FOR PUBLICATION

In the United States Court of Appeals
For the Eleventh Circuit

No. 23-11458

CHARBEL CONSUL,

Plaintiff-Appellant,

versus

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:21-cv-00505-TJC-LLL

Before ROSENBAUM, ABUDU, and TJOFLAT, Circuit Judges.

ABUDU, Circuit Judge:

Charbel Consul, who was found liable in an underlying automobile accident case involving another vehicle, sued his insurer, Progressive American Insurance Company ("Progressive"), for engaging in bad faith during settlement negotiations with the injured

party. In this separate bad faith action Consul brought against Progressive, the district court granted summary judgment in Progressive's favor. Consul appeals that ruling, arguing that the totality of the circumstances created genuine issues of material fact which warranted the case going to trial.

After a thorough review of the record and the parties' briefs, and with the benefit of oral argument, we agree Progressive was not entitled to summary judgment as to whether it acted in bad faith viewing the evidence in the light most favorable to Consul. Accordingly, we vacate the district court's judgment and remand the case for further proceedings.

I. FACTUAL BACKGROUND

Progressive issued an automobile insurance policy to Consul, which included bodily injury (with limits of $10,000 per person) and property damage coverage (with limits of $10,000 per accident). While driving an insured vehicle on September 6, 2016, Consul rear-ended William Choisser.

Both Consul and Choisser were injured in the accident. Consul hired an attorney, Christopher Campione, to represent him regarding "injuries sustained in the . . . accident." Choisser was driving a 1991 Mercedes that he purchased for $3,000 a few years prior in a "friendly deal," because he knew the prior owner. His car was damaged in the accident and towed to a junkyard.

Progressive determined that Consul was 100% at fault for the accident. Progressive's adjuster testified that, upon receiving the insurance claim, she immediately mailed an excess letter to

Consul, indicating that the damage from the accident could exceed the policy limit of his insurance coverage. At her deposition, she produced a time-date-stamped copy of the letter. Consul disputes whether Progressive actually sent the letter, as he did not recall receiving it. Additionally, Progressive's litigation manager for this claim indicated on an internal form that an excess letter must not have been sent because he could not locate a copy of the letter in Progressive's electronic record system or hard copy files, which is where it would have been kept had it been sent. At the summary judgment phase, we must assume Consul never received the letter.

Days after the accident, Progressive contacted Choisser's attorney, Matthew Posgay, to request documentation of Choisser's injuries to aid in settlement negotiations.[1] Additionally, Progressive requested Choisser's wife's name so it could prepare a release form for any loss of consortium claim she might have considered bringing. Choisser's attorney did not provide Choisser's wife's name, stating that he did not understand why Progressive needed that information and that Choisser's injury alone warranted tender of the policy limits.

Progressive determined that Choisser's car, which it valued at $2,258.42, was a "total loss" under Florida law. Choisser's attorney disputed Progressive's determination of the car's assessed value and the car's legal status as a "total loss."

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[1] Posgay represented Choisser in "any and all claims" arising out of the September 6, 2016, crash. Importantly, he did not represent Choisser's wife.

On October 17, 2016, Posgay, on behalf of Choisser, offered to settle the dispute if Progressive paid $10,000 for Choisser's injuries and $5,000 for the damage to his car. That offer was contingent on Consul completing a financial affidavit indicating that he could not pay any damages out of pocket and pending resolution of Choisser's uninsured motorist claims against Consul. Progressive communicated this offer to Campione.[2] Campione helped Consul complete the affidavit and returned it to Posgay.

On November 15, Progressive sent a counteroffer to Posgay. Progressive agreed to pay $10,000 for Choisser's injuries and $5,000 for damage to Choisser's car, and it attached the appropriate checks for each amount. However, Progressive tried to impose two new conditions. First, it required that Choisser's wife release any consortium-related injuries she may have suffered due to Choisser's injuries.[3] Progressive made no efforts to contact Choisser's wife directly and did not contact Consul to ask whether he wanted to settle without having her release the consortium claim. The second

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[2] The parties dispute whether Campione was Consul's attorney for the purposes of Choisser's injuries and suit, as opposed to solely representing Consul to recover for his injuries. Nonetheless, Progressive continued to contact Campione over the course of the settlement, and he continued to respond on Consul's behalf. Furthermore, Consul testified that he hired Campione to be his representative when communicating with Progressive and that Campione was corresponding with Progressive on his behalf.

[3] After Choisser's attorney refused to provide Progressive with the identity of Choisser's wife, Progressive conducted its own investigation, came to the mistaken conclusion that Choisser's ex-wife was his current wife, and placed the ex-wife's name on its proposed consortium claim release form.

condition, based on Progressive's own interpretation of Florida law, required Choisser to transfer the title of his vehicle to it as a total loss.

On December 1, Posgay inquired whether Consul's acceptance of Progressive's additional terms and relinquishment of title were necessary to settle the claim. He also reminded Progressive that he did not represent Choisser's wife. Progressive responded a week later, on December 7, reiterating that a waiver of any loss of consortium claim was necessary and that Choisser's car was a total loss, so he *must* transfer its title, even if he wished to retain salvage rights over the vehicle. At this juncture, Progressive again failed to notify Consul of its actions or solicit his input on the settlement. Consul testified that, had he been asked whether he wanted to forego the loss of consortium waiver from the settlement, he would have done so. Choisser's wife testified that she had no interest in pursuing a consortium claim, had she been asked.

On December 13, Posgay declined Progressive's counteroffer on behalf of Choisser. He reiterated that he did not represent Choisser's wife and could not waive claims on her behalf. Moreover, Posgay reported that he did "not believe that [Progressive's] determination that the cost of repair exceeds the value of the vehicle (making it a total loss) requires surrender of the vehicle title, if it is Dr. Choisser's desire to retain and repair the vehicle." Therefore, as Posgay stated in his denial letter, Choisser was "unable to resolve the claim on the terms [Progressive] propose[d], and

[Progressive] declined to resolve the claim on the terms proposed by" Choisser.

Choisser maintained that he would have settled under his original terms, had Progressive offered them, even after this denial letter. Yet, Progressive determined that the parties were at an impasse and the claims could not be resolved. Progressive timely notified Campione that the settlement efforts failed and that he should be on notice of a lawsuit. Campione expressed concern that Progressive might be acting in bad faith and exposing Consul to an excess judgment.

In November 2017, Choisser filed suit in a Florida state court against Consul. Eventually, Choisser settled his property damage claim; he surrendered title of his vehicle to Progressive in exchange for $7,500. The bodily injury claim proceeded to a jury trial. The jury verdict resulted in a total judgment of over $1,000,000, including costs and fees, in favor of Choisser.

II. PROCEDURAL HISTORY

In May 2021, Consul commenced this bad faith action against Progressive. Consul alleged that Progressive breached its obligations to him in its accident investigation, settlement negotiations with Choisser, and communications with Consul. According to Consul, Progressive's bad faith handling of Choisser's claims resulted in the excess judgment entered against him in state court. Progressive moved for summary judgment, arguing that it had not acted in bad faith under the totality of circumstances.

After briefing, the district court granted Progressive's motion for summary judgment. The district court reasoned that Progressive's efforts to settle the consortium claim were not in bad faith. It also determined that Progressive's request for Choisser's vehicle title was based on a reasonable interpretation of Florida law. Moreover, it concluded that Progressive sufficiently communicated with Consul and Campione throughout the settlement negotiations. The district court held that Progressive could not be held responsible for the excess judgment award because no settlement was possible once Choisser rejected Progressive's additional settlement terms. Consul timely appealed.

III. STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*, construing all facts and drawing all reasonable inferences in favor of the non-moving party. *Guevara v. Lafise Corp.*, 127 F.4th 824, 828 (11th Cir. 2025). Summary judgment is appropriate when no genuine dispute of material fact exists, which is when no reasonable jury could return a verdict for the non-moving party. *Id.* at 828–29; *see Gogel v. Kia Motors Mfg. of Georgia, Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (*en banc*) ("[A] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990))). "[T]he non-movant's evidence is to be accepted for purposes of summary judgment." *Kinsale Ins. Co. v. Pride of St. Lucie Lodge 1189, Inc.*, 135 F.4th 961, 968 (11th Cir. 2025) (quoting *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996)). While

a court can resolve a case at summary judgment when there are no genuine issues of material fact, it is the function of a jury to weigh the evidence, make credibility determinations, and draw any legitimate inferences from the facts. *Hicks v. Middleton*, 141 F.4th 1174, 1180 (11th Cir. 2025).

IV. DISCUSSION

The issue on appeal is whether the district court erred in granting summary judgment against Consul on his bad faith claim. Given the totality of circumstances in this case, we hold that summary judgment was improper.

In reviewing this case under our diversity jurisdiction, we apply Florida law to state-law issues and decide them as Florida courts would. *Pincus v. Am. Traffic Sols., Inc.*, 986 F.3d 1306, 1310 (11th Cir. 2021). Under Florida law, an insurer "has a duty to use the same degree of care and diligence [in handling the defense of claims against its insured] as a person of ordinary care and prudence should exercise in the management of his own business." *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980); *see Kinsale Ins. Co.*, 135 F.4th at 968 (same); *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018) (holding that the central issue in a bad faith claim 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").

As part of this obligation, an insurer must "investigate the facts," "advise [the insured] as to the probable outcome of litigation," "warn of the possibility of an excess judgment," and explain

any steps the insured can take to avoid an excess judgment. *Am. Builders Ins. Co. v. Southern-Owners Ins. Co.*, 71 F.4th 847, 854 (11th Cir. 2023) (quoting *Boston Old Colony Ins. Co.*, 386 So. 2d at 785). Regarding settlement specifically, the insurer must "give fair consideration to a reasonable settlement offer," "advise the insured of settlement opportunities," and settle when a "reasonably prudent person" would do so. *Id.* (quoting *Boston Old Colony Ins. Co.*, 386 So. 2d at 785).

Whether an insurer has met its duty of good faith to an insured is a fact-based inquiry, considered under the totality of circumstances. *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 680 (Fla. 2004); *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1123 (11th Cir. 2016). As such, "[g]ood-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder." *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000); *Woods v. Progressive Am. Ins. Co.*, 159 F.4th 837, 842 (11th Cir. 2025) (same); *see also Harvey*, 259 So. 3d at 7 ("[I]t is for the jury to decide whether the insurer failed to 'act in good faith with due regard for the interests of the insured.'" (quoting *Boston Old Colony Ins. Co.*, 386 So. 2d at 785)). However, summary judgment is appropriate where no reasonable jury could conclude that the insurer behaved in bad faith. *Eres v. Progressive Am. Ins. Co.*, 998 F.3d 1273, 1278 (11th Cir. 2021).

The conditions attached to a settlement offer must be reasonable. *See Cruz v. Am. United Ins. Co.*, 580 So. 2d 311, 312 (Fla. 3d DCA 1991) ("The legal standard governing an insurer's settlement

conduct is one of reasonableness."); *Boston Old Colony Ins. Co.*, 386 So. 2d at 785 (holding that an insurer must "give fair consideration to a settlement offer that is not unreasonable under the facts"). The question of whether the settlement strategy, including its terms, was reasonable is also a question of fact typically determined by a jury. *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 561 (Fla. 4th DCA 2003).

Here, taking the evidence and drawing all reasonable inferences in the light most favorable to Consul, a jury reasonably could have concluded that Progressive did not attempt to settle Choisser's claim in good faith, resulting in the excess judgment award against Consul. In particular, the evidence raised questions about Progressive's settlement efforts, especially given the parties' apparent mutual assent as to the original terms, Progressive's subsequent refusal to remove a theoretical consortium claim from the settlement, and its requirement that Choisser surrender the car title as a total loss on the vehicle. Additionally, Consul raised disputed factual questions related to Progressive's outreach to Consul, either through his attorney or directly, regarding the additional settlement terms, Choisser's position, and the developing likelihood that settlement was becoming less likely. While Progressive tries to minimize its acts as, at most, slightly negligent, a jury could conclude the insurer's behavior rose more to the level of failing to act with the necessary "care and diligence" to protect Consul from a $1 million excess judgment. *Harvey*, 259 So. 3d at 8; *see Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1251 (11th Cir. 2021) (explaining that while negligence is not the standard for bad faith claims, it is relevant to

the bad faith inquiry). Thus, genuine issues of material fact exist as to whether Progressive satisfied its duty of good faith to Consul in negotiating a settlement with Choisser. *See Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991) ("[T]he insurer has the burden to show . . . that there was no realistic possibility of settlement within policy limits. . . .").

A. Consortium Claim Waiver

As to the consortium claim waiver, the evidence suggested that Choisser's wife was not interested in pursuing a claim in the first place. Progressive's agent handling the settlement, contrary to her standard practice, never attempted to reach out to Choisser's wife about any potential consortium claim. Indeed, Progressive never communicated with Choisser's wife at all, and instead relied on her husband's lawyer—who it knew did not represent her—to communicate its position. If Progressive had contacted her, it would have discovered that she never intended to pursue a consortium claim, so a reasonable jury could conclude that she would have waived the claim. Additionally, Progressive never asked Campione or Consul directly whether Consul wanted to settle without waiving the consortium claim. Had it done so, Consul testified that he would have foregone the loss of consortium waiver to settle the other claim. Instead, Progressive initiated its own flawed investigation into Choisser's wife's identity, mistook her for

Choisser's ex-wife, and erroneously listed the ex-wife's name on the proposed release form that it sent to Choisser's attorney.[4]

In general, an insurer's refusal to amend problematic language in a release may or may not constitute bad faith based on the context in which the refusal took place. *See Pelaez*, 13 F.4th at 1253; *Eres*, 998 F.3d at 1279. Although Progressive offered to amend the release's language or correct the name if it was incorrect, it refused to remove the waiver requirement even when it became clear that it was one of the primary impediments to settling the case. Federal courts have found genuine issues of material fact when an insurer refused to remove overly broad and disputed indemnification language. *See Eres*, 998 F.3d at 1279 (noting that while "an overbroad release *can* create a jury question about bad faith," it did not do so when the insurer offered to strike the offending language) (emphasis in original). A jury could reasonably conclude that Progressive at least should have complied with its regular business practice of communicating with the person from whom a waiver is sought, as opposed to what happened here, where Progressive failed to take those steps. Such a jury finding is especially reasonable given the evidence suggesting that Choisser's wife would have waived the consortium claim. *See Harvey*, 259 So. 3d at 7 (holding that the insurer must "diligently, and with the same haste and precision as if

[4] We are not blind to the fact that Posgay provided no reason as to why he could not provide his client's wife's name and failed to even alert Progressive that the release listed the wrong person. Yet, while we factor in the claimant's behavior, we focus on the actions of the insurer and, at this stage, we review the evidence in a light most favorable to Consul. *Pelaez*, 13 F.4th at 1250.

it were in the insured's shoes, work[] on the insured's behalf to avoid an excess judgment"). Therefore, there is a genuine issue of material fact as to whether conditioning the settlement on the waiver of the consortium claim—particularly without even seeking to secure the waiver from Choisser's wife—was reasonable.

B. Transfer of Vehicle Title

With respect to the title issue, Progressive continued to rely on its interpretation of Florida's total loss statute to require the car title as part of any settlement. Without wading too deeply into the proper interpretation of Section 319.30, the interpretation and application of this statute were a sticking point for both parties in negotiations. Section 319.30 states, in relevant part, "As used in this section, a motor vehicle or mobile home is a 'total loss' . . . [w]hen an insurance company pays the vehicle owner to replace the wrecked or damaged vehicle with one of like kind and quality . . . ." Fla. Stat. § 319.30(3)(a)(1)(a). It continues:

> A motor vehicle or mobile home shall not be considered a "total loss" if the insurance company and owner of a motor vehicle or mobile home agree to repair, rather than to replace, the motor vehicle or mobile home. However, if the actual cost to repair the motor vehicle or mobile home to the insurance company exceeds 100 percent of the cost of replacing the wrecked or damaged motor vehicle or mobile home with one of like kind and quality, the owner shall forward to the department, within 72 hours after the agreement, a request to brand the certificate of title with the words "Total Loss Vehicle."

Id. § 319.30(3)(a)(2).

Progressive and Choisser differed in their interpretations of this Section and on whether Florida law required Choisser to provide Progressive with the title if Progressive declared the car a total loss.[5] Progressive took Section 319.30 to mean that transfer of title was required once they (alone) deemed the car a total loss and attempted to compensate Choisser for the value of a replacement vehicle. Conversely, Choisser contended that Progressive could not merely declare the car's status as a total loss based on its sole determination, especially if Choisser decided to retain and repair the vehicle. Choisser did not agree that his car was a total loss. He wanted Progressive to work with him to determine a mutually acceptable valuation for the car and asked that Progressive consider the Kelley Blue Book and NADA Guidebook in reaching that valuation. Florida Statute § 626.9743(5) suggests various ways to value a total loss, including "[a] guidebook that is generally available to

[5] While we need not definitively say who is right and who is wrong on this matter of statutory construction, we note that there are not many cases addressing this portion of this statute. *See, e.g., Allen v. GEICO Gen. Ins. Co.*, No. 24-CV-21230, 2024 WL 2976757, at *6 n.7 (S.D. Fla. June 13, 2024) (explaining Section 319.30(3)), *report and recommendation adopted*, 2024 WL 3616004 (S.D. Fla. Aug. 1, 2024); *Koung v. Giordano*, 346 So. 3d 108, 116 (Fla. 1st DCA 2022) (acknowledging that Section 319.30 requires transfer of title when both parties agree that the vehicle was a total loss); *McKinney v. Fortune Ins. Co.*, 949 So. 2d 225, 225 (Fla. 3d DCA 2006) ("Section 319.30 defines a vehicle which constitutes a 'total loss' as one when there is an agreement between the insurance company and the vehicle owner to replace the vehicle with one of like kind and quality.").

the general public," another method "supported by documentation," or "[a]ny other method agreed to by the claimant." Because Choisser never agreed to replace as opposed to repair his car, he did not believe that the statute required him to transfer the title.

Florida's bad-faith law focuses on the actions of the insurer "in fulfilling its obligations to the insured." *Berges*, 896 So. 2d at 677. Here, Progressive knew that Choisser was rejecting its calculation, knew the sources Posgay wanted Progressive to consider, and knew how to calculate the vehicle's value using the NADA Guidebook. A reasonable jury could conclude that Progressive's failure even to consider these sources in the valuation during settlement negotiations was unreasonable. That raises a genuine dispute of material fact about the car's valuation and whether Progressive acted in bad faith in working with Posgay to determine the car's value.[6]

Additionally, Progressive avers it was required by statute to obtain the car's title, as a total loss, to forward it to Florida's Department of Motor Vehicles. However, a subsection of the Florida Statutes clarifies that either Progressive or Choisser could have forwarded the title to the state, negating the need for Progressive to require the title transfer. That subsection provides:

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[6] Once again, the record reflects that Posgay may have contributed to the problem. Progressive appears to have sought more information from Posgay about how he valued the car, and Posgay does not appear to have been responsive. For this reason, a reasonable jury could conclude that Progressive did not act in bad faith when it did not reconsider the car's valuation.

> [I]f the owner retains possession of a motor vehicle or mobile home in connection with a total loss claim settlement for such motor vehicle or mobile home, *the owner must*, within 72 hours after the motor vehicle or mobile home becomes salvage, *or the insurance company must*, within 72 hours after receiving the certificate of title for such motor vehicle or mobile home, forward the certificate of title to the motor vehicle or mobile home to the department for processing . . . .

Fla. Stat. § 319.30(3)(b) (emphasis added). The plain text of this subsection of the statute shows that Progressive did not need to insist on the title once it learned that Choisser wanted to retain the car because the law allowed for Choisser to send the title to the state on his own.

Given how clear this subsection is, Progressive "'dropped the ball' in its handling of this case." *Berges*, 896 So. 2d at 682. Florida generally does not recognize ignorance or misunderstanding of the law as excusable, so there is no reason why we should assume that Florida would permit insurers to claim lack of bad faith when making this sort of basic error. *Cf. Hovercraft of S. Fla., LLC v. Reynolds*, 211 So. 3d 1073, 1077 (Fla. 5th DCA 2017) (collecting cases regarding an attorney's mistake of law).

The insurer's duty of good faith includes being "diligent in its effort to negotiate a settlement." *Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12, 14 (Fla. 1993); *cf. Martinez v. GEICO Cas. Ins. Co.*, 152 F.4th 1323, 1335 (11th Cir. 2025) ("When an insurer faces both 'an affirmative duty to offer settlement' and a coverage issue,

it still must be allowed some opportunity 'to resolve the coverage dispute promptly' or with the requisite 'diligence and thoroughness.'" (quoting *Am. Builders Ins.* Co., 71 F.4th at 855–56)). Of course, the insurer need not exhaust all sources of information to obtain necessary facts to be characterized as acting in good faith, but it must exercise a reasonable "degree of care and diligence" which an ordinary person would exert when managing their own affairs. *Auto Mut. Indem. Co. v. Shaw*, 184 So. 852, 858 (Fla. 1938) (quoting *Hilker v. W. Auto. Ins. Co.*, 235 N.W. 413, 415 (Wis. 1931)); *King v. Gov't Emps. Ins. Co.*, No. 8:10-CV-977-T-30AEP, 2012 WL 4052271, at *4 (M.D. Fla. Sept. 13, 2012) (noting that, when an insurer unsuccessfully raises a legal issue, the jury need not decide the merits of the legal issue but whether the insurer acted "fairly and honestly toward its insured with due regard for his or her interests by insisting on legal defenses instead of settling" (citing *Kearney v. Auto-Owners Ins. Co.*, 664 F. Supp. 2d 1234, 1243–44 (M.D. Fla. 2009)).

Here, the law does not support Progressive's decision to make a hardline stance and pressure Choisser into a title transfer as a prerequisite to a high-value settlement. *See, e.g.*, Fla. Stat. § 624.155(4)(A) ("An action for bad faith involving a liability insurance claim, including any such action brought under the common law, shall not lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim."). Not only that, but if Progressive had any uncertainty, it could have included a

reservation of rights clause in the settlement agreement or sought a declaratory judgment regarding Section 319.30's application. Instead, Progressive tried to impose another precondition just as the parties were close to a meeting of the minds, and exposed Consul to a significant excess judgment award. Therefore, a reasonable jury could find Progressive acted in bad faith when it insisted Choisser turn over his title to it to receive the money for the damage to the car.

C. Communication with Consul

There are also genuine disputes over the diligence Progressive exercised in communicating with Consul. The record, again viewed in the light most favorable to Consul, adequately suggests that Progressive failed to keep Consul abreast of its settlement negotiations or seek his input on settlement terms, including the imposition of conditions Choisser indicated he did not believe were mandatory. *See Powell*, 584 So. 2d at 14 ("An insurer has a duty to advise the insured of settlement opportunities and the probable outcome of a lawsuit and to warn him of the consequences of an excess judgment so that he might take whatever steps are available for his own protection."). Additionally, insurers are required to caution their insured of a potential excess judgment. *Boston Old Colony Ins. Co.*, 386 So. 2d at 785. However, there is conflicting evidence over whether Progressive even sent an excess-judgment letter to Consul. While a claims specialist testified that she sent the letter, Progressive's litigation manager could not find either a hard copy or an electronic copy of any record that it had sent an excess letter to Consul, and Progressive indicated on an internal form that no

excess letter had been sent. Given this factual debate and the jury's role in determining credibility, it is more appropriate for a jury to decide whether to believe the claims specialist who said she sent the letter, the litigation manager who said he could not find the letter, or Consul who indicated he did not recall receiving it, for purposes of deciding whether Progressive fulfilled its notice obligations. *See Hicks*, 141 F.4th at 1180; *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312, 1317 (11th Cir. 2024) ("[T]he court will not make credibility determinations or weigh the parties' evidence.").

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Taken together, a jury could conclude that Progressive failed to act with the required diligence and care when it demanded that Choisser relinquish title to his vehicle and insisted upon the release of rights from a third party with whom it never communicated. This must be considered in addition to the alleged irregularities in outreach to the insured in contravention of Florida law. When viewed as a whole, we cannot say that a reasonable jury could not have ruled in Consul's favor on the bad faith claim. *See generally Kinsale Ins. Co.*, 135 F.4th at 971 ("To be certain, we do not decide whether—as a factual matter—the Lodge's liability *was* 'clear.' We hold only that a jury could reasonably so find when presented with this fact pattern.").

Finally, achieving a settlement was still possible even after Posgay's December 13 letter. Though Posgay later testified that settlement negotiations seemed nonviable after December 2016, Posgay's December 16 letter did not foreclose the possibility of

settlement, Progressive's case notes suggested that Progressive believed the case could settle, and Choisser later testified that he "would have" settled the case at that time. Indeed, a portion of the suit—the property damage claim—settled before trial.

The authorities upon which Progressive relies are not helpful to its case. In a handful of cases cited in Progressive's brief, the injured party would not have settled under the circumstances presented, making any settlement effort fruitless. *See, e.g.*, *Messinese v. USAA Cas. Ins. Co.*, No. 3:13-CV-160-J-20JBT, 2014 WL 2916451, at *5 (M.D. Fla. May 22, 2014) ("In sum, Plaintiffs would not have settled for $100,000 in any event. For this reason, even if Plaintiffs have raised a genuine dispute as to whether USAA acted in bad faith, they have failed to raise a genuine dispute as to whether USAA's purported bad faith caused or contributed to the excess judgment."), *aff'd,* 622 F. App'x 835 (11th Cir. 2015) (unpublished); *Deary v. Progressive Am. Ins. Co.*, No. 21-11878, 2022 WL 2916358, at *4 (11th Cir. July 25, 2022) ("In Florida, 'once it is clear that a claimant is unwilling to settle with one insured and give him a complete release, the insurance company has no further opportunity to give fair consideration to a reasonable settlement offer' for that insured." (alterations accepted) (quoting *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16, 21 (Fla. 4th DCA 2006))). However, as stated above, this case could have settled because the injured party remained willing to do so.

To be sure, Progressive is correct that it was not required to settle in excess of the insurance policy's coverage limits. *Kropilak v.*

21st Century Ins. Co., 806 F.3d 1062, 1069 (11th Cir. 2015) ("While an insurer has a duty to act in good faith to offer the policy limits under appropriate circumstances to avoid exposing its insured to a judgment in excess of those policy limits, it has no duty on behalf of its insured to agree to a consent judgment in excess of policy limits and then subject itself to a suit for bad faith for the amount in excess of the policy limits."). Yet, here, the initial settlement terms were at or below the policy limits, so this was not a concern. Choisser's testimony and subsequent actions established that he was open to settling his claim—at or below the policy limits.

There is no question that Progressive owed Consul a duty of care to act in good faith. *Boston Old Colony Ins. Co.*, 386 So. 2d at 785; *McNamara v. Gov't Emps. Ins. Co.*, 30 F.4th 1055, 1059 (11th Cir. 2022). There is a "requirement of a causal connection between the primary insurer's bad-faith actions and the loss or damage suffered by the excess insurer," *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900–01 (Fla. 2010), and we have noted that "showing the *existence* of an 'excess judgment' is generally the most straightforward way to prove causation." *McNamara*, 30 F.4th at 1059 (citing *Perera*, 35 So. 3d at 899). There was such an excess judgment here, which resulted from a failure to settle, suggesting causation. The question of whether the insurer acted with bad faith remains, but that is a question for the jury.

A jury could reasonably infer, on this record, that the deficient settlement process led to the excess judgment. *See Powell*, 584 So. 2d at 14 ("Any question about the possible outcome of a

settlement effort should be resolved in favor of the insured."). "[T]he insurer has the burden to show . . . there was no realistic possibility of settlement within policy limits . . . ." *Id.* A jury could find that there was still a realistic possibility of settlement, and that Progressive failed to show that there was not.

V. CONCLUSION

For the reasons we have explained, we conclude that there are material issues of fact in this record that a jury should resolve. We vacate the district court's decision and remand the case for further proceedings.

VACATED and REMANDED.

TJOFLAT, Circuit Judge, Dissenting:

I. CONSUL AS NAMED PLAINTIFF

Consul's bad faith action seeks damages from Progressive to satisfy Choisser's judgment against Consul in the underlying torts suit. It is uncontested that Consul is judgment-proof. Consul testified that no one has attempted to collect any portion of the judgment from him. When asked whether he filed a lawsuit against Progressive in this case, Consul answered, "I'm not sure." When asked whether he has "read the complaint in this case" and whether he knows "why [he] sued Progressive," Consul answered "no" to both questions. When asked whether he could explain what he felt Progressive did wrong in handling his case, Consul answered: "No, sir." In addition to its statements at the summary judgment hearing, the District Court addresses the agreement in a footnote to its Order: "While there has been no official assignment of claims, the parties have an agreement that if Consul collects any money on his bad faith claim, the money will [be] used to satisfy the underlying judgment against him in favor of Choisser."

Should Consul prevail in this bad faith claim, he will remit all payment to satisfy Choisser's judgment. Should Progressive prevail in this bad faith claim, Consul will bear the cost of his attorneys' fees and will be taxed for the Court's costs. Because it is undisputed in this record Consul is judgment proof, he would seem to have little to gain and much to lose in bringing this third-party claim. It is true that he would avoid future collection efforts by Choisser on the underlying judgment, but, given Consul's

judgment proof status, Choisser appears aware that those collection efforts would be doomed from the start. Perhaps, considering these facts, it's unsurprising Consul would not know "why [he] sued Progressive." Nonetheless, Consul has standing to appear before us so that he can get Choisser's unpaid judgment "off of the books," so to speak.

On the other hand, Choisser and his attorney, Matthew Posgay, have much to gain from Consul's bad faith claim. The Amended Final Judgment in the underlying tort suit includes $388,505.00 in attorney's fees, $76,000.00 in taxable costs, and $790,000.00 in damages.

As the District Court noted at the hearing on Progressive's motion for summary judgment, there are often assignments involved in third-party bad faith claims. It continued, "[where] there are assignments involved, the real parties in interest are less clear." I would emphasize that statement.

As named in this suit, Consul is the plaintiff in this action against his insurer, Progressive. As reflected in this record, Consul signed a written agreement with Choisser and Posgay agreeing that any damages recovered in this case would pass through to Choisser. When asked about this agreement, Choisser testified "[he] didn't recall any signed agreement. We may have one, but I don't recall it." Choisser's attorney, Posgay, testified to the existence of this agreement: "There have been documents or a document signed, but I don't recall the specifics of it. But there was -- if I recall correctly, there's not been an agreement to never collect,

but my understanding is to let this case take its course before efforts are taken to collect."

Consul's personal attorney in the underlying action, Christopher Campione, described the agreement as an assignment of rights:

> Q: Did you enter into any kind of an agreement with anyone on behalf of Charbel Consul that would either limit or forestall collection of the judgment obtained by Dr. Choisser in the Consul case
>
> A: I think this—other than the assignment of the rights for Mr. Choisser to pursue this claim, I don't believe so.

While the content of this agreement is outside the record on appeal, the finer points of the agreement may remain relevant to the eventual disposition of this case. In *Clement v. Prudential Prop. & Cas. Ins. Co.*, this Court sounded a note of caution in rejecting a similar agreement.

> We assume without deciding that the assignment of the insured's claim may serve as consideration for the injured party's release of the insured from any further liability without at the same time extinguishing the bad faith claim. It is clear as a matter of Florida law, however, that if, prior to any valid assignment of the insured's bad faith claim, the injured party releases the insured from any further liability for the excess damages that are alleged to have resulted from the bad faith of the insurer, the bad faith claim is extinguished.

790 F.2d 1545, 1548. As Posgay described the agreement, Choisser agreed not to collect the judgment against Consul until "this case takes its course." Under those terms, assignment or not, Consul has not been completely released from the excess judgment and thus meets our standing requirements under Article III. But even where Choisser has not formally extinguished Consul's liability, it remains unclear (to Consul himself, apparently) what Consul may practically gain by bringing this lawsuit.

Indeed, there are strange incentives at play here. Where Consul neither (1) understands *whether* he is suing Progressive, (2) understands *why* he is suing Progressive, nor (3) can state *any details* about what he feels Progressive did wrong in handling his claim, I feel our warning in *Clement* bears repeating:

> In the real world of litigation, it is sometimes thought more desirable for one particular person or entity rather than another to prosecute or defend a claim. Some might consider a jury in a bad faith case more likely to sympathize with the wronged insured than an assignee of his claim. Perhaps the situation was so perceived in this case, for the agreement executed to release the insured from further exposure was carefully drafted so that the insured would appear as the plaintiff in the case against his insurance carrier. To that end, it was clearly provided that whatever claim the insured may have against the insurance company was not yet assigned, but remained then the property of the insured.

Clement, 790 F.2d at 1548.

Today's majority correctly notes some of the oddities in this case. It "[is] not blind to the fact that Posgay provided no reason as to why he could not provide his client's wife's name and failed to even alert Progressive that the release listed the wrong person," Maj. Op. at 12 n.4, and it notes, "[o]nce again, the record reflects that Posgay may have contributed to the problem" when he refused to provide information regarding how he reached his valuation of the car. Maj. Op. at 15 n.6. Rather than confronting those oddities, it retreats to our duty in reviewing a grant of summary judgment to "tak[e] the evidence in the light most favorable to Consul." *See* Maj. Op. at 12 n.4 ("Yet, while we factor in the claimant's behavior, we focus on the actions of the insurer and, at this stage, we review the evidence in a light most favorable to Consul.").

The majority is correct in applying this standard. Indeed, a claimant's "actions can[not] let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith in handling the insured's claim." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 11 (Fla. 2018). Even so, I pause to highlight that gamesmanship in bad faith claims seems to have proliferated within our District Courts' dockets. *See, e.g.*, *Ellis v. GEICO Gen. Ins. Co.*, 541 F. Supp. 3d 1371, 1380 (S.D. Fla. 2021) ("A court should not allow a claimant to manufacture a claim for bad faith for the purpose of creating insurance coverage."); *Cosola v. Geico Gen. Ins. Co.*, 2013 WL 4854516, at *4 (S.D. Fla. Feb. 28, 2013) ("The Court will not permit Plaintiff to manufacture a claim of bad faith for the purpose of creating unlimited insurance coverage where no bad faith exists."); *Shin Crest PTE, Ltd v. AIU Ins. Co.*, 605 F. Supp. 2d 1234, 1243

(M.D. Fla. 2009) (recognizing the Court's "responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts." and reiterating "[t]he Court likewise has a responsibility to not allow contrived bad faith claims that are the product of sophisticated legal strategies and not the product of actual bad faith.") (quoting *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 685–86 (Fla. 2004) (Wells, J., dissenting)).

In light of such concerns, and in light of Choisser's (and, by extension, Posgay's) position as the practical "party in interest" here, I caution against the potential for the majority's proper regard for Consul's nominal interest to swallow due concern about Choisser and Posgay's continued gamesmanship throughout the settlement process in this case. There can be no question Choisser and Posgay are materially interested in the subject of this action, and, if this action is remanded to the District Court, I would instruct the Court to properly join Choisser and Posgay under Federal Rule of Civil Procedure 19.[1]

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[1] Federal Rule of Civil Procedure 19 states:

> *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or

I would also instruct the Court to enter an order to show cause as to why Richardson and Thompson should not be sanctioned for their conduct. When filing a pleading in federal court, an attorney certifies that he or she has conducted a reasonable inquiry and that the pleading is well-grounded in fact, legally tenable, and "is not being presented for any improper purpose." Fed. R. Civ. P. 11(b). Consul cannot state with certainty whether he is bringing a claim against Progressive, why he is bringing a claim against Progressive, or which actions by Progressive led to his claim. An order to show cause under Rule 11(c) would clarify what steps, if any, Richardson and Thompson took to inform Consul of the risks (such as bearing costs and expenses of litigation) Consul exposed himself to in pursuing this claim; an order would also clarify whether

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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The commentary to Rule 19 continues: "Whenever feasible, the persons *materially interested* in the subject of an action should be joined as parties so that they may be heard and a complete disposition made." *Id.* (emphasis added). *See also*, Fed. R. Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.").

Thompson and Richardson "presented [this action under Consul's name] for any improper purpose" as proscribed by Rule 11(b)(1).[2]

Questions of gamesmanship aside, I would still find summary judgment appropriate here as a matter of law because no genuine dispute of material fact exists, and, accordingly, no reasonable jury could return a verdict for Consul as the non-moving party.

II. FAILURE TO SETTLE THE LOSS OF CONSORTIUM CLAIM

Today's majority reasons that summary judgment was improper because a genuine issue of material fact exists as to whether Progressive was reasonable in "conditioning the settlement on the waiver of the consortium claim." Maj. Op. at 13.

At bottom, the majority reasoning rests on three grounds: (1) Progressive never communicated with Choisser's wife independently, and had it done so, it would have discovered Choisser's wife did not intend to pursue a loss of consortium claim; (2) "Progressive never asked Campione or Consul directly whether Consul

[2] The 1983 amendment to Fed. R. Civ. P. 11 notes that the word "sanctions" in the caption of Rule 11(c) "stresses a deterrent orientation in dealing with improper pleadings, motions, or other papers." It also notes "[the court] has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." *Id.* Here, the District Court may find sanctions appropriate as applied to Consul's appellate counsel where, after issuing an order to show cause, it is not satisfied Richardson and Thompson discharged their duties to Consul and to the Court in investigating the facts of this claim and informing Consul thereof.

wanted to settle without waiving the consortium claim"; and (3) "[a]lthough Progressive offered to amend the release's language or correct the name if it was incorrect, it refused to remove the waiver requirement even when it became clear that it was one of the primary impediments to settling the case." Maj. Op. at 12.

While we assess the totality of the circumstances in determining whether an insurer has met its duty of good faith to an insured, *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1123 (11th Cir. 2016), it is nonetheless helpful to address each of the majority's grounds in turn to demonstrate that no dispute of material fact exists with regard to Progressive's attempt to settle the consortium claim.

A. Progressive Did Not Attempt to Independently Contact Choisser's Wife

In determining bad faith, we focus on the actions of the "insurer in fulfilling its obligations to the insured." *Ilias v. USAA Gen. Indem. Co.*, 61 F.4th 1338, 1344 (11th Cir. 2023) (internal citations omitted). By beginning its analysis with the statement, "the evidence suggested that Choisser's wife was not interested in pursuing a claim in the first place," the majority focuses on the hypothetical actions of Choisser's wife in determining the reasonableness of Progressive's actions. Maj. Op. at 11. Instead, I find it proper to begin by focusing on Progressive's actions to determine whether it acted in bad faith in attempting to settle the consortium claim. As I will later discuss, the majority's assertion that, had Progressive contacted Choisser's wife, "it would have discovered that she never

intended to pursue a consortium claim" is complicated by the testimonies of Choisser and Choisser's wife that, though Choisser's wife did not intend to pursue a claim, she would not have accepted a waiver had she been offered one.

B. Progressive Attempted to Identify Choisser's Wife

Before addressing the waiver issue, I note that the testimony of Progressive's agent clearly establishes she did not make an attempt to contact Choisser's wife directly before sending the November 15 settlement offer. The record also reflects that the agent reached out to claimants' spouses in the past, even when the claimants were represented by attorneys.[3] The majority's analysis, however, overlooks the agent's five previous attempts to request Choisser's wife's name from Posgay, glosses over the details of the agent's "flawed investigation," Maj. Op. at 11, and fails to credit the agent's frank admission in her November 15 letter that her investigation was "unsuccessful."

By summarily concluding that Progressive initiated a "flawed investigation," the majority makes no attempt to identify what additional steps it would have asked Progressive's agent to

[3] When Progressive's agent was asked directly whether she sent a letter to Choisser's wife, she admitted she did not. Her reasons for failing to do so are unclear: in her deposition statement, she explains her failure to send a letter to Choisser's wife by deflecting to the outstanding issue about the surrender of title for Choisser's vehicle.

undertake after she failed to learn Choisser's wife's name. Maj. Op. at 11.

The undisputed facts tell the story of Progressive's investigation: After repeated attempts to determine Choisser's wife's name by contacting Posgay, the agent "[g]oogled [Choisser] for any information on him or his family," and searched a third-party database Progressive uses to "identify relatives in a household." When searching the internet and the private database for Choisser's wife's name, she "recall[ed] seeing a name 'Mary' come up quite often" though she "wasn't able to tell if that was his wife or a daughter or someone else." The agent said the goal of her investigation was to "get [Choisser's wife's] name for the release for any potential loss of consortium claim," and, when asked whether her search of the database revealed contact information for Choisser's wife, the agent said she did not believe "[the third-party database] would have given her emails or phone numbers." The agent noted her failure to establish Choisser's wife's identity in her November 15 settlement offer to Posgay:

> In reference to our proposed release, I have made several attempts to secure your client's wife's name for the release, but have been unsuccessful. Our investigation shows that Dr. Choisser's wife's name is Mary and we have added her, as such. If this is not correct, please advise me at your earliest convenience so we can change it, accordingly. Should the language on the drafts or proposed release not meet your specifications, please call me immediately . . . to discuss.

Posgay responded, "I do not represent Dr. Choisser's wife and I am writing to clarify whether you and your company are conditioning the $10,000.00 bodily injury policy limits tender on Dr. Choisser's wife being included in the release?" The agent wrote back on December 7:

> We include both parties on the release due to loss of consortium. If you do not wish for Dr. Choisser's wife's name to be on the release, we need a letter stating you will not be pursuing a loss of consortium claim on her behalf. We can then remove her name.[4]

On December 13, 2016, Posgay responded that "[he did] not represent Mrs. Choisser and [he] cannot waive claims on her behalf" and wrote that his client was unable to resolve the claim on Progressive's terms.

Focusing on the actions of the insurer, Progressive's agent acted in good faith by requesting Choisser's wife's name from Posgay, investigating the identity of Choisser's wife in good faith by making searches of the internet and a third-party database, and taking reasonable steps to inform Posgay of her confusion in case her identification was mistaken.

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[4] Progressive's concern over a separate loss of consortium claim is well founded. Choisser's negligence action and his wife's loss of consortium action "are separate and distinct" and Choisser's wife's loss of consortium action may have been maintained without joinder of Mr. Choisser. *Busby v. Winn & Lovett Miami, Inc.*, 80 So. 2d 675, 676 (Fla. 1955)

Posgay's responses gave Progressive's agent reason to be confused. In his December 13 response to the agent's December 7 letter, Posgay identified Choisser's wife as "Mrs. Choisser." Whether this wording was intentional or not, Posgay's reference to "Mrs. Choisser" could only describe Choisser's first wife: who went by Mary Hoffman Choisser during their marriage. Choisser's current wife is named "Dana Marie Merritt."[5] The majority, in a footnote to its "flawed investigation" assertion, acknowledges "Posgay provided no reason as to why he could not provide his client's wife's name and failed to even alert Progressive that the release listed the wrong person." Maj. Op. at 12 n.4. It disposes of this detail away in the same footnote: "Yet, while we factor in the claimant's behavior, we focus on the actions of the insurer and, at this stage, we review the evidence in a light most favorable to Consul." *Id.* In doing so, the majority moves too quickly. Posgay's actions are relevant here because they informed Progressive's course of action. *See Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1254 (11th Cir. 2021) ("In a bad faith action there's a difference between *focusing* on a claimant's actions, which would be improper, and *factoring* a claimant's actions into the totality of the circumstances analysis, which is not improper.") (emphasis in original).

Where, as discussed above, Choisser and Posgay are the functional parties in interest, I would properly factor their actions into the totality of the circumstances analysis in determining

[5] Choisser later testified Merritt kept her last name upon marrying Choisser because she is a professional and had to keep her title.

whether Progressive acted in good faith when conducting its investigation and communicating with Posgay.

When Posgay (1) refused to identify Choisser's wife in response to the agent's first five communications, (2) failed to alert the agent that she listed the wrong person, and (3) referred to a "Mrs. Choisser" that cannot be understood to reference Choisser's wife, Posgay set into action the series of events that necessitated the agent's investigation, failed to cure her mistake, and eliminated any reasonable opportunity to correctly identify Choisser's wife thereafter.

The question here is whether Progressive acted reasonably in pursuing a release from Choisser's wife and by failing to independently contact her. There's no indication in the record that Progressive's agent ever learned Merritt's name, much less learned of contact information at which she could reach her. Failing to identify Meritt as Choisser's wife, the agent undertook the steps available to her in working to protect Consul's interests.

C. Whether Choisser's Wife Would Have Waived Her Claim

Perhaps more importantly, the majority's next assertion overlooks a gap in Consul's causation claim: "If Progressive had contacted her, it would have discovered that she never intended to pursue a consortium claim, so a reasonable jury could conclude that she would have waived the claim." Maj. Op. at 11. While the record suggests Choisser's wife never intended to pursue a claim,

the undisputed evidence here establishes Choisser's wife *would not have waived her claim*, had Progressive contacted her.

At his February 1, 2022, deposition, Choisser testified that he "never considered" asking his wife whether "she was going to pursue a loss of consortium claim arising from [his] accident." When asked whether, if requested, his wife "would have signed a release of her consortium claim back at or about the time the parties were trying to settle this case in the fall and winter of 2016," Choisser replied "I don't think she would have signed a release." When asked whether his wife would have been unwilling to relinquish her claim, Choisser continued "She just doesn't trust lawyers. She doesn't want to sign an agreement she doesn't have to sign. And so just knowing her personality, she would say no." On the same day, Merritt testified "[she] did not want to become involved in doing a lawsuit." When asked if Choisser knew of her position at the time, she responded: "He probably [knew] that I don't like to deal with lawyers." Finally, when asked whether she "would . . . have been willing to sign" a release "waiving any consortium claim or any claim [she] may have had . . . for the amounts [her] husband was demanding," Merritt responded, "I have no idea. That never came up."

If, as Choisser believed, and as his wife's testimony seems to agree, his wife would not have signed a waiver of the consortium claim, then it can hardly follow that Progressive acted in bad faith by pursuing a waiver, and, after Posgay rejected Merritt's inclusion, offering to remove the language if Posgay confirmed Merritt

would not pursue a claim. In an exchange with Consul's counsel, the District Court specifically considered a scenario where Progressive settled the personal injury claim without receiving a release for Merritt's potential loss of consortium claim:

> THE COURT: So if Mr. Posgay, who was saying "I don't represent the wife" and—and "I'm trying to make the consortium claim a—an issue," for lack of a better term—so what if Progressive had said to Mr. Posgay, "All right. You're right. Don't worry about the consortium claim. Cross that out. Sign the—have Mr.—have Dr. Choisser sign the release, send it back, and we're done," and then that happens and the next day either Mr. Posgay or another lawyer files a consortium action against Mr. Consul, the insured. Would the insurance company be at risk for having settled the personal injury claim without taking into account the consortium claim?
>
> MR. RICHARDSON: That's a really good question, Judge. I think that there's a possibility yes. But in this case I think the wife's deposition testimony, when read in our favor, was that she wouldn't actually have done that.
>
> THE COURT: Well, wait, wait, wait, wait, wait. That doesn't—
>
> MR. RICHARDSON: Of course.
>
> THE COURT: Progressive wouldn't have known that, right? That's why they kept asking. What about

> the wife, right? They wouldn't—they wouldn't have known—I mean, if—if she would have said that at the time, or if Mr. Posgay would have said to them, "Don't worry, there's no consortium claim," then they would have gone through with it, right?
>
> MR. RICHARDSON: Yes. Well, let me see if I can reframe my answer, hopefully in a more satisfying way.
>
> Yes, I think the insurance company could have been at risk because of a filing of a consortium claim, but it would only have been because it insisted it didn't reach out earlier to the wife to resolve the consortium claim, which they could have done; they could have contacted her directly. And it sounds—and I know that you say they wouldn't have known this. But when you're looking at causation, it looks like she would have waived any kind of consortium claim.

As the District Court noted in its subsequent order, Consul admitted that Progressive would open itself to a possible bad faith claim by *settling* the personal injury claim without a waiver. Under the totality of the circumstances, taking into account the details of Progressive's agent's investigation and her subsequent communications with Posgay, I would affirm the District Court's finding that "the undisputed evidence shows that Progressive was reasonably trying to ensure that its insured did not get sued post-settlement on a consortium claim." Whatever "flaw" existed in Progressive's investigation of Choisser's wife's name, *see* Maj. Op. at 11, it can hardly be said the agent acted in bad faith by failing to

independently communicate with a person she could not identify—especially where the record reveals no evidence she ever obtained any address, phone number, or email address attached to Merritt, and her subsequent decision to insist on either a waiver of the claim or an assurance that a claim would not follow was eminently reasonable given the impact of even a small judgment on Consul's personal finances.[6]

III. TRANSFER OF VEHICLE TITLE

Consul next contends the District Court erred in finding, "[e]ven if Progressive was not legally required to take title under Florida law (about which the court expresses no opinion), Progressive had a good-faith interpretation of the law." As I understand the District Court's reasoning, the Court's conclusion as cited by Consul is best read within the context of the sentences immediately preceding it. Here is the District Court's discussion following its citation of Florida law:

> Neither Choisser nor Posgay ever conceded that the vehicle was a total loss; however, Choisser and Posgay also never stated that Choisser wanted to repair the vehicle and never offered any evidence to Progressive of their valuation of the vehicle. There is a scenario where Progressive did not have to take title to the

[6] Consul testified that even a judgment as small as five, ten, fifteen, or twenty thousand dollars could have a serious financial impact on his finances. In light of this concern, and in light of Choisser's testimony that his wife would have been unlikely to waive her claim, Progressive acted properly in working to avoid a post-settlement consortium claim against Consul.

> vehicle, but it was reasonable for Progressive to request the title given its determination that the vehicle was a total loss and Choisser's silence regarding repairing the vehicle. In response to Choisser's objection, Progressive agreed to pay Choisser's full $5,000 demand for the property damage in addition to allowing Choisser to retain salvage rights to the vehicle. But Progressive continued to request the title because it believed it was required by law to take the title. Even if Progressive was not legally required to take title under Florida law (about which the Court expresses no opinion), Progressive had a good faith interpretation of the law.

The District Court places its conclusion about Progressive's "good faith interpretation" of the law within the broader context of Progressive's actions following Choisser's objection to Progressive's title request. As to the interpretation of the law itself, the District Court stated at the hearing,

> "[W]e read that title law. And, you know, you could read it the way you're reading it. You could read it the way they're reading it.
>
> You could also guess that getting the title on a totaled car is standard practice, and so it wasn't beyond the pale for them to be asking for that.
>
> And, again, those things, to me, sound like somebody, at most, who might not be doing it quite right or—but the bottom line is they sent you the $15,000.

> I guess I'm not quite understanding where the bad faith is coming from.
>
> MR. RICHARDSON: Yes, sir. And so I do understand in her deposition testimony she repeatedly said that all she was doing was acting to protect her insured.
>
> But the—the—we would say that it's—that the facts are reasonably susceptible to a different conclusion based on some of these baffling decisions that she made. Again, for example—and it's not just the stuff that I've already talked about. There are other really inexplicable decisions that she made that I think place this above your negligence into bad faith territory.
>
> So in addition to that—the other stuff I've talked about, she insisted on communicating with Attorney Campione instead of Mr. Consul. She talked to Mr. Consul just the one time and allegedly sent him the excess letter.

In response to direct questioning, Mr. Richardson declined to directly address the reasonableness of Progressive's interpretation of the statute and instead focused on the separate issues of Progressive's investigation, Progressive's client communication, and the excess letter.

While the majority notes "there are not many cases addressing this portion of the statute," Maj. Op. at 14 n.5, it ultimately concludes:

> Given how clear the statute is, Progressive "dropped the ball in its handling of this case," *Berges*, 896 So. 2d at 682. Florida generally doesn't recognize ignorance or misunderstanding of the law as excusable, so there's no reason why we should assume that Florida would permit insurers to claim lack of bad faith when making this sort of basic error.

Maj. Op. at 16. I disagree that the statute is so clear that Progressive's actions can be described as "basic error." The District Court noted its uncertainty in interpreting the statute at the hearing, the majority opinion itself notes a lack of case law on the topic, and the record reflects Consul's counsel shifts the focus away from interpretation when questioned at the summary judgment hearing.

After Choisser objected, Progressive both (1) agreed to pay Choisser's full demand and (2) allowed Choisser to retain salvage rights to the vehicle. Under Progressive's understanding of the law, this was all it could legally do to settle Choisser's claim.

IV. CAUSATION ISSUES REGARDING THE EXCESS LETTER

The Majority also finds a genuine dispute of material fact regarding the level of diligence Progressive exercised in communicating with Consul. Maj. Op. at 18. The District Court summarizes Consul's two arguments on this topic in its Order:

> First, Consul states that Progressive did not directly contact Consul about the settlement of Choisser's claims because it incorrectly assumed Campione was Consul's attorney handling Choisser's claims, a

> position which, according to Consul, is "directly contrary" to [Progressive]'s notes and Campione's letter of representation. Second, Consul asserts there is evidence that Progressive did not send an excess letter to Consul, which traditionally warn insureds of the possibility of an excess judgment.

As to the issue of communicating with Campione, the insured's attorney, rather than Consul, the insured, the District Court correctly concluded that "Progressive did not act unreasonably in communicating with Campione." Campione sent Progressive a letter on September 28, 2016, roughly three weeks after the accident, stating, "[t]his office represents Charbel Consul in regard to injuries sustained in the above referenced accident." Progressive's agent spoke with Campione after receiving his letter and wrote in the claim notes that "[Campione] is representing [Consul] for his injury claim." The District Court correctly rejected Consul's argument that Progressive acted unreasonably in communicating with Campione regarding the settlement of Choisser's claims because "there is no evidence that Campione ever objected to Progressive contacting him regarding Choisser's insurance claims and Consul testifies that he expected Campione to handle any communication with Progressive on Consul's behalf."

Progressive's consistent communications with Campione regarding updates in settling Choisser's claims comported with Consul's expectations. When Consul was asked why he didn't reach out

to Progressive for an explanation in response to its excess letter,[7] Consul testified, "I think that is when I hired a lawyer." Consul's testimony continues as follows:

> Q. And you expected the lawyer to deal with all of this?
>
> A. To handle it, yeah.
>
> Q. And to be your representative at least in communicating
>
> A. Yes
>
> Q. with Progressive?
>
> A. That is why I didn't -- I didn't pay attention to, you know
>
> Q. All right. Because Mr. Campione was doing that on your behalf?
>
> A. Right.

[7] Consul testified he does not recall whether he received or read an excess letter. When asked whether, if he had received a document like the excess letter, he would have read it or "put it aside," Consul responded "Set it to the side." Consul stated, "I think that is when I hired an attorney" in response to further questioning about why he did not reach out to Progressive regarding a potential judgment exceeding his coverage amounts.

> Q. And you expected that any communication back and forth from Progressive regarding Dr. Choisser's claim Mr. Campione would deal with?
>
> A. Right.
>
> Q. Okay. And that is because and that is the reason that you didn't ask questions or pay particular attention to it?
>
> A. Uh-huh.

Even when viewed in the light most favorable to the insured, the evidence shows Progressive acted reasonably in communicating with Campione. After receiving Campione's letter, Progressive's agent copied Campione on all settlement negotiations between Progressive and Consul.[8] When Choisser requested a financial affidavit from Consul as a condition of settlement, Campione helped Consul complete the affidavit, and Campione sent the affidavit directly to Posgay.

Along with copying Campione on all communications, Progressive's agent also spoke with Campione over the phone on

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[8] Progressive's records reflect that its agent spoke with Campione over the phone on October 25, November 4, November 11, December 7, and December 20, 2016. Progressive sent a letter to Campione on October 26 which explicitly acknowledged "the possibility exists that should this case go to trial, a judgment could be entered in excess of his policy limits." Progressive's agent copied Campione on her letters to Posgay on November 15, December 7, and read the content of Posgay's December 13 response to Campione over the phone during the December 20 phone call.

December 20, 2016, following Posgay's December 13 letter rejecting Progressive's "counter-offer." Her file notes document the conversation:

> Received return call from [Consul's] Atty, Christopher Campione. Explained claims not resolving and read [Posgay's December 13] letter to him. Mr. Campione stated he is concerned that we are exposing [Consul's] personal assets. He went on to mention "bad faith." Explained we have met [Choisser's] demands, monetarily; however, the state of FL requires the title be processed whether [Choisser] or Progressive retains [the vehicle's] salvage. Informed Mr. Campione of suit letter sent to him on behalf of client. Requested [Campione] pls discuss same with his client and let us know if and when [Consul] is served with a lawsuit.

The agent's call with Campione establishes that Campione was aware of Posgay's December 13 letter in its entirety. Focusing on the insurer's actions, Progressive did not act unreasonably in communicating with Campione where those communications comported with Consul's expectations and adequately kept Campione, the insured's attorney, informed of Progressive's settlement negotiations with Choisser.

For these reasons, I cannot agree with the majority's conclusion that "[t]he record, again viewed in the light most favorable to Consul, adequately suggests that Progressive failed to keep Consul abreast of its settlement negotiations or seek his input on

settlement terms, including the imposition of conditions Choisser indicated he did not believe were mandatory" Maj. Op. at 18.

The majority next argues that there's a factual dispute over whether Progressive sent an excess-judgment letter to Consul. The District Court laid out the facts in the record:

> [Progressive's agent] testifies that in normal course she would have sent Consul an excess letter as soon as she was assigned the claim and saw he carried the minimum insurance limits. Progressive also provides copies of two excess letters, one of which was noted as being sent three days after the accident. Consul testifies that he does not remember whether he received or read an excess letter. Consul also offers the testimony of Keith Pelkey, a litigation representative at Progressive, who testified that he searched records of this case and could not find a record that an excess letter was sent. However, Pelkey did not testify that an excess letter was not sent. And [Progressive's agent] later testified that the letters were stored in a separate electronic file, and it is unclear if Pelkey searched that separate file.

Today's majority disagrees with the Court's finding of no dispute of material fact regarding the excess letter. It writes:

> Given this factual debate and the jury's role in determining credibility, it is more appropriate for a jury to decide whether to believe the claims specialist who said she sent the letter, the litigation manager who said he could not find the letter, or Consul who indicated he did not recall receiving it, for purposes of

> deciding whether Progressive fulfilled its notice obligation.

Maj. Op. at 19.

As the majority later notes, there is a "requirement of a causal connection between the primary insurer's bad-faith actions and the loss or damage suffered by the excess insurer." *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 900–01 (Fla. 2010). The majority seems to overlook this causation requirement in finding a dispute of material fact regarding the excess letter. Even if Progressive failed to send the letter, Consul's claim still fails because he testified that rather than "taking the time to read it," he would have "set the letter to the side" had it been sent to him. *See Mesa v. Clarendon Nat. Ins. Co.*, 799 F.3d 1353, 1360 (11th Cir. 2015) (citing *Perera,* 35 So. 3d at 903–04) ("Finally, although Clarendon may have been negligent in failing to keep its insured advised of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment, such negligence was not the cause of the excess judgment, and is therefore immaterial.")

Thus, I agree with the District Court's finding that no dispute of material fact exists regarding the excess letter or Progressive's communications with Consul.

V. PROGRESSIVE'S LACK OF SETTLEMENT EFFORTS FOLLOWING POSGAY'S DECEMBER 13 REJECTION

Finally, the District Court did not err by concluding that Progressive's failure to engage in settlement negotiations after December 13, 2016, could not have caused the excess judgment because

Progressive could not have settled within policy limits. "[T]here must be a causal connection between the damages claimed and the insurer's bad faith." *Perera,* 35 So. 3d at 903–04. As the District Court noted, "Posgay unequivocally testified that the case could not have been settled within Consul's policy limits after Posgay's December 13, 2016 letter declining Progressive's counteroffer." Posgay testified as follows:

> Q: Was this a case that could have been settled, Mr. Posgay, after December [13th,] 2016, for a payment within the policy limits?
>
> A: . . . I'd have to take a look at the correspondence as far as the date, but I think I did send a letter indicating when it could no longer be resolved because Progressive refused to accept our settlement offer without a counteroffer.
>
> Q: . . . But whatever the date of that letter is, that would have been the last date that Progressive would have had an ability to settle this case, the Choisser case, within the policy limits; fair?
>
> A: For the bodily injury and for what we offered on the property damage, correct.

Consul argues that the District Court erred because it "failed to give appropriate weight to the other testimony and evidence in the case." As the Court noted in its order:

> When asked if Choisser would settle "if Progressive had offered to pay [Choisser] the $10,000 bodily

> injury liability limit without [his] wife having to sign a release and without -- and the $5,000 property damage check without [him] having to agree that [his] vehicle was a total loss and to surrender the title," he testified "[w]e would have" settled.

The Court properly rejected Consul's argument regarding Choisser's testimony creating a dispute of material fact where, "upon a full reading of Choisser's testimony, it is clear that [Choisser's] statement merely evidence Choisser's amenability to settlement on his terms laid out in the October 17, 2016 demand letter." Having concluded that Progressive acted reasonably in pursuing a release of the consortium claim or, in the alternative, insisting on an assurance that Choisser's wife would not purse a claim, and that Progressive acted reasonably in adhering to its good-faith interpretation of the vehicle title law, I would affirm the District Court's ruling that "[a]s a matter of law, Progressive's failure to continue settlement negotiations after December 13, 2016, did not cause the excess judgment."

VI. CONCLUSION

For the foregoing reasons, I would affirm the District Court's grant of summary judgment where no dispute of material facts exists. Alternatively, I would instruct the District Court on remand to join Choisser and Posgay as parties in interest under Rule 19, and I would instruct the District Court to enter an order to show cause as to why Richardson and Thompson should not face sanctions for their failure to investigate the facts of this action, and

for their failure to properly inform Consul of the risks inherent in serving as the named plaintiff in this action, where Consul has nothing to practically gain in bringing suit.