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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 OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff, JoAnn Enrique, filed a Complaint against Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), in the Superior Court in and for Kent County on July 22, 2008. This Complaint alleged personal injuries and damages on behalf of Plaintiff resulting from a motor vehicle collision on September 26, 2005 caused by an uninsured motorist, Bridgett Roy. The Complaint also alleged bad faith on the part of Defendant State Farm in the handling of its insured's uninsured motorist (UM) claim.

Nearly seven months prior to filing suit, Plaintiff submitted an offer to settle her UM claim to Defendant for $165,000. Plaintiff's UM policy limits were $100,000. In response to Plaintiff's settlement offer, Defendant offered $25,000. On September 3, 2008, Defendant issued a partial payment of UM benefits to Plaintiff in the amount of $25,000.

On September 19, 2008, Defendant filed a Motion to Sever and/or Stay the portion of Plaintiff's Complaint alleging Defendant's bad faith. The parties filed a Stipulation for Partial Dismissal on January 13, 2009, dismissing the Plaintiff's bad faith claim without prejudice, thereby permitting the Plaintiff to pursue the bad faith action following the resolution, and contingent on the outcome, of Plaintiff's UM personal injury claim.

In a further effort to negotiate this claim, Plaintiff subsequently reduced her

settlement offer to $100,000, the policy limits. In a final attempt to resolve the claim, Plaintiff further reduced her settlement demand to $90,000. Defendant's final settlement offer prior to trial was $20,000 beyond the $25,000 previously paid, for a total offer of $45,000.

In February of 2010, a jury trial of the matter was held. On February 24, 2010, the jury rendered a verdict for Plaintiff and against State Farm in the amount of $260,000. Defendant did not seek remittitur or move for a new trial on the grounds of excessive verdict. Defendant did file an appeal with the Delaware Supreme Court alleging evidentiary error based on the trial court's admission of vehicle photographs for a limited purpose. On September 3, 2010, the Delaware Supreme Court denied the Defendant's appeal.

After affirmance of the jury verdict, which far exceeded the Plaintiff's $100,000 uninsured policy limits, Defendant paid Plaintiff the remaining $75,000 of its UM limits. On October 18, 2012, Plaintiff filed a Complaint in the Superior Court in and for Kent County against Defendant, alleging bad faith by Defendant in the handling of Plaintiff's UM claim. The Complaint sought punitive damages for the unpaid portion of the jury's verdict in the amount of $160,000.

On June 10, 2015, Defendant filed a Motion for Summary Judgment pursuant to Superior Court Civil Rule 56 seeking dismissal of the action. On October 14, 2015, the Superior Court granted Defendant's Motion for Summary

Judgment on the grounds that Plaintiff failed to establish a prima facie case of bad faith.

Plaintiff filed a timely appeal to this Court on November 13, 2015, which seeks review of the above-mentioned Superior Court Opinion dated October 14, 2015, which granted Defendant's Motion for Summary Judgment. Plaintiff, JoAnn Enrique's, submits this Opening Brief in support of her appeal which seeks the reversal of the lower court's granting of Defendant's motion for summary judgment.

SUMMARY OF ARGUMENT

1. An insurer owes a duty of good faith and fair dealing to its insured. Part of that duty is adequately investigating and processing a claim without unreasonable delays. Defendant knew that Plaintiff suffered multiple injuries in a severe crash that destroyed two motor vehicles, that Plaintiff was declared void of any liability for the collision, that Plaintiff suffered multiple injuries in the collision, including bilateral knee injuries when her knees struck her minivan's dashboard, and that Plaintiff immediately required medical treatment for her multiple injuries. Defendant also knew the Plaintiff reported no pre-existing problems in connection with her knees, that no medical records indicated such a problem, and that prior to the accident, Plaintiff's job required her to stand for prolonged periods of time which she did without issue.

2. Defendant, alleging potential pre-existing knee problems without medical substantiation of the same, assumed the validity of its own conjecture, although its causation theories were in direct conflict with the opinions of the Plaintiff's treating physician, the Defendant's IME physician, and all of the Plaintiff's medical records. While Defendant could have obtained Plaintiff's pre-existing records or sought an IME addendum to further address causation issues when it sought to challenge the initial report completed by its IME physician, it did not. Defendant did, however, document on numerous occasions in its activity log the need to acquire Plaintiff's

pre-accident medical records or an IME addendum in order to accurately evaluate the Plaintiff's claim. Defendant's failures were self-serving. If Defendant received Plaintiff's pre-existing records and found no support for its causation contentions, Defendant would have been forced to increase its valuation of its insured's claim. Therefore, Defendant's failure to investigate the claim, and failure to do what it repeatedly indicated needed to be done, allowed the Defendant to continue delaying a fair resolution of the claim while continuing to make minimal offers. Defendant's actions were in violation of its duty of good faith and fair dealing owed to Plaintiff.

3. Defendant acted with reckless indifference to its insured by delaying a fair resolution of the claim over a period of years knowing that the Plaintiff would likely have to accept an unreasonably low settlement offer or go to trial to obtain a fair and reasonable award of UM benefits. Defendant knew that Plaintiff was a mother, that Plaintiff's minivan was destroyed in the crash, that Plaintiff received only $2,865 to replace her vehicle; that Plaintiff's fiance (Defendant's policyholder) was ill and passed away during the years of settlement delay after the crash; and that Plaintiff lost her job because of injuries suffered in the accident and was unable to find a replacement job given her training and physical restrictions. Defendant delayed, and ultimately failed, to order prior medical records it declared were necessary to fairly consider the value of Plaintiff's claim; delayed over

months, and ultimately failed, to order an addendum to its IME report; forced the Plaintiff to try the matter where a jury awarded Plaintiff $260,000. Defendant's conduct, resulting in the claim taking approximately five years to resolve, was recklessly indifferent to the interests of Defendant's insured.

4. In formulating its Opinion, the Superior Court appears to have relied upon incomplete or inaccurate information. First, evidence concerning the Plaintiff's insurance expert witness was not considered or referenced in the Court's Opinion, nor was it referenced that Defendant failed to offer any expert evidence to counter the Plaintiff's expert. Second, the Court indicated that the Defendant was justified in relying on the claim valuations of its defense counsel based on his years of experience with these types of cases. However, said counsel could recall only trying two uninsured motorist cases during his years of legal practice, both of which he undervalued based on the jury verdicts. Further, Defendant knew that its former legal counselor did not possess Plaintiff's prior medical records and thus could not accurately assess the actual value of Plaintiff's claim. Third, the Superior Court erroneously gave favorable inference to the moving party concerning the Defendant's justification for undervaluing the Plaintiff's claim based on causation theories which were not only unsubstantiated, but also contrary to the information State Farm possessed. Defendant did not produce one single medical record or medical opinion that validated its causation position. On the other hand, Plaintiff's

medical records, Plaintiff's treating physician, and Defendant's IME physician indicated that Plaintiff's knee injuries were related to the motor vehicle collision. Thus, the Superior Court erred in concluding that Defendant had a meritorious defense on causation to this bad faith action as a matter of law.

STATEMENT OF FACTS

JoAnn Enrique was the operator of a Chevrolet Lumina minivan that was involved in a severe motor vehicle collision in Dover, Delaware on September 26, 2005. (A13-26). The collision occurred as Plaintiff was driving on South Little Creek Road, when a Dodge Durango, operated by Bridgett Roy, turned into the Plaintiff's immediate path. (A13-26). State Farm determined that Bridgett Roy caused the crash and Plaintiff was "free of negligence." (A185, Log 66; A195-196, Log 280).

Bridgett Roy's vehicle was uninsured at the time of the collision. (A184, Log 36). The minivan Plaintiff was operating, which was owned by Jason Garber, was insured by Defendant State Farm. Defendant State Farm's automobile insurance policy provided uninsured motorist coverage for Plaintiff with limits of $100,000 per person.

The crash between the vehicles resulted in extensive, disabling damage to the front of Plaintiff's minivan, which was declared a total loss by Defendant. (A187, Log 85; A195-196, Log 280). Defendant State Farm also provided PIP coverage for Plaintiff's benefit, which provided for payment of reasonable and related medical bills and lost wages sustained by Plaintiff due to the injuries caused her in the motor vehicle collision. None of these losses were disputed by State Farm.

Plaintiff Enrique suffered multiple injuries as a result of the crash, including a fracture of her right fifth rib; injuries to both knees from striking the dashboard during the collision resulting in contusions and internal structural injury for which Plaintiff underwent right knee arthroscopic surgery and was a candidate for left knee arthroscopic surgery; edema; cervical spine strain; and numerous contusions and abrasions to her forehead, chest and abdomen. (A189-190, Log 173; A192-193, Log 212; A195-196, Log 280; A205, Log 329; A205-206, Log 330; A209-210, Log 366; A219, Log 415). Plaintiff's injuries resulted in permanent impairments to both knees. (A195-196, Log 280; A205, Log 329; A218, Log 415). At the time of the collision, Plaintiff was a 33 year-old female who had a future life expectancy of 44.9 more years. (A194-195, Log 279). Plaintiff's proposed left knee surgery would cost approximately $18,000.00. (A206-207, Log 330.)

Because of her severe injuries, Plaintiff Enrique was unable to continue working as a cafeteria aide for approximately 9 months following the collision. (A206-207, Log 330; A209-211, Log 366). Defendant State Farm paid, under its Personal Injury Protection (PIP) coverage, Plaintiff's medical bills in the amount of $25,354.23 and lost wages in the amount of $6,132.70. (A210, Log 365). Per the Defendant's IME physician's report, all treatment was reasonable and necessary. *Id.*

On January 25, 2008, Plaintiff's counsel submitted a settlement offer to

Defendant State Farm in the amount of $165,000. (A196, Log 281). Plaintiff's settlement offer letter was directed to J.R. Roach, the adjuster assigned to handle the Plaintiff's claim. *Id.* At the time, Mr. Roach had approximately 20 years of adjusting experience with Defendant, and was assigned by Defendant to handle Plaintiff's claim in addition to his typical West Virginia claims. (A230-232).

In January of 2008, Mr. Roach evaluated Plaintiff's initial demand package, and requested authority from his superior to offer the sum of $50,080 to settle the claim. (A196, Log 281). In response, Mr. Roach's team manager, Mary Adkins, denied his request, valuing the claim at $35,000 and citing potential causation issues. (A196, Log 282). In March of 2008, Defendant raised a plethora of causation suppositions concerning Plaintiff's knee injuries, from Lyme disease, congenital issues, weight issues, minor childhood scarring, overuse, to knock-knees. (A194, Log 276; A194-195, Log 279; A195-196, Log 280; A196-197, Log 283). Ms. Adkins directed Mr. Roach to limit any settlement offers on behalf of Defendant to $35,000 or less. (A196, Logs 281 & 282). Ms. Adkins noted that Defendant could not accurately assess the value of Plaintiff's claim without copies of Plaintiff's medical records pre-dating the collision. (A196, Log 281). Defendant offered $25,000 to resolve Plaintiff's uninsured claim. (A198, Log 289).

Months later, in April of 2008, Defendant continued to question the cause of

Plaintiff's knee injuries. (A199-200, Log 299). Defendant requested an IME of Plaintiff with a doctor of its choosing. (A201-202, Log 307). In good faith, Plaintiff readily agreed to undergo an IME. (*Id.*)

Defendant selected Lawrence Piccioni, M.D. to perform an IME. *Id.* Mr. Roach and Ms. Adkins consulted in crafting a detailed IME request letter and enclosures. (A203, Log 319; A204, Log 320). On July 23, 2008, Dr. Piccioni completed a physical examination of Plaintiff and reviewed medical records submitted to him by Defendant. (A250-257.) In conflict with the unfounded suppositions raised by Defendant's management, Dr. Piccioni's opinion was essentially the same as Plaintiff's treating orthopedist, Dr. Glen Rowe. (A253, 255) Specifically, Dr. Piccioni indicated that Plaintiff's treatment was reasonable and necessary, that the "described injuries were caused by the motor vehicle accident," noting specifically that the motor vehicle collision exacerbated the Plaintiff's chondromalacia, causing a possible meniscal tear in the left knee, and that Plaintiff suffered "some permanent impairment related to the motor vehicle accident." (A205, Log 329; A205-206, Log 330). Further, Dr. Piccioni subsequently stated that Plaintiff had a "mild permanent impairment to the left and right knees." (A263-264).

Following receipt of Dr. Piccioni's IME report, Mr. Roach performed a detailed analysis of Plaintiff's claim for settlement purposes on August 7, 2008.

(A205, Log 327; A205, Log 329; A205-207, Log 330). In consideration of the medical aspects of Plaintiff's claim, the 100% fault of the other driver, the Plaintiff's future life expectancy, and the serious nature of the collision, Mr. Roach determined that Plaintiff's claim had a current value range of between $62,080 and $94,960. *Id.* Mr. Roach methodically itemized each category of Plaintiff's damages in a detailed manner, to-wit: general damages in the amount of $50,000 to $65,000; future treatment in the amount of $2,000 to $17,000; impairment in the amount of $10,000 to $12,000; and ortho. bill in the amount of $80. *Id.* Mr. Roach listed additional factors he considered in making his determination of claim value, including Plaintiff's inability to continuously stand for three hours, being off from work for nine months, being terminated from her employment because of her inability to stand throughout her shift, and difficulty using stairs and getting out of chairs. *Id.*

Despite having an IME report and a detailed valuation from the adjuster assigned to the matter, Ms. Adkins continued to "still have questions about this claim" and "questions about exactly what the IME Dr. [sic] is concluding." (A208, Log 357). Although a prime opportunity existed to either confirm or further dispel her causation theories by following up with the Defendant's IME physician, Ms. Adkins stated that she "didn't read the IME report" and that she did not think she asked anyone with a medical background to review the IME report to assist her in

understanding the same. (A234-235).

In July of 2008, Plaintiff filed suit against the Defendant. On August 26, 2008, Defendant's Claim Section Manager, Elizabeth Carol Hanson, completed her first review of the Plaintiff's claim, which included Mr. Roach's detailed value analysis of August 7th. (A209-210, Log 363). Ms. Hanson agreed with her management associate, and disagreed with Mr. Roach's value range of $62,080 to $94,960. Ms. Hanson indicated a review of Plaintiff's prior records was necessary concerning any preexisting conditions upon which Defendant could base its lower settlement value. *Id.* Ms. Hanson stated: "When we have the necessary info (complete prior records including PT), we can consider an addendum to IME to address causation/extent of aggravation of chondromalacia and re-evaluate. *Id.* Ms. Hanson suggested distribution of a Partial Settlement to Plaintiff of $25,000. *Id.*

The following day, Mr. Roach's State Farm log entry indicated that further evaluation would occur "when we have complete copy of the prior records" (A210, Log 365). On the same day, it was noted that "Attorney Shalk indicates an evaluation in a $35,000 to $50,000 range **may** (emphasis added) be warranted. "When we have a complete copy of prior records including PT) [sic] we can consider an addendum to the IME to address causation/extent of aggravation of R knee chondromalcia & RE-EVAL." (A211, Log 367; A211-212, Log 368).

Shortly thereafter (September 3, 2008), a $25,000 partial uninsured settlement was issued to Plaintiff by Defendant "due to impasse." (A214, Log 393).

Following Ms. Hanson's assessment, Mr. Roach further evaluated the claim on November 12, 2008. (A215-216, Log 399). Despite having indicated prior medical records were necessary and possibly an IME addendum in order to properly evaluate the claim's value, Mr. Roach performed a revaluation without any additional medical documentation. (A215, Log 398; A215-216, Log 399). However, significant Personal Injury Protection documentation was mentioned, which indicated a total of $31,406.93 was paid for Plaintiff's medical expenses and lost wages under the PIP portion of State Farm's policy, including $25,274.23 for medical bills and $6,132.70 for lost wages. *Id.* Mr. Roach also noted Plaintiff's proposed future treatment was reasonable per Defendant's IME physician consisting of 2 injections per year at $270 per year and future surgery at an approximate cost of $17,880. *Id.* Despite the significant PIP expenditures, Mr. Roach, without further explanation, substantially decreased his valuation of the case from $62,000-$94,000 to $25,000-$35,000. *Id.* Mr. Roach also decreased the valuations of his itemized categories, without reason or explanation, to coincide with his new overall valuation, as follows: general damages $24,217.85 to $34,217.85 (decreased from $50,000 to $65,000); **impairment 0 (decreased from $10,000 to $12,000)** (emphasis added); and **future treatment: 0 (decreased from**

$2,000 to $17,000). (emphasis added) *Id.*

After declaring a need for prior medical records or an IME addendum concerning causation over a period of many months, Mr. Roach noted in the activity log on April 28, 2009 that "we have not received any new medical information" and "Colin believes our CV [current value] is appropriate." (A221, Log 459). Thus, from August of 2008 through nearly the end of April of 2009, Defendant failed to do the two things it indicated needed to be done: (1) request Plaintiff's prior medical history in order to dispel or confirm its allegations so that Defendant could accurately assess the Plaintiff's claim beyond the minimal claim values utilized by Defendant. (A196, Log 282; A196-197, Log 283; A208, Log 357; A209-210, Log 363; A210, Log 365; A212-213, Log 373; A214, Log 394; A215, Log 398; A218-219, Log 412; A220, Log 446; A221, Log 459); and (2) consult with its own IME physician concerning any residual causation questions, or seek an addendum from its IME physician concerning the same. (A208, Log 357; A209-210, Log 363; A211, Log 367; A212-213, Log 373; A214, Log 394; A216-217, Log 400; A218-219, Log 412; A220, Log 446).

Prior to trial, Defendant increased its offer to $45,000, inclusive of the $25,000 it paid due to impasse on September 3, 2008. (A222-223, Log 534). Plaintiff's final demand was $90,000, inclusive of the $25,000 prior payment. (A228, Log 584). After documenting that its maximum exposure was the policy

limits of $100,000 (A227, Log 577), State Farm's management directed counsel to try the case if Plaintiff will not settle within $50,000 (A227, Log 578). A trial of the case was held in February of 2010. The jury ruled against the Defendant and awarded the Plaintiff $260,000 on February 24, 2010. The jury's verdict was over five times the Defendant's final and best offer.

ARGUMENT 1

I. PURSUANT TO DELAWARE LAW, COURTS HAVE HELD THAT AN INSURER ACTS IN BAD FAITH WHEN IT FAILS TO INVESTIGATE OR PROCESS A CLAIM OR DELAYS PAYMENTS IN BAD FAITH AND WHEN ITS DELAY OR DENIAL OF BENEFITS IS CLEARLY WITHOUT ANY REASONABLE JUSTIFICATION.

QUESTION PRESENTED

Whether an insurer acts in bad faith when the insurer, over a span of years, fails to obtain medical records it declares are pivotal to its accurate analysis of claim value; ignores the opinions of medical experts, including its own IME physician; arbitrarily rejects the detailed assessment and valuation of its own experienced claim adjuster; and consistently undervalues a claim based on speculation regarding alternative causes of injuries, see Plaintiff's Opposition Response (A94-180).

SCOPE OF REVIEW

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo*. *ConAgra Foods Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1996). All reasonable inferences must be drawn in

favor of the non-movant, Joann Enrique. *Sweetman v. Strescon Industries, Inc.*, 389 A.2d 1319 (Del. Super. 1978).

MERITS OF ARGUMENT

Insurers have a duty to investigate, process claims, and pay claims in good faith and without delay. *Tackett v. State Farm Fire and Casualty Ins. Co.*, 653 A.2d 254 (Del. Supr. Ct. 1995). The *Tackett* Court held that "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 insured can show that insurer's denial of benefits was clearly without any reasonable justification." (*Id.* at 264.)

In *Tackett*, Defendant State Farm delayed the processing of an insured's claim by initially undervaluing the claim. (*Id.* at 257.) Like Enrique, a State Farm supervisor ordered an IME to address suspected causation issues alleged by Defendant's management team, while simultaneously undervaluing Tackett's claim. *Id.* However, unlike the Enrique case, Defendant State Farm in *Tackett* actually requested and received clarification from their IME physician following his initial IME report. *Id.* Further, Defendant State Farm in *Tackett* voluntarily reevaluated the Plaintiff's claim in a fair manner, and paid policy limits after a delay of only

seven months. *Id.* In Enrique, it took years of delay, a trial, and a $260,000 jury verdict in Plaintiff's favor.

Defendant State Farm's failure to seek additional information from their IME provider despite indicating a need to do so multiple times in its activity log and without which, the Defendant indicated, it was unable to resolve the unsubstantiated causation issues raised by Defendant's management team delayed resolution of the claim and did not substantiate management's order to lower the claim's value. Specifically, in the State Farm Activity Log produced by Defendant, there are at least eight references from August 25, 2008, through March 2, 2009, indicating a need to obtain additional causation information in the form of an addendum from its IME physician, yet this never occurred. (A208, Log 357; A209-210, Log 363; A211, Log 367; A212-213, Log 373; A214, Log 394; A216-217, Log 400; A218-219, Log 412; A220, Log 446).

Further, from August of 2006 through the trial in February 2010, Defendant failed to obtain Plaintiff Enrique's pre-existing medical records which it declared on numerous occasions were pivotal to accurately evaluating the value of Plaintiff's claim. Specifically, in the State Farm Activity Logs, from February 1, 2008 through April 24, 2009, there are at least eleven references indicating a need to obtain prior medical records. (A196, Log 282; A196-197, Log 283; A208, Log 357; A209-210, Log 363; A210, Log 365; A212-213, Log 373; A214, Log 394;

A215, Log 398; A218-219, Log 412; A220, Log 446; A221, Log 459). While the Superior Court found_that "this claim was heavily examined by State Farm," and Defendant cited over 600 entries in their activity log as evidence of their lack of bad faith, neither heavy examination nor 600 log entries can be fairly equated to good faith when an insurer fails to do exactly what it states it must do in order to ascertain an accurate settlement valuation of its insured's claim. See attached Exhibit A at page 6 and (A92).

Equally telling, Defendant arbitrarily rejected the detailed analysis and valuation of its own experienced claims adjuster. Said analysis was subsequently reduced dramatically without explanation. Defendant also ignored the opinion of its IME physician which was counter to causation suppositions raised by Defendant's management staff. Notably, Defendant did not have even one medical record supporting its contention that Plaintiff had knee pain or knee problems prior to the motor vehicle collision of September 26, 2005. On the other hand, Defendant knew that Plaintiff's knees were injured, painful, and bruised following the crash from hitting the dashboard; that the front-end collision was violent and totaled the Plaintiff's minivan; that Plaintiff immediately sought emergency treatment for her multiple injuries, including her knees; and that prior to the collision Plaintiff stood for hours while working as a cafeteria server without complaint. Defendant also knew that both its own IME physician and Plaintiff's

treating physician stated that Plaintiff's injuries were caused by the collision and that Plaintiff suffered permanent impairments relative to her knees as a result of the motor vehicle accident. Ignoring these facts for a period of years, Defendant's management staff, only one of whom had limited medical training, continued to base Defendant's minimal settlement offers on various hypothetical causation issues, including Plaintiff's weight, Lyme disease, knock-knees, and childhood scarring.

Simultaneously, Defendant's PIP division, under the same automobile insurance policy as Plaintiff's uninsured coverage, acknowledged Plaintiff's knee injuries as fully compensable, and paid medical bills incurred by Plaintiff within two years of the collision. In addition, Defendant's PIP division also recognized as compensable, and paid without causation questions, the Plaintiff's lost wages for a period of 9 months, as Plaintiff was unable to stand for a prolonged period of time due to her knee injuries.

Defendant, without reasonable justification, refused to fairly and in good faith investigate and evaluate the Plaintiff's UM claim, and refused to base its claim valuations on medical facts, rather than theories, for over four years. Defendant's actions caused Plaintiff Enrique to suffer needlessly for nearly five years after the auto collision of September 26, 2005. Obviously, the delay Plaintiff Enrique endured was years longer and more egregious than the seven-month delay

incurred in *Tackett*.

ARGUMENT II

II. AN INSURER ACTS WITH MALICE AND RECKLESS INDIFFERENCE TOWARD ITS INSURED WHEN IT CONSISTENTLY UNDERVALUES AND DELAYS RESOLUTION OF AN UNINSURED CLAIM WITH KNOWLEDGE THAT ITS DELAYS OVER A PERIOD OF YEARS WILL LIKELY FORCE THE INSURED TO ACCEPT A SUBSTANTIALLY LESS AMOUNT THAN THE ACTUAL VALUE OF THE CLAIM.

QUESTION PRESENTED

Whether an insurer's actions amount to reckless indifference or malice towards its insured when it makes wholly inadequate settlement offers over a period of years knowing that the insured will likely be forced to accept substantially less than its UM policy limits, which the insurance company knows is its maximum exposure limit regardless of the passage of time, see A95-99.

SCOPE OF REVIEW

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo*. *ConAgra Foods Inc.*, 21 A.3d at 68. The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations. *Ramunno*, 705 A.2d at 1034. All reasonable inferences must be drawn in favor of the non-movant, Joann Enrique. *Sweetman*, 389 A.2d at 1319.

MERITS OF ARGUMENT

In *Tackett,* the Court noted that an insurer must have reasonable justification for delaying payments to an insured and that denials, without a reasonable basis, may subject the insurer to a bad faith action. 652 A.2d at 266. Further, the Court held in *Tackett* that an insurer acts in bad faith when it acts with malicious intent or reckless indifference towards its insured's interests. *Id.*

In the present case, Defendant acted with reckless indifference toward its insured. Defendant knew that its policy limits exposure was limited to a maximum of $100,000, whether it paid the claim promptly or delayed its resolution for years. Defendant was aware of Plaintiff's hardship as a result of the collision and the serious injuries she sustained in the crash. Specifically, Defendant knew Plaintiff's family's minivan was destroyed in the accident (A186, Log 84); that Plaintiff received only $2,865 with which to purchase a replacement vehicle (A187, Log 85); that Plaintiff had children (A226, Log 571); that Plaintiff's fiance, who was Defendant's policyholder, was ill, was hospitalized for approximately six weeks, and died on October 26, 2009 (A181-182, Log 9; A224, Log 542; A225, Log 548); that Plaintiff lost her job on December 11, 2005 because of the injuries she suffered in this collision (A188, Log 141; A205-206, Log 330); and, that as of July 23, 2006 (over seven months later) Plaintiff had been unable to find another job given her physical limitations. (A263).

With full knowledge of the foregoing facts, Defendant continued, for a period of years, to undervalue the Plaintiffs UM claim. With reckless indifference toward Plaintiffs claim, Defendant made only minimal offers ranging from $17,500 on September 11, 2006 (A191, Log 183) to $45,000 on January 28, 2010 (A227, Log 580) to resolve the Plaintiffs claim. In good faith, Plaintiff lowered her initial demand of $160,000 to $100,000 and then to $90,000. Defendant rejected each offer, citing causation issues which it needed to address, but failed to address, in a veiled attempt to justify its delay and minimal-offer methodology. State Farm's reckless indifference is also evidenced by management's arbitrary rejections of its own adjuster's valuation of Plaintiff's UM claim and its failure to procure Plaintiff's pre-accident medical records and an addendum from its IME physician as medical bases to support a low settlement offer. These actions were taken where liability was 100% undisputed. State Farm's conduct evidences two recognized forms of deceptive and unfair claims practices: (1) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonable clear; and (2) compelling insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured, see 18 Del. C. § 2304 (f) & (g). State Farm used both of these practices to force Plaintiff to take a substantially lower amount or go to trial on an undisputed

liability claim.

Following a trial, jury verdict of $260,000, and unsuccessful appeal, Defendant paid its $100,000 policy limits. If Defendant was reasonably justified in valuing Plaintiff's UM claim at $45,000 or less over a period of years, it is counter-intuitive that Defendant would suddenly be willing to pay its $100,000 policy limits without seeking remittitur of the verdict or a new trial on excessive verdict grounds. Defendant did neither. Defendant's delaying and undervaluing of the Plaintiff's claim without reasonable justification resulted in an extensive delay in payment of Plaintiff's benefits and amounted to a reckless indifference in the handling of Plaintiff's UM claim by Defendant.

ARGUMENT III

III. THE SUPERIOR COURT ERRED IN FAILING TO CONSIDER THE NON-MOVING PARTY'S EXPERT WITNESS EVIDENCE; ERRED IN FINDING THAT DEFENDANT WAS JUSTIFED IN RELYING ON THE OPINION OF ITS COUNSEL IN MAKING MINIMAL OFFERS; AND ERRED IN GIVING FAVORABLE INFERENCE TO THE MOVING PARTY'S UNSUPPORTED CONTENTIONS CONCERNING PLAINTIFF'S PRIOR MEDICAL CONDITION.

QUESTION PRESENTED

Did the Superior Court err in failing to consider the Plaintiff's expert insurance witness evidence and in failing to consider that the Defendant offered no counter expert witness evidence; did the Superior Court err in the formulation of its Opinion when it relied upon Defendant's former legal counsel's opinion based on his "years of experience with these types of claims" when the counselor could recall trying only two uninsured motorist cases throughout his 30 years of practice and both jury verdicts were greater than the counselor's final claim valuations (A238); and did the Superior Court err in its Opinion when it declared that Defendant had a meritorious bad faith defense because Plaintiff had physical conditions which could have contributed to Plaintiff's knee injuries, despite having no medical records or medical opinions to support such a conclusion, see A 94-99.

SCOPE OF REVIEW

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo. ConAgra Foods Inc.*, 21 A.3d at 68. The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations. *Ramunno*, 705 A.2d at 1034. All reasonable inferences must be drawn in favor of the non-movant, Joann Enrique. *Sweetman*, 389 A.2d at 1319.

MERITS OF ARGUMENT

It is well established that summary judgment should be denied upon motion if any evidence or any inferences from evidence support the non-moving party. *Plant v. Catalytic Constuction Co., Inc.*, 287 A.2d 690 (Del. Super. 1971), aff'd 297 A.2d 37 (Del. 1972). Further, it is well established that the record must be viewed in a light most favorable to the nonmoving party. *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

Plaintiff's expert witness regarding insurance practices, Ivan E. Cohen, RF, ARM, CRM, CIC, AAI, MLIS, CRIS, CPIA, opined within the formal record that Defendant acted in bad faith towards Plaintiff in connection with her UM claim. (A247-261). Witness Cohen outlined a list of Defendant's actions which amounted to bad faith, and provided reasoning for his conclusions. *Id.* Defendant failed to

offer any expert testimony to counter Plaintiff's expert or to support any of its contentions. The Superior Court's Opinion granting Summary Judgment to Defendant neglects to reference or address in any manner the Plaintiff's expert evidence, which clearly supported the non-moving party in this action, and fails to note that Defendant did not introduce expert evidence to negate Plaintiff's expert's opinion or support its position. The Court erred in failing to give consideration to Plaintiff's expert witness evidence particularly where Mr. Cohen states that Mr. Roach's supervisor, Mary Atkins, did not even read the IME report yet disapproved of Mr. Roach's valuation which forced an arbitrary lowering of the Roach valuation. (A241). The lower valuation had $0 value for Plaintiff's permanent impairment to each of her injured knees for a person with a life expectancy of more than forty (40) more years. (A240-246).

In reaching its summary judgment decision, the Court specifically cited the valuation of Attorney Shalk as providing a reasonable justification to Defendant for offering less than policy limits. The Court cited Attorney Shalk's position as a "respected Delaware attorney with years of experience with these types of claims." See attached Exhibit A at page 10. In fact, after reviewing his trial list during his deposition, Attorney Shalk could only recall handling and trying two UM claims over his three decades of practice. (A237-238). In both instances, Attorney Shalk's valuations were less than the awards of the juries. *Id.* Further, Defendant

knew, as did Attorney Shalk, that Attorney Shalk's claim value assessment was based on incomplete information. (A214, Log 393). Both Attorney Shalk and Defendant's employees indicated a need for Plaintiff's prior medical records, or further clarification from their IME physician, in order to accurately evaluate the Plaintiff's claim. Neither Attorney Shalk nor Defendant's employees obtained said records or an IME addendum. Thus, Attorney Shalk, like Defendant's employees, based his claim value on incomplete information and unsupported conjecture concerning Plaintiff's pre-existing medical conditions. At one point, Adjuster Roach asked Shalk to provide a detailed value analysis similar to what Roach had done as of August 7, 2008 and Shalk advised he could not do so. In fact, Mr. Shalk described his evaluation of Plaintiff's damages as: "I've simply assumed in evaluating this case that the Plaintiff has had one related surgery; a rib fracture; residual problems with the left leg which both doctors seem to think are related to the accident; and which would merit surgery if she decided to have it now. I haven't made any predictions for the future except that she has mild impairments to both knees. The specials are pretty minimal. 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. (A256-258). In contrast, Roach is the only person to perform a detailed analysis of Plaintiff's claim which others rejected without a factual basis. The determination by the Superior Court that

Defendant had justification for offering less than policy limits based on Attorney Shalk's alleged extensive uninsured claims experience and Attorney Shalk's assessment of value, which Defendant knew was based on incomplete medical information, is contrary to the evidence in this case. Further, State Farm has the duty to evaluate Plaintiff's claim in good faith. It employs experienced adjusters such as J. R. Roach to make such evaluations. An outside attorney hired for litigation purposes should not relieve State Farm of its duty to act in good faith toward its insured, especially when the record fails to identify any reliable basis for such attorney evaluations.

Likewise, the Court's favorable inference on behalf of the moving party that Defendant was justified in undervaluing the Plaintiff's claim based on unsupported causation theories is contrary to the evidence. Plaintiff clearly disputed that Plaintiff had knee pain or prior knee problems before the motor vehicle collision of September 26, 2005. While the Defendant surmised that Plaintiff may have had pre-existing knee problems, Defendant did not have one single medical record or medical opinion that supported such a theory. On the contrary, there is medical documentation, as well as testimony from the Plaintiff's doctor and the Defendant's IME physician that counters Defendant's suppositions. Both the Plaintiff's orthopedic surgeon and the Defendant's IME physician relate the Plaintiff's knee problems to the motor vehicle collision. Neither physician cites any pre-existing

knee pain, physical deficits, or knee injuries. Thus, the Court erred in relying upon the premise that the Defendant had a meritorious defense to this bad faith action based on Plaintiff having physical conditions which could have contributed to Plaintiff's knee injuries, when the evidence indicates the opposite.

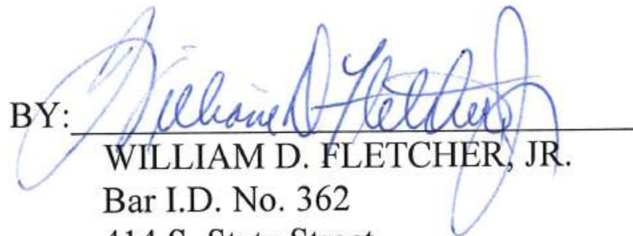
The Superior Court also erred by failing to consider State Farm's conduct in failing to procure Plaintiff's pre-accident medical records, or its failure to have its IME physician offer an addendum to his original finding which could serve as a medical basis to place a lower value on Plaintiff's claim than the one offered by Roach in August 2008 of between $62,080 and $94,960.

CONCLUSION

For the aforementioned reasons, the Superior Court's Order granting State Farm's Motion for Summary Judgment should be reversed, and the case remanded to Superior Court for trial by jury, to allow a jury to determine whether State Farm adjusting of Plaintiff's UM claim was done in bad faith and with reckless indifference to its insured's interests.

Respectfully submitted,

SCHMITTINGER & RODRIGUEZ, P.A.



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DATED: December 28, 2015

EXHIBIT
A

EFiled: Oct 14 2015 04:37PM EDT
Transaction ID 58017275
Case No. K12C-10-028 WLW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOANN ENRIQUE, Plaintiff, v. STATE FARM MUTUAL AUTO-MOBILE INSURANCE CO., Defendant.	: : : : : : : : : :	C.A. No. K12C-10-028 WLW

Submitted: September 11, 2015
Decided: October 14, 2015

OPINION

Upon Defendant's Motion for Summary Judgment.
Granted.

William D. Fletcher, Esquire of Schmittinger & Rodriguez, Dover, Delaware; attorney for Plaintiff.

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorney for Defendant.

WITHAM, R.J.

The issue before the Court is whether the Plaintiff, Joanne Enrique ("Enrique"), has established a prima facie case of bad faith by the Defendant, State Farm Mutual Insurance Co. ("State Farm"), for failure to pay the policy limit for uninsured motorist protection. For the following reasons, the Defendant's motion for summary judgment is GRANTED.

FACTS

On September 26, 2005, Enrique was involved in a motor vehicle accident with Bridgett Roy ("Roy"), an uninsured motorist. State Farm provided a motor vehicle insurance policy to Jason Garber, the owner of the vehicle Enrique was driving. The policy provided uninsured motorist ("UM") protection with a policy limit of $100,000. Enrique suffered injuries resulting in permanent impairment to both knees and a fractured rib, and was unable to work for nine months. As a permissive driver of the Garber vehicle, Enrique made a claim under the policy's UM benefit for the policy limit of $100,000. State Farm disputed the damages, and Enrique filed a complaint ("Damages Action") against State Farm that sought the UM policy limits of $100,000 as well as punitive damages for Roy's alleged reckless conduct in causing the accident. In July 2009, State Farm was granted a partial motion for summary judgment relating to punitive damages. After trial, a jury awarded Enrique $260,000 for damages arising out of the automobile accident. In October 2012, Enrique file the current action claiming State Farm acted in bad faith when negotiating a settlement offer, thus forcing Enrique to go to trial in order to obtain a fair and reasonable award for her injuries and damages.

Initial negotiations between Enrique and State Farm prior to the Damages Action resulted in a demand by Enrique for a $165,000 settlement and offer by State Farm to settle for $35,000.[1] State Farm log entries for Enrique's claim show they were aware of damage consistent with grade 2 chondromalacia[2] in the right knee as early as December 2005.[3] In August 2006, State Farm questioned whether the chondromalacia was a condition present before the motor vehicle accident because it was present in both knees.[4] In January 2008, Richard M. Roach ("Roach"), the State Farm Claims examiner assigned to Enrique's claim, requested authority to settle with Enrique for $50,080, but was told by his supervisor, Mary Adkins ("Adkins"), the request would be reviewed after further clarification of the causation issues.[5] It was also noted that an independent medical examination ("IME") or records review might be necessary to resolve the causation issue. In April 2008, State Farm decided to retain Dr. Lawrence Piccioni ("Dr. Piccioni") to perform an IME. The IME was scheduled and completed in July 2008.

In August 2008, Roach received the IME report and noted that per the IME the treatments were reasonable and necessary and that the described injuries were caused

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[1] Def. Mot. Summ. J. Ex. B at 108, activity log numbers 281-82.

[2] Chondromalacia is defined as "softening of any cartilage." *Stedman's Medical Dictionary* 369 (28th ed. 2006).

[3] Def. Mot. Summ. J. Ex. B at 138, activity log number 109.

[4] *Id.* at 128, activity log number 171.

[5] *Id.* at 108, activity log numbers 281-82.

by the motor vehicle accident.[6] Roach valued Enrique's damages at between $62,080 and $94,960 based on the following breakdown: (1) future treatments between $2,000 and $17,880; (2) general damages between $50,000 and $65,000; (3) impairment between $10,000 and $12,000; and an orthopedic bill of $80.[7] Later that month, Adkins noted that she and Roach had reviewed the IME results with attorney Colin Shalk ("Shalk") and that Shalk indicated a valuation of between $35,000 and $50,000 may be warranted.[8] Adkins still had questions about causation because State Farm had yet to receive a complete prior records set from Enrique.

Betsy Hanson ("Hanson"), a State Farm claim section manager, also reviewed the claim and disagreed with Roach's valuation. Hanson noted that Enrique had denied any previous medical history involving her knees despite multiple scars on her right knee. Hanson further noted Enrique had reported leg swelling before the accident, and that her preexisting conditions, which included Lyme's disease and obesity, may be partially responsible for her current knee condition. In addition, Hanson noted that Dr. Piccioni had specified in his report that he had not received prior records or x-ray/MRI films to review, and had opined that the chondromalacia changes pre-existed the accident.[9]

Subsequent valuations performed by Roach in August and November of 2008

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[6] Def. Mot. Summ. J. Ex. B at 94, activity log number 329.

[7] *Id.*

[8] *Id.* at 88, activity log number 357.

[9] *Id.* at 86-87, activity log number 363.

valued Enrique's damages between $25,000 and $35,000.[10] Neither evaluation contained amounts for future treatments or for impairment. The total amount of the valuation was listed as general damages. Although no amount was listed in future treatments, a preceding line in each log entry contained calculations for future treatments, but noted there would be further evaluation when a complete copy of prior records was received.

In February 2009, Shalk revised his estimate slightly to between $45,000 and $50,000. Shalk's estimate was based on Enrique's right knee injury, future treatment for left knee pain, and the fact that Enrique would make a good witness.[11] In March 2009, Adkins authorized payment of up to $50,000,[12] and Roach then revised his valuation of Enrique's damages to between $45,000 and $50,000.[13] By November 2009, Enrique had adjusted her demand to a total of $90,000, and State Farm had adjusted their offer to $45,000.[14] Mediation failed to resolve the impasse, and based on Dr. Piccioni's findings that chondromalacia changes pre-existed the motor vehicle accident,[15] Roach recommended proceeding to trial. It seems clear that if anything

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[10] *Id.* at 79, 86, activity log numbers 398, 365. The August evaluation was between $24,950 and $34,920, and the November evaluation was between $24,217.85 and $34.217.85.

[11] Def. Mot. Summ. J. Ex. B at 74, activity log number 429.

[12] *Id.* at 71, activity log number 445.

[13] *Id.* at 71, activity log number 446.

[14] *Id.* at 55, activity log number 548.

[15] The IME initially stated that Enrique's injuries were caused by the motor vehicle accident, but could not be certain she sustained a reported meniscus tear. Def. Mot. Summ. J. Ex. B at 94, activity log number 329. He later specified that he did not have prior history medical records or x-ray/MRI films to review, and opined the chondromalacic changes may have preexisted the accident.

is true, this claim was heavily examined by State Farm. After trial, a jury awarded Enrique $260,000 in damages.

Enrique subsequently filed the current action seeking exemplary damages. She claims the jury verdict far exceeded State Farm's final offer, thus showing State Farm was guilty of bad faith in handling her claim. Enrique claims State Farm had no reasonable justification to refuse her $90,000 pretrial demand, and thus forced her to go to trial in order to receive a fair and reasonable recovery. State Farm claims Enrique has failed to state a prima facie showing of bad faith and requests summary judgment under Superior Court Civil Rule 56.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[16] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[17] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary

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Id. at 55, 86-87, activity log numbers 548, 363.

[16] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Super. Ct. Civ. R. 56c.

[17] Super. Ct. Civ. R. 56c.

judgment will not be appropriate.[18] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[19]

DISCUSSION

A claim against an insurer for a "bad faith denial or delay in claim payments sounds in contract and arises from the implied covenant of good faith and fair dealing."[20] To establish bad faith, "the plaintiff must show that the insurer's refusal to honor its contractual obligation was clearly without any reasonable justification."[21] However, an action lacking a reasonable justification, standing alone, will not justify punitive damages.[22] Punitive damages require that the bad faith actions of an insurer be taken with a reckless indifference or malice towards the plight of the insured.[23] Thus, the question of bad faith is a two part conjunctive test. The first element questions "whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a bona fide dispute and therefore

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[18] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797, 802 (6th Cir. 1957)).

[19] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[20] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 440 (Del. 2005) (citing *Tackett v. State Farm Fire & Cas. Co.*, 653 A.2d 254, 264 (Del. 1995)).

[21] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982) (citing *Nobel v. National Amer. Life Ins. Co.*, 624 P.2d 874 (Ariz. Ct. App. 1979)). *See also Tackett*, 653 A.2d at 266 (stating mere delay is not evidence of bad faith provided a reasonable justification exists).

[22] *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1367 (Del. 1996).

[23] *Id.*

a meritorious defense to the insurer's liability."[24] If the answer is yes, then there is no bad faith on the part of the insurer. However, if the answer is no, then the second element of this test questions whether the actions of the insurer were taken with a reckless indifference or malice towards the plight of the insured. If there is no reckless indifference or malice, then there is no bad faith on the part of the insurer.

In *Tackett v. State Farm Fire and Casualty Insurance Co.*,[25] the plaintiff had purchased an automobile insurance policy through State Farm Fire and Casualty Insurance Co. ("State Farm") which included underinsured motorist ("UIM") coverage with a policy limit of $50,000. The plaintiff was involved in an automobile accident, and after finding the tortfeasor's policy limit of $25,000 did not cover the full extent of the plaintiff's damages, she made a demand on State Farm for the UIM policy limit of $50,000. The demand was based solely on a lost wage calculation of $110,000, and did not include future medical expenses or pain and suffering. State Farm's initial internal evaluation valued the claim between $45,000 and $50,000. Outside counsel advised State Farm that an arbitrator would probably award $50,000 in damages, and that the benefit of an IME was questionable, but an IME was still ordered. The IME report stated that Tackett was capable of gainful employment in some kind of career requiring only sedentary work.

Despite an initial evaluation that reached the policy limits and a confirmation by outside counsel that valued the claim at $50,000, a State Farm claim

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[24] *Casson*, 455 A.2d at 369.

[25] 653 A.2d 254 (Del. 1995).

superintendent authorized payment of only $30,000, with an initial offer of $20,000. The claim was later transferred to a new claim superintendent who determined the claim had been undervalued and, seven months after the claim had been filed, extended an offer of policy limits. The Tacketts claimed the delay was due to a "get tough" policy instituted by State Farm and filed a complaint seeking damages for a bad faith delay in payment. The Delaware Supreme Court held "[w]hile 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," and therefore there was no basis for a bad faith claim.[26]

In the case at bar, Enrique states that "bad faith through inadequate offers and economic coercion are claims that are dragged out for several years, low balled, grossly disproportionate to the verdict and well below the policy limits paid for by the insured."[27] She argues that the passing of five years between the accident and the trial, the low initial offer followed by a final offer of $45,000, and the fact that the jury awarded more than five times the final offer are indicative of bad faith by State Farm. Enrique's argument is unavailing. Delaware case law states that bad faith is shown when an insurer refuses to honor its contractual obligation without any clear and reasonable justification and does so with a reckless indifference or malice

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[26] *Tackett*, 653 A.2d at 266.

[27] These elements for a bad faith claim are found in 18 Am. Jur. 3d *Proof of Facts* §§ 27-28 (1992).

towards the plight of the insured.

Just as the defendant in *Tackett* relied on an IME report to show the plaintiff was capable of sedentary work, State Farm relied on an IME in the current case for proof that the damages suffered by Enrique may have been related to a preexisting condition. However, the comparison ends there. In this case, State Farm was not told by counsel that the benefit of an IME would be questionable, they were not given a valuation by outside counsel that approached the policy limits, and no State Farm representative admitted the claim was undervalued just prior to settlement. In this case, State Farm noted that Enrique had scars on her right knee despite denying any preexisting condition, suffered swollen joints due to Lyme's disease, and was obese. Each of these could have contributed to Enrique's condition, thus providing State Farm with a set of facts from which to present a meritorious defense. Based on the information available, State Farm could argue that if they had paid the amount demanded by Enrique, they may have paid for damages not related to the accident.

Moreover, the claim was evaluated for State Farm by Shalk, a respected Delaware attorney with years of experience with these types of claims. Shalk's initial evaluation of the claim was between $35,00 and $50,000, and was later raised to between $45,000 and $50,000. Thus, whether based on concerns regarding preexisting condition, or based on an evaluation by Shalk that did not consider preexisting conditions, State Farm had a reasonable justification for offering less than policy limits despite Roach's initial evaluation, and the bad faith claim would fail on the first element of the test.

But, even if State Farm lacked a reasonable justification, Enrique has failed to show the reckless indifference or malice towards the plight of the insured required to show bad faith under the second prong of the test. Enrique relies on the fact that the jury verdict was substantially higher than the offer made by State Farm in order to show bad faith, but makes no specific allegations of reckless indifference or malice. In *Tackett*, the initial valuation of $50,000 was confirmed by outside counsel and later confirmed by the second claim superintendent who agreed the claim had been undervalued. In this case, Roach's supervisor determined the claim was worth substantially less than his initial evaluation, and this lower evaluation was confirmed by outside counsel. Just as State Farm's conduct in *Tackett* did not constitute reckless indifference or maliciousness, neither does State Farm's conduct in this case.

CONCLUSION

For the foregoing reasons, the Defendant's motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh