely prevalent in this state. And there is evidence…that 'the types of accidents caused by the operation of the carts are due to the particular design features of the carts and are *identical to those involving other motor vehicle accidents.*'[28]

The Florida Supreme Court's decision in *Meister* noted that the fact that the country club had rented a golf cart to the operator did not call for a different result compared to when an owner loans a golf cart.[29]

• *Liability Cap* — F.S. §324.021(9)(b)3 provides the following liability caps on a natural person who owns a motor vehicle and loans it to a permitted user: 1) $100,000 per person; 2) $300,000 per incident for bodily injury; and 3) up to $50,000 for property damage. If a permitted user of the motor vehicle is uninsured or has insurance with combined property damage and bodily injury limits of less than $500,000, the motor vehicle owner shall be liable for up to an additional $500,000 in economic damages only arising out of the use of the motor vehicle.[30] The additional specified liability of the owner for economic damages shall be reduced by amounts actually recovered from the permitted user and from any insurance covering the permitted user.[31] The motor vehicle owner's liability limitations from actions of a permitted user shall not affect the motor vehicle owner's liability for his or her own negligence.[32]

Chiong makes no reference to §324.021. This is presumably because §324.021(1) defines a motor vehicle as "[e]very self-propelled vehicle that is designed and required to be licensed

for use upon a highway" and based upon such definition, a golf cart may not be considered a motor vehicle for purposes of the owner liability cap in §324.021(9)(b)3. This is consistent with *American States Insurance Company v. Baroletti,* 566 So. 2d 314 (Fla. 2d DCA 1990), in which the Second District Court of Appeal held that, in Florida, a golf cart is not a motor vehicle subject to statutory financial responsibility or the motor vehicle no-fault law unless it is operated on highways, even though a golf cart is a dangerous instrumentality.

Assuming a golf cart is not a motor vehicle, it appears that its owner has general unlimited vicarious liability for its operation by a permitted person.[33] Accordingly, in most cases the golf cart owner can be found liable for damages caused by the driver's negligence.

The consequences of a golf cart not being considered a "motor vehicle" under F.S. §324.021 are severe, as illustrated by the following examples distinguishing unlimited golf cart vicarious liability from limited automobile vicarious liability.[34]

Example 1 (Father Loans Golf Cart to His Son): If a golf cart owner (father) loans his golf cart to his 45-year-old son (son) who has an excellent driving record and is sober, and the son drives a friend (friend) to the community golf course that is a quarter mile from the father's house, the golf cart is permitted and customarily driven in the father's community, the golf cart is not designed and required to be licensed for use upon the highway, and the son negligently fails to stop at a stop sign and is involved in an accident in which the friend is severely injured, *it appears that there would be no limit on the father's financial liability exposure for the son's negligence.*

Although *Meister* held that the owner of a golf cart is subject to vicarious liability even if the golf cart is not designed to be operated on public highways, the liability caps in F.S. §324.021(9)(b)3 are not applicable because they only apply to "motor vehicles," defined in F.S. §324.021(1) as those "designed and required to be licensed for use upon a highway."

Example 2 (Father Loans Automobile to Son): If father loans his automobile to his son to drive to the golf course with a friend and son negligently fails to stop at a stop sign and is involved in an accident in which the friend is severely injured, *the liability to the father for injuries caused by son's negligence in driving the automobile would be limited by F.S. §324.021, as described above.*

Takeaways, Uncertainties, and Suggestions

• *Limit Users* — Advisors, including attorneys, insurance agents, and financial advisors, should inform their clients of the liability risks of golf cart ownership and caution those owners of the risks of loaning their golf carts, especially to drivers who are not adults or who are otherwise unlicensed drivers.

• *Amend §324.021(1)* — The Florida Legislature should consider expanding the definition of motor vehicle in §324.021(1) to include golf carts in light of their very frequent use in Florida, so the cap on liability in §324.021(9)(b)3 would apply to golf carts.

Doing so would not affect the liability of the owner of a motor vehicle for his or her own negligence. Accordingly, if §324.021 is amended to include golf carts and the golf cart owner negligently loans the golf cart to a 14-year-old,[35] or to a clearly intoxicated driver who negligently causes an accident resulting in significant injuries, the golf cart owner would have unlimited liability due to his personal negligence in entrusting the golf cart to the permitted user.

• *Review Insurance* — The two judgments totaling approximately $68 million should sound an alarm for those who own a golf cart and freely allow friends and relatives to drive it, as well as for golf cart drivers themselves. As a consequence of the prevalence of golf carts in Florida and their operation in many places beyond golf courses, golf cart accidents in Florida are commonplace. Accordingly, golf cart owners and drivers should be aware of their financial exposure described herein and carefully consider the adequacy of their applicable insurance coverage. Those who own or drive golf carts should carefully review their automobile insurance, homeowners' insurance, and general liability (aka, excess risk or umbrella) policies to determine whether injuries resulting from their negligent operation will be covered. In general, notifying the insured's insurance company and acquiring coverage for a golf cart through the insured's automobile coverage, homeowners coverage, and general liability (aka, excess risk or umbrella) policy would cover injuries caused by the negligent operation a golf cart. Nonetheless, it is unclear, and doubtful, that the owner's insurance would cover liability resulting from injuries caused by a golf cart loaned to an unlicensed driver (*e.g.,* a 13-year-old grandchild) or a permitted driver known by the owner to be intoxicated or otherwise impaired.

The determination of whether automobile insurance covers golf cart negligent operation depends on the specific policy and the circumstances of the accident. In most cases, insurance companies classify golf carts and low-speed vehicles[36] differently from automobiles, which is why golf carts may not be covered under a traditional automobile insurance policy. Some insurance companies may offer specific coverage for golf carts or offer endorsements to add golf cart coverage to a standard automobile insurance policy.

• *Avoid Co-ownership* — Vicarious golf cart liability exposure appears to follow the owner of the golf cart. If married Florida residents own a golf cart, it may be considered to be owned as tenants by the entirety, especially if joint funds were used for its purchase and it is not registered or titled. In such event, both spouses as co-owners could be vicariously liable for injuries caused by the golf cart being loaned to a driver whose negligent operation caused injuries.

To avoid joint vicarious liability in the event a golf cart is owned as tenants by the entirety or as joint tenants with rights of survivorship, or was purchased with funds from a tenants by the entirety account or a joint tenants with rights of survivorship account, the golf cart owners should consider transferring golf

cart ownership to the primary golf cart driver (referred to as the "owner spouse") because doing so may reduce the amount of spousal assets that are exposed in the event the owner spouse loans his or her golf cart and there is an accident involving the driver's negligence. If only one spouse owns the golf cart, only that spouse should be subject to vicarious liability.

Such a change of ownership likely could be reflected in the golf cart registration if there is one. Nonetheless, more frequently there is no such registration or title in Florida for a golf cart that is not intended to be driven outside of a private golf community. In such event, spouses should consider executing an affidavit that reflects that the golf cart is owned 100% by the owner spouse, and the other spouse should assign any and all interests in the golf cart to the owner spouse. Further, the other spouse should not authorize the use of the owner spouse's golf cart.

This article and these suggestions are not intended to be a comprehensive review of golf cart liability. The most certain way to preclude vicarious golf cart liability is to not loan the golf cart to anyone else.

Conclusion

Chiong serves as a warning, not only to golf cart owners, but also to anyone who holds significant assets and has not considered the potential consequence of a judgment from an unforeseen accident or other financial exposure. Florida provides numerous constitutional, statutory, and common law exemptions from creditor's claims that protect a person's assets (*e.g.,* homestead, retirement plan assets, annuities, cash surrender value life insurance, and wage earner accounts). Although many practitioners advise clients on the importance of obtaining appropriate general liability (aka, excess risk or umbrella) insurance coverage, and underlying insurance, very few individuals have policies that would cover the $68 million in judgments that were rendered in *Chiong*. Notwithstanding that, having significant liability insurance coverage may result in a settlement and avoid personal liability to the golf cart owner or driver. Accordingly, obtaining adequate insurance that would cover a golf cart accident and safeguarding assets under Florida law before any significant liabilities arise should be considered for all golf cart drivers and owners.[37]❑

[1] *Gonzalez v. Chiong*, No. 2017-010063-CA-01 (Fla. 11th Jud. Cir. Sept. 19, 2023) (findings of fact and conclusions of law).
[2] *See id.* at 2.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Gonzalez v. Chiong*, No. 2017-010063-CA-01 (Fla. 11th Jud. Cir. Aug. 2, 2017), plaintiff's motion to amend the amended complaint at 8.
[7] *Gonzalez v. Chiong*, No. 2017-010063-CA-01 (Fla. 11th Jud. Cir. Sept. 19, 2023), findings of fact and conclusions of law at 9.
[8] *Id.* at 11.
[9] *GEICO General Ins. Co. v. Gonzalez*, 2022 WL 454166, No. 21-13304, at *1 (11th Cir. Sept. 29, 2022).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Gonzalez v. Chiong*, No. 2017-010063-CA-01 (Fla. 11th Jud. Cir. Sept. 19, 2023), findings of fact and conclusions of law at 9.
[17] *Id.* (citing *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984)).
[18] *Id.*
[19] *Id.* (citing *Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012), and *Saullo v. Douglas*, 957 So. 2d 80 (Fla. 5th DCA 2007)).
[20] *Id.* at 10.
[21] *Id.*
[22] *Id.* at 11.
[23] *See Saullo*, 957 So. 2d at 80 (holding trucking company vicariously liable for operator's acts under dangerous instrumentality doctrine); *Reid v. Associated Engineering of Osceola, Inc.*, 295 So. 2d 125 (Fla. 4th DCA 1974) (allowing case to proceed against employer for employee's negligent actions with employer-owned truck).
[24] *Saullo*, 957 So. 2d at 86 (citing *Southern Cotton Oil v. Anderson*, 86 So. 629 (Fla. 1920); *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000)).
[25] *Meister*, 462 So. 2d at 1071-72. Of note, Fla. Stat. §316.003(68) is now §316.003(29).
[26] *Id.* at 1073.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Fla. Stat. §324.021(9)(b)3.
[31] *Id.*
[32] *Id.*
[33] *See also* Fla. Stat. §§324.011, 627.731.
[34] In both examples, a separate lawsuit could also be filed against the negligent driver.
[35] Effective July 1, 2023, golf carts may not be operated on public roads or streets by a person who is under 18 years of age unless he or she possesses a valid learner's driver's license or a valid driver's license. Fla. Stat. §316.212(7)(a).
[36] "'Low-speed vehicle' means any four-wheeled vehicle whose top speed is greater than 20 miles per hour but not greater than 25 miles per hour, including, but not limited to, neighborhood electric vehicles. Low-speed vehicles must comply with the safety standards in 49 C.F.R. s. 571.500 and s. 316.2122." Fla. Stat. §320.01(41). Low-speed vehicles may be operated on any street where the posted speed limit is 35 miles per hour or less and must be registered and insured in accordance with Fla. Stat. §320.02 and titled pursuant to Fla. Stat. Ch. 19; Fla. Stat. §316.2122(1). Golf carts, on the other hand, may only be operated on designated roads. *See* Fla. Stat. §316.212.
[37] For a more detailed discussion on how to combine estate planning and asset protection in Florida and asset protection techniques, *see* Asset Protection in Florida (7th ed. 2022), and Barry A. Nelson, Estate Planning and Asset Protection in Florida (2019).

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This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Sarah Swaim Butters, chair, and Allison Archbold and Homer Duvall, editors.

Filing # 182158299 E-Filed 09/19/2023 03:26:24 PM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2017-010063-CA-01
SECTION: CA11
JUDGE: Carlos Lopez

Eileen Gonzalez et al

Plaintiff(s)

vs.

Luis O. Chiong et al

Defendant(s)

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the testimony and exhibits received into evidence on September 6, 2023, at a Bench Trial and having given all the evidence full and careful consideration, the Court hereby issues its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. For several years before July 4, 2016, plaintiff Eileen Gonzalez and defendant Luis Chiong were neighbors and friends. They went to each other's homes. They shared meals. They knew each other's children. They spent time together frequently and celebrated special events together.

2. On July 3, 2016, they, along with their children, other neighbors and friends, participated in a block party held in front of their residences on SW 83 Court, in Palmetto Bay, Florida.

3. On that date, Defendant Chiong was the owner of a golf cart. *(See Exhibits 1 and 2, showing the golf cart and accident scene).*

4. On that date and on many prior occasions, he allowed it to be driven and used by people, including adults and children in the neighborhood, as well as friends.

5. That weekend, Defendant Chiong's step niece was staying with him as an overnight houseguest, as she had often done in the past. Her name is Zabryna Acuna and she was 16 years old at that time. Mr. Chiong testified that he undertook responsibility for her actions while she was staying with him.

6. On July 3, 2016, Zabryna Acuna had Mr. Chiong's permission to and did drive the golf cart, as she had done many times in the past. She drove it with and without adults, as she had done in the past. She drove children of Frank Bennar and Eileen Gonzalez up and down the street in front of their house in a safe manner, as she had done in the past, and she had Ms. Gonzalez' permission to do so.

7. On July 4, 2016, around mid-day, Zabryna Acuna was driving Defendant Chiong's golf cart. She had Mr. Chiong's son Luca, and 3 of the children of Eileen Gonzalez and Frank Bennar riding as passengers, including Devin Bennar, who was then aged 12. Devin's date of birth is February 3, 2004. *(See Trial Exhibit 26).*

8. At that date and time, near SW 170th Street and SW 79th Place, a short distance from the parties' respective residences, the golf cart was driven by Ms. Acuna who ran a stop sign and caused a crash with a motor vehicle. The golf cart rolled over onto its side after the initial impact, and everyone on the golf cart was ejected and injured to a degree.

9. Devin Bennar suffered by far the most serious, in fact, catastrophic injuries. He was bleeding from his ears, nose and mouth and was unresponsive when fire rescue arrived. *(See Trial Exhibit 4 EMS report).*

10. The parties agree the injuries that Devin Bennar suffered as a result of the crash were horrific and catastrophic. Indeed, this is documented in the medical records that were received in evidence that describe Devin Bennar's severe traumatic brain injury, hospitalizations,

surgeries, rehabilitation. (*See Trial Exhibits 4 through 18; 28*).

11. Initially, Devin Bennar was in the Nicklaus Children's Hospital for two months immediately following the accident. His mother remained at his side almost the entire time. His father visited regularly and took a larger role in caring for his other children, Devin's siblings. Both parents, though divorced, were very involved in the lives of their children, including Devin. Both parents were profoundly affected by the injury to their son and did everything they could to help him.

12. Devin's hospital course including extensive care, intubation, tracheostomy, right sided craniectomy with epidural evacuation, g-tube, VP shunt placement control hydrocephalus. Devin could barely speak any words or follow commands. He could not eat or swallow. He used diapers for two years. He could not do his activities of daily living without assistance.

13. After the extended initial hospitalization, Devin Bennar was transferred to inpatient rehab at Baptist Health where he remained for several months for intensive rehab. He had repeated hospitalizations for additional craniectomies for treatment of brain swelling. He had a total of three brain surgeries to remove portions of his skull. He ultimately had to have a prosthetic with bone from a donor applied to close his skull.

14. Since he was released from inpatient care and discharged home, his mother Eileen Gonzalez has been his 24/7 caregiver. His father, Frank Bennar, fills that same role when Devin is with him several days a week. This is and has been extremely difficult for them and the entire family.

15. Defendant Choing denied that Ms. Acuna had his permission to drive the golf cart on July 4, 2016. On this point, although there was some conflict in the testimony, the totality of the testimony indicates she did have his permission.

16. For example, although Mr. Chiong testified he did not affirmatively give her permission on

the date of the accident, he also acknowledges having previously given her permission to drive it on several occasions; he admitted he did not tell her not to drive it that day so as to revoke any prior permission; and he admitted that he did not object to her driving it even after he admits he specifically learned about it that day and for about a half an hour thereafter - before he said he learned of the accident.

17. Ms. Acuna testified that she did not think Mr. Chiong had specific knowledge that she was driving the golf cart at the time of the crash, but she admitted that she had used the golf cart frequently in the past, always had his permission to do so and believed she did not have to ask for specific permission that day for that reason.

18. Eileen Gonzalez testified that Ms. Acuna drove the golf cart very often and it had been stated by Mr. Chiong to Ms. Acuna in her presence in the past that Ms. Acuna could use the golf cart anytime she wanted, meaning that Ms. Acuna had standing permission to use it. Ms. Gonzalez further testified that on the date in question, Ms. Acuna advised Mr. Chiong in her presence that she was going to use the golf cart and that Mr. Chiong was aware of and consented to her use of it.

19. Plaintiff Frank Bennar testified that while at the hospital after the crash, Mr. Chiong told him that his niece, Ms. Acuna, was driving the golf cart at the time of the accident because he had given her permission to drive the golf cart.

20. Therefore, based on the above and upon the totality of the testimony and based on the relative credibility of the witnesses, the Court finds by the greater weight of the evidence that Acuna did have defendant Chiong's permission to drive the golf cart at the time of the incident, and thus she was a permissive driver of defendant Chiong's golf cart.

21. Separately, Defendant Chiong alleged that that Eileen Gonzalez was herself negligent, that she knew about the risk and voluntarily assumed the risk of the accident and injuries of her son. The only evidence of this was defendant Chiong's testimony that Plaintiff Gonzalez

gave her children permission to ride with Ms. Acuna driving the cart on the day in question and Ms. Acuna's uncorroborated testimony that Plaintiff Gonzalez assisted her to open a gate on the side of the Chiong residence where the golf cart was stored and guided her as Ms. Acuna drove it out to the front of the property.

22. Although Ms. Gonzalez acknowledged that she generally allowed her children to ride with Ms. Acuna in the golf cart safely up and down the street in front of their residence, she denies assisting Ms. Acuna with the golf cart on the day in question.

23. The Court notes that Plaintiffs' counsel's cross examination of both defendant Chiong and Ms. Acuna illustrated they had each made a number of prior statements under oath that were inconsistent with – and at times dramatically opposed to -- their live testimony at trial. Ms. Acuna also admitted on cross that she was trying to help her uncle. This raised questions about the veracity of Mr. Chiong and Ms. Acuna's trial testimony, which the Court found both of them not to be entirely credible.

24. On the other hand, the Court found credible and persuasive the testimony of Frank Bennar and that of Eileen Gonzalez, including that she did not assist Ms. Acuna with the gate or with taking out the golf cart on the day in question.

25. Plaintiff Gonzalez' testimony was also persuasive to establish that any permission she had given for her children to ride the golf cart with Ms. Acuna was limited to golf cart rides up and down the street in front of her residence, and it did not extend to several blocks away where the accident occurred. Indeed, she testified Ms. Acuna had been told and therefore knew anything further than the street in front of her residence was off limits for the Bennar children and that Acuna had never before driven the children outside those boundaries.

26. The Court therefore finds that Ms. Gonzalez had absolutely no knowledge that Acuna was going to deviate from the designated boundaries and leave the area with the children in the golf cart on the day in question, much less that Acuna would run a stop sign and cause a

crash. The Court finds that Ms. Gonzalez therefore did not expressly or impliedly assume the risk of this incident of or her son's injury. The Court accepts Ms. Gonzalez testimony in this regard as fact and therefore assigns no blame or fault to Mrs. Gonzalez in connection with this matter for comparative negligence or for assumption of the risk.

27. Devin and his parents' lives have been dramatically affected and they bear no resemblance to the lives they enjoyed before this terrible accident. Devin was a perfectly healthy and intelligent 12-year-old child before the accident thriving in every way and was on track for a great future. In the blink of an eye, all that changed. A substantial portion of his childhood was lost forward. The brain injury has left him with severe physical and mental deficits and limitations that are permanent. He requires assistance and care around the clock to this day. He attends a special school due to his handicap. *(See Trial Exhibit 22)*

28. The Court has viewed the before and after photos and videos of Devin Bennar as well as the day in the life video, all of which were received into evidence. This evidence is compelling. (*See Trial Exhibits 3, 27, 50, 50(a); 50(b); 50(c) and 50(d).*

29. There is no doubt Devin has endured tremendous physical pain and suffering, disfigurement, lost the capacity for the enjoyment of life, mental anguish, disability, scarring and mental pain and suffering as well as lost earning capacity.

30. And though they love their son, Devin's parents have suffered and their relationship with their son was forever damaged by his permanent injury. He is no longer the son that they knew before the incident.

31. As a result of the injury to Devin Bennar, the plaintiffs have demanded compensatory damages, to include economic and noneconomic damages.

32. Concerning economic damages, the evidence shows that medical billing to date is over $2 million dollars for medical care, and the subrogation lien received in evidence reflects

payments for $662,459 for such care, the latter of which is compensable. The evidence shows the cost of medications for Devin since the incident totals $16,243, which is also compensable. (*See Trial Exhibit 30)*

33. The plaintiff presented a Life Care Plan that was prepared by vocational and rehabilitation expert with Comprehensive Rehabilitation Consultants, Inc., Darlene Carruthers, MEd, CRC, CDMS, CCM, FIALCP. Her report was prepared in consultation and with specific input from Devin Bennar's treating doctors. It outlines Devin Bennar's ongoing and needs for treatment, services and equipment necessary to maximize his medical and rehabilitative potential and to care for him for the rest of his life. This includes, medical evaluations, diagnostic tests, therapeutic evaluations, medical care, surgical procedures, therapy, education and training, support care, ancillary services, home modifications, equipment for activities of daily living, orthotic equipment, mobility equipment, transportation, personal items, medications, and exercise equipment.

34. Ms. Carruthers vocational evaluation concludes that although Devin would have completed a bachelor's degree and earned an annual income of approximately $81,340, but as a result of his brain injury and condition, he "will not be able to compete in the open labor market. At best he may succeed in a supported employment environment," or if not, then in a "habilitation environment where he can volunteer and benefit from socialization."

35. The Life Care Plan was admitted into evidence, and neither the expert's credentials nor the report was challenged in any way. This rehabilitation and vocational expert report and the opinions therein are therefore unrefuted. This Court accepts the opinions. (*See Trial Exhibit 20)*

36. Dr. Gary Anderson, Ph.D., an expert economist, prepared a detailed report and calculations to quantify the economic damages to Devin Bennar in this case. His report confirms that as of June 30, 2023, Devin Bennar's life expectancy is 63.1 years. The mortality table was

received into evidence and is consistent. (*See Trial Exhibit 51*) Dr. Anderson calculated the present value of Devin Bennar's past and future economic losses, including the current/past medical subrogation lien, the Life Care Plan, as well as Devin's lost earning capacity and lost services using economic principles.

37. Dr. Anderson prepared two models of damages calculations, which yield similar results. Model 1 is based on the vocational expert's opinion that Devin may succeed at best in a supportive employment environment and concludes the present value of his total future economic loss is $22,372,930, plus $662,459 for the current/past cost of his care/subrogation lien, plus $16,243 for current/past cost of medications, for a total of $23,051,632 in economic damage to Devin Bennar as a result of his severe brain injury.

38. Dr. Anderson's Model 2 was based on the secondary opinion of the vocational expert that in a habilitation environment and concludes the present value of Devin Bennar's future total economic damages is $22,001,715, plus the $662,459 current/past cost of care, plus $16,243 for current/past cost of medications for a total of $22,680,417 in economic damages.

39. Dr. Anderson's report was admitted into evidence, and neither the expert's credentials nor the report was challenged in any way. (*See Trial Exhibits 21 and 21(a)).* This economic expert report and the opinions therein are therefore unrefuted. This Court accepts the opinions.

40. The plaintiffs have requested that the Court award Devin Bennar the economic damages under Dr. Anderson's Model 1.

41. Concerning non-economic damages, the plaintiffs have requested that Devin Bennar be awarded same amount as they requested for economic damages, above, and additionally, each parent has requested an award of $2,000,000 in non-economic damages for loss of their son's consortium.

CONCLUSIONS OF LAW

42. The plaintiff's third amended complaint, filed On October 24, 2019, alleges defendant Chiong entrusted the golf cart to Ms. Acuna and was negligent thereby causing the plaintiff's damages.

43. The Court has jurisdiction over the plaintiff's cause of action and over the parties before the Court.

44. Plaintiff and defendants are citizens of Miami-Dade County, which is where the crash at issue occurred.

45. The defendant Chiong owed the plaintiffs a duty of reasonable care. Defendant breached that duty of care and was negligent in entrusting the golf cart to Ms. Acuna who negligently operated it, causing the crash at issue and the resulting damages.

46. The Dangerous Instrumentality doctrine imposes vicarious liability upon the owner of a motor vehicle who voluntarily entrusts it to an individual whose negligent operation of it causes damage to another. Rippy v. Shepard, 80 So. 3d 305 (Fla. 2012); Saullo v. Douglas, 957 So. 2d 80 (Fla. 4th DCA 2007).

47. The Florida Supreme Court has held that a golf cart is a dangerous instrumentality. Meister v. Fisher, 462 So. 2d 1071 (Fla. 1985).

48. This Court concludes that Defendant Choing was the legal owner of the golf cart, and that the golf cart was a dangerous instrumentality.

49. The Court further concludes that Defendant Choing voluntarily entrusted the golf cart to Ms. Acuna for her general use and specifically for her use on July 4, 2016 at the time of the accident.

50. This Court has previously determined that Ms. Acuna was negligent and 100% responsible for causing the subject crash. See Order dated January 6, 2023, wherein the Court granted plaintiffs' motion for partial summary judgment, determining as a matter of law that Acuna was 100% at fault for the crash.

51. Accordingly, as the owner of the golf cart and under the dangerous instrumentality doctrine, Defendant Chiong is liable and responsible for the negligent operation of the golf cart by Ms. Acuna at the time of the crash and for the damages in this case.

52. Concerning defendant's defense of assumption of the risk, that Ms. Gonzalez "knew about the risk and voluntarily undertook the risk" of injury to her son, see defendant's affirmative defense number 4, filed on January 3, 2020, the Court observes that express assumption of the risk includes express written contracts not to sue for injury and situations where there is actual consent, namely actual knowledge of the specific risk. McGraw v. R and R Investments, Ltd., 877 So. 2d 886, 891-892 (Fla. 1st DCA 2004) (citing Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977)). There was no evidence of an express contract not to sue or otherwise any credible evidence presented in this case to support a defense of express assumption of the risk based on the Court's findings of fact herein.

53. Nor was there any credible evidence to support the defense of implied assumption of the risk. The doctrine of implied assumption of the risk is now subsumed within the doctrine of comparative negligence. McGraw, 877 So. 2d at 891-892. Defendant has alleged Ms. Gonzalez was "guilty of negligence" in his affirmative defense number 2.

54. But implied assumption of the risk may not be asserted as an ordinary defense to break the chain of legal causation. Kendrick v. Ed's Beach Service, Inc., 577 So. 2d 936, 938 (Fla. 1991). The Court also notes that historically under the doctrine of assumption of the risk, a person does not assume a risk that cannot reasonably be anticipated or that may result from the negligent act of another. Brady v. Kane, 111 So. 2d 472, 474 (Fla. 3d DCA 1959).

55. The Court therefore rejects defendant's defense that Eileen Gonzalez was guilty of comparative negligence and rejects the defense of assumption of the risk. Neither defense was proven by the greater weight of the evidence. The Court concludes based on all the evidence presented that no fault will be attributed to Mrs. Gonzalez in this matter.

56. Accordingly, the Court, having concluded that Ms. Acuna is 100% at fault for the crash in this case, finds under the dangerous instrumentality doctrine that the defendant Chiong is 100% at fault for her negligence, and was himself negligent for entrusting the golf cart to her and therefore is legally responsible for the crash and for all the resulting damages in this case. The Plaintiffs have proven their case.

57. Damages were not disputed or challenged in any way. The Court determines that Devin Bennar's injury has left him totally and permanently physically and mentally disabled.

58. The Court awards Devin Bennar damages for his past and future economic damages in the sum of Twenty-Three Million Fifty-One Thousand Six Hundred Thirty-Two dollars ($23,051,632.00). The Court further awards Devin Bennar damages for his past and future noneconomic damages including for his pain and suffering also in the sum of twenty-three million fifty-one thousand six hundred thirty two dollars ($23,051,632.00), as requested by his counsel in closing argument. The Court finds the damages in this case have been proven to a reasonable certainty. The facts of this case support this award. Miami-Dade County Express. Auth. v. Electric Trans. Consult. Corp., 300 So. 3d 291, 294 (Fla. 3d DCA 2020)("under Florida law the plaintiff must present evidence regarding a reasonable certainty as to the amount of damages").

59. Concerning the individual claims of Frank Bennar and Eileen Gonzalez, there was evidence introduced without objection as to their respective loss of their son's consortium because of his severe injury. Such damages are limited to the period of the child's minority. Cruz v.

Broward County School Board, 800 So. 2d 213, 217 (Fla. 2001). In this case, such damages are thus awardable for a period of 5 years and 7 months. The Court awards damages for loss of consortium to Eileen Gonzalez in the sum of two million dollars ($2,000,000) and to Frank Bennar in the sum of ($2,000,000).

60. Based on the above Findings of Fact and Conclusions of Law, the Court will separately issue a Final Judgment in favor of the Plaintiffs.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 19th day of September, 2023.

2017-010063-CA-01 09-19-2023 3:13 PM
Hon. Carlos Lopez

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2017-010063-CA-01
SECTION: CA11
JUDGE: Carlos Lopez

Eileen Gonzalez et al

Plaintiff(s)

vs.

Luis O. Chiong et al

Defendant(s)

_____/

FINAL JUDGMENT

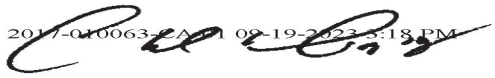
This action was tried before the Court on September 6, 2023. Based on the evidence presented, the Court has issued its Findings of Fact and Conclusions of Law. It is therefore ADJUDGED that:

1. Plaintiff Devin Bennar, 1398 NE 33rd Avenue, #109, Homestead, Florida 33033, SSN: XXX-XX-4048, recover from Defendant Luis O. Chiong, 16975 SW 83rd Court, Miami, Florida 33157, SSN: unknown, the sum of $46,103,264.00 that shall bear interest at a rate of 7.69 % a year, for which let execution issue.

2. Plaintiff Eileen Gonzalez, 1398 NE 33rd Avenue, #109, Homestead, Florida 33033, SSN: XXX-XX-9860, recover from Defendant Luis O. Chiong, 16975 SW 83rd Court, Miami, Florida 33157, SSN: unknown, the sum of $2,000,000.00 that shall bear interest at a rate of 7.69 % a year, for which let execution issue.

3. Plaintiff Frank Bennar, 1655 NE 33rd Road, #114, Homestead, Florida 33033, SSN: XXX-XX-9699, recover from Defendant Luis O. Chiong, 16975 SW 83rd Court, Miami, Florida 33157, SSN: unknown, the sum of $2,000,000 that shall bear interest at a rate of 7.69 % a year, for which let execution issue.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 19th day of September, 2023.



2017-010063-CA-01 09-19-2023 3:18 PM
Hon. Carlos Lopez

CIRCUIT COURT JUDGE
Electronically Signed

Final Order as to All Parties SRS #: **12** (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

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2022 WL 4545166
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

GEICO GENERAL INSURANCE COMPANY, Plaintiff-Counter Defendant-Appellee,

v.

Eileen GONZALEZ, Frank Bennar, Individually, and as parents and natural guardians, Devin Bennar, a minor, Zabryna Hernandez Acuna, Individually, Defendants-Counter Claimants-Appellants, Luis O. Chiong, et al., Defendants.

No. 21-13304
|
Non-Argument Calendar
|
Filed: 09/29/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:20-cv-21549-KMW

Attorneys and Law Firms

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Before Grant, Luck, and Brasher, Circuit Judges.

Opinion

PER CURIAM:

***1** This appeal requires us to determine whether a golf cart qualifies as a "private passenger auto," as that term is defined in an insurance policy. We conclude that the policy definition does not exclude golf carts, and that the district court therefore erred in entering judgment in favor of the insurance company. We reverse in part, vacate in part, and remand for further proceedings.

I.

GEICO General Insurance Company filed this declaratory action in the Southern District of Florida, seeking a ruling that an insurance policy it issued to Monika and Jesse Acuna did not provide coverage for an accident allegedly caused by the insureds' minor daughter, Zabryna Hernandez Acuna, while she was driving a golf cart. The accident was the subject of a personal-injury lawsuit brought against Zabryna and Monika Acuna and others by the parents of Devin Bennar, a passenger in the golf cart who was injured during the accident.

According to the personal-injury complaint, Zabryna was driving a golf cart owned by Luis Chiong to or from a golf course in south Florida when she caused a collision with a Dodge Caliber. Devin was ejected from the golf cart and suffered a permanent traumatic brain injury. Ultimately, Devin's parents obtained a consent judgment against Zabryna for $18 million.

Zabryna was covered under her parents' liability insurance policy with GEICO for bodily injury and property damage arising from the use of, as relevant here, a "non-owned auto." The policy defined "non-owned auto" as "a private passenger, farm, or utility auto or trailer not owned by, furnished or available for regular use for either you or your relative." GEICO contended that it was not required to defend or indemnify the Acunas for the accident because the golf cart was not a "private passenger auto," a "farm auto," or a "utility auto" as defined in the policy.

The district court agreed. It granted GEICO's motion for summary judgment on the declaratory claim and on the defendants' counterclaim for breach of contract and denied the defendants' motion for summary judgment on the declaratory claim. This appeal followed.[1]

II.

***2** Florida law applies in this diversity-jurisdiction action involving the interpretation of an insurance policy issued in Florida. *See Hegel v. First Liberty Ins. Corp.*, 778 F.3d

1214, 1220 (11th Cir. 2015); *Prime Ins. Syndicate, Inc. v. B.J. Handley Trucking, Inc.*, 363 F.3d 1089, 1091 & n.1 (11th Cir. 2004). We review a district court's interpretation of an insurance policy and application of state law in a summary judgment ruling de novo. *Hegel*, 778 F.3d at 1219; *Horn v. Liberty Ins. Underwriters, Inc.*, 998 F.3d 1289, 1293 (11th Cir. 2021). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In diversity cases like this one, we must decide questions of state law "the way it appears the state's highest court would." *Pincus v. Am. Traffic Sols., Inc.*, 986 F.3d 1305, 1310 (11th Cir. 2021) (quotation omitted). If the state's highest court has not issued an opinion on a question of state law, we must apply the relevant decisions of the state's intermediate appellate courts, "absent some persuasive indication that the state's highest court would decide the issue otherwise." *Id.* (quotation omitted).

"Under Florida law, insurance contracts are construed according to their plain meaning." *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007) (quotation omitted). Ambiguities in insurance policies are construed against the drafter and in favor of the insured. *Id.* Thus, if "the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage," the policy will be interpreted to provide coverage. *Id.*

The dispute here involves the meaning of the term "private passenger auto." The policy defines "private passenger auto" as a "four-wheel private passenger, station wagon or jeep-type auto, including a farm or utility auto as defined." A "farm auto" is defined as "a truck type vehicle with a gross vehicle weight of 15,000 pounds or less, not used for commercial purposes other than farming." And the policy defines "utility auto" as "a vehicle, other than a farm auto, with gross vehicle weight of 15,000 pounds or less of the pick-up body, van or panel truck type not used for commercial purposes."

Read in isolation, the policy definition of "private passenger auto" includes golf carts like the one involved in the accident here—the golf cart was a four-wheeled, privately owned, passenger vehicle. And as one Florida appellate court has explained, the undefined term "auto" can encompass golf carts. *Fireman's Fund Ins. Cos. v. Pearl*, 540 So. 2d 883, 884 (Fla. Dist. Ct. App. 1989).

Reading the definition of "private passenger auto" in context to include the definitions of the terms "farm auto" and "utility auto" results in a narrower interpretation—but one that still does not exclude golf carts. In *Martin v. Nationwide Mutual Fire Insurance Company*, Florida's Second District Court of Appeal interpreted a liability insurance policy with similar definitions for the terms "private passenger automobile," "farm automobile," and "utility automobile." 235 So. 2d 14, 16–17 (Fla. Dist. Ct. App. 1970). The court explained that those definitions revealed a common—"albeit implicit"—element: all had "as an inherent design characteristic the capacity to be driven legally and safely on public highways." *Id.* at 16. The court determined that the insured's "jeep," a "moveable vehicle" which he had "built from scratch" from miscellaneous car parts and used to drive around his pasture, was not an "automobile" within the meaning of the policy because it "was not intended to be road operable" and was never driven on the road. *Id.*

***3** In contrast to the homemade vehicle at issue in *Martin*, golf carts typically can be driven safely on public roads where their use is allowed by law. Of course, golf carts are designed to be used mainly "at low speed on a golf course or for similar sporting or recreational purposes, or for transportation on private property"; operation on the public roadway is not their principal purpose. *Herring v. Horace Mann Ins. Co.*, 795 So. 2d 209, 211 (Fla. Dist. Ct. App. 2001). Thus, one Florida appellate court has concluded that a golf cart did not meet an insurance policy's definition of a "motor vehicle" where that term was defined to include only vehicles "designed for use on public roads." *Id.* And a panel of this Court has held that a golf cart was not a "car" under a policy that defined that term as a four-wheeled motor vehicle "designed for use mainly on public roads." *State Farm Mut. Auto. Ins. Co. v. Baldassini*, 545 F. App'x 842, 843–44 (11th Cir. 2013) (unpublished).

But the Acunas' insurance policy had no such limiting language for liability coverage,[2] and *Martin*'s interpretation does not require that a "private passenger auto" be designed specifically for roadway use—only that it have the *capacity* to be used legally and safely on public roads. *Martin*, 235 So. 2d at 16. Golf carts do.

Florida law allows golf cart use on designated county roads and municipal streets, on certain state park roads, and to cross state highways in specified locations. Fla. Stat. § 316.212. Golf carts are ubiquitous—and legal—on public roads in golfing and beach communities throughout Florida. And they are frequently encountered on neighborhood streets traveling

to or from a nearby golf course, just as Zabryna Acuna and her passengers apparently were doing when the accident occurred.

GEICO argues that the golf cart Zabryna was driving on the roadway could not have been driven legally on the road because it lacked some of the equipment that Florida requires for cars, such as windshield wipers and seatbelts. That argument fails for two reasons. First, Florida law does not require the same equipment on golf carts as it does on cars; a golf cart can be driven legally on designated roads without windshield wipers or seatbelts. *See* Fla. Stat. § 316.212(6). And second, even if, as GEICO contends, the golf cart lacked some of the equipment (a rearview mirror and red warning stickers) that Florida requires for golf carts, it still had the capacity to be driven legally and safely on the road if those equipment deficiencies were corrected. *Cf. Martin*, 235 So. 2d at 16 (distinguishing the built-from-scratch "jeep" from "the situation where an automobile is rebuilt, or undergoes major repairs or is inoperable because of the temporary absence of an essential component").

In short, the district court erred in determining that the golf cart did not qualify as a "private passenger auto" as defined in the insurance policy and that the policy did not provide liability insurance coverage for the accident for that reason. It therefore erred in granting GEICO's motion for summary judgment on its claim for declaratory relief, and in denying the defendants' cross-motion for summary judgment on GEICO's declaratory claim.

The district court's error in interpreting the insurance policy also formed part of the basis for granting GEICO's motion for summary judgment on the defendants' counterclaim for breach of contract. The court adopted the magistrate judge's report and recommendation, which explained that since (under the erroneous interpretation of the contract) GEICO had no contractual obligation to provide liability coverage, it could not have breached the contract by denying the claim for coverage. This conclusion was faulty because of its faulty premise.

***4** But the magistrate judge's recommendation was also based in part on his observation that the defendants' counterclaim did not set out a coherent claim for breach of contract—the defendants seemed to be trying to disguise what was actually a premature bad-faith failure-to-settle claim as a breach-of-contract claim. This criticism appears justified; among other things, the defendants sought extra-contractual damages that may be awarded on a statutory bad-faith claim in Florida, but not in an action for breach of an insurance contract. *See Citizens Prop. Ins. Corp. v. Manor House, LLC*, 313 So. 3d 579, 582 (Fla. 2021). On remand, the district court will need to reconsider GEICO's motion for summary judgment on the counterclaim in light of our decision on the coverage issue, the relief sought in the counterclaim, and defenses to the counterclaim that were raised by GEICO but not reached by the district court.

III.

For the reasons discussed above, we REVERSE the district court's order granting GEICO's motion for summary judgment on its claim for declaratory relief and denying the defendants' motion for summary judgment on that claim, VACATE the order granting GEICO's motion for summary judgment on the defendants' counterclaim, and REMAND for further proceedings.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 4545166

Footnotes

1 We carried with the case the question of whether the district court's failure to enter a final default judgment against defendant Luis Chiong affected our appellate jurisdiction. Upon consideration, we are satisfied that we have jurisdiction over this appeal despite the omission because aside from the procedural matter of a separate judgment, the claims against Chiong have been resolved. *See Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1530–31 (11th Cir. 1985). Chiong failed to answer GEICO's complaint or enter an appearance, and the district court directed the clerk to enter default against Chiong and directed GEICO to file a motion for final default judgment. Because GEICO sought only declaratory relief against Chiong, the district court was not required to determine the amount of damages due from him. In short, the district court's order "clearly evidenced that it had entered its final decision" with respect to Chiong. *Id.* at 1531.

2 The policy did include similar language in the section providing personal injury protection coverage, which among other things defined a “motor vehicle” in part as “any self-propelled vehicle of four or more wheels which is of a type both designed and required to be licensed for use on the highways of Florida.” The defendants in the declaratory judgment action do not contend that the golf cart qualified as a “motor vehicle” under that definition.

End of Document

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 2017-010063-CA-01 (11)

EILEEN GONZALEZ and FRANK BENNAR, individually, and as parents and natural guardians of DEVIN BENNAR, a minor,

Plaintiffs,

v.

LUIS O. CHIONG, individually and ZABRYNA HERNANDEZ ACUNA, individually,

Defendants.

/

FINAL JUDGMENT

THIS CAUSE having come before the Court pursuant to a stipulation between the parties, it is thereby ORDERED AND ADJUDGED that Plaintiffs, Eileen Gonzalez and Frank Bennar, as parents and natural guardians of Devin Bennar, a minor, recover from the Defendant, Zabryna Hernandez Acuna, compensatory damages in the amount of $18,000,000.00, that shall bear interest rate at the legal rate of 6.6 percent annum, and in accordance with Fla. Stat. §55.03 the interest shall be adjusted until paid in full, and for all sums let execution issue. The Court shall retain jurisdiction to enforce the parties' stipulation as to this judgment.

DONE AND ORDERED in chambers in Miami-Dade County, Florida this 14 day of JULY 2020.

CIRCUIT COURT JUDGE

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:20-CV-21549-KMW

GEICO GENERAL INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v.

EILEEN GONZALEZ and FRANK BENNAR, Individually, and as parents and natural guardians of DEVIN BENNAR, a minor, and ZABRYNA HERNANDEZ ACUNA, individually,

Defendants/Counter-Plaintiffs.
_____/

AMENDED COUNTERCLAIM

Defendants/Counter-Plaintiffs, Eileen Gonzalez and Frank Bennar, individually, and as parents and natural guardians of Devin Bennar, and as assignees of Zabryna Hernandez Acuna, sue Plaintiff/Counter-Defendant GEICO General Insurance Company, as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action seeking damages resulting from GEICO's failure to promptly settle the Bennars' claim against its insured, Zabryna Acuna, when it could have and should have done so.

2. Eileen Gonzalez and Frank Bennar are the parents and natural guardians of Devin Bennar, a minor, and are citizens of the state of Florida.

3. GEICO General Insurance Company is a foreign corporation organized and existing under the law of the State of Maryland, and is actively engaged in the sale of insurance in Florida.

4. This Court has jurisdiction pursuant to 28 U.S.C. §1332 due to the parties' diversity of citizenship. The amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000), exclusive of interests and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because the acts giving rise to this action, including GEICO's delivery of the insurance policy at issue, adjustment of the claim, and the subject automobile accident, occurred within the Southern District of Florida.

GENERAL ALLEGATIONS

6. The Policy: At all material times, GEICO General Insurance Company ("GEICO") was Zabryna Acuna's automobile liability insurer. The GEICO automobile policy issued to Ms. Acuna's parents, Monika and Jesse Acuna, had bodily injury policy limits of $10,000.00 per person/$20,000 per accident (the "Policy"). [D.E. 1-1].

7. The Policy constitutes an enforceable contract under Florida law, and the Acunas paid the full premium on the Policy and satisfied all other conditions to maintain the Policy in full force and effect at all relevant times.

8. Under the terms of the Policy and the obligations placed on it by Florida law, GEICO was required to use the Policy's limits to settle the Bennars' claim against Ms. Acuna.

9. The Accident: On or about July 4, 2016, Ms. Acuna and the Bennar children were involved in an accident in Miami-Dade County, Florida. Ms. Acuna was negligently operating a 1987 TEXL EZ GO golf cart with the Bennars as her passengers when she collided with a motor vehicle (the "Accident").

10. Devin Bennar suffered significant and permanent injuries and damages as a result of the Accident. The value of these damages clearly exceeded the Policy's coverage limits.

11. The Bennars, who are also insured with GEICO, timely notified GEICO of the Accident via their insurance policy, and GEICO assigned Claim No. 040614708-0101-016.

12. On September 26, 2016, GEICO denied the claim, incorrectly asserting that the golf cart does not meet the definition of a "motor vehicle" under the policy.

13. The Bennars hired counsel and made a statutory request for insurance information under the GEICO policy issued to Zabryna Acuna's parents.

14. Rather than promptly using the Acunas' policy limits to initiate settlement negotiations on a clearly catastrophic claim, GEICO responded with a reservation of rights letter to the Bennars while it continued to "investigate" whether the golf cart Ms. Acuna was operating met the definition of a "non-owned auto" under the Policy.

15. The Underlying Lawsuit: On or about April 27, 2017, because GEICO had not engaged in settlement negotiations and instead incorrectly asserted that there was no coverage under the Policy, the Bennars filed a lawsuit against Ms. Acuna in the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 2017-010063-CA-01 (the "Underlying Lawsuit"), for damages arising from the Accident.

16. It was not until after the Bennars filed a lawsuit against its insured that GEICO confirmed it would be providing bodily injury coverage for the Bennars' claim, writing (through counsel) on May 23, 2017 that "the full policy limits ($10,000/$20,000) are being made available and the only issue at the [proposed settlement] conference will be the distribution of those limits." [D.E. 45-1]; [D.E. 44-3]; [D.E. 44-1].

17. The Underlying Lawsuit proceeded against Acuna.

18. The Settlement and Assignment Agreement: On or around May 21, 2020, with GEICO's written consent, the Bennars entered into a Settlement and Assignment Agreement with

Ms. Acuna. As part of the Agreement, Ms. Acuna assigned to the Bennars her right, title, and interest in any cause of action she may have against GEICO related to the Accident.

19. By agreement of the Parties and with GEICO's consent, on July 14, 2020, a Final Judgment was entered against Ms. Acuna for an amount in excess of the Policy limits.

20. The Bennars engaged the undersigned counsel to represent their interests in this action and agreed to pay a reasonable fee for services rendered.

21. All conditions precedent to bringing this action have been performed, waived, or have otherwise occurred.

COUNT I: COMMON LAW BAD FAITH

22. Counter-Plaintiffs reallege the facts set out in Paragraphs 1 through 21 as if fully set forth herein.

23. GEICO had a duty to use the same degree of care and diligence in the investigation and resolution of the Bennars' claim against Ms. Acuna as a person of ordinary care and prudence would exercise in the management of their business, and to fairly evaluate the Bennars' claim against Ms. Acuna with the same degree of care and urgency as a reasonably prudent person would if faced with the prospect of paying the total recovery.

24. GEICO had an affirmative duty to initiate settlement negotiations with the Bennars on behalf of its insured, given its insured's clear liability and the permanent, life-altering, and debilitating nature of the Bennars' injuries as evidenced by the photos and traffic report his counsel submitted to GEICO.

25. GEICO breached its fiduciary duties to Ms. Acuna by failing to initiate settlement discussions and settle the Bennars' claim within the Policy limits when it could and should have done so, had it acted fairly and honestly and with due regard for their interests.

26. As a direct and proximate result of GEICO's breach of its duties under the Policy, the Bennars suffered and continue to suffer damages in the form of the resulting Judgment and any additional consequential damages flowing therefrom.

WHEREFORE, Counter-Plaintiffs, Eileen Gonzalez and Frank Bennar, individually, and as parents and natural guardians of Devin Bennar, and as assignees of Zabryna Hernandez Acuna, demand judgment against Counter-Defendant, GEICO General Insurance Company, for all consequential damages, including: the amount of the Final Judgment, pre- and post-judgment interest; attorney's fees and costs pursuant to Fla. Stat. §627.428; and any further relief this Court deems equitable, just, and proper.

DEMAND FOR TRIAL BY JURY

Counter-Plaintiffs, Eileen Gonzalez and Frank Bennar, individually, and as parents and natural guardians of Devin Bennar, and as assignees of Zabryna Hernandez Acuna, request trial by jury of all issues so triable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via transmission of Notices of Electronic Filing generated by CM/ECF on this 24th day of July 2023 on all counsel of record.

/s/ Stephen A. Marino, Jr.
Stephen A. Marino, Jr.

2024 WL 2945460
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

Eileen GONZALEZ, et al., Plaintiffs,

v.

GEICO GENERAL INSURANCE COMPANY, Defendant.

Case No. 20-21549-CV-WILLIAMS/TORRES
|
Signed April 3, 2024

Attorneys and Law Firms

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REPORT AND RECOMMENDATION ON GEICO'S MOTION FOR SUMMARY JUDGMENT

EDWIN G. TORRES, United States Magistrate Judge

***1** Pending before the Court is GEICO's motion for summary judgment regarding the only remaining cause of action in this case—Plaintiffs' claim for "bad faith" under Florida law. [D.E. 142]. The motion is fully briefed and therefore ripe for disposition. [D.E. 153, 162]. And so, for the following reasons, the Court recommends that GEICO's motion for summary judgment be **GRANTED** and the case be **CLOSED**.[1]

I. BACKGROUND

This case and its complicated procedural history stem from an accident involving a golf cart in which children were injured. At this late phase of the case, the only remaining cause of action is an insurance bad faith claim alleged against GEICO by Eileen Gonzalez and Frank Bennar.[2]

The material facts are largely undisputed.[3] On July 4, 2016, a car struck a golf cart driven by Zabryna Acuna and carrying Devin Bennar, Savannah Bennar, Isabella Bennar, and Luka Chiong.[4] At the time of the accident, Zabryna's parents held an insurance policy with GEICO that provided bodily injury coverage in the amount of $10,000.00 per person and $20,000.00 per occurrence (the "Acuna Policy").[5]

Approximately eight months later, GEICO received a letter from Carlos Silva, the Bennars' lawyer, advising of his representation of Eileen Gonzalez, Frank Bennar, and the Bennar children in connection with the golf cart accident.[6] This was the *first* time that GEICO received notice of a bodily injury claim against the Acuna Policy.[7] GEICO separately received notice of the Bennar children's injuries in July 2016 through a claim made by the Bennars against a separate GEICO policy that they held at the time of the accident (i.e., the "Bennar Policy"); however, the record is silent regarding when, if ever, GEICO connected the dots between the Acuna Policy and the Bennar Policy prior to receiving the March 2017 letter from Attorney Silva.[8]

***2** Attorney Silva further informed GEICO in March 2017 that Devin Bennar sustained a traumatic brain injury during the accident.[9] In response to Attorney Silva's communications, GEICO assigned the claim to claims examiner Sheri Delaney who in turn "immediately" proceeded to investigate the loss in a variety of ways.[10]

As part of this investigation, Ms. Delaney and other GEICO personnel sought to resolve questions such as the condition of the golf cart, who owned it, who was driving it at the time of the accident, how the accident occurred, how the passengers sustained their injuries, and whether the golf cart should be covered by the Acuna Policy.[11] GEICO also periodically communicated with the interested parties about its ongoing investigation and the reservation of its rights under the Acuna Policy.[12]

On May 10, 2017, GEICO held a "roundtable meeting" regarding whether the golf cart was covered by the Acuna

Policy; it determined at this meeting that the golf cart was *not* covered.[13] Nevertheless, after consulting with in-house counsel, GEICO decided the following day to afford liability coverage under the Acuna Policy in conjunction with the golf cart accident.[14]

On May 12, 2017, GEICO asked outside counsel to set up a "global settlement conference" to settle all claims arising from the golf cart accident for the $20,000.00 policy limits available under the Acuna Policy.[15] Ten days later, GEICO's counsel sent a letter to all interested parties advising that GEICO made $20,000.00 available to settle all claims and requesting that all potential claimants attend a conference on June 13, 2017, for the purpose of facilitating a settlement; the letter specifically advised that GEICO's tender of the policy limits would "never be withdrawn."[16] On May 30, 2017, GEICO sent additional correspondence to the interested parties, including Attorney Silva, explaining GEICO's decision to afford coverage under the Acuna Policy.[17]

One day before the global settlement conference, Attorney Silva advised GEICO's counsel that neither he nor his clients would attend the conference because GEICO had purportedly acted in bad faith.[18] Despite Attorney Silva's absence, GEICO did not revoke its $20,000.00 global settlement offer; by contrast, in the days following the settlement conference, GEICO delivered a $20,000.00 check to Attorney Silva's office and communicated to him that the Acuna's policy limits were being given to the Bennars to resolve their bodily injury claims arising from the accident.[19]

On June 20, 2017, Attorney Silva returned GEICO's $20,000.00 check, reiterating his "bad faith" allegation and advising that the tender was otherwise "defective" and "untimely."[20] But the following week, an associate of Attorney Silva communicated to GEICO that they nevertheless wanted to settle the claims of Savannah and Isabella.[21]

***3** GEICO learned soon thereafter that the Bennars filed suit against the Acunas in connection with the golf cart accident.[22] GEICO appointed counsel to defend the Acunas in that lawsuit.[23]

On August 8, 2017, Attorney Silva's office and GEICO reached an agreement to settle Savannah and Isabella's claims for $5,000.00 each.[24] Accordingly, on August 17, 2017, GEICO reissued the remaining $10,000.00 bodily injury limits to Attorney Silva to settle Devin's claim.[25] Attorney Silva again refused to settle Devin's claim for the tendered policy limits.[26] GEICO responded that it was nevertheless "ready, willing and able to reissue" the $10,000.00 check to settle Devin's claim.[27] GEICO never settled Devin's claim prior to or during this case; however, on July 14, 2020, the Bennars obtained a final judgment against Zabryna, the driver of the golf cart, for $18,000,000.00.[28]

GEICO submits in its motion for summary judgment that, based upon the undisputed material facts, no reasonable jury could find it liable for bad faith in connection with its handling of Devin Bennar's bodily injury claim against the Acuna Policy. In accordance with Florida law, we are inclined to agree that there is no genuine dispute as to any material fact in this case and that GEICO is accordingly entitled to judgment as a matter of law on the bad faith claim.

II. ANALYSIS

GEICO submits that a reasonable jury could not find bad faith from the record before us because GEICO did not have a reasonable opportunity to settle Devin's claim for the policy limits. After discussing the legal standard that applies to summary judgment motions and the Florida law that governs bad faith claims, we conclude that GEICO cannot be found to have acted in bad faith as a matter of law.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "On summary judgment the inferences to be drawn from the underlying facts must be

viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

In opposing a motion for summary judgment, the nonmoving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323B24 (1986). The existence of a mere "scintilla" of evidence in support of the nonmovant's position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A court need not permit a case to go to a jury ... when the inferences that are drawn from the evidence, or upon which the non-movant relies, are 'implausible.' " *Mize v. Jefferson City Bd. Of Educ.*, 93 F.3d 739, 743 (11th Cir. 1996) (citing *Matsushita*, 475 U.S. at 592-94).

***4** At the summary judgment stage, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. In making this determination, the Court must decide which issues are material. A material fact is one that might affect the outcome of the case. *See id.* at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ibid.*

Florida's insurance bad faith law "imposes a fiduciary obligation on an insurer to protect its insured from a judgment that exceeds the limits of the insured's policy." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 3 (Fla. 2018). "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." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 682 (Fla. 2004). The Florida Supreme Court has explained that:

> 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.

Id. at 682-83. Thus, bad faith jurisprudence merely "holds insurers accountable" for failing to fulfill their obligations. *Harvey*, 259 So. 3d at 6 (quoting *Berges*, 896 So. 2d at 683).

In handling the defense of claims against its insured, the insurer "has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Id.* (quoting *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)). In *Boston Old Colony*, the Florida Supreme Court explained at length what this duty entails:

> This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. The question of failure to act in good faith with due regard for the interests of the insured is for the jury.

386 So. 2d at 785 (internal citations omitted); *see also Harvey*, 259 So. 2d at 9 (noting that "negligence alone is insufficient to prove bad faith"). The conduct in question must evidence a "*conscious disregard or indifference* to the rights of the insured." *Feijoo v. GEICO Gen. Ins. Co.*, 137 F. Supp. 3d 1320, 1330 (S.D. Fla. 2015) (emphasis added); *Francois v. Illinois Nat. Ins. Co.*, No. 01-cv-08070, 2002 WL 33760405, at *4 (S.D. Fla. Mar. 28, 2002) (citing *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 830-32 (Fla. 1938)).

"The question of whether an insurer has acted in bad faith ... is determined under the totality of the circumstances." *Moore v. GEICO Gen. Ins. Co.*, 758 F. App'x 726, 729 (11th Cir. 2018) (internal citation and quotation omitted). The "critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey*, 259 So. 3d at 7. In other words, "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 obligations to the insured." *Berges*, 896 So. 2d at 677. "The

damages claimed by an insured in a bad faith case 'must be caused by the insurer's bad faith.' " *Id.* (quoting *Perera v. U.S. Fidelity & Guar. Co.*, 35 So. 3d 893, 902 (Fla. 2010)).

***5** Where the insurer had no reasonable opportunity to settle the claim, however, the insurer "could not have acted in bad faith as a matter of law." *Deary v. Progressive Am. Ins. Co.*, 536 F. Supp. 3d 1298, 1266 (S.D. Fla. 2021) (citing *RLI Ins. Co. v. Scottsdale Ins. Co.*, 691 So. 2d 1095, 1096 (Fla. 4th DCA 1997), *aff'd.*, No. 21-11878, 2022 WL 2916358, at *3-4 (11th Cir. July 25, 2022). Thus, although it is usually for the jury to decide whether an insurer has acted in bad faith, it is well-established that an insurer may be entitled to summary judgment if the insurer did not have a reasonable opportunity to settle the claim at issue. *See, e.g.*, *Mesa v. Clarendon Nat. Ins. Co.*, 799 F.3d 1353, 1358-60 (11th Cir. 2015); *Montanez v. Liberty Mut. Fire Ins. Co.*, 824 F. App'x 905, 910-12 (11th Cir. 2020); *Deary*, 536 F. Supp. 3d at 1269-70; *Valle v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-22117, 2010 WL 5475608, at *2-4 (S.D. Fla. Jan. 15, 2010), *aff'd.*, 394 F. App'x 555, 557-58 (11th Cir. 2010). GEICO asserts that this such a case.

To illustrate why GEICO's argument is well taken, compare the facts here with those in *Mesa*, where four people were injured in a car accident caused by an insured driver. 799 F.3d at 1355-56. Three weeks after the accident, the insurer received notice of the accident through a letter from one of the injured parties. *Id.* at 1356. The insurer promptly hired an adjuster to investigate the claim as well as an attorney to identify potential claimants and to assist those claimants in reaching a global settlement. *Id.* A little more than a month after the accident, the insurer's attorney communicated to the claimants that the insurer was willing to tender the full $20,000.00 bodily injury limits in furtherance of the global settlement even though it understood that such a sum would be insufficient to satisfy all of the claimants' damages. *Id.* One month later, the insurer's attorney followed up on his settlement correspondence and again tried to coordinate a global settlement conference. *Id.* In response to the follow-up settlement communications, three of the claimants expressed a willingness to settle their claims by dividing the policy limits equally among the four claimants. *Id.* The fourth claimant, Carlos Mesa, did not respond to the settlement letters sent by the insurer's attorney. *Id.* at 1356-57. And even though he never voiced an objection to settling the claims globally, Mesa quietly filed a lawsuit against the insured while the other parties attempted to coordinate a collective settlement. *Id.*

Approximately four months after the accident, the insurer and the insured learned of Mesa's lawsuit and were told (for the first time) that Mesa would be unwilling to accept less than half of the $20,000.00 policy limits. *Id.* After obtaining an excess judgment against the insured, Mesa filed a bad faith action against the insurer premised on the insurer's failure to immediately tender the $10,000.00 per person liability limits to Mesa. *Id.* at 1358-60. The district court granted summary judgment on the bad faith claim in the insurer's favor and the Eleventh Circuit affirmed, holding that no reasonable jury could find that the insurer acted in bad faith because the insurer's decision to "pursue a global settlement was consistent with its duty of good faith under Florida law" and "it is not unusual for settlement negotiations to last several months." *Id.* at 1360.

Along the same lines, the Eleventh Circuit in *Montanez* addressed a bad faith claim where an insured's son caused an accident with two other vehicles that resulted in the death of one person and injuries to four others. 824 F. App'x at 907. Upon being notified of the accident, the insurer began to investigate coverage and to gather information regarding the claimants' injuries. *Id.* More than a month after being notified of the accident, the insurer sent a letter to all claimants that offered the insurer's per accident policy limits and advised that it would arrange a settlement conference to apportion the insurance proceeds. *Id.* at 908. Counsel for the decedent's estate subsequently wrote to the insurer and preemptively rejected any offer by the insurer to settle the wrongful death claim. *Id.* The estate's attorney argued that the insurer acted in bad faith by trying to schedule a settlement conference and not immediately tendering the per person policy limits to settle the wrongful death claim, even though the decedent's attorney never demanded to settle that claim. *Id.*

***6** In the subsequent bad faith action, the district court entered summary judgment in favor of the insurer, holding that no reasonable jury could find that the insurer failed to act with appropriate care and diligence; moreover, the district court concluded, no reasonable jury could find that the month-long delay between learning of the accident and scheduling a global settlement conference was unreasonable. *Id.* at 909. The Eleventh Circuit affirmed and held that there was "no evidence" indicating the insurer unreasonably exposed its insured to a judgment in excess of his policy limits. *Id.* at 912. As the Court put it:

> Despite the fact that Plaintiff never even attempted to communicate with Defendant—much less make a

> settlement demand—before Defendant made the full policy limits available, Plaintiff contends that Defendant should have immediately tendered the $250,000 policy limit for the wrongful death claim. But "because there were multiple claimants, Defendant's decision to pursue a global settlement was consistent with its duty of good faith under Florida law." Moreover, given the lack of communication from Plaintiff, we see no evidence in the record suggesting that Defendant knew it was exposing its insured to excess liability by failing to immediately tender the full policy limits for the wrongful death claim and by proposing a global settlement conference 32 days after first learning of the accident and before receiving any of the medical records that it repeatedly sought during that period.

Id. at 911-12 (internal citations omitted and alterations adopted).

In *Deary*, a similar finding was rendered as a matter of law: An insurer was never presented with a reasonable opportunity to settle because the injured party withdrew her settlement demand at the same time that she increased her damages amount by electing to undergo surgery. 536 F. Supp. 3d at 1269. After a car accident where the insured was at fault, the insurer and one of the injured claimants began to negotiate a settlement. *Id.* at 1260-62. The insurer believed that the claim could be fairly settled for $12,701.00 or less, but the claimant demanded that she be paid the full $25,000.00 bodily injury policy limits. *Id.* at 1262-63. The claimant subsequently elected to undergo spinal surgery to resolve pain allegedly caused by the accident and, only a few days before the surgery, she notified the insurer that her $25,000.00 demand was withdrawn because she would be undergoing surgery. *Id.* Because its previous damages calculation had not accounted for spinal surgery, the insurer responded by increasing its settlement offer to the $25,000.00 limit; however, the claimant countered with a $250,000.00 settlement demand. *Id.* at 1263. In the subsequent bad faith action, the district court awarded summary judgment to the insurer and the Eleventh Circuit affirmed. *Id.* at 1269-70. Highlighting that the claimant's $25,000.00 settlement demand was arguably too high until she elected to undergo surgery, the district court noted that the insurer was never given a reasonable opportunity to settle the claim for $25,000.00 because "in the same breath that Plaintiff advised Progressive that she intended to undergo the spinal surgery, which would obviously increase her damages, she closed the door to settlement at or within the policy limits." *Id.* at 1269. And absent a reasonable opportunity to settle the claim, no reasonable jury could find that the insurer acted in bad faith. *Id.* at 1269-71.

Valle is also instructive. There the insured caused a motor vehicle accident which resulted in the death of one person and injuries to seven others. *Valle*, 395 F. App'x at 556. Shortly after it learned of the accident, the insurer contacted the potentially aggrieved parties in an effort to resolve its liability. *Id.* About one month after the accident, and after receiving responses from all but the decedent's estate, the insurer indicated to all parties that it was willing to settle for the policy limits so long as the parties could agree on a collective settlement. *Id.* The settlement conference occurred a little more than two months later, at which time the estate learned that the other seven parties were willing to give the estate $10,000.00 and then split the remaining $10,000.00 of the policy limits among themselves. *Id.* The estate rejected the settlement offer and instead pursued a bad faith claim against the insurer relating to the delay in payment. *Id.* The district court granted summary judgment and the Eleventh Circuit affirmed, noting that it could not find any Florida case law "permitting a third-party claimant to participate in settlement negotiations, reject a policy-limits settlement offer, claim post-hoc that the offer was untimely, and prevail in a bad faith action against the insurer." *Id.* at 557.

***7** Plaintiffs are hoping that this case bucks the trend discussed above. Here, it is important to recall that the Bennars are not suing GEICO for its conduct in processing the PIP claim that Devin's parents made on *their policy* shortly after the golf cart accident. The bad faith claim at issue is limited to GEICO's conduct in processing the bodily injury claim made against the *Acuna Policy*, which GEICO undisputedly learned about in March 2017. Nevertheless, Plaintiffs argue that GEICO learned of Devin's injuries only weeks after the accident and therefore GEICO's coverage investigation effectively lasted almost one year. This ten-month duration factors heavily into Plaintiffs' bad faith argument because, in their view, it evidences GEICO's selfish and unnecessarily prolonged focus on avoiding its liability under the Acuna Policy.

The problem Plaintiffs have, however, is that there is no evidence other than speculation to support this argument. The undisputed record clearly shows that GEICO learned about Devin's injuries in July 2016 because his parents filed a PIP claim on their GEICO policy. GEICO denied that PIP claim, but nothing in the record other than Plaintiffs' speculation shows that, in adjudicating the PIP claim, GEICO's assigned

adjuster realized that the Acuna Policy might provide coverage for Devin's loss. By contrast, the record shows that the adjuster assigned to the Bennar Policy PIP claim answered only the question presented (i.e., whether the Bennar Policy covered the claimed loss) without considering whether any other policies may be liable for the damage. Accordingly, the undisputed record reflects that GEICO first learned about the bodily injury claim being made against the Acuna Policy on March 3, 2017—the date that Attorney Silva, the Bennars' lawyer, contacted GEICO about the claim. Although the denial of the PIP claim on the Bennar Policy factors into the totality of the circumstances analysis, the duration of the coverage investigation undertaken by GEICO *in connection with the bodily injury claim made on the Acuna Policy* was only 69 days—March 3 (the date GEICO learned of the claim) to May 11 (the date GEICO decided to afford liability coverage for the claim)—not ten months as Plaintiffs suggest.

We therefore find it dubious at best for Plaintiffs to claim now, as they did back in 2017, that GEICO's settlement offer was untimely and that this alleged untimeliness is evidence of bad faith. The case law is clear that both coverage investigations and settlement negotiations in this area can take several months to complete. Moreover, this tragic accident is not a run-of-the-mill fender bender. GEICO was confronted with an accident between a car and a golf cart that was being driven by unlicensed teenager who did not (and whose parents did not) own the golf cart involved in the accident. Five passengers were hurt, including Devin whose life has been permanently changed by the injuries he sustained in this accident. And as GEICO attempted to ascertain important details regarding the accident, its investigation was delayed by forces beyond its control such as the golf cart's presence in a police impound lot and the police's refusal to allow GEICO to inspect the golf cart absent the presence of a specific detective. In sum, resolution of the bodily injury claim on the Acuna Policy was necessarily going to take some time in light of the complicated facts involved.

It is further undisputed that the Bennars never made a settlement demand for the $10,000.00 policy limits. And aside from the self-serving affidavits of Eileen Gonzalez and Attorney Silva, there is no evidence to suggest that the Bennars *ever* considered settling Devin's claim against the Acuna policy for that amount. Indeed, even when viewed in the light most favorable to the Bennars, the balance of the record suggests that $10,000.00 was far below what they would have been willing to accept.

***8** After GEICO concluded its two-month coverage investigation and made the full bodily injury policy limits available, it properly sought to coordinate a global settlement conference to resolve all liability claims. Nevertheless, Attorney Silva advised GEICO the day before the conference that neither he nor his clients would attend. And when GEICO tendered a check for $20,000.00 to Attorney Silva to settle the claims of the Bennar children, he returned the check to GEICO and claimed that the settlement offer was "untimely." Notably, however, this alleged untimeliness did not preclude the Bennars from subsequently settling their daughters' claims against the Acuna Policy.

Considering the record as a whole, the undisputed facts show that GEICO was never given a reasonable opportunity to settle with Devin for the $10,000.00 per person policy limit. The Bennars insist that they would have accepted a $10,000.00 settlement prior to the conclusion of GEICO's coverage investigation; however, because the investigation did not conclude prior to an arbitrary and uncommunicated deadline, GEICO's settlement offer was somehow untimely in their view and thus they rejected the offer because they believed GEICO to be operating in bad faith.

Nevertheless, the undisputed record shows that GEICO diligently investigated the coverage issue that it identified soon after it learned of the claim. And it needed the time it took to conclude its coverage investigation because, to some extent, aspects of the investigation were beyond its control. GEICO kept the relevant parties informed about the progress of its investigation and, very soon after the investigation concluded, GEICO offered the policy limits and attempted to coordinate a global settlement with those who it perceived to be potential claimants. During the investigation, the Bennars never demanded the policy limits from GEICO. After the investigation concluded, the Bennars refused to attend a settlement conference where it knew the maximum recovery would be $20,000.00. And after the settlement conference, the Bennars refused to settle their children's claims because payment was untimely; however, that timeliness problem ultimately was not a problem as far as Devin's siblings were concerned.

All things considered, and even accepting as true that the Bennars would have accepted $10,000.00 for Devin's claim if GEICO tendered the money before the Bennars' unspoken deadline, the Bennars never gave GEICO a reasonable opportunity to settle Devin's claim because GEICO could not have known that its coverage investigation, which it had a

right to conduct, needed to be resolved in only a few weeks if it was going to have a chance to settle for the policy limits.

Cases like *Mesa, Montanez, Deary*, and *Valle* teach that an insurer does not act in bad faith by instigating a two-month coverage investigation and then attempting to reach a global settlement with potential claimants for the maximum amount of money afforded by the insurance policy at issue. These cases also teach that, when a claimant does not give an insurer a reasonable opportunity to settle a claim, the insurer cannot be found to have acted in bad faith as a matter of law. Here, the undisputed facts demonstrate that GEICO did *not* have a reasonable opportunity to settle Devin's bodily injury claim on the Acuna Policy. Accordingly, GEICO did not act in bad faith and summary judgment should be granted in GEICO's favor.

III. CONCLUSION

For the foregoing reasons, GEICO's motion for summary judgment should be **GRANTED** and the case should be **CLOSED**.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the Court finds good cause to expedite objections and therefore the parties have seven (7) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g.*, *Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

***9 DONE AND SUBMITTED** in Chambers at Miami, Florida, this 3rd day of April, 2024.

All Citations

Slip Copy, 2024 WL 2945460

Footnotes

1 On January 18, 2024, the Honorable Kathleen M. Williams referred GEICO's motion for summary judgment to the undersigned for a report and recommendation. [D.E. 144].

2 The original parties included Luis Chiong (the owner of the golf cart), Zabryna Acuna (the driver of the golf cart during the accident), and Zabryna's parents Monika Acuna and Jesse Acuna (insured by the GEICO policy at issue). Pursuant to the only remaining claim, the only Plaintiffs are Zabryna and Devin Bennar's parents—Eileen Gonzalez and Frank Bennar—who acquired their right to sue GEICO for bad faith through the consent of its insured, Zabryna.

3 Plaintiffs repeatedly violate S.D. Fla. L. R. 56.1(b) in their response to GEICO's statement of undisputed facts. To dispute a statement material fact, a party must aver that a particular statement is "disputed" and then support its dispute with evidentiary citations. S.D. Fla. L. R. 56.1(b)(2). Accordingly, Plaintiffs' repeated assertions that particular statements are "[d]isputed as phrased" or "[d]isputed" simply because Plaintiffs are "without knowledge" regarding the stated fact or "[d]isputed" only insofar as the Plaintiffs disagree that a particular fact is "material" do not effectively controvert the facts submitted by GEICO. *See, e.g.*, [D.E. 152 at ¶¶ 6, 8]. Therefore, unless otherwise noted, the Court will deem the uncontroverted material facts as undisputed by Plaintiffs pursuant to the discretion granted by S.D. Fla. L. R. 56.1(c).

4 [D.E. 141 at ¶¶ 1, 2]; [D.E. 152 at ¶¶ 1, 2].

5 [D.E. 141 at ¶ 3]; [D.E. 152 at ¶ 3].

6 [D.E. 141 at ¶ 4]; [D.E. 152 at ¶ 4].

7 [D.E. 141 at ¶ 4]; [D.E. 152 at ¶ 4]. Plaintiffs do not cite evidence to controvert that GEICO first received notice of a bodily injury claim *against the Acuna Policy* through a letter dated March 3, 2017. Plaintiffs submit instead that GEICO has been

aware of the loss since July 2016 because the Bennars, who held a separate policy with GEICO (the "Bennar Policy"), made a PIP claim on the Bennar Policy soon after the accident. *See* [D.E. 50-17 at 58-60].

8 *See* [D.E. 50-17 at 58-66] (deposition of GEICO's corporate representative discussing GEICO's handling of the Bennar Policy claim); *see also* [D.E. 51-3 at 4] (September 2016 letter denying the Bennar Policy claim because GEICO determined that the golf cart was not a "motor vehicle" as defined in the Bennar Policy).

9 [D.E. 141 at ¶ 5]; [D.E. 152 at ¶ 5].

10 [D.E. 141 at ¶ 6]; [D.E. 152 at ¶ 6].

11 [D.E. 141 at ¶¶ 6-34]; [D.E. 152 at ¶¶ 6-34].

12 *See id.*

13 [D.E. 141 at ¶ 35]; [D.E. 152 at ¶ 35].

14 [D.E. 141 at ¶ 36]; [D.E. 152 at ¶ 36].

15 [D.E. 141 at ¶ 38]; [D.E. 152 at ¶ 38].

16 [D.E. 141 at ¶ 39]; [D.E. 152 at ¶ 39].

17 [D.E. 141 at ¶ 40]; [D.E. 152 at ¶ 40].

18 [D.E. 141 at ¶ 41]; [D.E. 152 at ¶ 41].

19 [D.E. 141 at ¶¶ 42-46]; [D.E. 152 at ¶¶ 42-46].

20 [D.E. 141 at ¶ 47]; [D.E. 152 at ¶ 47].

21 [D.E. 141 at ¶ 48]; [D.E. 152 at ¶ 48].

22 [D.E. 141 at ¶ 49]; [D.E. 152 at ¶ 49].

23 [D.E. 141 at ¶ 50]; [D.E. 152 at ¶ 50].

24 [D.E. 141 at ¶¶ 51-52, 56]; [D.E. 152 at ¶¶ 51-52, 56].

25 [D.E. 141 at ¶ 53]; [D.E. 152 at ¶ 53].

26 [D.E. 141 at ¶ 54]; [D.E. 152 at ¶ 54].

27 [D.E. 141 at ¶ 55]; [D.E. 152 at ¶ 55].

28 *See* [D.E. 141 at ¶¶ 57-58]; [D.E. 152 at ¶¶ 57-58].

End of Document

THE 15TH JUDICIAL CIRCUIT OF FLORIDA

FACT INFORMATION SHEET

Form 1.977

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

Form 1.977(a)

Form for fact sheet required to be filed by **individual** judgment debtor after entry of judgment
(Fla. R. Civ. P. Form 1.977(a))

Fact Information Sheet. In addition to any other discovery available to a judgment creditor under this rule, the court, at the request of the judgment creditor, shall order the judgment debtor or debtors to complete **form 1.977**, including all required attachments, within 45 days of the order or such other reasonable time as determined by the court. Failure to obey the order may be considered contempt of court.

Attached is the fact information sheet, form 1.977, per rule 1.560 of the Florida Rules of Civil Procedure with Forms.

Note that the form 1.977, along with all attachments, is to be returned to the creditor's attorney, or to the judgment creditor if the judgment creditor is not represented by an attorney.

After form 1.977 and all attachments have been delivered, a notice of compliance (the last page of this packet) is to be filed with the clerk of court.

For more information, see Florida Rules of Civil Procedure, Rule 1.560.

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

FACT INFORMATION SHEET

For Individuals.

Full Legal Name: .....

Nicknames or Aliases: .....

Residence Address: .....

Mailing Address (if different): .....

Telephone Numbers: (Home) .....

(Business) .....

Name of Employer: .....

Address of Employer: .....

Position or Job Description: .....

Rate of Pay: $ _____ per _____. Average Paycheck: $ _____ per .....

Average Commissions or Bonuses: $ ___ per _____ Commissions or bonuses are based on .....

Other Personal Income: $ ___ from .....

(Explain details on the back of this sheet or an additional sheet if necessary.)

Social Security Number: _____ Birthdate: .....

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

Driver's License Number: .....

Marital Status: _____ Spouse's Name: .....

* * * * * * * *

Spouse Related Portion

Spouse's Address (if different): .....

Spouse's Social Security Number: _____ Birthdate: .....

Spouse's Employer: .....

Spouse's Average Paycheck or Income: $ _____ per .....

Other Family Income: $ _____ per _____

(Explain details on back of this sheet or an additional sheet if necessary.) Describe all other accounts or investments you may have, including stocks, mutual funds, savings bonds, or annuities, on the back of this sheet or on an additional sheet if necessary.

* * * * * * * *

Names and Ages of All Your Children (and addresses if not living with you): .....

Child Support or Alimony Paid: $ _____ per .....

Names of Others You Live With: .....

Who is Head of Your Household? _____ You ___ Spouse ___ Other Person

Checking Account at: _____ Account # .....

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

Savings Account at: _____ Account # .....

For Real Estate (land) You Own or Are Buying:

Address: .....

All Names on Title: .....

Mortgage Owed to: .....

Balance Owed: .....

Monthly Payment: $ .....

(Attach a copy of the deed or mortgage, or list the legal description of the property on the back of this sheet or an additional sheet if necessary. Also provide the same information on any other property you own or are buying.)

For All Motor Vehicles You Own or Are Buying:

Year/Make/Model: _____ Color: .....

Vehicle ID No.: _____ Tag No: _____ Mileage: .....

Names on Title: _____ Present Value: $ .....

Loan Owed to: .....

Balance on Loan: $ .....

Monthly Payment: $ .....

(List all other automobiles, as well as other vehicles, such as boats, motorcycles, bicycles, or aircraft, on the back of this sheet or an additional sheet if necessary.)

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

Have you given, sold, loaned, or transferred any real or personal property worth more than $100 to any person in the last year? If your answer is "yes," describe the property, market value, and sale price, and give the name and address of the person who received the property.

Does anyone owe you money? Amount Owed: $ .....

Name and Address of Person Owing Money: .....

Reason money is owed: .....

Please attach copies of the following:

a. Your last pay stub.

b. Your last 3 statements for each bank, savings, credit union, or other financial account.

c. Your motor vehicle registrations and titles.

d. Any deeds or titles to any real or personal property you own or are buying, or leases to property you are renting.

e. Your financial statements, loan applications, or lists of assets and liabilities submitted to any person or entity within the last three years.

f. Your last two income tax returns filed.

UNDER PENALTY OF PERJURY, I SWEAR OR AFFIRM THAT THE FOREGOING ANSWERS ARE TRUE AND COMPLETE.

.....

Judgment Debtor

STATE OF FLORIDA

COUNTY OF _____

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

The foregoing instrument was acknowledged before me this _____ day of _____ (year), by

_____

(name of person making statement), who is personally known to me or has produced

_____

as identification and who _____ (did/did not) take an oath.

Witness my hand and official seal, this _____ day of _____, (year).

.....

Notary Public State of Florida
My Commission expires:

_____

AFTER THE ORIGINAL FACT INFORMATION SHEET, TOGETHER WITH ALL ATTACHMENTS, HAS BEEN DELIVERED TO THE JUDGMENT CREDITORS' ATTORNEY, OR TO THE JUDGMENT CREDITOR IF THE JUDGMENT CREDITOR IS NOT REPRESENTED BY AN ATTORNEY, THE JUDGEMENT DEBTOR SHALL FILE WITH THE CLERK OF THIS COURT A NOTICE OF COMPLIANCE

.

Exhibit 8: Fact Information Sheet Form 1.977 - Individuals

NOTICE OF SERVICE FACT INFORMATION SHEET

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,

IN AND FOR _____ COUNTY, FLORIDA

Case No.: _____

_____
Petitioner

And

_____
Respondent

Notice is hereby given that the undersigned judgment debtor has completed the fact information sheet required by Rule 1.560, Florida Rules of Civil Procedure, and has served on or delivered the same to _____, the judgment creditor or his attorney, at _____ (address) by hand delivery or regular U.S. mail, postage prepaid this _____ (date).

_____

Judgment Debtor

_____

Address

_____

Phone