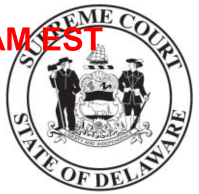
EFiled: Jan 06 2016 09:42AM EST
Filing ID 58356402
Case Number 618,2015D



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOANN ENRIQUE,	**)Case No. 618, 2015**
	)Court Below:
Plaintiff below/Appellant,	**)Superior Court of the**
	)State of Delaware for
	)Kent County
	)C.A. #: K12C-10-028 WLW
v.	**)**
	)
STATE FARM MUTUAL	**)**
AUTOMOBILE INSURANCE COMPANY,	**)**
	)
Defendant below/Appellee.	**)**

APPELLEE'S ANSWERING BRIEF

YOUNG & MCNELIS
/s/ Jeffrey A. Young

____

JEFFREY A. YOUNG (#3449)
300 South State Street
Dover, Delaware 19901
(302) 674-8822
Fax (302) 674-8251
jyoung@youngandmcnelis.com
Attorney for Defendant Below/Appellee

Dated: January 6, 2016

I. TABLE OF CONTENTS

Table of Citations iii

Nature of the Proceedings 1

Summary of the Argument 3

Statement of the Facts 9

Argument 13

I. DENIED AS STATED. PLAINTIFF'S SELF-EVIDENT STATEMENT THAT AN INSURER ACTS IN BAD FAITH WHEN IT ACTS IN BAD FAITH DOES NOT ACCURATELY EXPRESS THE BAD FAITH STANDARDS IN DELAWARE 13

1. Question Presented 13

2. Scope of Review 13

3. Merits of the Argument 14

II. DENIED. A THOROUGH INVESTIGATION, INCLUDING INPUT FROM MULTIPLE KNOWLEDGEABLE SOURCES AS TO THE VALUE OF A PERSONAL INJURY CLAIM IS A FAR CRY FROM SINGLING OUT AN INSURED FOR MALICIOUS TREATMENT. A DISAGREEMENT OVER CLAIM VALUE BETWEEN AN INSURED AND AN INSURER SHOULD NEVER BE THE BASIS FOR CONTRACTUAL BAD FAITH.. 20

1. Question Presented 20

2. Scope of Review 20

3. Merits of the Argument 20

III. DENIED. THE SUPERIOR COURT THOROUGHLY REVIEWED THE ABUNDANT RECORD DEMONSTRATING EXTENSIVE INVOLVEMENT AND INVESTIGATION BY DEFENDANT, AND ACCURATELY APPLIED THE BAD FAITH STANDARDS IN DELAWARE TO THE EVIDENCE IN DETERMINING THAT THERE WAS NO MALICIOUSNESS OR RECKLESSNESS BY DEFENDANT TOWARD PLAINTIFF 27

1. Question Presented 27

2. Scope of Review 27

3. Merits of the Argument 28

Conclusion 33

TABLE OF CITATIONS

Cases

Casson v. Nationwide Ins. Co. 22
455 A.2d 361 (Del. Super. 1982)

Corrado Bros., Inc. v. Twin City Fire Ins. Co. 21
562 A.2d 1188 (Del. 1989)

Daubert v. Merrell Dow Pharmaceuticals 7, 29, 30
509 U.S. 597 (1993)

Davis v. Maute 9
770 A.2d 36 (Del. 2001)

Evangelista v. Nationwide Ins. Co. 22
726 F. Supp. 1057 (S.D. Miss., 1988)

Jardel v. Hughes 18, 22
523 A.2d 518 (Del. 1987)

M.G. Bancorporation, Inc. v. LeBeau 29
737 A.2d 513 (Del. 1999)

Pierce v. International Ins. Co. of Ill. 22
671 A.2d 1361 (Del. 1996)

Price v. State Farm Mutual Automobile Ins. Co. 21
2013 WL 1213292 (Del. Super. 2013), aff'd, 77 A.2d 272 (Del. 2013)

Rowe v. Nationwide Ins. Co. 22-23
6 F. Supp. 3d 621 (W.D. Pa., 2014)

Shockley v. Lewis 26
2015 WL 4400011 (Del. Super. 2015)

Sostre v. Swift 13, 20, 27
603 A.2d 809 (Del. 1992)

Tackett v. State Farm Fire and Casualty Ins. Co. 14, 15, 18, 22, 24
653 A.2d 254 (Del. 1995)

Travelers Prop. Cas. Co. of America v. National Union Ins. Co. of Pittsburgh, PA
557 F. Supp. 2d 1040 (W.D. Mo., 2008) 30

Statutes

18 Del. C. § 2304(16) (f) & (g) 24

Rules

Delaware Rules of Evidence 702 29

NATURE OF THE PROCEEDINGS

Plaintiff's Opening Brief offers a rather expansive version of the nature of the proceedings in this matter. The fact is that the current appeal simply stems from the Superior Court Order granting summary judgment to the Defendant on October 14, 2015. Said summary judgment decision, on Plaintiff's allegation of bad faith claim handling by Defendant, followed extensive discovery of claims adjusters, supervisors, attorneys, and records pertaining to claim handling. Subsequently, Defendant filed its Motion for Summary Judgment on June 10, 2015. After initial briefing, the Superior Court heard oral argument on September 11, 2015, and, after reserving a decision, issued the written order on October 14, 2015.

Defendant certainly has no objection to the additional, superfluous background provided by Plaintiff, addressing matters from the initial uninsured motorist ("UM") claim. However, Defendant does take issue with the representation that the severance of Plaintiff's bad faith allegation in her original UM claim was "contingent on the outcome" of that claim. Rather, because the bad faith allegations could not be adjudicated without also investigating the claims handling process, and thus discovery of work-product information, claims evaluation assessments, and other matters entirely prejudicial to Defendant's defense of the UM bodily injury claim

(A29), the UM claim had to be resolved first. Accordingly, any issues connected to claim handling or case evaluation had to be stayed. The simultaneous discovery of why and how Defendant was evaluating a case, while negotiating and adjudicating that very case, obviously could not occur without tremendous unfair prejudice to Defendant. Thus, the bad faith allegations, though never meritorious, had to be severed and stayed until the injury claim resolved.

Otherwise, Plaintiff's Nature of the Proceedings is factually accurate, if not overly broad in scope.

SUMMARY OF THE ARGUMENT

1. DENIED IN PART AND ADMITTED IN PART

An insurer's duties under Delaware law are well established, and not at issue in this matter. Defendant denies that a breach of any such duty occurred in the handling of this matter. Moreover, Plaintiff's Opening Brief has largely ignored, and certainly failed to meet, the very high standard to sustain a bad faith claim in Delaware, based on the abundant case law establishing that standard. Defendant was of course aware of the injury claims and documented support for some of those claims by Plaintiff and developed through the course of discovery. The fact is that Defendant vigorously pursued the evaluation and adjustment of Plaintiff's UM claim from start to finish. In addition to extensive discovery and the review and oversight of information and evaluations by adjusters, supervisors, team managers, and, most importantly, multiple local and experienced attorneys, the claims handling process was abundant and thorough. Morever, Plaintiff falls far short of demonstrating the requisite malicious or reckless conduct on the part of the insurer or any indication that Plaintiff was singled out for malicious treatment. In the absence of any such evidence of malice, Plaintiff's bad faith claim cannot stand.

2. DENIED

Plaintiff poses an interesting, though entirely unsubstantiated, theory about Defendant's state of mind. First, Defendant did not actually allege anything, as this was Plaintiff's claim to make. Similarly, Defendant, as neither a doctor nor even a testifying witness, does not assert "causation theories" at trial. As evidenced by repeated entries among the approximately 600 log entries in Defendant's claims handling file, Defendant continuously sought information and input from various sources. Regardless, Plaintiff completely ignores the overriding fact of this claim; namely that the claims handling involved an evaluation of a personal injury claim. As much as Plaintiff apparently believes there is some scientific formula for that process, there simply is not. An insurance company, or any party for that matter, assesses whatever information is available, consults with knowledgeable people, and places a value on a claim. Presumably, Plaintiff's lawyers do the exact same. In any case, said evaluations are in large measure a "best guess," given the fact that jury verdicts are inherently unpredictable. Where, as here, an insurer has received input and evaluations from very knowledgeable sources about the likely value of a personal injury claim, there is little more that can reasonable be done. Unquestionably, evaluations are not always accurate, and jury verdicts occasionally come as a real

shock to the parties involved. The verdict itself, however, has no bearing at all on the faithfulness of the evaluation process, and of course has no bearing on the underlying question of whether there is evidence of an insurer showing a reckless indifference or malice toward the plight of an insured. Opposing parties often disagree about the value of a plaintiff's pain and suffering. Such disagreements, if irreconcilable, are what trials are for. Nevertheless, having a difference of opinion does not suggest one party is forcing another party to do anything against that other party's will; it is simply the nature of litigation.

3. DENIED

Defendant invites Plaintiff to produce any evidence that Plaintiff's financial situation, station in life, or the health of family members ever played a role in the evaluation of this personal injury claim. There of course is no such evidence. Again and again, Defendant sought information and input from knowledgeable people and sources, including Delaware lawyers with over 50 combined years of experience evaluating such claims. Acting on the recommendations of those attorneys and sources, Defendant made offers of settlement to Plaintiff. Obviously, Defendant had no idea if Plaintiff would accept or reject those offers, but Plaintiff's motivations had absolutely no bearing on the evaluation process. Plaintiff's Opening Brief seems to

suggest that Plaintiff or her attorney omnipotently ascertained the "fair resolution" value of a case, despite the fact that no one could possibly know what a jury would ultimately decide. Indeed, the fact that the jury's verdict was nearly 300% higher than Plaintiff's own final settlement position is rather compelling evidence that no one in the case accurately assessed the "true value" of Plaintiff's claims. Further, there is absolutely no evidence to suggest that Defendant made undue continuous requests, prolonged discovery unnecessarily, or acted outside the bounds of all reasonable litigation practices. And again, most importantly, there is <u>nothing</u> to suggest a reckless indifference or malice toward the plight of the insured, without which bad faith is non-existant.

4. DENIED

The Superior Court considered all relevant facts and evidence in its well-reasoned summary judgment decision. As opposed to Plaintiff's Opening Brief on appeal, the Superior Court actually cited the relevant case law and applicable standards for a bad faith contractual claim. Further, there is nothing to suggest that the Superior Court did not consider and address all arguments made through written submissions and oral argument. Once again, the question the Superior Court had to

answer was whether there was any evidence that Plaintiff was "singled out for malicious treatment through a reckless indifference or malice toward her" by State Farm. The Court was provided the activity log file regarding Defendant's handling of the claim, as well as Plaintiff's depositions of Defendant's lead counsel, claims adjuster, claim supervisor, and team manager. In none of that abundant discovery material is there even the hint of malice toward Plaintiff or some reckless indifference toward evaluating the claim. To the contrary, the evaluation of this claim consumed far more resources and input than the vast majority of personal injury claims. As the Superior Court noted, "This claim was heavily examined by State Farm." Additionally, the theory that the lawyers Defendant retained for opinions as to the value of the case, with vast experience making such evaluations for decades, should somehow be ignored in favor of Plaintiff's "expert" is absurd. Plaintiff's proposed expert, who undoubtedly would not have survived a Daubert challenge had that been necessary, is an insurance broker from Carmel, New York, who advises clients on the types and scope of insurance coverage they should get. He has never adjusted an insurance claim in his lifetime, and admits that he is not qualified to render any opinions on Delaware law or the appropriate value of a Delaware personal injury claim. Obviously, this "expert opinion," even if were to be considered at all, did not

change the facts regarding how the claim was handled or how Defendant evaluated it. The bottom line is that Defendant never denied Plaintiff coverage or available benefits; not only did not fail to investigate the claim, but investigated it exhaustively; and never delayed any payment which was in fact owed to Plaintiff at any time. Consequently, the complete absence of malice or recklessness on the part of Defendant could not be clearer, and thus summary judgment was appropriate.

STATEMENT OF FACTS

As noted in Plaintiff's Opening Brief, on September 26, 2005, Plaintiff was involved in an automobile accident. Said accident caused certain injuries to Plaintiff, and because the tortfeasor was uninsured, Plaintiff filed a UM claim against Defendant under coverage for the vehicle provided to Jason Garber, the vehicle owner. Despite Delaware Supreme Court precedent that the extent of damage to a vehicle does not correlate to the seriousness of the injuries of an occupant (Davis v. Maute, 770 A.2d 36, 40 (Del. 2001)), Plaintiff includes with her appendix photographs of the vehicle and emphasizes the extent of the damage. In any case, as a result of the UM filing, Defendant went about adjusting the claim and trying to place an appropriate value on Plaintiff's alleged pain and suffering. At no point did Defendant deny coverage to Plaintiff, though she was not a named insured in the policy. Additionally, as the extensive log notes confirm, from the very outset, Defendant adjusted, investigated, and evaluated this personal injury claim.

After initial information-gathering by a variety of adjusters, this claim was assigned to claims adjuster David Mullen on October 27, 2005. (B1, Log 63).[1] Because of a high volume of claims in Delaware, the UM portion of the case was later

[1] To clarify, Log numbers are identified next to ACTIVITY LOG NUMBER entries. They appear in reverse chronological order and are read from the bottom of the page to the top.

reassigned to J.R. Roach, a West Virgnia claims handler for Defendant. (B2, Log 166). West Virginia claims adjuster Roach went about compiling and reviewing the medical claim and the facts of the loss. Because of a lack of familiarity with Delaware injury claims, Mr. Roach sought the input of others, including Delaware claim representative John Rogin (B3, Log 175), Delaware Team Manager Paul Gerlitz (B4, Log 181), and of course his own supervisor, Mary Adkins (B5, Log 177). The initial evaluations from those various sources placed the case in a range of between $17,000 and $25,000. Incidentally, regardless of any evaluation, Mr. Roach's individual authority to settle a claim was limited to $10,000. (B23, Roach page 5). Regardless, Mr. Roach and others at State Farm continued to acquire information and adjust the claim.

Indeed, on January 31, 2008, West Virginia claims handler Roach contacted Delaware attorney Brian McNelis, seeking yet another perspective on the potential claim value. (B6, Log 275). Attorney McNelis, with decades of experience handling, evaluating, and litigating bodily injury claims in Delaware, told Mr. Roach that if the knee injuries were caused by the motor vehicle accident, he would see the value for general damages to be $35,000 to $50,000. Id. Yet, additional discovery seemed appropriate at that point, in order to determine if there was any prior medical history

for Plaintiff or separate causes for knee complaints which might diminish the claim value. (B7, Log 281). With input from Joan Barker (B8, Log 291), an in-house consultant for Defendant with a nursing background, claim supervisor Mary Adkins sought additional information and authorized up to $35,000 in settlement authority. (B9, Log 276; B10, Log 282). Of note, given Plaintiff's emphasis on good faith negotiating, is the fact that, despite a contractual maximum recovery of $100,000, Plaintiff demanded from Defendant $165,000 in her initial demand. (B11 Log 273). In any case, with settlement unlikely, suit was filed, with Plaintiff's counsel indicating that he would send Plaintiff's prior medical records to Defendant to help in the evaluation. (B12, Log 289).

Once suit was filed, the claims handling and evaluation process continued. (B13, Log 300; B14, Log 299). Indeed, as page after page of Plaintiff's Statement of Facts and numerous log entries report, the case was continuously evaluated and investigated. By way of further example, once suit was filed, Defendant retained Colin Shalk, Esquire to defend the suit. Remarkably, Mr. Shalk, with over 30 years of experience evaluating and litigating personal injury claims, discussed the case with Mr. Roach and, independent of Mr. McNelis's earlier evaluation, placed a value of between $45,000 and $50,000 on the case. (B15, Log 429). Even after attorney

Shalk's more extensive involvement in the case, through the discovery process, depositions, IME review, etc., that evaluation did not change. (B16, Log 548). In fact, on November 25, 2009, attorney Shalk had reviewed the IME report from Dr. Piccioni, had deposed Plaintiff, and had of course reviewed all of the medical information, and reported to Defendant that the current range of value of $45,000 to $50,000 was still appropriate. That remained true up to the time of trial (B17, Log 571), and thus, despite Plaintiff's demand decreasing to $90,000, settlement could not be reached. Accordingly, the matter proceeded to trial, which is the inevitable result when resolution between the parties cannot be reached. Coming as a surprise to everyone (B25, Fletcher page 5), the jury awarded Plaintiff $260,000.[2]

[2] The jury was not told what the policy limits were under the applicable coverage, and was simply asked to award a single lump sum value.

ARGUMENT I

I. DENIED AS STATED. PLAINTIFF'S SELF-EVIDENT STATEMENT THAT AN INSURER ACTS IN BAD FAITH WHEN IT ACTS IN BAD FAITH DOES NOT ACCURATELY EXPRESS THE BAD FAITH STANDARDS IN DELAWARE.

1. QUESTION PRESENTED

Whether an insurer which relies on extensive investigation by multiple claims handlers at various levels of authority, as well as the valued opinions of well-seasoned local counsel, to place a value on the inherently unknowable pain and suffering aspect in a personal injury case is guilty of singling out Plaintiff for malicious treatment and acting with a reckless indifference or malice toward the plight of the insured. (A88-93).

2. SCOPE OF REVIEW

Following the grant of a motion for summary judgment, the applicable standard of appellate review requires the Supreme Court to examine the record to determine whether, viewing the facts in a light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law. Sostre v. Swift, 603 A.2d 809, 812 (Del. 1992) (citation omitted).

3. MERITS OF ARGUMENT

Plaintiff has deemed it necessary to divide into three different arguments the fairly simply and singular question of whether there are any facts presented in this claim to demonstrate that Defendant acted toward her with a reckless indifference or malice toward her plight and singled her out for malicious treatment. That standard, which Plaintiff unquestionably fails to meet, was the basis for the well-reasoned Superior Court decision, and underscores the validity of that decision. The theory that Defendant should have done even more investigation into this claim, while contrary to the facts, does nothing to advance Plaintiff's case in meeting her burden. Moreover, interestingly, the only case cited by Plaintiff purportedly to support her theory that the facts at bar demonstrate bad faith claim handling only underscores the accuracy of the Superior Court's holding.

Despite Plaintiff's reliance on Tackett v. State Farm Fire & Casualty Ins. Co., 653 A.2d 254 (Del. 1995), a case with clearly questionable claims handling and settlement postures, that reliance is misplaced. In Tackett, the initial State Farm claim representative handling the case concluded that the Plaintiff's underinsured motorist claim had a value of $45,000 to $50,000 (where the policy limits were $50,000). Tackett, 653 A.2d at 257. The claim superintendent for that case, the State Farm

representative with authority to approve such an evaluation, agreed. Id. Additionally, the outside counsel retained by State Farm to evaluate the case also concurred. Id. Nevertheless, State Farm extended a fraction of that evaluation and authority to the Plaintiff initially. Id. Not for several months until a new claim superintendent assumed responsibility for the file were the full $50,000 policy limits offered. Id. In other words, in stark contrast to the case at bar, the State Farm claims handler and evaluators, including outside counsel, where the representatives with actual authority were involved, felt the claim was one for policy limits, (and the Plaintiff's lawyer was willing to accept that figure for settlement), yet failed to resolve the case without justification or explanation for some seven months. And yet, this Court wrote:

> [T]he Tacketts have not shown either malicious or reckless conduct on the part of State Farm. The "tough stance" policy was merely one part of State Farm's dilatory handling of the Tacketts' claim. While a delay of seven months in paying policy limits in the face of full documentation and recommendations of the claim agent and outside counsel may well constitute bad faith we agree with the Superior Court that the Tacketts were not singled out for malicious treatment. In the absence of a showing of egregious conduct, there was no basis for submission of punitive damages claim to the jury. Id. at 266 (underscore added).

The contrast between Tackett and the instant case is obvious. In the case at bar, the claim representative, JR Roach, a West Virginia claims handler, evaluated the Enrique claim on 8/15/06 with general damages $25,000 to $30,000. (B18, Log 174).

Because that evaluation was beyond Mr. Roach's authority, his supervisor, Mary Adkins, reviewed the evaluation and authorized a range of value of $17,500 to $22,500 on 8/17/06. (B5, Log 177). On 9/11/06, Team Manager Paul Gerlitz, a long-experienced Delaware team manager, reviewed the file and placed a range of value of $19,000 up to $25,000 on the claim. (B4, Log 181). On 1/31/08, Mr. Roach discussed the claim value with experienced Delaware defense attorney, Brian McNelis, Esquire, who placed an evaluation of $35,000 to $50,000 on the case. (B6, Log 275). Following that review by defense counsel, Mary Adkins authorized up to $35,000 for settlement on 2/1/08. (B10, Log 282). On 8/25/08, Mary Adkins and JR Roach reviewed the file, including the IME results, with veteran Delaware defense counsel, Colin Shalk, Esquire. (B19, Log 357). At that time, attorney Shalk's evaluation of the case was in the $35,000 to $50,000 range. The evaluation process continued through the rest of 2008. On 2/2/09, following attorney Shalk's deposition of the Plaintiff, and an assessment of the future prospects for treatment and injury complaints, attorney Shalk again evaluated the case at between $45,000 and $50,000. (B15, Log 429). Once again, after additional adjusting and discussions among claims handlers and defense counsel, on 3/2/09, Mary Akins authorized up to $50,000 for settlement authority. (B20-21 Log Notes 445-447).

How can that chronology of extensive claim evaluation, and all of the log notes in addition, suggest a failure to investigate a claim? Plaintiff's counsel offers that more could have been done.[3] While Defendant disagrees with that contention, there cannot possibly be an argument that State Farm failed to investigate this case.

Obviously, this claim was processed, reprocessed, and processed some more by Defendant, its agents, and attorneys from its very outset through the litigation and discovery process and right up to the time of trial. Likewise, there can be no suggestion that State Farm delayed payment in bad faith. Rather, once the litigation process concluded, including all appeal issues, Defendant paid to Plaintiff the balance of the bargained-for insurance policy limits, as well as all recoverable costs, plus interest, on a timely basis. Presumably, Plaintiff does not take the position that Defendant had a payment obligation before there was settlement or a judgment in place. In fact, Defendant had advanced to Plaintiff $45,000 prior to trial, even with no obligation to do so, and no settlement having been reached; the essence of good faith negotiating. In sum, Defendant not only provided advanced payments to Plaintiff (though a jury could well have awarded less than that), ultimately paid more

[3] Notably, a chief complaint of Plaintiff is Defendant's lack of pursuit of prior medical records for Plaintiff. And yet, it was Plaintiff's counsel who promised to provide prior medical records to Defendant (B12, Log 289).

to Plaintiff than the policy limits for which her fiancé had previously bargained, spent significant time and resources investigating and evaluation the claim, and never once denied coverage for any reason or reserved a right to challenge coverage. As such, Plaintiff at bar falls astoundingly short of meeting the Tackett standard of showing Plaintiff was singled out for malicious treatment.[4]

Plaintiff wishes to dissect every investigative decision made by Defendant through the course of this claim. Yet, there is of course no checklist for what must be done in good faith to evaluate a pain and suffering allegation. Ultimately, a jury hears a case and puts a number on that claim. Those numbers occasionally come as a great surprise to the people involved, and inevitably reject at least one of the positions taken during settlement negotiations. It cannot possibly be the law that one party has committed reprehensible conduct, permitting punitive damages to be assessed, simply because his or her pre-verdict settlement position was quite different from the jury's view of things. See Jardel v. Hughes, 523 A.2d 518 (Del. 1987) ("Mere inadvertence, mistake or errors of judgment" do not establish actionable punitive damages). Someone loses every time.

[4] It is worth noting that the $50,000 evaluations by both outside counsel, Brian McNelis and Colin Shalk, were given assuming that Plaintiff's knee injuries and treatment, including surgery, as well as other complaints, were indeed caused by the subject accident (B6, Log 275 and attorney Shalk letter at A256-258).

The art of personal injury claim evaluation is precisely that - an art. There is no magical formula, and there is no guarantee. In the case at bar, two veteran attorneys with multiple decades of experience evaluating personal injury claims just like this one (far more often correctly than incorrectly), independently evaluated Plaintiff's claim, even assuming all complaints were connected to the accident, at between $35,000 and $50,000. Plaintiff's lawyer, also with decades of experience, agreed to accept $90,000 as a case value. A jury determined that everyone was wrong; with Plaintiff's lawyer himself only slightly less wrong than Defendant's evaluators. That is the nature of litigation in the personal injury world; it is not malicious conduct or reckless indifference toward the plight of any insured.

ARGUMENT II

II. DENIED. A THOROUGH INVESTIGATION, INCLUDING INPUT FROM MULTIPLE KNOWLEDGEABLE SOURCES AS TO THE VALUE OF A PERSONAL INJURY CLAIM IS A FAR CRY FROM SINGLING OUT AN INSURED FOR MALICIOUS TREATMENT. A DISAGREEMENT OVER CLAIM VALUE BETWEEN AN INSURED AND AN INSURER SHOULD NEVER BE THE BASIS FOR CONTRACTUAL BAD FAITH.

1. QUESTION PRESENTED

Whether a good faith value disagreement in a contractual claim involving personal injuries can render the insurer guilty of bad faith claim handling. (A88-93).

2. SCOPE OF REVIEW

Following the grant of a motion for summary judgment, the applicable standard of appellate review requires the Supreme Court to examine the record to determine whether, viewing the facts in a light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law. Sostre v. Swift, 603 A.2d 809, 812 (Del. 1992) (citation omitted).

3. MERITS OF ARGUMENT

The underlying UM claim by Plaintiff against Defendant was a contract action.

"The relationship of insurer and insured. . . arises contractually with each party reserving certain rights under the contract, the resolution of which often leads to litigation." Corrado Bros., Inc. v. Twin City Fire Ins. Co., 562 A.2d 1188, 1192 (Del. 1989). "Although an insurance carrier sells an uninsured motorist insurance policy to its insured, once a claim is filed under that provision, the insurer 'stands in the shoes of the uninsured tortfeasor.' Therefore, a UM claim necessarily involves a somewhat adverse relationship between the insured and the insurer." Price v. State Farm Mut. Auto. Ins. Co., 2013 WL 1213292 (Del. Super. 2013). The adverse parties in the case at bar evaluated the available information, proceeded through extensive discovery, and at least on Defendant's part, consulted multiple authorities to try to evaluate fairly the likely range of value of Plaintiff's claims. During that process, negotiations were pursued, including mediation, but settlement could not be reached. Ultimately, assuming the jury's verdict was the "true" value of Plaintiff's claim, it was determined that not one single evaluation by anyone involved on either side of the case had been even close to that value. And yet, Plaintiff now argues that Defendant singled her out for malicious treatment (or at least must so argue and prove to have a viable claim).

The applicable standard to meet the threshold for a punitive damages claim for

bad faith claim handling has been addressed in this brief, and is further outlined by the Superior Court's decision. See Tackett v. State Farm, supra; Jardel v. Hughes, supra; Casson v. Nationwide Ins. Co., 455 A.2d 361, 369 (Del. Super. 1982); Pierce v. International Ins. Co. of Ill., 671 A.2d 1361, 1367 (Del. 1996). As discussed earlier, Plaintiff completely fails to demonstrate any evidence in the record that Defendant refused to honor a contractual obligation to Plaintiff. Coverage was never denied, payment was never delayed, and never once was there any thought given to some sort of inequitable settlement leverage or "hardships" claimed by Plaintiff. As such, Plaintiff's argument is clearly unavailing.

Further, although inherent in the bad faith standards and discussion in the Tackett and Casson rulings, among others, Defendant suggests this Court expressly adopt the "pocketbook dispute" jurisprudence of other jurisdictions. See Evangelista v. Nationwide Ins. Co., 726 F. Supp. 1057 (S.D. Miss., 1988). The Federal Court in Evangelista held, "A personal injury claim includes various intangibles such as pain and suffering which render it much harder to evaluate than a static property damage claim. However, that does not render the insurer guilty of bad faith denial of a claim simply because an insured believes her claim is worth more than the insurer offers." Id. at 1060. Likewise, the Court in Rowe v. Nationwide Ins. Co., 6 F. Supp. 3d 621

(W.D. Pa., 2014), held that a disagreement between insured and insurer over claim value could not be the basis for contractual bad faith. Notably, Plaintiff's Opening Brief fails to cite any Delaware case, or any case from any jurisdiction for that matter, where a disagreement over the value of a pain and suffering claim can become the basis for punitive damages in a bad faith action.

The fact is that in assessing the appropriate value of a pain and suffering bodily injury claim, there is no right answer. There are opinions based on the facts of the case, the people involved, and analogous experiences. In the overwhelming majority of such claims, the parties are able to figure out a number satisfactory to both sides to resolve the case. That of course does not mean that the settlement figure is the magical true compensable value of a given plaintiff's pain and suffering. Additionally, there are times when the middle ground cannot be attained, so trials ensue. At the end of that trial, at least one party's settlement position will be deemed a poor one. However, the verdict itself cannot possibly then suddenly render the losing side's settlement assessment an egregious act of bad faith. Hence, the verdict is essentially irrelevant to the meritorious claim handling; thus, the express adoption of the pocketbook dispute jurisprudence by other courts.

Plaintiff cites 18 Del. C. § 2304 (f) & (g) in support of her argument. Presumably, Plaintiff was referring to Section (16) of that statute. However, this statute is also unavailing to Plaintiff's position. To begin, Defendant did indeed attempt in good faith to settle Plaintiff's claims, as discussed at length above. Not only were settlement offers made, which were consistent with the evaluations of multiple experienced authorities, but Defendant actually advanced to Plaintiff $45,000 prior to trial, regardless of what a jury might or might not have determined. Further, Defendant never compelled the insured to institute litigation to recover amounts which were due. Plaintiff did not have to sue Defendant to enforce a judgment, and she brought no action regarding any delay of payment once the litigation and adjudication of the claims concluded. Obviously, there is no amount "due" if the parties do not reach settlement and before a final judgment is rendered.

By comparison, even in Tackett, where all of those with authority and evaluation experience deemed the case to be one of policy limits value, the failure to pay those limits for some seven months did not constitute bad faith claim handling. But regardless, Plaintiff seems to think that an amount due is simply what she thought her case was worth, and that is certainly an improper interpretation of the applicable statute. Moreover, Section (16) of 18 Del. C. § 2304 is prefaced with the requirement

that a showing be made of improper conduct "with such frequency as to indicate a general business practice." Of course, there is no evidence in the record, or elsewhere, that Defendant pursued a general business practice of failing to negotiate claims in good faith or refusing to pay judgments due. The notion that Defendant decided to try a case figuring it had nothing to lose given the policy limit cap is nonsense. Were that the business practice for Defendant, then every uninsured or underinsured case would end up in front of a jury in the hopes that State Farm could get "lucky." The fact that a tiny fraction of injury claims actually get litigated, and only a tiny fraction of that tiny fraction are first party claims, easily rebuts any such theory.

Finally, Plaintiff's Opening Brief also seems to take issue with Defendant's decision not to seek remittitur following the jury verdict. Not only does that position have nothing to do with the claim handling process prior to trial, but it ignores the realities of such a motion. The extraordinarily high standard that a party has to meet to get a new trial or remittitur granted is well settled. Not only are Delaware jury verdicts given great deference, but the Court must conclude that a verdict shocks the

Court's conscience.[5] Thus, as opposed to evaluating the claim based on its many variables and the likely range of value, a motion for remittitur would require the presiding judge to view all facts in a light most favorable to the plaintiff, and only be granted if the verdict shocked the court's conscience. Not only is that standard exceedingly high, but to make any discernable difference, the Superior Court here would have had to reduce the jury verdict by nearly 60% to bring the award within the $100,000 policy limits. As attorney Shalk confirmed at his deposition, the likelihood of a successful remittitur motion seemed quite unlikely. (B26-29). For good reason, the post trial motions were far better placed elsewhere. In any case, that post-trial decision had nothing to do with the good faith claim handling pre-trial.

[5] See Shockley v. Lewis, 2015 WL 4400011 (Del. Super. 2015).

ARGUMENT III

III. DENIED. THE SUPERIOR COURT THOROUGHLY REVIEWED THE ABUNDANT RECORD DEMONSTRATING EXTENSIVE INVOLVEMENT AND INVESTIGATION BY DEFENDANT, AND ACCURATELY APPLIED THE BAD FAITH STANDARDS IN DELAWARE TO THE EVIDENCE IN DETERMINING THAT THERE WAS NO MALICIOUSNESS OR RECKLESSNESS BY DEFENDANT TOWARD PLAINTIFF.

1. QUESTION PRESENTED

Whether the unqualified opinion from a New York insurance broker changes the applicable facts or Delaware law regarding the bad faith claim handling standard; and whether that unqualified opinion should have played any part in altering the Superior Court's decision. (A88-93).

2. SCOPE OF REVIEW

Following the grant of a motion for summary judgment, the applicable standard of appellate review requires the Supreme Court to examine the record to determine whether, viewing the facts in a light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law. Sostre v. Swift, 603 A.2d 809, 812 (Del. 1992) (citation omitted).

3. MERITS OF ARGUMENT

Plaintiff's argument disparaging the qualifications of attorney Shalk to evaluate a personal injury claim, meanwhile proffering the opinion of a New York insurance broker on the issue of Delaware bad faith is a peculiar one. The misplaced emphasis in this argument is highlighted by the fact that Plaintiff asks this Court to deem attorney Shalk inexperienced in personal injury evaluation simply because he recalled trying only two UM claims during his decades of practice. Although Plaintiff actually also accuses attorney Shalk of only "handling and trying" two UM claims, that is a rather deceptive representation. In fact, attorney Shalk has likely handled more first party litigation claims than any other attorney in the State of Delaware. Obviously, in attorney Shalk's 30 years of doing precisely that kind of work, he has evaluated countless first party claims, and offered his opinion as to pain and suffering value to innumerable clients on thousands of cases. Having only recalled actually trying two such cases has absolutely zero bearing on attorney Shalk's capacity or authority to offer insight into the likely outcome of a personal injury claim. Additionally, attorney Shalk has actually tried over 100 personal injury claims during the course of his career, so there are few, if any, attorneys in this State more experienced or better qualified to predict what a jury may do with a certain claim.

In stark contrast to the credentials of attorney Shalk, however, Plaintiff complains that the Superior Court ignored the opinion of Ivan Cohen in this case. To begin, the Superior Court had submitted to it Mr. Cohen's opinion for this claim through the briefs submitted to that Court. (A141-158). The fact that this opinion did not become part of the Court's decision certainly does not mean that it was not considered, but only confirms that it played no role in the factual background or its application to Delaware law. In addition, there was certainly no reason for the Court to address, or give any value whatsoever, to any opinion offered by Mr. Cohen.

Ivan Cohen is utterly unqualified to render any opinion that might qualify as viable Rule 702 evidence. Mr. Cohen undoubtedly would have failed a Daubert challenge, had that been necessary.[6] Ivan Cohen is an insurance broker in Carmel, New York. He advises clients on the types and scope of insurance coverage they should get. (B31). He has never adjusted an insurance claim in his lifetime; in Delaware or anywhere else. Indeed, he has never even sold a policy of insurance in Delaware. By his own admission, he is not qualified to render any opinions on Delaware law. He is not qualified as an expert in Delaware insurance claim handling.

[6] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 597 (1993) , adopted by Delaware in M.G. Bancorporation, Inc. v. LeBeau, 737 A.2d 513 (Del. 1999) (providing the gatekeeping threshold for permissible expert testimony).

He has never evaluated a Delaware personal injury claim from either a plaintiff or insurance company side. (B32-34). Mr. Cohen admits that he is not qualified to offer an opinion as to value of a Delaware personal injury claim. He has of course never tried a personal injury claim in Delaware and has no experience with Delaware juries. (B35). Remarkably, by virtue of selling insurance in New York, Mr. Cohen believes he can offer expert opinions about Delaware insurance claims handling. By every measure of the Daubert standard, he can not. See Travelers Prop. Cas. Co. of America v. National Union Ins. Co. of Pittsburgh, PA, 557 F. Supp. 2d 1040 (W.D. Mo., 2008). Mr. Cohen may have general knowledge of the insurance industry through his brokering and underwriting experience, but the Daubert standard requires far more than that. Mr. Cohen of course can not be permitted to offer opinions on the applicable principles of law and lacks the background to testify about Delaware claims handling. Even in the very limited number of times that Mr. Cohen has offered expert opinions, they have dealt with insurance coverage matters, and nothing consisting of claims evaluation or claim handling. (B36-41).

As discussed previously in this brief, in addition to the initial West Virginia claims handlers and supervisors being involved in the investigation of this claim, input was sought from Delaware adjusters and team managers, as well as Delaware

attorneys with decades of experience. Plaintiff's position that there would have been increased authority for settlement if more work had been done simply ignores the facts, and, in any case, has no bearing on whether there are any facts indicating a reckless indifference or malice toward the plight of Plaintiff. Both attorney McNelis and attorney Shalk offered their evaluations of the claim assuming all of Plaintiff's complaints were caused by the subject accident. More to the point, even those opinions were simply opinions. There is no formula; there is no science; and there is certainly no certainty in the world of personal injury evaluation. Thus, even if Defendant had disagreed with the values determined by local counsel, the claim handling does not enter the realm of bad faith.

Defendant investigated this contract claim for UM motorist benefits. That fact cannot be denied, as evidenced by nearly 600 log entries. Representatives of various levels and settlement authority reviewed the information and the opinions of a variety of sources and attempted to settle the case for a fair value. Plaintiff believed her case held more value than the offer by Defendant, and thus litigation ensued. The jury determined in essence that all parties had significantly undervalued Plaintiff's level of pain and suffering and rendered its decision. That decision was not broken down into subparts or impairments or any other calculated formula - it was simply a single

whole number; a number anticipated by no one. Neither J.R. Roach, nor attorney Shalk, nor attorney McNelis, nor attorney Fletcher knew what a jury would do with this case. Obviously, neither did Defendant. However, Defendant at no time engaged in a practice of venomous or malicious conduct toward Plaintiff. The claim handling in this case was done with thoughtful thoroughness, and certainly to a reasonable level under the circumstances. There is simply nothing to suggest maliciousness or recklessness by Defendant, or a punitive incentive toward its insured, and thus the unassailable decision by the Superior Court to dismiss this bad faith claim must stand.

CONCLUSION

Given the extensive record which is completely bereft of any showing that Defendant, through the course of extensive claims evaluation, acted maliciously or recklessly or singled out Plaintiff for malicious treatment, the Superior Court's decision granting summary judgment to Defendant on Plaintiff's assertion of bad faith claims handling against Defendant was entirely appropriate and must be affirmed.

Respectfully submitted,
YOUNG & MCNELIS
/s/ Jeffrey A. Young

JEFFREY A. YOUNG (#3449)
300 South State Street
Dover, Delaware 19901
(302) 674-8822
Fax (302) 674-8251
jyoung@youngandmcnelis.com
Attorney for Defendant Below/Appellee

Dated: January 6, 2016