UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-22524-CIV-WILLIAMS

THOMAS ARCHER BANNON and
MARGARET JOAN RANDALL,
individually and as husband and wife,

Plaintiffs,

vs.

GEICO GENERAL INSURANCE
COMPANY,

Defendant.
_________________________________/

OMNIBUS ORDER DENYING DEFENDANT'S
POST-TRIAL MOTIONS AND CLOSING CASE

THIS MATTER is before the Court on (DE 181) Defendant's motion for a new trial and (DE 182) Defendant's renewed motion for judgment as a matter of law. These motions are fully briefed. For the reasons below, the motions (DE 181; DE 182) are **DENIED.** The Clerk of the Court is directed to **CLOSE** the case.

I. BACKGROUND[1]

This case arises from a car accident that occurred on October 27, 2010, between Plaintiffs, Thomas Archer Bannon and Margaret Joan Randall, and GEICO insured driver, Melissa Servold. At the time of the accident, Servold and her mother, Beverly Allen, were insured under a GEICO policy providing liability insurance limits of $250,000 per person and $500,000 per occurrence. On November 2, 2010, Allen contacted GEICO and informed it of the accident.

[1] These facts are undisputed unless otherwise noted. The Court has omitted many facts adduced at trial that are not directly relevant to the motions for a new trial and judgment as a matter of law.

On November 19, 2010, Plaintiffs sued Servold and Allen for negligence in state court in *Bannon, et al. v. Servold, et al.*, Case No. 2010-CA-1499-K (Monroe Cty. Cir. Ct.). Three days later, on November 22, GEICO tendered the $250,000 policy limits by delivering the check to Plaintiffs' lawyer. The following day, Plaintiffs rejected the tendered limits. Over the next four years, Plaintiffs litigated their negligence claim against Servold and Allen, and made several settlement offers to both the insureds and GEICO, as GEICO's policy required that it be part of any settlement agreement.

On March 26, 2015, GEICO permitted Allen and Servold to enter into a proposed consent judgment for $2.95 million. In April 2015, Servold and Allen entered into a stipulated final judgment in the underlying state court case, in which they agreed to a $2.95 million judgment against them and assigned their rights to pursue a bad faith claim against GEICO to Plaintiffs. In accordance with the stipulation, Plaintiffs executed covenants not to sue against Servold and Allen, agreeing not to pursue the judgment against them until after the conclusion of Plaintiffs' bad faith claim against GEICO, and to limit the amount they collect against them to $200,000 per person.

On July 6, 2015, Plaintiffs, through the assignment from GEICO's insureds of any bad faith claims, filed the instant action against GEICO, alleging that GEICO acted in bad faith in handling Randall's claim and by not agreeing to negotiate a consent judgment. The case was tried before a jury from November 29, 2016, through December 8, 2016. The jury returned a verdict in favor of Plaintiffs and against GEICO (DE 157), and the Court entered a Final Judgment in favor of Plaintiffs in the amount of $2,912,227.40 (DE 173). GEICO's motions for a new trial (DE 181) and for judgment as a matter law (DE 182) followed.

II. LEGAL STANDARD

A. Motion for New Trial

Under Federal Rule of Civil Procedure 59(a)(1)(A), a court may grant a new trial "on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." When ruling on a motion for a new trial, a trial judge must determine "if in his [or her] opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice." *Ins. Co. of N.A. v. Valente*, 933 F.2d 921, 923 (11th Cir. 1991) (quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984)). "[T]o assure that the judge does not simply substitute his [or her] judgment for that of the jury," "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Ins. Co. of N. Am. v. Valente*, 933 F.2d 921, 923 (11th Cir. 1991) (citing *Hewitt*, 732 F.2d at 1556). "[A] new trial is warranted only where the error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's "substantial rights" or resulted in "substantial injustice"). *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004).

"To determine if a party's substantial rights were affected, [the court] analyze[s] factors including 'the number of errors, the closeness of the factual disputes, the prejudicial effect of the evidence, the instructions given, and whether counsel intentionally elicited the evidence and focused on it during trial.'" *SEB S.A. v. Sunbeam Corp.*, 148 F. App'x 774, 790 (11th Cir. 2005) (quoting *Ad–Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1465 (11th Cir.1994) (holding that a party's substantial rights were not affected as long as "the judgment was not

substantially swayed by the error."). A motion for new trial is left to the discretion of the trial court. *Lambert v. Fulton Cnty.*, 253 F.3d 588, 595 (11th Cir. 2001); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 562 (11th Cir. 1987).

B. Motion for Renewed Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) allows a party to renew a motion for judgment as a matter of law made pursuant to Rule 50(a) following entry of a jury verdict. *See* Fed. R. Civ. P. 50(b). Rule 50(b) provides, in pertinent part, as follows:

> **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial**. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. . . . In ruling on the renewed motion, the court may:
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> (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law.

When considering a Rule 50(b) motion, the court must consider the evidence presented at trial, drawing all reasonable inferences in favor of the non-moving party. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192–93 (11th Cir. 2004). A defendant's motion for judgment as a matter of law should be granted only if the plaintiff failed to present a legally sufficient evidentiary basis for a reasonable jury to find for it on a material element of its cause of action. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278 (11th Cir. 2005). The motion should be denied if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of its case. *Id.*

III. DISCUSSION

A. GEICO's Motion for New Trial

GEICO advances four arguments why it suffered substantial prejudice and was deprived of a fair trial. (DE 181; DE 197). First, "the introduction of argument and testimony concerning post-tender offers for consent judgments in excess of GEICO's policy limits misled the jury to believe that GEICO had an obligation to consider and agree to such proposals, notwithstanding well-settled Florida law holding otherwise." Second, "the introduction of evidence, testimony and argument concerning GEICO's claims manuals and any alleged deviations therefrom on GEICO's part inevitably confused the issues and invited the jury to find against GEICO based on self-imposed standards which rise above what is required under Florida law." Third, Plaintiffs' expert, Lewis Jack, "invaded the province" of the Court and the Jury. Fourth, Randall's testimony "served only to invoke sympathy from the Jury and invite the Jury to find against GEICO on an impermissible basis." (*Id.*). The court will address these arguments in turn.[2]

i. Post-Tender Conduct

GEICO argues that the evidence, argument, and testimony concerning GEICO's post-tender conduct and the proposals for consent judgments were contrary to both Florida law and the Court's rulings, and produced a substantial prejudicial effect that deprived GEICO of a fair trial. GEICO insists that the jury was misled to believe "that

[2] Although the Court agrees with Plaintiffs that GEICO failed to raise contemporaneous objections to many of the statements upon which GEICO's motion for new trial is based, the Court resolves GEICO's motion on the merits.

GEICO could have settled Randall's claim with payment of the $250,000 policy limits for approximately five (5) years after GEICO's tender was rejected." (DE 196 at 5-6).

Prior to trial for this matter, GEICO filed its First and Second Motions *in Limine* seeking to exclude all evidence and argument concerning GEICO's claim handling after the rejection of GEICO's tender made on November 22, 2010, and more specifically, to exclude any evidence and argument of offers for consent judgments in excess of GEICO's policy limits that were made by Plaintiffs following Plaintiffs' rejection of GEICO's tender. (DE 87; DE 88).

These motions were granted in part and denied in part in the Court's Omnibus Order (DE 121). The Court noted that, based upon the record before it, "GEICO refused to permit its insureds to enter into a consent judgment until more than four years after Plaintiffs filed their negligence suit in state court, despite numerous overtures from both the Plaintiffs' and the insured's counsel." (*Id.* at 5). Citing controlling precedent, the Court reasoned that "[u]nder its duty to defend, an insurer has a duty to act in good faith with respect to its insured, and may not act solely in its own interest – even when its insured is sued in excess of the policy limits." (*Id.* at 7). In harmonizing these principles with the Eleventh Circuit's ruling in *Kropilak v. 21st Century Ins. Co.*, 806 F.3d 1062, 1068-70 (11th Cir. 2015), upon which GEICO primarily relied, the Court held that:

> while an insurer has no obligation or duty to agree to an excess judgment, it may not act solely in its own interest when it has undertaken a defense of its insureds, as was the case here. GEICO was within its rights to litigate and test the evidence of Plaintiffs' negligence claim, and exercise discretion to determine when and if it would consent to its insureds' settlement of that claim. But GEICO could not exercise this discretion by indifference or obstruction without any regard for its insureds; such disregard could be evidence of bad faith in performing its duty to defend.

(*Id.* at p. 9).

The Court's Order excluded evidence and testimony about the offers for consent judgments and GEICO's post-tender conduct, but permitted Plaintiffs to "present limited evidence and testimony [regarding] (1) the fact of any settlement offers (without reference to the terms of these offers); (2) GEICO's response to any such offers (or lack thereof); and (3) when and how the underlying claim was resolved."[3] (*Id.*).

Against this backdrop, the Court rejects GEICO's contention that the evidence, argument,[4] and testimony at trial regarding post-tender conduct and proposals for consent judgments warrant a new trial under Rule 59. First, the Court has already rejected an argument that GEICO continues to advance here: "GEICO's post-tender conduct[] . . . should have been excluded entirely." (DE 181 at 5-6). The Court will not reconsider its prior rulings on this issue.

Second, the Court finds the jury instruction alleviated any prejudice caused by the improper introduction of evidence or argument on this issue: "[A]n insurer has no obligation to offer more than its policy limits to settle a claim or to agree to a judgment in

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[3] The Court denied GEICO's Motion for Reconsideration on this issue. (DE 125.)

[4] GEICO focuses on this statement made by Plaintiffs' counsel during closing argument:

> Geico was holding its insureds hostage on the vain hope that something would happen that would require Mr. Bannon to simply take $250,000 to settle the case. Nobody ever asked – they were never asked to pay more than the 250. They were just asked to allow the Bannon's to enter into a deal with the Servol's (sic) that would preserve our right to be here today.

(DE 195-2 at 58: 24-25, 59: 1-4). The Court is troubled that this statement likely exceeded the scope of permissible testimony under the Court's Omnibus Order on motions *in limine* (DE 121), especially in light of the extensive argument on this issue. The Court nonetheless finds that any error does not warrant a new trial under the circumstances.

excess of the policy limits." (Final Jury Instructions, DE 155 at 8). Thus, the Court made clear to the jury that despite any mention at trial regarding proposals for consent judgments, GEICO was *not* obligated to consent to providing any more than the policy limits. Juries are presumed to follow the Court's instructions. *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 898 (11th Cir 2011).

Third, and most importantly, the purportedly prejudicial evidence and argument cited by GEICO[5] did not cause "substantial prejudice," affect GEICO's "substantial rights," or result in "substantial injustice." *See e.g., Peat*, 378 F.3d at 1162; *Peterson v. Willie*, 81 F.3d 1033, 1036 (11th Cir. 1996). Based on the record, no reasonable juror would have been misled that GEICO was obligated to consent to a judgment for more than the policy limits, and there is ample evidence in the record to support the jury's finding that GEICO acted in bad faith.

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[5] The Court notes that it was GEICO's counsel who elicited from Plaintiffs' first witness, Mr. Osur, that none of the settlement proposals required GEICO to issue a settlement check for more than $250,000.00:

> Q. Mr. Osur I have one last question for you.
>
> Before we took our break, we were talking about proposals you had made throughout the time the lawsuit was pending. All of the proposals that you made were for more than the policy limits, weren't they?
>
> A. Yes, but Geico was not obligated to pay more than their policy limit.
>
> MR. DUKE: Thank you. That's all I have, Your Honor.

(DE 200-1 at 66).

ii. Claims Manuals

GEICO next seeks a new trial because "the presentation of evidence, argument, and testimony regarding GEICO's alleged deviations from internally created policies and procedures have no relevance to whether GEICO fulfilled its duties under Florida Law, and the considerable weight placed on GEICO's internal policies distracted the jury from the real issue and substantially prejudiced GEICO." (DE 181 at 9).

This argument is without merit. It, too, seeks reconsideration of a prior Court Order: The Court's Omnibus Order (DE 121 at 10) also denied GEICO's third motion *in limine*, which sought "to exclude evidence and testimony regarding GEICO'S claims manuals, policies, and procedures."[6] And any prejudice that may have arisen from evidence or testimony regarding GEICO'S claims manuals, policies, and procedures, was cured by the Court's instructions to the jury:

> Throughout the trial, you heard evidence regarding GEICO's internal policies and procedures contained within GEICO's claims manual. An insurer's duty of good faith is determined by application of Florida law. An insurance company is free to structure its own policies, procedures and manuals separate from what is required by Florida law. So if a GEICO employee acts in a manner inconsistent with GEICO's internal policies or training manuals, this alone does not constitute bad faith. However, to the extent that these policies, procedures, and manuals are shown to conform to industry standards, non-compliance may be evidence of bad faith.

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[6] Plaintiffs' response to GEICO's third motion *in limine* argued that "a defendant's failure to comply with its own internal policies and procedures, or with the industry standard, is probative of GEICO'S bad faith, and that claims manual, policies, and procedures are relevant to establishing the standard of care." (DE 121 at 10). The Court ruled in favor of Plaintiffs on this issue, citing *McMullen v. GEICO Indemnity Co.*, No. 14-cv-62467-BB, 2015 WL 11197744, at *7 (S.D. Fla. Oct. 9, 2015) (noting that "to the extent [GEICO's] policies are shown to conform to industry standards, this 'non-compliance may be evidence of bad faith.'") (quoting *Altheim v. GEICO General In. Co.*, No. 8:10-cv-156-T-24 TBM, 2011 WL 1429735, at *5 (M.D. Fla. Apr. 14, 2011); *Kearney v. Auto-Owners Ins. Co.*, No. 8:06-cv-595-T-24 TGW, 2009 WL 3712343, at *7 (M.D. Fla. Nov. 5, 2009). (DE 121 at 10).

> Thus, you must determine whether an insurer has acted in bad faith under Florida law based on the totality of the circumstances in this case.

(Final Jury Instructions, DE 155 at 9-10). The Court also gave a similar instruction when the Claims Manual was admitted into evidence. (DE 195-1 at 44).[7] Accordingly, the manuals were properly admitted under the Court's prior rulings, and the jury was properly instructed that it was Florida law, rather than GEICO's policies and procedures, that fixed the standard of care in this case.

The Court further finds that in light of the evidence presented at trial, the purportedly prejudicial evidence and argument[8] cited by GEICO on this issue did not cause "substantial prejudice," affect GEICO's "substantial rights," or result in "substantial injustice." *See e.g., Peat*, 378 F.3d at 1162; *Peterson*, 81 F.3d at 1036.

iii. <u>Expert Testimony</u>

Plaintiffs' third argument for a new trial is that Plaintiffs' expert witness, Lewis Jack, Esq., improperly testified: (i) that GEICO owed a duty of good faith to the claimants, Randall and Bannon; and (ii) as to the ultimate question for the jury, *i.e.* that GEICO acted in "bad faith" in its handling of Randall's claim. (DE 181).

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[7] The Court instructed the jury that "[a]n insurer's duty of good faith is determined by application of Florida law. An insurance company is free to structure its own policies, procedures, and manuals separate from what is required by Florida law. So if a GEICO employee acts in a manner inconsistent with GEICO's internal policies or training manuals, this alone does not constitute bad faith."

[8] The argument of Plaintiffs' counsel on this issue was consistent with the Court's rulings and Florida law:

> The judge is going to tell you that if they do not comply with their manual, if the people do not comply with their manual, it is evidence of bad faith. It does not make it bad faith alone, but it is evidence of bad faith that you can consider in the totality of the circumstances.

(DE 195-2 at 22).

Once again, GEICO reiterates arguments it made in a motion in *limine* to exclude Mr. Jack's testimony which were rejected by the Court in its Omnibus Order (DE 121). Mr. Jack testified that "'the policy in endeavoring to settle claims as quickly as possible applies to third party claims as well,' and this is a third party claim." (DE 195-1 at 11-12) (quoiting Geico claims manual). Thus, Mr. Jack's testimony related to the claims manual, not requirements under Florida law, and did not mislead the jury that GEICO owed a "duty of good faith" under Florida law to Plaintiffs. This is especially so because, at GEICO's request, the jury was specifically instructed that "[a]n insurer does not owe a duty of good faith directly to an injured third-party claimant." (Final Jury Instructions, DE 155 at 7). In addition, Mr. Jack's testimony regarding GEICO's "bad faith" does not warrant a new trial because it addresses an ultimate issue. *See* Fed. R. Evid. 604; *Hanson v. Waller*, 888 F.2d 806, 812 (11th Cir. 1989) (holding that expert can opine on ultimate issue if opinion is helpful to the jury and based on adequately explored legal criteria). Finally, to the extent that testimony of Mr. Jack was introduced in error, such testimony did not cause "substantial prejudice," affect GEICO's "substantial rights," or result in "substantial injustice," in light of the evidence presented at trial. *See e.g., Peat*, 378 F.3d at 1162; *Peterson*, 81 F.3d at 1036.

iv. Randall Testimony

Plaintiffs argue that "Randall's testimony concerning her medical condition prior to the subject motor vehicle accident, as well as testimony concerning her deceased husband's medical condition was completely irrelevant and highly prejudicial." These brief statements, when viewed in light of the entire trial, did not cause any substantial prejudice that would constitute grounds for a new trial.

In sum, GEICO is not entitled to a new trial based on the arguments it makes in its motion for new trial. Most of these arguments were rejected before trial, and none of the purportedly prejudicial evidence or argument introduced affected GEICO's substantial rights or caused substantial injustice. There was ample evidence in the record to support the jury's verdict. GEICO's motion for new trial is therefore **DENIED.**

B. Renewed Motion for Judgment as a Matter of Law

GEICO moves for judgment as a matter of law[9] on two grounds. First, "there was insufficient evidence for a reasonable jury to find that GEICO handled the bodily injury claim made by Randall in bad faith," because "no reasonable jury could find that GEICO's tender was untimely, or that there was a delay in settlement negotiations which was willful and without reasonable cause." (DE 182). Second, the evidence was insufficient to demonstrate that Randall's claim could have been settled for the policy limits. Specifically, "neither Bannon nor his attorney had the legal authority to settle Randall's" claim, and, even assuming the claim could have been settled, "no reasonable jury could conclude from the record evidence that Randall's claim could have settled for the insureds' $250,000 policy limits, or that Randall or Bannon were ever willing to settle for that amount." (*Id.*).

The Court has already rejected GEICO's first argument. (DE 115). After the completion of discovery, GEICO moved for summary judgment as a matter of law (DE 54) based on the same arguments raised here and essentially the same facts presented

[9] The Court denied GEICO's *Ore Tenus* Motion for Judgment as a Matter of Law on December 20, 2016, and noted that GEICO could "renew its motion for judgment as a matter of law under Rule 50(b) following the Court's entry of final judgment in this matter . . . , (DE 162), which it has done here.

at trial. Citing to facts in the record on summary judgment (which were also presented at trial)[10], the Court concluded:

- "[T]here are triable issues of fact regarding whether GEICO had an affirmative duty to initiate settlement discussions before [November 22]";
- "[R]easonable minds could differ over whether Servold was clearly liable for causing the accident before November 22, 2010";
- "[T]here is a triable issue of fact regarding when GEICO knew Randall's injuries to be so serious that her claim would likely exceed the $250,000 policy limit";
- "[R]easonable minds could differ over when GEICO knew Randall's injuries to be so serious so as to exceed the policy limit, which would in turn give rise to an affirmative duty to initiate settlement discussions";
- "The Court cannot find that offering the limits twenty days from the claim is good faith as a matter of law"; and
- "In light of the numerous factual issues identified in this Order, the timing of GEICO's tender, whether and how the amount of the policy limit affected GEICO's conduct, and the reasonableness of that conduct are best left to a jury to consider under the totality of the circumstances."

The numerous factual issues identified in the Court's Order denying summary judgment were tried to a jury, and the jury returned a verdict in favor of Plaintiffs. "[T]he question of bad faith is, as a general matter, one reserved for the jury due to the flexible and expansive nature of the bad faith inquiry." *Hinson v. Titan Ins. Co.*, No. 15-14485, 2016 WL 4169117, at *4 (11th Cir. Aug. 8, 2016). As discussed above, the Court also

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[10] The evidence at trial showed, for example, that as of November 5, 2010, GEICO had already assigned 100% liability to its insured, Melissa Servold. (P's Tr. Ex. 72, at GLC 2402). By November 10, 2010, GEICO had visited Ms. Randall in the neurosurgical ICU at Jackson Memorial Hospital (P's Tr. Ex. 70 at GLC 0006 10/8/10 3:54pm), and ordered reserves on Ms. Randall's claim to be set at the policy limits of $250,000, plus expenses, (id. at GLC 0007 11/10/10, 3:14pm). The very next day GEICO advised its insureds that there was a potential for an excess judgment and that it would "make every effort to settle all claims within [its insured's] coverage limit." (P's Tr. Ex. 7).

held in its Omnibus Order on motions *in limine* (DE 121) that GEICO had an "obligation to take its insureds' interests into account (along with its own) when affirmatively defending and settling a negligence claim, even when that claim is for an excess judgment." (DE 121 at 8-9). The Court further noted that "GEICO could not exercise [its discretion to consent to its insureds' settlement of the case] by indifference or obstruction and without any regard for its insureds; such disregard could be evidence of bad faith . . . ." (DE 121 at 9). GEICO's renewed motion for judgment as a matter of law largely ignores this separate and independent ground for the jury to find bad faith.

The Court also rejects GEICO's argument that it is entitled to judgment as a matter of law because "the record evidence presented at trial was insufficient to demonstrate that Randall's bodily injury claim could have been settled" for the policy limits. There was evidence presented at trial that Bannon had authority to settle Randall's claim. *See* (DE 195-1 at 16-17, 23-24; DE 195-1 at 25-27). And the Court agrees with Plaintiffs that when an insured is incapacitated, an insurer may fulfill its duties by timely and promptly notifying the victim's family that the policy limits have been tendered. The question is whether the tender was timely, not whether it was accepted.[11] Accordingly, GEICO is not entitled to judgment as a matter of law on

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[11] As Mr. Jack testified at trial:

> Q. Who could they have tendered it to? If Ms. Randall is incapacitated in the hospital and they have not contacted any of her family members, there is no way for them to get somebody to sign a release at that point, is there?
>
> A. They can tender and protect the insured and condition it upon once Ms. Randall is able to sign the release that she would sign the release. They don't have to get it signed right there. This is not the first time that situations like this happen.

Plaintiffs' bad faith claims, and GEICO's renewed motion for judgment as a matter of law is **DENIED.**

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for a new trial (DE 181) and Defendant's renewed motion for judgment as a matter of law (DE 182) are **DENIED**. The Clerk of the Court is directed to **CLOSE** the case.

DONE AND ORDERED in Chambers in Miami, Florida, this 21st day of August, 2017.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

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So they know that they can either write and send a letter explaining that they're tendering and -- a lot of things can be in a letter; such as, "You may not be in a position right now to respond to us, but when you are, here's our letter. We're tendering the policy limits," and they could send it to the address in Key West or deliver it to the hospital at Ryder Trauma or Jackson.

(DE 195-1 at 101-103).