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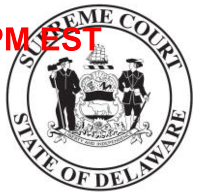

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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RESTATEMENT OF FACTS

Defendant's claim that it advanced $45,000 to Plaintiff prior to trial is erroneous. (Appellee's Answering Brief, page 17). As the record clearly reflects, Defendant paid $25,000 to Plaintiff in September of 2008, nearly three years after the serious motor vehicle collision of September 26, 2005. Nothing more was paid to Plaintiff by Defendant until after the conclusion of the trial and Defendant's unsuccessful appeal of the jury verdict rendered against it. (AR 6-8).

ARGUMENT I

I. PLAINTIFF HAS MET THE STANDARD TO SUSTAIN A BAD FAITH CLAIM UNDER DELAWARE LAW.

(1) MERITS OF ARGUMENT

Defendant's arbitrary actions over a period of years, including making minimal settlement offers without reasonable justification for Defendant's valuations, disregarding the value assessment of its own experienced claims adjuster, ignoring the opinions of its IME physician as well as Plaintiff's treating physician, and failing to obtain medical information it decided was required to accurately value Plaintiff's claim, constitute a violation of the Defendant's duty of good faith and fair dealing owed to its insured, the Plaintiff. According to legal principles established in Delaware by *Tackett*, "Where the insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of implied obligations of good faith and fair dealing underlying all contractual obligations; lack of good faith, or presence of bad faith, is actionable where an insured can show that insurer's denial of benefits was clearly without any reasonable justification." *Tackett v. State Farm & Cas. Ins. Co.*, 652 A.2d 254, 264 (Del. 1995).

In defense of its actions, Defendant provides a litany of claim log entries as proof that Plaintiff's claim was thoroughly investigated. However, a closer look at many of the log entries cited by Defendant does not lend support to its defense. For instance, the first log entry cited, Log Entry 174 dated August 15, 2006 (B3), indicates the primary claims adjuster, J.R. Roach, evaluated the claimant's general damages at "$25,000 to $30,000." However, the balance of the entry log indicates that Adjuster Roach's "gross

current value" estimation, at this early stage, was actually "$42,822.75 to $47,822.75."

Log Entry 181 by Paul Gerlitz on September 11, 2006 (B4), indicating a range of value of $19,000 to $25,000 is cited by Defendant, apparently as corroboration of Defendant's initial value assessments. However, the balance of the log entry makes it clear that Mr. Gerlitz's valuation is conditional and based on incomplete information, "Depending on the the [sic] documented pain related to the fractured rib and any proposed disability for left or right knee, ROV (range of value) is $19,000 up to $25,000."

Defendant cites to Log Entry 275 (B 11) where Attorney Brian McNelis of Young and McNelis valued the Plaintiff's claim from $35,000 to $50,000 as of January 31, 2008. Mr. McNelis did not have a complete file to review when he rendered his initial valuation, since State Farm 's IME with Dr. Picconi had yet to occur. It is undisputed that Dr. Picconi's findings were particularly favorable in support of Plaintiff's injury claim. Moreover, the balance of this log entry states that Attorney McNelis "said due to the extensive frontend dmg, the knee injs. were probably caused by the mva." Of course, Attorney McNelis' opinion that the motor vehicle accident likely caused Plaintiff's knee injuries is counter to the many causation theories asserted by Team Manager Adkins.

This log entry also raises an additional issue. Log No. 275 (B 11) was originally redacted from the Defendant's activity logs provided Plaintiff, yet Defendant included it in its Appendix. The three activity log entries concerning Attorney McNelis which did

appear in Plaintiff's redacted version were all from August of 2008. Log Numbers 334 (AR 1) and 337 (AR 1) both referred to the forwarding of Defendant's file to Attorney McNelis via Federal Express and a telephone call to confirm his receipt of the suit papers. The third log entry, Log No. 338 (AR 2), was dated August 11, 2008, and was written by Team Manager Mary Adkins, as follows: "The defense is assigned to Colin Shalk. I left JR a message advising the file should not be assigned to Brian McNelis."

No explanation is given for Team Manager Adkin's reassignment of the file, but it is clear that Attorney McNelis and Team Manager Adkins had different opinions regarding the cause of Plaintiff's severe knee injuries. Given that causation issues raised by Team Manager Adkins were the basis for the unjustified rejection of Adjuster Roach's detailed $62,080 to $94,960 valuation on August 7, 2008, as well as Defendant's persistent arbitrarily low settlement offers thereafter, it is telling that Team Manager Adkins would direct that the case not be handled by Attorney McNelis.

Defendant also cites Log No. 357 (B 19) by Team Manager Adkins on August 25, 2008, which indicated a review of the file occurred between Adjuster Roach, Team Manager Adkins, and defense counsel Colin Shalk. At that time, Defendant was in receipt of Dr. Piccioni's IME report which indicated Plaintiff's injuries were caused by the accident and Plaintiff's medical treatment was reasonable and necessary. Despite this favorable and supportive opinion regarding Plaintiff's injuries, Attorney Shalk indicated a valuation of $35,000 to $50,000 might be warranted. The log entry also includes the following by Team Manager Adkins: "I still have questions about this claim

since we do not have a complete prior records set..." Unexplainably, despite receipt of Dr. Piccioni's IME report, Attorney Shalk's value assessment remained the same, while Team Manager Adkins continued to assert pre-existing causation issues which Dr. Piccioni rejected.

Defendant also cites Log No. 429 (B 15) wherein Attorney Shalk increased his case valuation to $45,000 to $50,000 on February 2, 2009, following Plaintiff's deposition. The activity log suggests that Attorney Shalk increased his valuation based on the right knee injury, future treatment for the left knee pain, and that Plaintiff made a good witness for herself. Shortly after this log entry, Adjuster Roach requested a breakdown of Attorney Shalk's revised range of value on February 17, 2009 in Log No. 412 (B 15). Attorney Shalk responded by letter dated February 23, 2009, as follows: "I'm placing emphasis on two knee injuries one surgical and one not with some residual impairments. I can't honestly break down the component parts better than this." (A 268-270). Attorney Shalk makes no mention that Plaintiff's documented general damages, according to Adjuster Roach as of the same date, totaled $40,217.85 to $45,217.85, nearly equivalent to Attorney Shalk's revised baseline valuation.

Defendant argues that this claim was "processed, reprocessed, and processed some more by Defendants, its agents, and attorneys." While it is true that Defendant's activity log contains over 600 entries, making log entries and discussing a claim does not equate to acting in good faith. Defendant fails to address, or is unable to justify, why State Farm disregarded its own adjuster's valuation of the claim, despite his 23 years of

claims experience with State Farm; why it disregarded both its own IME physician's opinion regarding causation as well as Plaintiff's treating physician; and why it failed to acquire Plaintiff's prior medical records or seek an addendum to its IME report in order to clarify any lingering causation theories concerning Plaintiff's permanent knee injuries. These failures support a finding that State Farm intentionally and arbitrarily set its value of Plaintiff's claim at an unreasonably low number.

Nearly three years after the crash, Defendant claims that it acted in good faith because it advanced $25,000 to Plaintiff in September of 2008, due to "settlement impasse." (AR 3, Log 372) Defendant states that this represents "the essence of good faith negotiating." However, if Defendant had fairly valued Plaintiff's claim in a timely manner, Plaintiff would not have been forced to wait nearly three years to receive less than 10% of the $260,000 value attributed to her claim by a jury. Defendant further claims to have advanced an additional $20,000 to Plaintiff prior to trial. This is simply untrue. Plaintiff received only $25,000 from Defendant prior to trial, which was transmitted nearly three years after the serious crash. Defendant boasts that it advanced these funds despite the risk that a jury might rule otherwise. Given Plaintiff's zero percent liability in causing the accident, the serious injuries suffered by the Plaintiff which required surgery, the permanent impairments suffered by the Plaintiff whose life expectancy was 44.9 more years, the complete destruction of the Plaintiff's vehicle, the undisputed opinions of Plaintiff's treating physicians and the defense IME physician, a policy limit of $100,000, and an unjustified delay of years, an advancement of only

$25,000 hardly seems "the essence of good faith negotiating."

Defendant alleges it has "no checklist for what must be done in good faith to evaluate a pain and suffering allegation." *Tackett* holds otherwise. Defendant had a duty to its insured to investigate the Plaintiff's claim, to process the claim, and to avoid a delay of payment. A $25,000 "good faith" payment on a claim worth $260,000 after a delay of three years is a violation of Defendant's duty to effectuate a prompt, fair and equitable settlement. Defendant's excuses that "someone loses every time" and there is "no magical formula" further belies Defendant's malicious indifference to the real value of Ms. Enrique's claim. Under these circumstances, a finding of bad faith adjusting by State Farm is reasonable and actionable.

ARGUMENT II

II. DEFENDANT ACTED IN BAD FAITH IN MALICIOUSLY AND UNJUSTFIABLY UNDERVALUING PLAINTIFF'S CLAIM OVER A PERIOD OF YEARS.

(1) MERITS OF ARGUMENT

Defendant states that it "continuously sought information and input from various sources" while processing the Plaintiff's claim. However, in Appellee's 38-page Answering Brief, Defendant fails to offer a single plausible explanation for State Farm's failure to request an addendum to the IME report from Dr. Piccioni (A 208, Log 357; A209-210, Log 363; A 211, Log 367; A 212-213, Log 373; A 214, Log 394; A216-217, Log 400; A218-219, Log 412; A220, Log 446) or to obtain Plaintiff's prior medical records (A 196, Log 282; A 196-197, Log 283; A 208, Log 357; A 209-210, Log 363; A 210, Log 365; A 212-213, Log 373; A 214, Log 394; A 215, Log 398; A 218-219, Log 412; A 220, Log 446; A 221, Log 459), both of which Defendant declared it needed at least 19 times in its activity log in order to accurately assess the value of Plaintiff's claim. Instead, Defendant suggests that claim processing is "not a science" and an insurance company assesses "whatever information is available." Plaintiff contends that merely examining a claim on a periodic basis; formulating unsubstantiated causation theories; asking for value assessments from co-workers based on incomplete medical documentation; and making log entries regarding those value assessments does not constitute adequate investigating and processing of a claim without unreasonable delay. To the contrary, failing to do what Defendant declared it needed to do in order to

accurately assess the claim's value, while only doing things that tend to support a minimal valuation of the claim over a period of years, clearly exhibits Defendant's failure to adequately investigate and process the Plaintiff's claim, in violation of Defendant's duty of good faith and fair dealing owed to Plaintiff. Defendant's "best guess" about the value of Plaintiff's case should have been based on facts, including Plaintiff's actual medical records and State Farm's own IME report, and not on unfounded and undocumented causation theories formulated by employees of Defendant with little or no medical training.

The Defendant, to this day, is unable to produce even one piece of evidence to support the unsubstantiated causation theories which were used by Defendant to arbitrarily ignore Adjuster Roach's $62,080 to $94,960 claim valuation. Defendant knew that Plaintiff's injuries were consistent with a devastating front-end crash. Defendant knew that all of Plaintiff's medical treatment and lost wages were deemed reasonable and necessary by State Farm. Defendant knew that Plaintiff lost her job and faced financial hardship because of the injuries she suffered in the accident. Despite this knowledge, Defendant maliciously continued to undervalue Plaintiff's claim over a period of years, without even one medical record to support its position. Lastly, Defendant knew its maximum exposure on the policy was only $100,000, basically the high end of its adjuster's valuation. Defendant's actions toward Plaintiff were malicious, constituting the essence of bad faith. It was Plaintiff who was forced to wait nearly five years to receive a fair resolution of her claim. It was Plaintiff that suffered the heavy

burden of Defendant's conduct.

ARGUMENT III

III. THE SUPERIOR COURT ERRED IN RELYING ON DEFENSE COUNSEL'S ASSESSMENT OF VALUE; ERRED IN FAILING TO GIVE CONSIDERATION TO PLAINTIFF'S EXPERT'S OPINION REGARDING DEFENDANT'S UNJUSTIFABLE REJECTION OF ITS OWN EXPERIENCED ADJUSTER'S VALUATION; AND ERRED IN GIVING A POSITIVE INFERENCE TO DEFENDANT'S UNFOUNDED INJURY CAUSATION THEORIES.

(1) MERITS OF ARGUMENT

The evidence indicates that the minimal values placed on Plaintiff's claim by defense attorney Shalk were arbitrary and were unjustified by the record. According to Log No. 357 (B19), Attorney Shalk thought a "$35,000 to $50,000" valuation was warranted, despite having received the defense IME report which was particularly favorable and supportive of Plaintiff's injury claim. Oddly enough, $35,000 to $50,000 was the exact value range Attorney Shalk's associate placed on the Enrique claim during a much earlier valuation, although the defense IME had not yet occurred. Only after Plaintiff's deposition did Attorney Shalk increase his valuation to $45,000 to $50,000, based on the right knee injury, future treatment for the left knee, and that Plaintiff made a good witness for herself. (B15, Log 429) When Adjuster Roach requested a breakdown of Attorney Shalk's valuation assessment, Attorney Shalk responded with the following: "I'm placing emphasis on two knee injuries one surgical and one not with some residual impairments. I can't honestly break down the component parts better than this. (A268-270). Even more disturbing, Attorney Shalk, when asked during his deposition if he factored in Ms. Enrique's life expectancy (44.9 more years) in his valuation of her claim in connection with her undisputed permanent injuries, he stated:

"I did not. I believe she was in her 30's or her 40's. I don't consider life expectancy to be all that important to anything, so I did not mention it." (Shalk Depo, pg 1 and 62, AR 3-4)

Clearly, Attorney Shalk failed to give any value whatsoever to the consequences of the permanent impairments that Ms. Enrique will endure over the balance of her life. For the foregoing reasons, the Court erred in relying upon defense counsel Shalk's valuation of Plaintiff's claim.

While the Defendant is highly critical of the Plaintiff's expert, Ivan Cohen, the Defendant failed to offer any expert testimony. In response to Defendant's criticisms, Mr. Cohen never claimed to have experience in the valuation of Delaware claims. Rather, Mr. Cohen's expert opinion centered on two primary issues: (1) What factors were at issue (determining liability was not in question because the uninsured motorist was solely responsible for the accident and the injuries suffered by Plaintiff, leaving only what value was reasonable and fair compensation to Plaintiff as the sole consideration of Defendant's); and (2) whether or not Defendant was justified in rejecting the detailed valuation of its own experienced adjuster's valuation of the claim. Plaintiff's expert did not evaluate the claim's value, but rather gave an opinion about the actions of the Defendant in arbitrarily reducing its primary adjuster's well-organized and justifiable claim valuation by eliminating certain categories of damages and reducing others without a reasonable explanation.

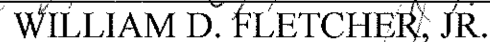
Finally, the positive inference given to the Defendant's causation theories related

to Plaintiff's knee injuries by the Superior Court was in error. The record indicates that Defendant failed to produce any evidence whatsoever indicating Plaintiff suffered a pre-existing condition which caused her knee injuries. On the contrary, the evidence indicates that Plaintiff sustained serious knee injuries as a result of the severe front-end collision of Plaintiff's vehicle that caused Plaintiff's knees to strike its dashboard. The impact caused external and internal injuries to Plaintiff's knees which both medical professionals supported. The lower Court's reliance on Defendant's unsupported suppositions regarding causation of Plaintiff's injuries was in error since State Farm failed to take any meaningful action to reasonably support their theories.

CONCLUSION

WHEREFORE, based on the foregoing and Appellant's Opening Brief, Plaintiff Below, Appellant, Joann Enrique, hereby respectfully requests that this Court reverse the Superior Court's decision granting State Farm's Motion for Summary Judgment, and direct that this matter be remanded for trial to determine whether State Farm acted in bad faith in the handling of its insured's uninsured motorist claim.

Respectfully submitted,



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