EFiled: Nov 12 2015 03:31PM EST
Filing ID 58156460
Case Number 426,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTINA CONNELLY,	:	No. 426, 2015
	:	Court Below: Superior Court of the
Plaintiff below,	:	State of Delaware, Kent County
Appellant,	:	
	:	C.A. No. K14C-09-002 WLW
v.	:	
	:	
STATE FARM MUTUAL,	:	
AUTOMOBILE INSURANCE CO.	:	
and RONALD B. BROWN, JR.	:	
	:	
Defendants below,	:	
Appellees.	:	

APPELLANT'S REPLY BRIEF

SCHMITTINGER & RODRIGUEZ, P.A.
WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
SHAE CHASANOV
Bar I.D. No. 4995
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff below, Appellant

Dated: November 12, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Others

ARGUMENT I

I. PLAINTIFF'S COMPLAINT PROPERLY ASSERTS THAT SHE IS A JUDGMENT CREDITOR OF DEFENDANT RONALD B. BROWN, JR. WHO HAS A "THIRD PARTY BAD FAITH" CLAIM AGAINST STATE FARM.

(1) MERITS OF ARGUMENT

Plaintiff filed her initial Complaint on September 3, 2014. This Complaint sufficiently alleges that Plaintiff's judgment debtor, Defendant Ronald B. Brown had a cause of action for State Farm's third party bad faith failure to settle, which Plaintiff sought to enforce.[1] This is reflected in Plaintiff's Complaint, specifically at paragraphs 16 through 21. These allegations allege that State Farm acted in bad faith, with no reasonable justification, when it failed to protect its insured, Ronald B. Brown, from an excess verdict at trial, and through its failure to settle the claim, within State Farm's policy limits, when it had an opportunity to do so. (A-16 to A-19). In the Complaint, Plaintiff as a judgment creditor, sought to enforce judgment debtor Brown's bad faith claim against Brown's insurer, State Farm.[2]

Subsequently, on March 3, 2015, Plaintiff obtained a valid assignment of rights from Defendant Ronald B. Brown, Jr. regarding his claims against his

---

[1] This issue is not before the Supreme Court, as the Superior Court did not decide it. Nevertheless, the Appellant discusses this issue briefly, as the Defendant has done so in its Answering Brief.

[2] Judgment actions are recognized in Delaware. *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

insurer, State Farm. Through this assignment, Defendant Brown assigned all of his legal rights and claims against Defendant State Farm to Christina Connelly. As such, the Plaintiff filed a Motion to Amend the Complaint on March 12, 2015. The motion was granted on April 2, 2015 and an Amended Complaint to reflect the assignment was filed on April 6, 2015. (A-143). At the time, State Farm, in its November 2014 Motion to Dismiss had already conceded that a valid assignment of rights by Brown to Plaintiff provided Plaintiff standing to pursue Brown's bad faith claim against State Farm. (A-74).

The Amended Complaint was not an effort to "re-characterize her claims" as argued by Defendant. Rather, Plaintiff raised the same allegations of bad faith against State Farm, pointedly for its failure to settle the claim brought against its insured, Brown, within the relevant policy limits, and to protect its insured, Brown, from an excess verdict. This was the basis of Plaintiff's claim on September 3, 2014, when the initial Complaint was filed. Plaintiff's Amended Complaint asserts the very same factual allegations as the basis for Plaintiff's amended claim. The Amended Complaint simply provided a second legal basis to assert Defendant Brown's bad faith claim against his insurer, State Farm.

ARGUMENT II

II. DELAWARE LAW HAS AND SHOULD CONTINUE TO RECOGNIZE THIRD PARTY EXCESS JUDGMENT BAD FAITH CLAIMS AGAINST LIABILITY INSURERS.

(1) MERITS OF ARGUMENT

The duty of an insurer to settle in good faith has been recognized under Delaware law. In fact, Delaware's Pattern Jury Instructions provide an instruction specific to this duty, citing to *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958). This Pattern Instruction, provides the following:

> "An insurance company has a duty to act in good faith to make a reasonable settlement of a claim within the insured's policy limits. An insurer fails to act in good faith when it refuses to offer to settle within the policy limits, and when this refusal is without reasonable justification.
>
> The fact that an award is in excess of policy limits or is more than the insurance company's evaluation does not establish that the insurance company acted in bad faith. It is not bad faith if the insurance company has a good defense, has acted reasonably, or has reasonable belief that the plaintiff's claim is not worth more than the policy limits." (Pattern Jury Instruction 17.)

Delaware has recognized a bad faith cause of action against an insurer for an insurer's failure to settle in good faith within its coverage limits resulting in the imposition of a final judgment in excess of its coverage limits against its insured, *Gruwell v. Allstate Insurance Company*, 988 A.2d 945 (Del. Super. 2009). Delaware also has recognized an assignment of rights by the harmed

insured, a point already conceded by State Farm (A-74), *Spine Care Del., LLC v. State Farm Mut. Auto. Ins. Co.*, 2006 Del. Super. LEXIS 465 at *9 (Del. Super. Nov. 17, 2006). Therefore, Plaintiff's claim, at least as assignee of the insured, Ronald Brown, is a recognized cause of action.

The Defendant argues that the legal precedent of Delaware law does not permit a third party to assert claims for bad faith in relation to an insurance contract. In support of this position, Defendant relies upon *Hostetter v. Hartford Ins. Co.*, 1992 Del. Super. LEXIS 284 (Del. Super. Ct., July 13, 1992). *Brief of Defendant/Appellee at 13-15*. *Hostetter* is inapposite to the instant matter. An excess judgment was never obtained in *Hostetter*, the *Hostetter* plaintiff was not an insured of the Defendant insurer and this Plaintiff resolved her dispute with the insurance company to her satisfaction. Thus, *Hostetter* did not involve a third party excess verdict bad faith claim, nor did it involve a first party bad faith claim. Furthermore, there was no assignment of rights by the Defendant's insured to the *Hostetter* plaintiff.

The *Hostetter* plaintiff was a homeowner who brought various claims against an insurance company for breach of contract and bad faith, among other allegations. The homeowner was not an insured under the relevant policy and never received an assignment of rights from the insured. As such, the court

dismissed the homeowner's claims, finding that she was not a third-party intended beneficiary to the insurance contract. *Id.* at *18.

The additional decisions cited by Defendant State Farm at B-1 through B-3 represent plaintiffs who have brought a lawsuit for bad faith against the tortfeasor's insurer, without a valid assignment of rights. The facts of the matter at hand are distinguishable from the decisions cited by State Farm, as Plaintiff Connelly obtained a valid legal assignment of rights from Defendant Brown, and through this assignment, pursues Brown's bad faith claims against Defendant State Farm as his assignee. Further, Brown's assignment renders Defendant's authorities immaterial as to their relevancy to Plaintiff's action on a judgment against Defendant Brown and his insurer State Farm to enforce Brown's cause of action against State Farm.

ARGUMENT III

III. THE APPLICABLE STATUTE OF LIMITATIONS FOR THIRD PARTY BAD FAITH CAUSE OF ACTION DOES NOT BEGIN TO RUN UNTIL THERE IS A FINAL, NON-APPEALABLE EXCESS JUDGMENT.

(1) MERITS OF ARGUMENT

A statute of limitations should not begin to run until the underlying litigation is concluded with finality. *Branin v. Stein Roe Inv. Counsel, LLC*, 2015 Del. Ch. LEXIS 203, *11 (Del. Ch. July 31, 2015). In *Branin* the Delaware Chancery Court recently pointed out that it makes "little sense", as a matter of litigative efficiency, to determine an issue in advance of a non-appealable final judgment. The Chancery Court went on to state that "[T]here is simply too great a risk that the appellate courts will take a different view from the trial court for it to make much sense to grabble with" presented claims until the underlying litigation is concluded with finality. *Id.* To hold otherwise would force a litigant to "rush in at the first possible moment" rather than "wait until the outcome of the underlying matter is certain." *Id.*

The issue in *Branin* involved when the statute of limitations began to run on a claim for indemnification. The underlying *Branin* litigation continued for approximately ten years and the defendant argued that the statute of limitations barred the claim for indemnification since it had been denied numerous times

over the years. While there is no indemnification issue present in the instant matter, the Chancery Court's reasoning with respect to the statute of limitations is directly on point and applicable to third party bad faith claims.

The pursuit of a bad faith claim against an insurer due to an excess judgment cannot accrue until an excess judgment exists and is final. Otherwise, as pointed out by the Chancery Court, there is too great a risk that the judgment will be altered before becoming final. Further, accrual at the time the insurer denies an injured party's settlement demand is premature since a trial may result in a judgment that is within the insured's policy limits. Not only may an excess judgment never exist, but State Farm's argument would also force litigants to file suit before the underlying litigation concludes. Such a practice would compel litigants to rush in at the first possible moment and file suit when harm to the insured does not even exist, rather than waiting until the outcome of the underlying matter becomes certain, and the excess judgment claim ripens. Thus, the cause of action should not accrue until the judgment is final and no longer subject to appellate review.

A claim for indemnification is analogous to a third-party, bad faith claim which arises from a liability insurance contract to provide indemnification to the insured. Both claims involve the same issues and should be treated similarly. In *Lapoint v. Amerisourcebergen Corp.*, 970 A.2d 185, 198 (Del. 2009), this Court

held that a claim for indemnification does not ripen for statute of limitations purposes until the underlying litigation is definitively resolved. Further, "until the final judgment of the trial court withstands appellate review, the outcome of the underlying matter is not certain", and resolution does not occur. In reaching this conclusion, this Court relied upon its holding in *Scharf v. Edgcomb Corp.*, 864 A.2d 909 (Del. 2004). *Scharf* also held that a claim for indemnification did not ripen for statute of limitations purposes until an underlying federal SEC investigation was definitively resolved. *Id.* at 919.

In both *Lapoint* and *Scharf*, this Court reversed lower court rulings that erroneously concluded that the statute of limitations began to run before the underlying litigation or investigation was definitively resolved. Similarly, the lower court erroneously concluded that the statute of limitations began to run in the present matter before the underlying litigation was definitely resolved.

The statute of limitations rule for indemnification claims established in the *Lapoint*, *Scharf*, and *Branin* decisions provides relevant and persuasive precedent for treating third-party, bad faith claims in a similar fashion. By comparison, the cases cited by State Farm have little similarity to this case. *Worrel v. Farmers Bank of Delaware*, 430 A.2d 469 (Del. 1981), dealt with the application of the U.C.C. statute of limitations regarding a claim for the

immediate payment of future installment payments. This case does not deal with claims arising from underlying litigation.

Albert v. Alex Brown Mgmt. Servs., Inc., 2005 Del. Ch. LEXIS 100 (Del. Ch. June 29, 2015), dealt with investment managers' wrongful conduct including fraud, breach of fiduciary duty, and conspiracy, among other claims. The Court's holding focused on the application of the "discovery rule" which tolls the running of the statute of limitations where the injury is inherently unknowable. Again, this issue differs from the present matter. In a third-party, bad faith case, there is no injury to the insured until a final, non-appealable judgment in excess of insurance limits is imposed on the insured personally. Thus, claims protected by the "discovery rule" has no application to this case.

In re Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563 (Del. Ch. 2007), dealt with allegations of self-dealing and breaches of fiduciary duties by Tyson family members and company board members. The *Tyson* court noted that generally a statute of limitations begins to run when the cause of action accrues. Accrual generally occurs when a harmful act by a defendant is committed. Again, this case has no similarity to claims arising from underlying litigation. Further, State Farm's harmful act to its insured was its insistence on and decision to compel a trial of the claims against Brown, which resulted in

Brown becoming liable for a portion of a final judgment imposed against him. *Tyson* is not similar to this case.

Defendant argues that the Plaintiff believes the applicable statute of limitations began to run in May 2011, when Defendant State Farm refused to pay the settlement demand. Defendant points to Plaintiff's allegations contained in her Complaint to support this position; however, this argument is flawed. First, the Plaintiff cannot choose the governing statute of limitations simply by allegations in a complaint. For instance, if Plaintiff's allegations were merely factual, would Plaintiff's claim accrue at a different time for statute of limitations purposes?

In *Lapoint v. Amerisourcebergen Corp., supra*, the Plaintiff alleged that the "breach of the Merger Agreement" first occurred in February 2004. This date was erroneously relied upon by the Superior Court in dismissing the suit as untimely. *Lapoint*, 970 A.2d at 191. Notwithstanding this allegation of breach of the merger agreement, this Court found that the statute of limitations did not begin to run until appellate review of the underlying litigation concluded in April of 2008. *Id.* at 198.

While the elements of Defendant State Farm's bad faith conduct includes its refusal to settle the underlying litigation within policy limits, this matter does not ripen and does not become actionable until a judgment in excess of the

policy limits becomes a final judgment. Therefore, the applicable statute of limitations began to accrue once the underlying excess judgment became final and non-appealable. In this particular case, finality occurred on April 29, 2012. Since all of Plaintiff's claims as Brown's assignee were filed within three years of this date, *i.e.*, before April 29, 2015, the Plaintiff's bad faith lawsuit was timely filed and is not barred by the statute of limitations.[3]

The most striking feature of State Farm's Answering Brief is the total absence of any decision from any other State, which supports its argument regarding the running of the statute of limitations. In *Taylor v. State Farm Mutual Automobile Insurance Company*, 913 P.2d 1092 (Ariz. 1996), the Arizona Supreme Court rejected State Farm's argument that the statute of limitations began to run before the excess judgment became final and non-appealable. *Id.* at 1097. In so doing, the Arizona Court noted that State Farm had failed to provide any case law contrary to the final judgment rule the Court would adopt. *Id.* at 1096, 1097. Now, more than fourteen (14) years later, State Farm still fails to provide case law from any other jurisdiction supporting its claim for the premature running of the statute of limitations. This Court should reject State Farm's invitation to be the first jurisdiction to accept its argument.

[3] Plaintiff's Motion to Amend Complaint to assert Brown's assigned claims was filed on March 12, 2015. The Motion was granted on April 2, 2015, and the Amended Complaint was filed on April 6, 2015. The related action as Brown's assignee in C.A. No. K15C-03-029WLW was filed on March 23, 2015.

Rather, this Court should find persuasive the sound judgment and public policy relied upon by the Arizona Supreme Court, which included:

> The policy underlying the final judgment rule is clear. First, it is impossible to determine if the insurer acted in bad faith, or the extent of the insured's damages until the underlying liability is finally determined. [citation omitted] Second, because the usual essential element of the insured's third-party bad faith case – the entry of a judgment in excess of policy limits – may be reversed or modified on appeal, a different rule would result in precautionary and duplicitous litigation – a waste of both the courts' and the parties' time and resources [citations omitted].

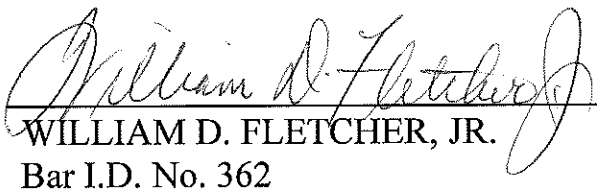
Id. at 1096. Thus, Plaintiff respectfully requests that this Court adopt the final judgment rule as set forth by the Arizona Supreme Court.

CONCLUSION

WHEREFORE, based on the foregoing and Appellant's Opening Brief, Plaintiff Below, Appellant, Christina Connelly, hereby respectfully requests that the Court find Plaintiff's claims to have been timely filed and reverse the decision of the Superior Court to the contrary, and remand this matter for trial to determine whether State Farm acted in bad faith by causing an excess judgment to be placed against its insured, Ronald Brown, due to its refusal to resolve the underlying litigation within its insured's policy limits when it had the opportunity to do so.

Respectfully submitted,

SCHMITTINGER & RODRIGUEZ, P.A.

BY: 

WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
414 S. State Street
SHAE CHASANOV
Bar I.D. No. 4995
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff, Below,
Appellant Christiana Connelly

Dated: November 12, 2015