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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EDWARD F. PRICE, III Plaintiff below/appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant below/appellee.	)	No. 188, 2013 On Appeal From the Superior Court of the State of Delaware in and for New Castle County C.A. No. N11C-07-069 RRC

APPELLANT EDWARD F. PRICE, III'S OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

In this uninsured motorist (or "UM") case the plaintiff Edward F. Price, III seeks the full value to which he is entitled under the Delaware UM statute, 18 *Del. Code* § 3902, and his State Farm UM coverage. Mr. Price also seeks recovery for State Farm's breach of the implied covenant of good faith and fair dealing. The latter claim relies chiefly on the following facts, none of which appear to be genuinely disputed:

- The injuries suffered by Mr. Price in his (covered) auto accident required the total replacement of his right knee joint.
- As a career elevator repairman paid at union wages, Mr. Price enjoyed a healthy income at the time of his accident, earning roughly $70,000 to $100,000 annually.
- Mr. Price's employment situation and approximate annual earnings were either known by State Farm at the time it handled Mr. Price's UM claim, or were readily ascertainable by State Farm through investigation.
- As a result of the injuries suffered by Mr. Price in the accident, he is unable to return to his former employment as an elevator repairman.

- Mr. Price's education, skills and experience do not qualify him for any livelihood that will ever produce the level of income he previously enjoyed.
- Mr. Price's accident thus left him with a staggering loss of future income -- a loss that, according to the only expert economist retained by either side, dwarfs the policy's $100,000 limit of liability for UM coverage by more than a factor of ten.
- Three established Delaware personal injury mediators -- ADR professionals whose services State Farm itself sometimes employs -- have opined that Mr. Price's injury was worth from $75,000 to $150,000 *exclusive of his seven-figure claim for lost future earnings.*[1]
- State Farm tendered just $50,000, or half of the UM limit, for Mr. Price's claim.

Against the backdrop of these undisputed facts, State Farm contends that Mr. Price knowingly and intentionally settled a claim whose value exceeded the $100,000 UM limit by over a million dollars *for just $50,000* -- and did so without signing any release, settlement agreement or other written instrument. State Farm offers no explanation for Mr. Price's supposed largess.

[1] The three Delaware mediators in question were former Superior Court judge Vincent A. Bifferato, Sr., former Superior Court Commissioner David A. White and attorney Yvonne Takvorian Saville. A248.

In any event, Mr. Price commenced the action on July 12, 2011. Following limited discovery, State Farm moved for summary judgment on April 19, 2012. On September 13, 2012 the Superior Court denied State Farm's motion without prejudice to its renewal on completion of discovery. *Price v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 4478665 (Del. Super. Ct.), Op. at *2-3 (Ex. A). As part of the same order, the Superior Court granted leave to Mr. Price to amend his complaint to add a claim of bad faith breach of contract.[2]

On January 11, 2013 State Farm filed its renewed motion for summary judgment. In a Memorandum Opinion dated March 15, 2013, the Superior Court granted State Farm's renewed motion. The Superior Court's essential holding was that State Farm and Mr. Price had formed a second and separate contract (independent of the insurance contract itself), under the terms of which Mr. Price agreed to settle his UM claim for $50,000. *Price v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 1213292 (Del. Super. Ct.), Mem. Op. at *5-7 (the "Memorandum Opinion") (Ex. B). Though it is undisputed that no settlement agreement or release was created to constitute or memorialize the purported settlement, the Superior Court found as a matter of law that Mr. Price accepted State Farm's $50,000 offer by virtue of his conduct. More specifically, the Superior Court concluded that Mr. Price accepted the $50,000 in full and final settlement when, having received State

[2] In its answer to the amended complaint State Farm pled accord and satisfaction and failure to state a claim as its sole affirmative defenses. A110-11.

Farm's check in the mail, and finding himself in dire financial straits due to 1) his inability to return to his former job and 2) State Farm's having taken 15 months to adjust the claim, Mr. Price cashed the $50,000 check. Again, State Farm does not allege (and the Superior Court did not find) that Mr. Price ever spoke, wrote or signed any words of acceptance to State Farm's $50,000 offer.[3]

Mr. Price filed his Notice of Appeal on April 12, 2013. This is Mr. Price's opening brief on appeal.

[3] On a collateral note, the Superior Court bemoaned the parties' numerous discovery disputes, which were presented "with little apparent effort by counsel to resolve disputes without court intervention." Memorandum Opinion at*4, n.20 (Ex. B). The documents reproduced at pages A250-59 of the accompanying appendix are but examples of Mr. Price's repeated efforts to engage State Farm in meaningful discovery-related negotiations.

SUMMARY OF ARGUMENT

1. The Superior Court erred in finding that Mr. Price entered into a settlement agreement with State Farm by virtue of his conduct. Under Delaware law, a contract inferred from a party's conduct (though not expressed in words) is an implied-in-fact contract. The party asserting the existence of an implied-in-fact contract bears a heavy burden of proof. Moreover, no implied-in-fact contract can properly be found where the parties have an express agreement dealing with the same subject matter. To be valid, in fact, an implied-in-fact contract must be *entirely unrelated* to the express contract.

At the time of the purported settlement, the parties already had an express written contract requiring State Farm to make payment for covered UM claims -- the same essential subject matter of the (allegedly) implied-in-fact settlement agreement. By no stretch of the imagination can the purported settlement agreement be characterized as "entirely unrelated" to the insurance contract's pre-existing obligations with respect to UM coverage. Under well-established principles of contract law, therefore, no "contract by conduct" should have been found.

2. Even if the concept of acceptance by conduct were properly in play (though it is not), a reasonable juror could find that Mr. Price's conduct did not constitute acceptance of an offer.

3. The Superior Court properly found that the first element of accord and satisfaction -- the existence of a bona fide dispute as to the amount owed, based on mutual good faith -- was lacking, so that no accord and satisfaction existed as a matter of law. Because State Farm filed no cross-appeal on this issue, the failure of State Farm's accord-and-satisfaction defense has been finally and definitively adjudicated.

4. A reasonable juror could conclude that by purporting to settle Mr. Price's UM claim for just $50,000 -- entirely ignoring his possession of a seven-figure claim for lost future earnings -- State Farm breached the implied covenant of good faith and fair dealing.

5. The Superior Court erred in holding that the Delaware Insurance Commissioner's authority preempts any private right of action by an insured against his insurer pursuant to the Consumer Fraud Act ("CFA").[4]

6. The Superior Court erred in holding, as a matter of law, that State Farm's 15-month investigation did not constitute unreasonable delay.

[4] We note that the Superior Court acted *sua sponte* on this issue, since State Farm never argued preemption.

STATEMENT OF FACTS

A. Facts Surrounding the Claim's Origin

The pertinent facts are either undisputed or not capable of genuine dispute. For example, there is no dispute that Mr. Price is insured under a Delaware auto policy issued by State Farm, and thus is covered for uninsured motorist claims. Section III of Mr. Price's policy, titled "Uninsured Motor Vehicle - Coverage U," sets forth the terms of his UM coverage. It states, in pertinent part, that

> [State Farm] will pay damages for *bodily injury* and *property damage* an insured is legally entitled to collect from the owner or driver of an *uninsured motor vehicle.* The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle.*

A34 (emphasis in original). "Bodily injury" is a specially defined term within the policy, meaning "bodily injury to a *person* and sickness, disease or death which results from it." A32 (emphasis in original). "Person" is defined in turn as "a human being." A33.

None of this offered Mr. Price the slightest inkling that UM coverage includes coverage for lost future earnings. Though lawyers, judges and insurance professionals might appreciate that "damages for bodily injury" can include lost future earnings, it is unreasonable to expect the average elevator repairman (here,

Mr. Price) to intuit such knowledge.[5] State Farm, for its part, never explained why ordinary consumers should read "damages for bodily injury" to mean *pain and suffering, plus past medical expenses not covered by PIP, plus future medical expenses, plus past lost earnings not covered by PIP, plus future lost earnings* -- which is apparently the reading State Farm intended.

There is no dispute that Mr. Price's policy provides limits of liability for UM coverage of $100,000. A61 (deposition of State Farm adjuster Gregory Bell ("Bell") at 70). Nor are the basic facts surrounding Mr. Price's accident disputed; as explained in his responses to State Farm's initial interrogatories, Mr. Price "was at the Exxon gas station at the Route 13/40 split and was putting windshield wiper fluid into [his] vehicle when another vehicle backed into him and pinned him between the two vehicles." A42 (response to Interrogatory No. 46).[6]

The Superior Court noted correctly that the parties' best estimate as to the date of the hit-and-run accident is July 2008. Memorandum Opinion at*1 (Ex. B). The Superior Court likewise noted correctly that Mr. Price did not report the

[5] Then again, there are doubtless real estate and tax lawyers, as well as bankruptcy and family law judges, who are in the same boat as Mr. Price when it comes to grasping the concept of "damages for bodily injury."

[6] State Farm describes Mr. Price's experience as "a minor accident [.]" Superior Court Transaction ID 48882776, at page "v". We respectfully submit, however, that a reasonable jury may not view an accident resulting in the total replacement of the victim's knee joint as minor. *Cf.* Memorandum Opinion at*1 (noting that Mr. Price's "knee was seriously injured" in the hit-and-run accident) (Ex. B). On the other hand, a reasonable jury may question why it took State Farm 15 months to offer money on what it apparently viewed as a minor claim.

accident to State Farm until February 2009. *Id.* The court did not explain the delay, though it would ultimately draw inferences unfavorable to Mr. Price on that account. Fortunately, State Farm's counsel elicited the explanation from Mr. Price at his deposition:

> Q. *** You went to your agent to pay a premium, and while you were talking to the agent, there was a discussion that the -- that a claim could be made to State Farm for your injuries from the accident. Yes? Is that what happened?
>
> A. Yeah.

A155 (deposition of E. Price ("Price") at 34).

There is thus no dispute that Mr. Price "delayed" in reporting the accident only because he failed to appreciate that UM coverage was available under his policy. Nor is it disputed that Mr. Price learned of the availability of such coverage by pure happenstance, while dropping off a premium payment with his insurance agent in February 2009. A35 (adjuster's log note).

B. Facts Leading to State Farm's $50,000 Offer

This case involves no coverage dispute. State Farm concedes causation, acknowledging that the medical treatment Mr. Price received, including a total knee replacement, was "treatment from the Accident."[7] State Farm also

[7] Superior Court Transaction ID 43763427, at 5.

acknowledges that Mr. Price initially opted for more conservative treatment before finally agreeing to knee replacement surgery. A59 (Bell at 62).

Similarly, there is (or should be) no dispute that State Farm knew or had reason to know that Mr. Price's claim included a component for lost future earnings. Mr. Price's application for Personal Injury Protection (or "PIP") benefits under the State Farm policy, which he submitted to State Farm in March 2009, disclosed his age -- he was 50 years old as of the date of the PIP application -- and his occupation as an elevator mechanic. A37-38. State Farm's chronological activity log, alternately authored by State Farm representatives Edea Barilo and Linda Walter, noted that Mr. Price inquired about lost wages; that he was "looking for wages after his surgery"; and that "he was concerned over loss of work if he has surgery." A35, A39.

These log entries are crucial evidence. First, though they were recorded in connection with Mr. Price's separate claim for Personal Injury Protection (or "PIP") benefits, they appeared in the same activity log that the UM adjuster, Gregory Bell, used to record activity on Mr. Price's UM claim:

> Q. Would that include -- and then what parts of the claim file are there? There are log entries; is that a fair way to characterize --
>
> A. Log entries.
>
> ***

Q. Any other components of the claim file?

A. It's basically any documentation that comes in that's related to the accident, it's all kept in the computer.

***

Q. Why is it that you don't believe you reviewed that note?

A. Because it wasn't part of my handling of the uninsured motorist claim. It was a PIP log.

Q. So are those separate or do all the notes go together? How is that kept in the computer?

A. They are physically all part of the same log.

A56, A61 (Bell at 50, 71).

Second, even if Mr. Price's concerns over lost future earnings had been recorded in a separate computer log (though they were not), Mr. Bell could have obviously learned of those concerns -- and thereby understood that investigation was needed on the issue of lost future earnings -- simply by asking Mr. Price about the subject. Yet despite the fact that lost future earnings are a fundamental part of UM coverage, and despite spending 15 months investigating the claim, there is no evidence that Mr. Bell ever asked Mr. Price if he had or anticipated a lost future earnings claim. Indeed, and as shown below, the undisputed evidence is to the contrary.

Finally, the fact that Mr. Price twice raised concerns regarding lost future earnings in conversation with PIP adjusters -- even though such earnings are not recoverable under PIP -- demonstrates that 1) Mr. Price did not understand that lost future earnings were recoverable as part of his UM claim, and 2) State Farm knew this, yet took no action to correct his misunderstanding.

The trial court, meanwhile, observed that "[f]or Plaintiff's wage inquiry, the [State Farm] notes include few details regarding the inquiry, including very little regarding the lost wage duration or amount sought." Memorandum Opinion at *2 (Ex. B). But if State Farm's record of claims handling is lacking in detail, what inferences should be drawn from that fact on *State Farm's own motion for summary judgment*? Does the fact that State Farm's record of Mr. Price's wage inquiry "includes few details" mean that a reasonable juror must pretend that the inquiry never occurred? Is a reasonable juror bound to blame *Mr. Price* for a perceived lack of detail in documents that State Farm created (and routinely creates) in the ordinary course of its insurance business? Is a reasonable juror bound to accept State Farm's role as a passive recipient of claims-related information? Or is it rather State Farm's duty to affirmatively investigate its insured's claim, following up on leads and inquiries as they arise?

C. Facts Surrounding the $50,000 Offer

As State Farm recounted in its opening brief below, Mr. Bell phoned Mr. Price on May 18, 2010 "and offered him $50,000 to settle the uninsured motorist claim."[8] Prior to that phone call, however, Mr. Price had never made any form of demand regarding his UM claim. A48 (Bell at 18). Nor did Mr. Price ever enter upon any dispute with State Farm regarding the value of his claim:

> Q. Tell me in any manner, if it happened, how Mr. Price disputed State Farm's offer of $50,000.
>
> A. It didn't happen in any manner whatsoever. Quite the opposite.

A53 (*Id.* at 41).

Mr. Price's uncontroverted testimony shows that by the time State Farm finally offered money on the claim, Mr. Price (who remains unable to return to his former job as an elevator repairman) was in dire financial straits:

> Q. Just tell me how the conversation went.
>
> A. I got good news for you, and I said, What? He says, I have a check for you for $50,000. And I pretty much said, you know, It's about time things got moving. And I said, When can I be expecting it? And he said he was mailing it out, and that was it.
>
> Q. And you said, it was about time things got moving. What did you expect to get moving?

[8] Superior Court Transaction ID 48882776, at 3.

> A. Something. I mean, I -- I mean, I didn't get nothing. I had a mortgage to pay. I am putting my son through college, you know.

A188 (Price at 67).

Mr. Bell acknowledged that in the course of the May 18, 2010 phone conversation, he never explained to Mr. Price that by accepting the $50,000 offer, he might surrender all rights to reimbursement of future medical expenses. A51 (Bell at 31). Nor did he explain the categories of loss (for example, lost future earnings) that comprise a Delaware UM claim. A51 (*Id.* at 31-33). Mr. Bell also failed to explain to Mr. Price why State Farm was offering less than the policy's full $100,000 UM limit. A61 (*Id.* at 70).[9]

In fact, State Farm has never explained how it arrived at $50,000. When its adjuster was deposed, State Farm refused to allow him to testify regarding the *bona fides* of the $50,000 tender:

> Q. Can you tell me how State Farm's offer of $50,000 was made in good faith?
>
> MR. SHALK: Well, I'm going to object. Good faith is a legal term of art, and he's not an attorney, and you haven't defined what good faith is. So I'm going to object and tell him not to answer that question.
>
> BY MR. KRAWITZ:

[9] State Farm has stipulated that Mr. Bell's testimony is "an accurate account of what he did, and also an accurate account of his understanding." Superior Court Transaction ID 49340559, at ¶2.

> Q. Can you tell me how State Farm made the decision to offer $50,000 as opposed to the policy limit of $100,000 to Mr. Price?
>
> MR. SHALK: Same objection. I'm going to instruct him not to answer.
>
> ***
>
> Q. Did you know that Mr. Price's UM claim was worth more than $50,000?
>
> MR. SHALK: I'm going to instruct him not to answer that question, too. It goes back to the same question you asked about the evaluation.

A53-54 (Bell at 41-42).[10]

State Farm forwarded its $50,000 check to Mr. Price along with a cover letter indicating that the check served "to settle your Uninsured Motorist claim as a result of the above accident." A40. Yet State Farm admits that it never provided Mr. Price with any proposed release. A52 (Bell at 34). When asked to explain the omission, Mr. Bell "testified that State Farm did not send a release to Plaintiff because State Farm's general practice was not to send releases for uninsured motorist claims to its own insureds." Memorandum Opinion at *3 (Ex. B). This explanation, we submit, is no explanation at all. It is also difficult to reconcile

[10] These instructions were improper. Under Rule 30(d), "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion [for protective order] under paragraph (d)(3)." Confronted with questions that go to the very heart of the case, State Farm nonetheless gagged its adjuster without invoking any claim of privilege, without the benefit of any Court-ordered limitation on discovery, and without filing any motion under Rule 30(d)(3).

with prior cases in which State Farm has indeed prepared written releases for UM claims, or contended that such releases existed.[11] Mr. Bell testified, however, that Mr. Price was excited and grateful for the $50,000 offer. A48 (Bell at 19).

D. Additional Facts On the Issue of Delay

Though State Farm characterizes Mr. Price's accident as "minor," there is no dispute that it took State Farm well over a year to offer money on the claim. Similarly, State Farm admits (without explanation) that it sent no investigator to the accident scene for nearly eight months.[12] *See also* A59 (Bell at 65). State Farm also says (again without explanation) that nearly six months were spent "actively gathering" medical records on the supposedly minor claim.[13]

Mr. Price's insurance expert, Francis J. Murphy, has opined that State Farm should have offered payment no later than October 2009 (or roughly seven months earlier than it ultimately did). Mr. Murphy testified that based on the evidence, State Farm came into possession of all the facts necessary to value the claim by the close of September 2009:

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[11] *See LeFevre v. Westberry*, 590 So.2d 154, 156 (Ala. 1991) (State Farm refused to pay UM benefits unless its insured signed a release); *State Farm Mut. Auto. Ins. Co. v. Acosta*, 479 So.2d 1089, 1092 (Miss. 1985) (State Farm prepared release in connection with UM settlement); *Shamey v. State Farm Mut. Auto. Ins. Co.*, 331 A.2d 498, 500 (Pa. Super. 1974) (State Farm settled its insureds' UM claim "in return for [their] execution of an instrument entitled, 'Release and Trust Agreement'"); *Gonzalez v. State Farm Mut. Auto. Ins. Co.*, C.A. No. 10-3041, 2011 WL 2607096, slip op. at *1 (E.D. La. July 1, 2011) (State Farm argued that release applied to UM settlement) (Ex. C).

[12] Superior Court Transaction ID 48882776, at 2.

[13] *Id.*

Q. Now, you draw the conclusion that by October 2009 [State Farm] should have simply paid him the policy limits; is that correct?

A. That's correct.

Q. And that's a four-month period [following the knee replacement surgery]. Upon what do you base that, do you base that upon a decision, upon statute, upon case law, upon the PIP status (*sic*), the UM statute, anything the (*sic*) that you've seen in the industry, what are you relying upon?

A. Well, from what I can glean from the facts, by around September or so of 2009, State Farm had the information that [Mr. Price] had had the knee replacement surgery, that he was, you know, having therapy post-knee replacement surgery.

So there was no question that he had had a knee replacement surgery, there does not seem to me to be any question in the case about the fact that the knee replacement is related to the incident that occurred that he's complaining about that was the basis for the Uninsured Motorist Claim.

The injury was a very severe one, requiring a total knee replacement. It doesn't seem to me that State Farm has ever contested that he required a total knee replacement. It's a very serious injury.

If you're looking at the file, you have a policyholder, and in this case, Mr. Price, who has had a very serious injury, had a major operation, had to have his knee replaced.

You're not contesting that it's related. You're not contesting that he had it. You're several months post-surgery. You have the bills. You have the information. And at that point in time, you can make a decision about

> -- a fair decision about whether or not you should pay the policy limits.
>
> ***
>
> I believe that they had the bills by then. So that's why I'm picking that period of time.

A306-08 (deposition of F. Murphy ("Murphy") at 47-49).

E. Facts Regarding Value

Mr. Price's insurance expert conducted a survey of certain Delaware personal injury practitioners and mediators. This survey asked the respondents to offer their best estimate as to the value of an injury resulting in a total knee replacement, exclusive of special damages. The persons surveyed, and the values at which they arrived, are as follows:

- Hon. Vincent A. Bifferato, Sr.: $100,000.
- Roger D. Landon: $100,000.
- Bernard A. Van Ogtrop: $150,000.
- Yvonne Takvorian Saville: $75,000.
- Michael I. Silverman: $150,000.
- David A. White: $100,000 to $150,000.

A248.

State Farm agrees that Ms. Saville, Mr. White and Judge Bifferato "are established mediators of Delaware personal injury claims," and that "[o]n occasion, State Farm has hired them to serve as mediators in connection with personal injury claims arising under State Farm auto policies."[14] In addition, Mr. Murphy has independently opined, based on decades of experience in personal injury matters, that Mr. Price's UM claim was worth at least $100,000 exclusive of special damages. A331 (Murphy at 72).

Of course, the actual value of Mr. Price's claim *includes* special damages in the form of lost future earnings. Dr. Robert Wolf, a Diplomate of the American Board of Vocational Experts and a Certified Rehabilitation Economist, opines that Mr. Price's lost future earnings claim totals $1,198,796. A119.

F. Facts Surrounding Mr. Price's Commencement of Litigation

In reciting the lawsuit's procedural history, the Superior Court stated that "Plaintiff's original complaint included no bad faith claim against State Farm and in what the Court finds to be a most unusual omission, made no mention of the $50,000 payment." Memorandum Opinion at *3 (Ex. B). As noted above, the Superior Court ultimately charged Mr. Price with "fourteen months of inactivity" in the interval between his receipt of State Farm's check and his commencement of

[14] Superior Court Transaction ID 49340559, at ¶1.

the lawsuit. *Id.* at *6. These observations, we submit, require some context as well as some rebuttal.

At oral argument on Mr. Price's motion for leave to amend the complaint (for the purpose of adding a bad faith claim), Mr. Price's counsel explained the circumstances surrounding the original complaint:

> THE COURT: Let me ask this question because it was in the case and maybe Ms. Bustard would need to answer this. But why did the original complaint, just -- was it just a boilerplate complaint for uninsured motorists benefits? Why was there not reference to $50,000 having been received? I mean, I can sort of understand State Farm's pique at receiving the complaint out of the blue in a case that it thought had settled. Perhaps you're the one I should ask.
>
> MS. BUSTARD: Yes, your Honor (*sic*). We actually had spoken to Greg Bell [State Farm's adjuster] before filing the complaint to let him know the complaint was being filed. So, I don't believe it was a complete surprise.
>
> THE COURT: All right.
>
> MS. BUSTARD: But, your Honor (*sic*), we did not feel that the elements of bad faith could be alleged at that time because we had not established those elements of bad faith without taking depositions and doing proper discovery in the matter.

A90-91.

In other words, State Farm was not ambushed; nor was it sued "out of the blue." Rather, Mr. Price's attorneys advised State Farm of the planned lawsuit in advance. Nor did Mr. Price indulge 14 months of inactivity, since it was during that very interval that he retained counsel, consulted with counsel, and had his lawyers make the pre-litigation overture to State Farm.

Significantly, State Farm itself recognized that any purported "delay" chargeable to Mr. Price caused it no prejudice whatever:

> NI [or "named insured"] advised he did not initially report the loss as he did not think it was much at first and did not realize it might be covered under auto until he happened to mention it to a/o [believed to be "agent's office"] staff recently. It does not appear delay in reporting prejudices us because NI did not obtain any CV tag info, there were no apparent witnesses, and he did he (*sic*) report the loss to the gas station attendant or police. So, even if he had reported it to us at the time of loss, there would have been nothing for us to investigate other than the injury itself, which is where [we] are now anyway. No Res of Rights [or "Reservation of Rights"] required.

A36. This explains why State Farm never raised any "late notice" defense. *See Hercules Inc. v. AIG Aviation, Inc.*, 776 A.2d 550, 567 (Del. Super. Ct. 2000), *aff'd*, 760 A.2d 162 (Del. 2000) ("It is settled in Delaware that before coverage is forfeited due to failure to notify, the insurer must establish prejudice.")

The Court should also consider the provisions of 10 *Del. C.* § 4317, which allows auto insurers to make advance or partial payment of claims without admitting liability for what may later prove to be the disputed remainder. 10 *Del. C.* § 4317 (providing that "[n]o advance payment or partial payment of damages made by any person or his or her insurer as an accommodation to an insured person . . . because of an injury . . . shall be construed as . . . an admission of liability . . . or the insurer's recognition of such liability . . . .") As Mr. Bell confirmed, State Farm routinely makes such advance payments. A56 (Bell at 52).

State Farm was thus fully cognizant of the nature of the dispute at the time this lawsuit commenced. It has never been dealt with unfairly by Mr. Price. Notwithstanding, it bears mention that since the original complaint did not allege any of the matters enumerated within Superior Court Civil Rule 9(b), Mr. Price was under no obligation to plead with particularity.[15]

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[15] As one commentator observes, the pleadings "discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved . . . ." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 (3d ed. 2004). The rest, however, is left to discovery:

> To the pleadings is normally assigned the task of general notice-giving. The task of narrowing and clarifying the basic issues and ascertaining the facts . . . is the role of the . . . discovery process.

Delaware Valley Drug Co. v. Kline, 144 A.2d 403, 405 (Del. Super. Ct. 1958).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING AN IMPLIED-IN-FACT CONTRACT BECAUSE AN EXPRESS CONTRACT REGARDING THE SAME SUBJECT MATTER ALREADY EXISTED

A. Question Presented

Did the trial court err in finding an implied-in-fact "settlement" contract where both sides were already parties to an existing express contract addressing the same subject matter (that is, payment of UM benefits)? Though neither State Farm nor the trial court addressed this issue in terms of an implied-in-fact contract, Mr. Price preserved the issue below when he argued that 1) no meeting of the minds occurred, and 2) cashing State Farm's check did not give rise to a settlement or release. A520-21, A524-26, A530-32, A535.

B. Scope of Review

This Court reviews questions of contract law *de novo*. *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997). The Superior Court's grant of summary judgment is likewise subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

The Superior Court found as a matter of law that Mr. Price's "conduct manifested his acceptance of [State Farm's] settlement offer." Memorandum Opinion at *6 (Ex. B). Under Delaware law, a contract inferred from a party's

conduct (though not expressed in words) is an implied-in-fact contract. *Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1098 (Del. 2002) (citations omitted). *See also id.* (quoting *Chase Manhattan Bank v. Iridium Africa Corp.*, 239 F. Supp. 402, 408 (D. Del. 2002) for the proposition that "[t]he parties' intent and mutual assent to an implied-in-fact contract is proved through conduct rather than words.") The party asserting the existence of an implied-in-fact contract bears a heavy burden of proof. *In re Loral Space and Communications Inc.*, 2008 WL 4293781 (Del. Ch. Ct.), Mem. Op. at *36 n.191 (citing *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 570 (N.Y. 1978)) (Ex. D).

Under settled law, "no implied-in-fact contract can be found when, as here, the parties have an express agreement dealing with the same subject." *In re Penn Central Transp. Co.*, 831 F.2d 1221, 1229 (3d Cir. 1987) (citing *Klebe v. United States,* 263 U.S. 188, 191-92 (1923); other citations omitted). To be valid, therefore, the implied contract must be "entirely unrelated to the express contract." *ITT Fed. Support Serv. v. United States*, 531 F.2d 522, 528 n.12 (Ct. Cl. 1976) (likewise citing *Klebe*).

At the time of the purported settlement, the parties already had an express written contract requiring State Farm to make payment for covered UM claims -- the same essential subject matter of the (allegedly) implied-in-fact settlement agreement. Certainly the purported settlement agreement cannot be characterized

as "entirely unrelated" to the insurance contract's pre-existing obligations with respect to UM claims. Under settled principles of contract law, therefore, the trial court erred in finding a "contract by conduct."

II. TO THE EXTENT "ACCEPTANCE BY CONDUCT" IS RELEVANT, GENUINE ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT

A. Question Presented

Did the Superior Court err in finding "acceptance by conduct" as a matter of law, where Mr. Price was compelled by his financial situation to cash State Farm's check? *See* A520-21, A524-26, A530-32, A535 (arguing that no meeting of the minds ever occurred).

B. Scope of Review

This Court reviews questions of contract law *de novo*. *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997). The Superior Court's grant of summary judgment is likewise subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

Even if the concept of acceptance by conduct were properly in play (though it is not), a reasonable juror could find that Mr. Price's conduct did not constitute acceptance of an offer. It is undisputed that Mr. Price used no words of acceptance, either orally or in writing. State Farm admits that it prepared no settlement agreement or release for Mr. Price's signature. According to the trial court's analysis, however, Mr. Price manifested acceptance because a) he was aware that State Farm *unilaterally* characterized its $50,000 tender as final

payment; b) he cashed State Farm's check anyway; and c) he took no further action for 14 months, at which point he consulted an attorney.

This analysis overlooks the inferences that are available to be drawn (and therefore should have been drawn) in Mr. Price's favor. First, since the claim was admittedly covered, State Farm had an obligation to make *some payment*, at least, to Mr. Price, independent of its characterization of the payment. Second, there is no dispute that at the time of the $50,000 tender, Mr. Price was in dire financial straits -- in part because of his inability to return to work as an elevator repairman, and in part because of the glacial pace of State Farm's claims handling. Third, by the time the check reached Mr. Price, State Farm had already spent 15 months "investigating" the (admittedly covered) claim.

A reasonable juror could thus infer that Mr. Price cashed the check under financial duress -- indeed, that as his family's primary breadwinner, he had no choice but to cash the check. A reasonable juror could likewise conclude that State Farm's delay in offering payment was a source of the duress. Finally, a reasonable juror could conclude that Mr. Price naturally viewed the ensuing lack of activity as typical of the pace at which State Farm was moving, given the 15-month interval between notice of the claim and the $50,000 tender.

III. THE SUPERIOR COURT CORRECTLY FOUND NO ACCORD AND SATISFACTION

A. Question Presented

Did the Superior Court correctly determine that no accord and satisfaction occurred where a necessary element of the defense was lacking? *See* A524, A526-30 (preserving this question for review).

B. Scope of Review

The Superior Court's grant of summary judgment is subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

The Superior Court properly found that the first element of accord and satisfaction -- the existence of a bona fide dispute as to the amount owed, based on mutual good faith -- was lacking, so that no accord and satisfaction existed as a matter of law.[16] Because State Farm filed no cross-appeal on this issue, the failure of State Farm's accord-and-satisfaction defense has been finally and definitively adjudicated.

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[16] The elements of accord and satisfaction were set forth in *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066 (Del. 1997):

> (1) that a bona fide dispute existed as to the amount owed that was based on mutual good faith; (2) that the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of the debt; and (3) that the creditor agreed to accept the payment in full satisfaction of the debt.

Acierno, 693 A.2d at 1068.

IV. A REASONABLE JUROR COULD FIND THAT STATE FARM ACTED IN BAD FAITH BY PURPORTING TO SETTLE MR. PRICE'S CLAIM FOR JUST HALF THE POLICY LIMIT

A. Question Presented

Did the Superior Court err in finding, as a matter of law, that State Farm acted reasonably with regard to its payment obligation? *See* A518-20, A532-35 (preserving the question for review).

B. Scope of Review

The Superior Court's grant of summary judgment is subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

Under Delaware law, an insurer acts unfairly (and in violation of statute) when it fails to promptly provide its insured with a reasonable explanation of the basis for an offer of compromise on the insured's claim.[17] Yet State Farm never explained to Mr. Price that lost future earnings were available under his UM coverage. Nor did State Farm explain what damages were encompassed (or not encompassed) within its $50,000 tender. State Farm withheld these statutorily-required explanations despite the fact that it knew (or had reason to know) that Mr.

[17] Delaware's unfair claims practices statute provides that "[n]o person shall engage in this State in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." 18 *Del. C.* §2303. Under section 2304 of the statute, an insurer engages in an unfair practice by "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement . . . ." 18 *Del. C.* §2304(16)(n).

Price was under the mistaken impression that lost future earnings could be recovered under his PIP coverage. A reasonable juror could thus conclude that by purporting to settle Mr. Price's UM claim for just $50,000 -- entirely ignoring his possession of a seven-figure claim for lost future earnings -- State Farm breached the implied covenant of good faith and fair dealing.

V. THE SUPERIOR COURT ERRED IN ITS READING OF THE CONSUMER FRAUD ACT

A. Question Presented

Did the Superior Court err in holding that the Insurance Commissioner's statutory powers preempt a private action by an insured against his insurer under the Consumer Fraud Act? Though State Farm's motion papers below made passing reference to the elements of common law fraud (which Mr. Price never alleged), State Farm made no mention of either the Consumer Fraud Act or preemption of the same. Rather, this issue was raised by the Court in the Memorandum Opinion *sua sponte*.

B. Scope of Review

The Superior Court's grant of summary judgment is subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

The Superior Court erred in holding that the Delaware Insurance Commissioner's authority preempts any private right of action by an insured against his insurer pursuant to the Consumer Fraud Act ("CFA"), 6 *Del. C.* § 2513. In so holding, the Superior Court contravened 25 years of Delaware precedent, including at least six prior decisions of the Superior Court and one reported decision of the U.S. District Court for the District of Delaware -- all of which hold that an insured may properly pursue a private action against his insurer under the

CFA, based on the insurer's betrayal of promises made in the insurance contract. *Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222 (Del. Super. Ct.), Letter Op. at *1-3 (plaintiffs successfully stated private action against their auto insurer under section 2513(a)) (Ex. E); *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511 (Del. Super. Ct.), *as modified*, 2003 WL 21742143 (Del. Super. Ct.), Op. at *3 (collecting cases for the proposition that "[r]ecovery is available for consumers of insurance products" under the CFA) (Ex. F); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542 (Del. Super. Ct.), Order at *6 (to same effect) (Ex. G); *Mentis v. Delaware Amer. Life Ins. Co.*, 1999 WL 744430 (Del. Super. Ct.), Letter Op. at *6-7 (same) (Ex. H); *DiSimplico v. Equitable Variable Life Ins. Co.*, 1988 WL 15394 (Del. Super. Ct.), Mem. Op. at *2 (same) (Ex. I); *Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433, 438-40 (D. Del. 2007) (same).

VI. THE ISSUE OF UNREASONABLE DELAY SHOULD HAVE BEEN LEFT TO THE JURY

A. Question Presented

Did the Superior Court err in deciding the issue of unreasonable delay as a matter of law? *See* A521-22, A535-36 (preserving this question for review).

B. Scope of Review

The Superior Court's grant of summary judgment is subject to *de novo* review. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

The Superior Court erred in holding, as a matter of law, that State Farm's 15-month investigation did not constitute unreasonable delay. In deciding this issue, the Superior Court drew several inferences unfavorable to Mr. Price (despite the familiar requirements of the summary judgment standard). For example, the Superior Court concluded that Mr. Price "delayed" in providing notice of the claim to State Farm. In fact, it is undisputed that Mr. Price failed to even appreciate that he possessed a UM claim until he was so advised by his local insurance agent -- at which point State Farm was immediately notified of the claim. The undisputed evidence likewise showed that *State Farm itself concluded* that the delay caused no prejudice to the company, and therefore could not form the basis of a "late notice" defense. Despite these undisputed facts, the trial court concluded that Mr. Price could not fairly "chastise" State Farm for its 15-month investigation when Mr.

Price "initially delayed filing the claim for nearly seven months" -- thereby saddling Mr. Price with unfavorable inferences based on conduct that was not blameworthy, and (by State Farm's own admission) caused State Farm no prejudice. Memorandum Opinion at *12 (Ex. B).

Similarly, the trial court emphasized that "[o]nce Plaintiff underwent his knee replacement in June 2009, he made no attempt to contact State Farm, until State Farm contacted Plaintiff in September 2009." *Id.* Continuing in the same vein, the trial court stated that "it is important to note that Plaintiff was not actively pursuing his claim by contacting State Farm." *Id.* These observations turn the parties' contractual relationship on its head. That is, it is not the insured's duty to investigate on the insurer's behalf; to lobby the insurer for an investigation or for payment; or to chase the insurer to prompt an investigation or payment. Rather, once the insurer receives notice of a claim, it is the insurer's duty to investigate and make timely payment of all covered elements of the claim.

State Farm represented to the trial court that it regarded (and still regards) Mr. Price's claim as "minor." A reasonable juror could conclude that in this age of digital communications, an auto insurer should not take 15 months to adjust a supposedly minor auto claim -- particularly in a hit-and-run scenario, where just a single eyewitness (the claimant) is available; and particularly where the insurer

never contested coverage, never contested the reasonableness of any medical treatment, and never contested the necessity of any treatment.

Further, given the uncontroverted evidence regarding the reasonable insurance value of a total knee replacement (ranging from $75,000 to $150,000 *exclusive* of Mr. Price's seven-figure claim for lost future earnings), a reasonable juror could conclude that State Farm should have tendered its $100,000 policy limit the moment it confirmed that knee replacement surgery was necessary. To hold otherwise is to ignore the many favorable inferences available to Mr. Price, and to draw all available inferences in favor of the insurance company. *Cf. Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (on a summary judgment motion, the trial court must view the facts in a light most favorable to the non-moving party).

CONCLUSION

For the reasons set forth above, plaintiff below/appellant Edward F. Price, III respectfully requests that the Superior Court's judgment be reversed.

Respectfully submitted,

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