



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDING

Plaintiff Edward F. Price, III (hereinafter Plaintiff or Price) filed suit against State Farm Mutual Automobile insurance Company (hereinafter State Farm) on July 12, 2011. The Complaint alleges that Price is entitled to uninsured motorist benefits pursuant to 18 Del. C. §3902 for an accident of July 31, 2008.

State Farm answered the complaint on September 20, 2011. State Farm asserted as a First Affirmative Defense that the plaintiff and State Farm settled the Plaintiff's uninsured motorist claim on May 18, 2010. Counsel and the Court held a scheduling conference on January 13, 2012 and the Court and counsel agreed to a case dispositive motion deadline of April 30, 2012.

The deposition of State Farm's claim representative Gregory Bell was taken by plaintiff's counsel on February 2, 2012. Thereafter State Farm filed its Opening Brief in Support of its Motion for Summary Judgment on April 19, 2012. The plaintiff was to respond by May 11, 2012. Oral Argument was scheduled for June 8, 2012.

The plaintiff filed his Answering Brief on May 11, 2012. In addition to denying that a settlement took place, the first time the plaintiff raised the contention that the settlement was in some manner in bad faith.

The Court heard Oral Argument on the Motion for Summary Judgment on June 8, 2012. The Court denied State Farm's Motion without prejudice and permitted

briefing on a proposed amendment. The amendment was granted and the Amended Complaint was filed on September 18, 2012.

Discovery ensued and State Farm filed a second Motion for Summary Judgment on January 11, 2013. On February 22, 2013 the Court sent a letter to counsel stating that it intended to grant State Farm's Motion for Summary Judgment both as to the uninsured motorist claim and the bad faith claim with an Opinion to be issued as soon as is practicable. All pending motions and dates were cancelled. On March 15, 2013, the Court issued an Opinion and Order granting State Farm's Renewed Motion for Summary Judgment.

The plaintiff filed a timely Appeal to this Court on April 12, 2013. The plaintiff's Opening Brief was filed on July 5, 2013. This is Appellees Answering Brief on Appeal.

SUMMARY OF ARGUMENT

1. State Farm denies that the Superior Court erred in concluding that the parties entered into a settlement on May 18, 2010. An offer was made, accepted, and a check and letter confirming the settlement was sent to the plaintiff on that date. The plaintiff received the check on May 21, 2010, deposited it and made no complaint..

2. Denied. The Superior Court properly concluded that the conduct between State Farm and the plaintiff and the plaintiff's actions upon receipt of the settlement check evidenced a settlement. The Court's finding that the plaintiff unquestionably accepted the \$50,000 settlement based upon his conduct is clearly correct as a matter of law and fact.

3. Denied. Although the Superior Court concluded that there was not an accord and satisfaction, this has been preserved on appeal. However, whether or not an accord and satisfaction existed the answer included all other applicable defenses and the Superior Court properly concluded a settlement occurred.

4. Denied. The purported seven figure claim for lost earnings did not exist until plaintiff's counsel secured a purported expert in September 2012 or more than two years following the May 18, 2010 settlement. The proposed testimony was the subject of a Motion in Limine because the grounds upon which the purported expert would testify are not legally sufficient for the reasons stated in the Motion in Limine.

5. Denied. The Court properly held regardless of whether there was a private cause of action under the Consumer Fraud Act, Plaintiff had failed to present sufficient evidence to sustain a claim under the Consumer Fraud Act.

6. Denied. The Superior Court properly concluded that as a matter of law the investigation conducted by State Farm was not an unreasonable delay. Further, the trial court correctly concluded that there is no authority which would allow Plaintiff to maintain a cause of action for bad faith after having settled the underlying bodily injury claim.

STATEMENT OF FACTS

On February 23, 2009, Price appeared at the office of his State Farm agent, Amanda Dixon, to pay a premium. While there, he and Dixon discussed the 2008 accident and the agent reported it to State Farm. (A-35). State Farm opened both personal injury protection and uninsured motorist (“UM”) claims.

The plaintiff completed an application for benefits for the personal injury protection or no-fault coverage dated March 6, 2009 identifying a date of accident of September 5, 2008. (A-37) The PIP application under “employers” lists one of his employers as Otis Elevator and identifies his employment as an elevator mechanic with dates of employment of “6/15/09 - 8/16/10” with the handwritten statement, “Casual days since Aug.” (A-37) In response to the question, “(d)id you lose wages or salary as a result of your injury?” the plaintiff checked off “no”.

Claim Representative Gregory Bell (“Bell”) was assigned to handle the UM portion of the plaintiff’s claim. (A-35, 45) During a February 27, 2010 conversation, Bell and Price discussed the facts of the subject accident and Bell explained to Price that he had a potential UM claim. (A-35, 57, 58) Bell explained that he would handle this claim. (A-58) Bell explained the differences between personal injury protection (PIP) benefits and UM coverage. (A-58) The question was asked, “Okay. At any point during the communications with Mr. Price, did you get the sense that he just

simply wasn't understanding what you were saying?" The response was, "[n]ot at all." (A-58)

On March 9, 2009, the plaintiff contacted Bell stating that he'd received paperwork from State Farm which he was in the process of completing. (A-58) The plaintiff also told Bell of his post accident treatment.¹ (A-58) On March 11, 2009 the plaintiff contacted Bell again to tell Bell that he was going to try cortisone injections for his knee before he considered knee surgery. (A-58, 59; B-30).

The next contact with the plaintiff and Bell was on September 23, 2009. One of the purposes of the September 23, 2009 conversation was to obtain more detail about the actual date of the loss. (A-59) After speaking with Price, Bell requested that State Farm send a representative to the Exxon gas station to investigate the accident. (A-59)

Bell sent medical records to include the PIP application, the records of Dr. Glasner, First State Orthopaedics, Christiana Care, Extendicare Rehabilitation Hospital, Pro PT, American Radiology, Wilmington Pain and Rehab and Neurology Associates to Dr. Mohammed Kamali on March 12, 2010. (A-59, A-60) Dr. Kamali produced a report to State Farm dated March 19, 2010 in which he concluded that the

¹ While the official date of the accident is July 31, 2008, the Plaintiff started treating with Dr. Leo Rasis on June 27, 2008. (B-122).

plaintiff had “achieved satisfactory recovery from his total knee replacement and other treatment relating to the accident is not needed or required.” (B-359-361)

After reviewing the plaintiff’s medical records and Dr. Kamali’s report, Bell evaluated the plaintiff’s claim to determine that the plaintiff had concluded his treatment for the accident. (A-51) Bell also considered the fact that the plaintiff had a serious leg injury before the accident. (A-48) There is no proof that as of May 18, 2010 there were any outstanding medical bills.²

As a consequence of his evaluation and after receiving approval from his supervisors, Bell called the plaintiff on May 18, 2010 and offered him \$50,000 to settle the uninsured motorist claim. (A-47, 48; B-3). Price accepted the offer and he was grateful and thankful. Bell verbally confirmed Price’s acceptance of the offer and he told Price he would be sending payment. (A-48).

Bell again explained UM coverage and he told Price that this would include anything he would normally recover against the tortfeasor. (A-51). Bell did not have

² As part of the discovery in this case and while the plaintiff was represented by counsel, State Farm attempted to learn whether the plaintiff had any outstanding medical bills. In discovery responses filed on March 22, 2012 the plaintiff answered that he could not identify any outstanding medical bills which at that point was more than two and a half years after the settlement. (B- 76).

a discussion about particular elements of the claim. (A-51).

The settlement check was sent to Price on May 18, 2010 along with a letter confirming the settlement.³ The plaintiff acknowledged receiving the check and the settlement letter. (B-69-70).

Price was deposed on October 17, 2012. (A-122). Price recalled speaking to Linda Walter, the PIP adjuster, and Walter told him that he would need something in writing verifying that he had a job, the effective date of the disability, and a disability note. (A-156). When asked whether he obtained this information he said, “[n]o, not that I recall.” (A-157, 35) When asked whether he gave State Farm a note in February 2009 saying that he could not work because of his right knee injury he said, “I don’t know if there was a note or not.” “I’m sure there might be one floating around.” (A-158).

Price acknowledged signing the March 6, 2009 PIP application. In response to the question, “[d]id you lose wages or salary as a result of your injury?” he checked off “No”. (A-161, 162) In response to that he said, “[y]eah, that’s the wrong answer. I picked up on that.” (A-161) Every question on the application pertaining to lost income was left blank. (A-162) While testifying that he’d been disabled since the time of the accident his response was, “[i]t was – I know I lost wages. It was filled out

³ The endorsed check from May 21, 2010 is included in Defendant’s Appendix at B-36.

wrong.” (A-164) He testified that he let his wife Marian know that it was filled out wrong but when asked whether State Farm knew his response was, “[n]o. I didn’t – I didn’t let State Farm know.” (A-165)

Price testified that he applied for social security in the summer of 2009. (B-236). He said that someone from social security called and asked if it was true about his ankle or his knee and he said, “[y]es, I have a busted up knee with screws in place and I’m running out of ways to walk.” (B-237). He was asked whether Dr. Rasis told him he could return to work in September 2009 after his knee surgery and his answer was, “(N)o, I don’t remember that. Because I told him my ankle is busted up, and I says, between the both, I can’t stand up for ten minutes.”⁴

Price testified that he received a phone call from Greg Bell about resolving his UM case. (A-187) When he was told that Bell’s notes reflect a date of May 18, 2010 and whether that sounded right he said, “[y]eah.”

According to Price the discussion was, “I (Bell) got good news for you, and I said, what? He says, I have a check for you for \$50,000. Then I pretty much said, you know, it’s about time things got moving. I said, when can I be expecting it? And

⁴ Dr. Rasis testified on September 27, 2012, that Price’s work limitations resulted from his knee injury and an unrelated ankle injury. As of November 2009, Price was completely disabled from an unrelated low back and ankle injury. (B-154).

he said he was mailing it out, and that was it.” (A-188) After first denying that he knew what was being settled he testified:

Q: Well Mrs. Price testified earlier today, and you were there, that she actually looked at the policy with you and saw there was \$100,000 in coverage for uninsured motorist coverage. Yes?

A: Yeah.

Q: So when you spoke to Mr. Bell on May 18, 2010, you knew he was speaking about the uninsured motorist coverage, didn't you?

A: Yeah. Yeah, I guess.

Q: Okay. And so when you said, It's about time things got moving, you were talking about getting money for the uninsured motorist coverage. Right?

A: Yeah.

Q: So did he say he has the check already drawn, or what did he say?

A: He said he was sending it right out.

Q: And what did you say?

A: Huh?

Q: What did you say?

A: Great.

Q: And were you happy?

A: At the time, yeah.

• • •

Q: Okay. So you knew that you were settling your uninsured motorist claim. Right?

A: I didn't know if.... if it was all of it, but I knew it was some of it.

Q: So you did ask the question, whether it was all of it or some of it?

A: No, I didn't.

Q: And why not?

A: I just didn't.

Q: Okay.

A: I – I – I mean, I just got \$50,000.

Q: Well, you didn't have it yet. You just had the conversation about \$50,000.

A: Yeah, I know. But you know what I'm saying.

Q: I am not really. A person is telling you he's giving you \$50,000 for your uninsured motorist claim. Right?

A: Okay.

Q: Yes? I mean you knew that right?

A: Yeah.

Q: Did he say he was going to send you more money?

A: No.

Q: Did you ask him if he was sending you more money?

A: He didn't ask –

Q: I'm not asking about him, we've already talked about him not telling you that. I'm asking you: Did you say to him, are you going to send me more than the \$50,000?

A: No, I didn't say it. (A-191-193)

Price testified that he “assumed” that the \$50,000 was in partial payment of his claim because his claim was worth \$100,000. (A-203) He acknowledged that Bell didn't tell him that the claim was worth \$100,000 and nor did the plaintiff tell Bell that he thought that the claim was worth \$100,000. (A-203, 204) He acknowledged that the check was received and deposited on May 21, 2010. (A-204) He acknowledged that he did not call the person to whom he spoke (Bell) three days earlier on May 18 to tell him that the claim was worth more than the money that he'd received. (A-204) He said, “I should have.” (A-205) He testified that he thought that his claim was worth \$100,000 “the whole time”.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT PLAINTIFF SETTLED HIS UM CLAIM FOR THE ACTS OF JULY 31, 2008

A. Question Presented

Did the Superior Court properly conclude based upon the facts and the law that the plaintiff settled his uninsured motorist claims arising out of the motor vehicle accident of July 31, 2008?

B. Scope of Review

The Superior Court's decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of the Argument

The facts of this case are simple. The manufactured facts are more complex. In speaking of one of his predecessors as Prime Minister Lord Baldwin, Winston Churchill said, "(h)e occasionally stumbled over the truth, but hastily picked himself up and hurried on as if nothing had happened."

When the plaintiff settled his uninsured motorist claim with State Farm on May 18, 2010, he was pleased to receive \$50,000. However, from the time of the filing of the plaintiff's answering brief on May 11, 2012 to the grant of summary judgment on March 15, 2013, nothing will do but to have State Farm punished for offering Price a settlement. In making his claims he has invented legal standards which appear no

where but in his amended complaint and he provides duties which exist no where but in the imagination of the plaintiff and his expert.⁵

Plaintiff claims an insurance carrier cannot make a settlement offer without consulting jury verdicts or consulting members of the Delaware bar for advice. Having made the offer, it must inquire as to the plaintiff's level of education, business experience, knowledge of negotiating contracts, and whether he understands all of the potential elements of a personal injury claim to include pain and suffering, future pain and suffering, the need for future treatment, future permanent impairment, etc. (A-48-51; B-417-421). In this Court the plaintiff bemoans the lack of knowledge of real estate and tax lawyers as well as bankruptcy and family court judges. Left unsaid, but which is obviously the next level of inquiry, if there is an obligation on the part of the UM carrier to explain to the adverse party all of the potential elements of a personal injury action, then how far does that obligation go? Is the carrier obligated to tell the adverse party how to define a permanent impairment and how to go about proving such a claim? If the injured party is unemployed for reasons unrelated to the subject event is the carrier obligated to tell the insured how to make such a claim anyway? In other words, as the entity which is said to stand in the shoes of the tortfeasor, is the

⁵ The trial court commented upon the lack of legal authority holding an insurance company to the purported standards. *Price* 2013 Del. Super. LEXIS 102 at *50 n. 97.

UM carrier obligated to represent the insured adverse party also?

On July 12, 2011 Price filed a generic complaint against State Farm seeking UM benefits. The Complaint makes no mention of the \$50,000 payment and it makes no claims of misrepresentation, bad faith, lack of good faith, or anything which would obviate the May 18, 2010 settlement.⁶

Puzzled about the lack of acknowledgment of the earlier settlement or at least the receipt of the \$50,000 check, State Farm issued interrogatories and noticed the deposition of Price. When the interrogatory answers were filed on November 27, 2011 and which acknowledged the receipt of the letter, the check, the deposit of the check and the phone conversation with Bell the Price deposition was cancelled.

Although the Price interrogatory answers claimed a lack of knowledge of what the \$50,000 check was for, the Price deposition told a different story. Price testified that he knew that the \$50,000 was for his UM claim, although he thought the claim was worth more.

The trial court held that the plaintiff accepted State Farm's offer. The deposit of the check along with the State Farm letter making confirming the settlement, are a clear manifestation of the acceptance of the offer. Any subjective intent of the

⁶ At the June 8, 2012, oral argument the trial judge expressed dismay at the lack of candor. (B-93).

plaintiff is not relevant to the settlement. *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066 (Del. 1997).

The plaintiff's argument in this Court is different than his argument in the trial court. In the Superior Court the plaintiff argued that "no meeting of the minds occurred" because the alleged statement "it's about time" "comes closer to words of protest" and these words raise a question of fact of whether this was an acceptance of the State Farm offer. (Price Answering Br. p. 10-1) In this Court, the plaintiff has changed horses and he now argues that where there is a written contract (the policy of insurance) there can be no implied contract (the settlement of the plaintiff's UM claim). From the plaintiff's point of view the written contract to provide insurance coverage is the exact same thing as a later agreement to pay pursuant to one or more of the coverages. This argument is so skewed from reality that it's hard to provide a response. The insurance policy is a contract providing certain coverages and subject to certain monetary limits. There is no promise to pay all of the coverage limits even upon the occurrence of a covered event. The promise is to pay up to those limits subject to the proper proof. If, for example, an insured has \$100,000 in PIP limits but only \$10,000 in medical expenses and lost wages subject to the no-fault coverage the insurer will only pay \$10,000 and not \$100,000. While the agreement for the settlement of the plaintiff's UM claim flows from the fact that he is a State Farm

insured, with coverage limits of \$100,000 for UM benefits that does not mean that he's automatically entitled to the \$100,000 limits and by necessity every covered claim requires a separate agreement for the payment of the claim. The settlement of the plaintiff's claim is a separate and apart from the insurance contract itself.

Left unsaid in the trial court and in this court is what did happen on May 18, 2010, if the parties did not resolve Price's uninsured motorist claim? Clearly everything that State Farm did evidenced a settlement. The adjuster spoke to Price and he offered a settlement in the amount of \$50,000. This is recorded both in the State Farm log notes and in the confirming letter of May 18, 2010, as well as Bell's testimony. If, as the plaintiff claims, no settlement was reached on May 18, 2010, then what does he claim happened? In the trial court he claimed that his alleged statement, "it's about time things got moving "were words of protest. In this court he claims that the trial court erred in concluding that Price's conduct evidenced a settlement because a written contract, and which appears to be the Price/State Farm policy of insurance, would preclude any settlement which isn't in writing and signed by both sides. Although Price has expressed the negative in different ways, then what is the positive? What does he say happened when he spoke to Bell on May 18, 2010 and he received and deposited the \$50,000 check on May 21, 2010?

II. THERE ARE NO ISSUES OF FACT FOR A JURY TO DECIDE

A. Question Presented

Did the Superior Court properly conclude that the plaintiff accepted the \$50,000 settlement offer?

B. Scope of Review

The Superior Court's decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of the Argument

As stated in the previous argument, the plaintiff has changed course by arguing a matter not brought to the attention of the trial court. In this Court, the plaintiff raises a number of contentions without any citations to the record. The lack of citation is because there is no record to which this argument can be cited.

The plaintiff claims that he was in "dire financial straits", "in part" because of his inability to return to work as an elevator repair man. However, there is nothing in the record to suggest as of May 18, 2010 that this is true, that Mr. Price informed State Farm of this or that State Farm had any such knowledge. Had Bell inquired as to the plaintiff's financial circumstances and then made an offer, the plaintiff would complain that State Farm preyed upon his financial circumstances. There is nothing in the record to suggest that the Plaintiff was under any duress and certainly nothing

in the record to state that State Farm was the source of any duress or had knowledge of it. All that Bell did was evaluate the plaintiff's UM claim and make an offer. He did not give the plaintiff a time limit to accept the offer and nor did he insist that the plaintiff accept the offer during the telephone conversation.

As for the alleged delay in the payment, that will be addressed more fully later in this brief. However, the first time State Farm was aware of the plaintiff's claim was on February 23, 2009. On March 11, 2009 the plaintiff told Bell that he was going to have cortisone injections. Bell was informed that the plaintiff had surgery on September 23, 2009. As stated in State Farm's opening brief below, it is typical for plaintiffs to wait a year post-surgery to see the results. State Farm had Dr. Kamali review the medical records approximately a year after the surgery. While the plaintiff now claims that "a reasonable juror could conclude that State Farm should have tendered its \$100,000 policy limits the moment they confirmed the replacement surgery was necessary" that is not even the position that the plaintiff took in the trial court. (Appellant's Opening Br. p. 35). Although this will be dealt with later in the brief, there is nothing to suggest that State Farm knew, should have known or should have done, other than to make an offer and await the plaintiff's response. It made a \$50,000 offer and for reasons known only to the plaintiff he accepted the offer. It was not State Farm's obligation to inquire as to his reasons for acceptance.

III. THE DEFENSE OF “ACCORD AND SATISFACTION” WAS ONE OF THE AFFIRMATIVE DEFENSES RAISED IN THE STATE FARM ANSWER. BY FOCUSING ON IT TO THE EXCLUSION OF ALL OF THE SURROUNDING EVIDENCE IS WRONG.

A. Question Presented

Can an insurance claim be settled without invoking the principle of accord and satisfaction?

B. Scope of Review

The Superior Court’s decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of the Argument

The plaintiff has misstated what the trial court ruled and he’s misstated it in a way that’s deceptive to this Court. The trial court ruled that there was no bona fide dispute of a debt and therefore the offer could not have been an accord and satisfaction. There was simply no discussion by the court below of any lack of mutual good faith. Since the overarching argument of the plaintiff is that there is bad faith or a lack of good faith on the part of State Farm by actually offering the plaintiff money, the concept expressed in the plaintiff’s brief that there was a lack of “mutual good faith” is misleading to the Court and misrepresentative of what the trial court said. Since there was no debt there could not be an accord and satisfaction. However, the court also ruled that “(i)t is axiomatic that an insurance claim that can be settled

without invoking the principle of accord and satisfaction.” As the court stated, “(q)uite simply, plaintiff made an insurance claim seeking an unclear amount of compensation, State Farm offered \$50,000 and plaintiff accepted the offer.” That is the case in a nutshell. As the court later stated,

“(w)hen Plaintiff made his uninsured motorist claim, Plaintiff had simply that, a claim. Presumably, in response, irrespective of the claims merits, State Farm could have possibly tendered any amount from zero to \$100,000. State Farm offered \$50,000 which the Plaintiff accepted in settlement of his uninsured motorist claim. There is no further analysis required because an accord and satisfaction was unnecessary for resolution of Plaintiff’s claim.”

Price 2013 Del. Super. LEXIS 102 at *27.

IV. NO REASONABLE FACT FINDER COULD DETERMINE THAT THERE WAS A RELATIONSHIP BETWEEN THE STATE FARM OFFER AND THE POLICY LIMITS AND THAT PAYMENT OF ONE HALF THE LIMITS OR ANY AMOUNT AS A PROPORTION OR PERCENTAGE OF THE POLICY LIMITS WOULD BE IN AND OF ITSELF BAD FAITH.

A. Question Presented

Did the trial court properly find that State Farm acted reasonably in its investigation of the claim and the settlement with the plaintiff?

B. Scope of Review

The Superior Court's decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of the Argument

From the time of the settlement on May 18, 2010 and to the filing of the Complaint on July 12, 2011 and up to the point of the filing of his answering brief in response to State Farm's initial Motion for Summary Judgment on May 11, 2012 there was no contention that State Farm did anything wrong in the settlement of the case. In fact, up to the point of the answering brief the only contention was the vague allegation in the plaintiff's answers to interrogatories that he did not know what the \$50,000 payment was for. (B-69-70).

Claim representative Bell was deposed on February 2, 2012. At that point the complaint filed in July 2011 was a generic complaint without any hint of bad faith or

lack of good faith on the part of State Farm. Plaintiff's counsel asked Bell whether he knew of the plaintiff's education, whether he understood the plaintiff's business experience, whether he knew how to run a business or negotiate contracts, and whether he knew all of the potential elements of the claim to include future lost earnings, permanent impairment and whether he "(broke) out the elements of what parts of the claim he could recover for". (A-48-51) Although the plaintiff complains that counsel advised the claim representative not to answer questions as to value, in fact there was nothing at issue as of the time of Bell's deposition to suggest that there were bad faith issues pending in the law suit. As plaintiff's counsel acknowledged in the conference with the trial court on June 8, 2012, "(h)e (Bell) was instructed not to answer questions regarding why \$50,000 and not more. Mr. Shalk gave him the instruction not to answer, and the instruction wasn't challenged so we're here today with that record." (B-95).

When the amended complaint was filed on September 18, 2012 the plaintiff claimed at paragraph 7 (x) that "[t]he dollar value of Mr. Price's claim for UM benefits must properly reflect either 1) the range of legal damages that a reasonable Delaware jury would likely award for injuries resulting in a total knee replacement, or 2) the settlement value that would likely be assigned to such injuries within the Delaware legal community." Neither then nor at any point did the plaintiff provide

any support for the proposition that these are the legal standards to which an insurer must adhere before making an offer to anyone or in particular to unrepresented plaintiffs. The plaintiff then filed what purports to be expert interrogatories on October 19, 2012 which echo the same sentiment.⁷ When attorney Murphy (another former law partner of Plaintiff's counsel) was deposed on November 20, 2012 he could not think of how a carrier could find out what a jury would have said as to any particular type of claim. In the plaintiff's answering brief below, he offered the unhelpful suggestion that "(t)his does not mean that an insurer must consult prior jury verdicts every time it pays a UM claim. It simply means that the goal is to mimic reasonable verdicts or settlements – something any insurer can do based upon the knowledge and expertise common to the trade." (A535). In other words, if it can not find a jury verdict which fits the fact of what the plaintiff considers to be the claim then it must mimic a jury verdict without any clear idea as to how that can be done.

The plaintiff also allegedly conducted a survey of local attorneys when the expert interrogatories were answered on October 19, 2012 and plaintiff's expert represented to the court that he conducted the alleged survey. In fact, plaintiff's counsel spoke to each person before such a contact was made and having assured himself of getting the right answer, attorney Murphy then called knowing in advance

⁷ The expert interrogatories are included in Defendant's Appendix at B-312-318.

what the answer was going to be. (B-319-21, 357-8). State Farm filed a motion in limine on January 9, 2013 to strike Murphy as an expert. (B-502). The motion, in part, relies upon the proposition that such alleged “survey” is not the kind of information upon which the expert can rely.

There is simply no authority for the proposition that a carrier must consult the Delaware Bar before deciding what offer to make. State Farm, as the UM carrier, stands in the shoes of the tortfeasor. The relationship need not be antagonistic or unpleasant but there is an adversarial relationship. As the Court is aware, trials involve two competing forces. The plaintiff offers evidence that he hopes will produce the highest verdict and the defense offers evidence which it hopes will produce the lowest verdict. The matter is then turned over to the jury where it is told among other things, “(t)he law does not prescribe any definite standard by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness should express an opinion about the amount of damages it would compensate such injury. The award should be just and reasonable in light of the evidence and reasonably sufficient to compensate the plaintiff fully and adequately.” (Pattern Jury Instruction 22.1) The jury is also told that the verdict should be reached only after the jury considers the issue fully and with each juror having a fair opportunity to express his or her views. In other words, even if a carrier, could

identify a pure jury verdict which contains no other element than the one element of a knee replacement without considering the results of the knee replacement, the particular person involved, whether there are any special damages or future projections, it would simply be one verdict reached after a trial. The plaintiff suggests as a standard the impossible task of compelling an insurance company to only make an offer after determining “(w)hat a reasonable Delaware jury would likely award”. Of course, although the present case speaks only of knee replacements, if this is the standard then an insurance carrier would be obligated to make such an inquiry when it settles a case of any sort unless the court is willing to impose this standard only in the case of pro se litigants and only in the case of knee replacement injuries.

The plaintiff also wants the Delaware legal community polled or surveyed before a settlement is reached. The plaintiff does not say what the Delaware legal community is. Is the community only plaintiff’s attorneys, only defense counsel, only attorneys with a certain amount of legal or trial experience, or does it include only mediators? Is there a number to be polled so that it must average the opinions or can it pick the lowest or must it pick the highest? Plaintiff’s expert suggests that State Farm would still be in bad faith if it relied upon the opinion allegedly expressed by Yvonne Saville, Esquire that the case has a value of \$75,000. (B- 465). Is it necessary to ask the persons surveyed whether they’ve ever resolved or tired a knee

replacement case without special damages or is it sufficient simply to talk to someone knowledgeable in the Delaware Bar without having any idea whether that person actually knows about a knee replacement claim? In this case, Attorney Murphy did not ask any of the alleged participants in the survey whether they'd ever tried or settled a knee replacement case without special damages. (B-492-3). So far as it appears, the only qualification for any of the people in the survey is that they have "impeccable integrity". (B-486-490). Knowledge, experience or any idea as to the value of the particular type of case except as cleared by plaintiff's counsel before plaintiff's expert called and knowing in advance what the witness was going to say is not relevant.

Although the plaintiff claims as fact that he had a large loss of earnings claim there is no such fact. The plaintiff's expert was subject to a motion in limine not simply to dispute the opinions but based upon the contention that he did not know enough about the underlying facts of the case to even be permitted to offer an opinion. (B-502-16). *Perry v. Berkley*, 996 A.2d 1262 (Del. 2010). In addition, such surveys, as used by the plaintiff's expert, are not admissible either before or after a settlement as a jury is not permitted to be told counsel's evaluation of a claim.

V. THE TRIAL COURT CORRECTLY FOUND THAT THE CONSUMER FRAUD ACT DID NOT APPLY REGARDLESS OF WHETHER PLAINTIFF COULD MAINTAIN A PRIVATE CAUSE OF ACTION

A. Question Presented

Does the Consumer Fraud Act apply when there were no misrepresentations were made in connection with a sale, lease or advertisement of merchandise?

B. Scope of Review

The Superior Court's decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of Argument

In his Opening Brief, Plaintiff focused on the Trial Court's holding that the Consumer Fraud Act ("CFA") is inapplicable to the present action as the statute provides a specific exclusion for "matters subject to the jurisdiction....of the Insurance Commissioner of this State." 6 *Del. C.* § 2513(b)(3). Plaintiff relied on several cases stating that an insured may have a private cause of action against an insurer under the CFA.⁸ *See* Opening Br. p. 32.

⁸ It should be noted that Plaintiff did not raise a claim under the CFA in his Amended Complaint. The CFA was first raised in Plaintiff's February 8, 2013 Answering Brief in a footnote (A530-1). As Plaintiff did not bring a claim under the CFA, he cannot recover under the CFA and any argument regarding a private cause of action under the CFA is superfluous.

Plaintiff, however, failed to address the fact that the Trial Court found that even if there was a private cause of action under the CFA, Plaintiff had failed to identify any facts which would demonstrate that Defendant had violated the CFA.⁹

The CFA provides that:

The act, use...by any person of any deception, fraud...misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment... in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

6 *Del. C.* § 2513(a). The purpose of the CFA is “to protect consumers and legitimate business enterprises from unfair merchandising practices...” 6 *Del. C.* § 2512. The Court has recognized that when a misrepresentation was made after the sale, there is no claim under the CFA. *Thomas v. Harford Mut. Ins. Co.*, 2003 Del. Super. LEXIS 268 (Del. Super. July 25, 2003).

Mentis v. Delaware Am. Life Ins. Co., 1999 Del. Super. LEXIS 419 (Del. Super. July 28, 1999), relied on by Plaintiff, addressed “the alleged use of deceptive sales practices during the sale of life insurance policies [sic]...” *Id.* at *1. Similarly, *Di Simplicio v. Equitable Variable Life Ins. Co.*, 1988 Del. Super. LEXIS 52 (Del. Super. Jan. 29, 1988), addressed a question regarding purchasing and applying for a life

⁹ *Price* 2013 Del. Super. LEXIS 102 at *32-33.

insurance policy. *Id.* at *15.

In the cases where the Court has considered whether a misrepresentation was made in the course of a sale, lease or advertisement for merchandise, the Court has held to the plain language of the statute and has found that “post-sale representations...were not connected to the sale or advertisement of the policy, and therefore do not fall within the constructs of the” CFA. *Thomas* 2003 Del. Super. LEXIS 36 at *12 (Del. Super. Jan. 31, 2003), *re’arg* denied on the CFA claim at 2003 Del. Super. LEXIS 268 (Del. Super. July 25, 2003).

In the present case, as Plaintiff did not assert a CFA claim below, it is unclear what Plaintiff claims to be the sale that would trigger the CFA. The purchase of the policy was the only possible sale in which Plaintiff and State Farm engaged. Plaintiff does not assert that there was a misrepresentation when he purchased the insurance policy. Plaintiff acknowledged that he was aware of his policy limits for UM coverage. While Plaintiff continues to assert that his claim was worth at least \$100,000 as a matter of fact, as discussed in this brief such assertion is not fact.

While the Trial Court discussed Plaintiff’s allegations of unclear policy language and whether it was a misrepresentation, Plaintiff has not raised that assertion again in his argument on appeal.¹⁰ Further, as the trial court found, there is no

¹⁰ Instead, Plaintiff made passing reference to the policy language and Plaintiff’s

evidence that any unclear policy language was used with the intent to deceive an individual into buying the policy, especially considering that Plaintiff asserts that the language as written appears to limit coverage when in fact the coverage is broader. It is illogical to suggest that State Farm would misrepresent coverage to be less than what it was in order to sell more insurance policies.

Plaintiff has provided no legal authority to establish that a violation of the CFA would vacate a settlement. The trial court correctly found that the CFA did not apply to the present case. Whether Plaintiff could maintain a private cause of action under the CFA is irrelevant as Plaintiff did not bring a claim under the CFA. Even if Plaintiff had brought a claim under the CFA, he would have been unable to maintain the claim as there were no facts to support an allegation of deception when the insurance policy was purchased.

understanding of the policy language in his Statement of Facts.

VI. THE TRIAL COURT PROPERLY CONCLUDED AS A MATTER OF LAW THAT THE INVESTIGATION AND OFFER DID NOT CONSTITUTE AN UNREASONABLE DELAY

A. Question Presented

Did the trial court properly conclude that the plaintiff failed to provide sufficient facts and law to establish a delay much less an unreasonable delay?

B. Scope of Review

The Superior Court's decision to grant summary judgment is reviewed *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

C. Merits of Argument

As previously stated as the UM carrier State Farm stands in the shoes of the tortfeasor. *See Williams v. Limpert*, 1997 Del. Super. LEXIS 277 (Del. Super. July 3, 1997); *Layton v. Hartford Fire Ins. Co.*, 2003 Del. Super. LEXIS 465 (Del. Super. April 7, 2003). It is entitled to defend itself and to defend what would typically be a personal injury action against a tortfeasor. The plaintiff has provided no case law or statutory authority for the proposition that there is any particular time limit by which a carrier must conclude its investigation and to make a settlement offer. While a personal injury protection carrier must process and pay or deny bills within a certain period of time there is no time limit at 18 Del.C. Section 3902. *See 21 Del. C. § 2118B(c)*. In the amended complaint filed on September 18, 2012, in 39 additional

paragraphs at 7(a) through 7xxxix the Plaintiff nowhere complains that State Farm delayed in the investigation and payment. It was not until an e-mail from plaintiff's counsel to defense counsel on November 20, 2012, that the issue of delay was raised. (B-501). In an e-mail, counsel stated, "...I've learned today that Mr. Murphy will opine that State Farm delayed unreasonably on tendering payment on Mr. Price's claim. You may wish to address this at today's deposition." At the deposition, Murphy opined that State Farm should have tendered the \$100,000 uninsured policy limits by October, 2012. (B-408-411).¹¹ However, in this Court, the plaintiff has abandoned Murphy's testimony and he now contends that State Farm should have tendered its \$100,000 limits the moment that it confirmed that replacement surgery was necessary. From the plaintiffs point of view, State Farm had no entitlement to learn the results of the surgery, to determine whether the surgery was needed or related to the subject accident, or to determine the impact upon the plaintiff's life. In fact, it didn't have time for the other tasks assigned to it by the plaintiff to survey the Delaware bar or to

¹¹ State Farm filed a motion in limine on January 9, 2013, to bar the testimony of Francis Murphy, Esq. and Robert Wolf on the basis of the Daubert standard. A reading of the several motions reveals the lack of basis and substance for their opinions. The trial court noted the motions in limine and the lack of support for the standards proposed by the plaintiff at footnote 97 of its opinion.

investigate jury verdicts. Although it is common in trial practice for both plaintiffs and defendants to wait a reasonable time after surgery to determine its results, as the plaintiff would have it, the mere knowledge of a particular type of surgery automatically triggers the policy limits offer without any concern of the surrounding circumstances or results. There was nothing to offer to the jury.

As the trial court noted, there is no authority in any jurisdiction where a bad faith claim proceeded after the underlying claim had been settled. *Price* 2013 Del. Super. LEXIS 102 at *35-6, *citing* S. Ashley, *Bad Faith Actions Liability & Damages* §§ 3:39, 5:2, 5A:2, 5:9, 5.10, 5.14 (Sept. 2012); Shernoff, *Insurance bad Faith Litigation* (May 1997); 14 *Couch on Ins.* §§ 205:23, 206:27, 206:28. Despite this statement by the trial court that there was no authority to support the plaintiff's position, the plaintiff has appealed to this Court and has again provided no authority.

CONCLUSION

There are many flaws in the concept and presentation of the plaintiff's case. The main flaw is the enunciation of legal standards and duties for which he has provided no legal authority either to the trial court or this court. He identifies legal standards by which State Farm must evaluate his claim and yet he provides no authority for these standards. He places duties upon State Farm in making an offer

which appear no where but in the imagination of the plaintiff's expert while at the same time providing no duties for himself. He complains that there are facts and inferences which he wanted to present to a jury without explaining what instructions would be given to the jury to guide their deliberations.

The trial court was obligated to analyze the case based upon the law and the facts. If the law is lacking it is because it doesn't exist or because the plaintiff didn't provide it. Simply telling this Court that he has a story to tell but that there is no law to support it is not enough. Between the filing of a complaint and the trial the trial court has an obligation to step in when the proof is lacking and that is what the trial court did in this case. The trial court did an excellent job in analyzing the law and the facts of record and it provided a thoughtful and erudite opinion. There is nothing in the plaintiff's appeal brief which casts any doubt on the opinion of the court below. The judgment should be affirmed.

Respectfully submitted,

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