EFiled: Sep 28 2015 06:27PM EDT
Filing ID 57931861
Case Number 426,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTINA CONNELLY,	:	No. 426, 2015
	:	Court Below: Superior Court of the
Plaintiff Below,	:	State of Delaware, Kent County
Appellant,	:	
	:	C.A. No. K14C-09-002 WLW
v.	:	
	:	
STATE FARM MUTUAL,	:	
AUTOMOBILE INSURANCE CO.	:	
and RONALD B. BROWN, JR.	:	
	:	
Defendants Below,	:	
Appellees.	:	

APPELLANT'S OPENING BRIEF

SCHMITTINGER & RODRIGUEZ, P.A.
WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
SHAE CHASANOV
Bar I.D. No. 4995
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff Below, Appellant

Dated: September 28, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Others

NATURE OF PROCEEDINGS

Plaintiff, Christina Connelly, filed a Complaint against Defendant Ronald B. Brown, Jr. in the Superior Court in and for Kent County, on October 8, 2009. This Complaint alleged the Defendant's negligent operation of a motor vehicle caused a motor vehicle collision on October 12, 2007. Plaintiff Connelly issued an offer to settle to defendant's counsel on May 10, 2011 in the amount of $35,000. State Farm insured Defendant Brown pursuant to an automobile liability policy, with limits of $100,000 per person. The Plaintiff's $35,000 offer was rejected by State Farm and the matter proceeded to trial on October 24, 2011. The jury awarded a verdict of $224,271.40 against Defendant Brown on October 28, 2011.

Counsel for Defendant Brown timely filed three (3) post-trial motions following the October 28, 2011 verdict, all of which concerned the amount of the verdict and its enforceability. The Honorable James T. Vaughn, Jr. denied Defendant Brown's post trial motions by Order dated March 30, 2012.

A thirty (30) day appeal period followed Judge Vaughn's Order, it expired on April 29, 2012. No appeal was taken and final judgment occurred in favor of Plaintiff Connelly and against Defendant Brown amounting to $333,246.29. This judgment amount is comprised of the $224,271.41 jury award, pre-judgment interest of $92,958.66, court costs of $5,435.28 and an additional $10,580.64 in

post judgment interest. Brown's insurer, Defendant State Farm paid $151,601.93 to Plaintiff Connelly, leaving $181,644.36 still owed by State Farm's insured, Ronald Brown, Jr. to Plaintiff Connelly.

Plaintiff Connelly, as a judgment creditor of Ronald Brown, filed a subsequent lawsuit on September 3, 2014 alleging entitlement to enforce Brown's third-party excessive verdict bad faith cause of action against Defendant State Farm for its wrongful conduct by its refusal to settle the Connelly claim within Brown's liability limits, force Brown to trial of this matter and cause Brown to incur liability for the judgment amount in excess of his insurance coverage limits. On November 7, 2014, Defendant moved to dismiss Plaintiff's claims solely on the grounds that Connelly required an assignment from Brown of his claim against State Farm. Plaintiff filed a Response in Opposition to this Motion on November 25, 2014. Thereafter, Connelly procured Ronald Brown's assignment of his rights against State Farm and moved to amend her complaint to assert Brown's claim as his assignee in March 2015. In contesting the Motion to Amend, State Farm, for the first time, raised the statute of limitations. The Commissioner granted the Motion to Amend on April 2, 2015. By Order of July 22, 2015, the Superior Court granted Defendant's Motion to Dismiss solely on the statute of limitations grounds. Plaintiff filed a timely appeal to this Court on August 14, 2015, which seeks review of the above-mentioned July 22, 2015 Superior Court Order, granting

Defendant's Motion to Dismiss. This is the Plaintiff, Christina Connelly's, Opening Brief in support of her appeal.

SUMMARY OF ARGUMENT

1. An insurer owes a duty of good faith and fair dealing to its insured. Since a liability insurer maintains complete and exclusive control over the resolution of a claim brought against its insured, it must maintain this duty when engaging in settlement negotiations on its insured's behalf, particularly when a settlement demand within policy limits is offered prior to trial. If an insurer breaches its duty during such settlement negotiations and forces its insured to trial which results in a verdict in excess of the policy coverage limits, the insurer may be subject to liability to its insured, for the verdict amount in excess of coverage limits under a third-party excessive verdict bad faith cause of action. Delaware law recognizes such claims against an insurer for damages arising from the bad faith negligent conduct of an insurer toward its insured.

2. While the relationship between an insurer and its insured initially arises out of a contractual undertaking, an insurer's breach of its good faith duty to negotiate a settlement with coverage limits prior to trial, thereby preventing personal exposure on its insured, is grounded in principles of tort law. There is vast support for this position. The lower court erred in finding that the insurer's bad faith breach of duty owed to its insured was a breach of contract cause of action, as the insured's remedy lies in a tort action against the insurer for its bad

faith failure to settle and prevent a verdict in excess of coverage limits becoming the insured's personal liability and judgment debt.

3. The statute of limitations for a third-party excess verdict bad faith cause of action against an insurer for its bad faith failure to settle accrues when the excess verdict becomes a final judgment. A judgment becomes final once it is enforceable and unable to be appealed. The lower court, in error, held that the statute of limitations' accrual period began when the insurer refused the settlement offer. Rather, a three-year statute of limitations, pursuant to 10 *Del. C.* § 8106, accrues upon the finality of the judgment in excess of the coverage limits.

STATEMENT OF FACTS

Christina Connelly was the front seat passenger of a motor vehicle involved in a severe rear-end collision in Newark, Delaware on October 12, 2007, when it was struck by a motor vehicle operated by Ronald B. Brown, Jr. Brown was insured pursuant to an insurance policy contract issued by Defendant State Farm. This policy, designated as 1080-531-20 provided automobile liability coverage for Brown with limits of $100,000 per person and $300,000 per occurrence.

Plaintiff Connelly suffered severe and serious bodily injuries with permanent impairments to certain body regions, for which medical treatment was provided and would continue to be provided into the future. She filed a lawsuit against Brown, to which Defendant State Farm provided counsel to defend his interests, pursuant to the aforementioned insurance policy. In fact, according to the policy, State Farm had the sole and exclusive right to determine if Connelly's claim against Brown would be resolved by settlement or by trial.

An offer to settle for $35,000, pursuant to 6 *Del. C.* § 2301(d), was extended to Brown, through his State Farm counsel, on May 10, 2011. This offer was rejected and Defendant State Farm insisted that its insured defend this matter at trial. Also in May 2011, Defendant State Farm, on behalf of its insured, Brown, stipulated that:

"Ronald B. Brown admits his negligence was the proximate cause of this October 12, 2007 automobile accident." (A31)

Trial commenced on October 24, 2011 and a verdict of $224,271.41 was rendered in favor of Connelly. As this verdict was greater than Connelly's settlement offer, she was also entitled to pre-judgment interest from the date of the October 12, 2007 collision, along with court costs, 6 Del Section 2301 (d).

After the jury verdict, State Farm directed Brown's counsel to file post-trial motions. Specifically, three timely post -trial motions were filed which challenged the verdict and pre-judgment interest cost for which Brown was at risk of being obligated to pay. The motions included a motion to amend or alter the judgment against its insured by remittitur, or a motion for a new trial.

By Order of March 30, 2012, The Honorable James T. Vaughn, Jr. denied Brown's post-trial motions and ordered judgment to be entered against Brown for the jury award of $224,271.41, pre-judgment interest of $92,958.96, court costs in the amount of $5,435.28, and an additional $10,580.64 in post-judgment interest for the 168-day period during which the judgment remained unpaid. (A52-67) Since Brown's post-trial motions were timely filed, State Farm was entitled to direct Brown's counsel to appeal this verdict in excess of coverage limits to the Delaware Supreme Court for (30) days, or until April 29, 2012, *Katcher vs.*

Martin, 597 A.2d 352 (Del. Super. Ct. 1991) aff'd. 608 A.2d 728 (Del. 1992) . State Farm did not direct such an appeal be taken for the benefit of its insured. Rather, State Farm, paid its policy limits of $100,000, $41,449.21 in pre-judgment interest, $2,646.58 in post-judgment interest and $5,435.28 in court costs. (A67). State Farm issued an additional post-judgment interest payment in the amount of $2,070.86, such that Defendant State Farm has paid $151,601.93 of the $333,246.29 then owed to Connelly by Brown. (A69).

The remainder of the unpaid judgment, unpaid pre-judgment interest, and unpaid post-judgment interest remained the legal responsibility and debt of Brown. To date, Brown has made no payment on his judgment debt to Connelly. Thus, Brown remains a judgment debtor of Connelly in the amount of $230,767.05 together with *per diem* post-judgment interest of $55.01 from December 3, 2014.

Connelly, as a judgment creditor of Brown has a legal right to enforce any legal rights or claims that her judgment debtor, Ronald Brown has or is entitled to assert against State Farm for its bad faith and wrongful adjustment of the Connelly claim and recover the damages Brown was entitled to receive from his insurer State Farm. Thus, Plaintiff Connelly, as judgment creditor brought an action on her judgment against her judgment debtor Ronald B. Brown, Jr. and his insurer, State Farm where she sought to enforce Bown's third-party excess verdict bad faith cause of action against State Farm on September 3, 2014. (A13-69)

In response to Plaintiff Connelly's bad faith Complaint, and in lieu of an Answer, State Farm filed a Motion to Dismiss claiming that Connelly lacked standing to pursue Brown's bad faith claim because she had no assignment of it. (A70-84) While Connelly opposed the Motion, Connelly also obtained Brown's assignment. On March 3, 2015, Brown assigned all of his legal rights and claims against Defendant State Farm to Christina Connelly. (A201, 202). Connelly moved to amend her Complaint to assert Brown's rights against State Farm as his assignee. Though opposed by State Farm, the Superior Court Commissioner granted the Motion on April 2, 2015. On April 6, 2015 Connelly's Amended Complaint was filed. (A143-202)

While opposing Connelly's Motion to Amend to assert a claim as Brown's assignee, State Farm raised for the first time, a claim that this action is barred by the Statute of Limitations. State Farm argued that this bad faith action was a *first-party contractual* claim that accrued either at the time the May 10, 2011 settlement offer was extended, or 30 days thereafter when the demand expired. However, neither Brown nor his assignee Connelly, could pursue this third party excessive judgment bad faith claim until this judgment was final on April 29, 2012. Had Brown or Connelly sought to enforce a third party excess judgment bad faith action prior to April 29, 2012, such action would have been dismissed for its prematurity.

The Superior Court granted Defendant's Motion to Dismiss, holding that a

3-year statute of limitations pursuant to 10 *Del. C.* § 8106 began to accrue at the time of the wrongful act, "which the Court finds is the date Defendant denied Plaintiff's settlement demand." (*Apellant's Brief Exhibit A page 7*).

ARGUMENT I

I. UNDER DELAWARE LAW COURTS HAVE RECOGNIZED A *THIRD-PARTY* BAD FAITH CAUSE OF ACTION WHEN AN INSURER IS AFFORDED THE OPPORTUNITY TO NEGOTIATE A SETTLEMENT WITHIN ITS INSURED'S POLICY LIMITS BUT REFUSES TO DO SO IN BAD FAITH, THEREBY EXPOSING ITS INURED TO AN EXCESS JUDGMENT.

(1) QUESTION PRESENTED

Whether Delaware law recognizes a third-party bad faith claim against a tortfeasor's insurer for permitting an excess verdict to be made against its insured, when the insurer rejected a settlement offer prior to trial that was within its insured's policy limits, see A13-69; A85-97; A278-287.

(2) SCOPE OF REVIEW

On appeal from a Motion to Dismiss granted pursuant to Delaware Superior Court Civil Rule 12(b)(6), this Court reviews the matter *de novo*. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1996); *Alston v. Hudson*, 748 A.2d 406 (Del. 2000). The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* It is the Court's duty to draw all reasonable inferences in favor of the non-movant, Christina Connelly in the instant matter.

(3) MERITS OF ARGUMENT

Insurers have a duty to act in good faith and with due care, particularly in settlement negotiations with a plaintiff prior to trial. *McNally v.*

Nationwide Ins. Co., 815 F.2d 254, 259 (3rd Cir. 1987). As set forth in *McNally* and in reliance upon Delaware law, an insurer is liable if its failure to use good faith or due care, caused its insured to suffer personal indebtedness. *Id.* (citing to *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958)). The *McNally* court held that when an excess judgment might be obtained by the plaintiff, "the good faith standard is satisfied only if the insurer acts in the same way as would a 'reasonable and prudent man with the obligation to pay all of the recoverable damages.' *Id.* (citing to 7C John Allen Appleman, *Insurance Law and Practice* § 4711 at 395 (Berdad ed. 1979)).

The procedural facts of *McNally* are similar to the instant matter. Plaintiff John McNally, Jr. negligently collided with an airport limousine, injuring fifteen (15) people. *Id.* at 257. Nationwide insured McNally with a policy offering limits of $100,000 per person and $300,000 per accident. *Id.* An injured couple, the Eckmans, offered to settle their claims against McNally for $100,000 prior to trial. Nationwide rejected the settlement offer and its counsel's alternative recommendation to interplead its funds. *Id.* at 258. The matter proceeded to trial and the Eckmans obtained a jury award of $3.15 million, to which McNally was responsible for 65%.

Following the excess verdict award, the Eckmans then agreed that if the defendants would sue their insurers for its bad faith refusal to settle, and

subsequently turn over any money awarded in the suits, the Eckmans would not proceed against the defendants. *Id.* McNally agreed and the bad faith lawsuit proceeded to trial. The jury held that Nationwide acted unreasonable and in violation of its good faith duty by failing to either interplead its coverage limits or accept the Eckmans' settlement offer, thereby exposing its insured to personal liability.

The Third Circuit's interpretation of Delaware law and recognition of the legal basis for a cause of action based upon an insurer's alleged bad faith failure to settle a claim by interpleading its policy was adopted thereafter as good law by the Superior Court in *Gruwell v. Allstate*, 988 A.2d 945 (Del. Super. 2009). Then President Judge Vaughn, reiterated an insurer's duty to use good faith and due care in settlement negotiations, such that the insurer protects its insured from an excess verdict. In other words, an insurer is liable in a separate cause of action if it 'fail[ed] to use good faith or due care in settlement negotiations with plaintiff prior to trial.' *Gruwell*, 988 A.2d at 948, citing to *McNally*, 815 F.2d at 259.

As evidenced by *McNally* and *Gruwell*, third-party excess verdict bad faith claims, against an insurer for damages arising from the bad faith negligent conduct of the insured have been recognized by Courts applying Delaware law. However, to date, this Court has not specifically ruled in a third party excess verdict bad faith

claim. In *Tackett v. State Farm Fire & Casualty Insurance*, 659 A2d 254 (Del. 1985), this Court noted:

> At the outset we note that we are confronted with a dispute over first party coverage, i.e. a claim by an insured that an insurer failed to make timely payments under a policy provision. Third-party claims asserted against both the insurer and the insured have the potential to create a conflict of interests and may involve fiduciary duties on the part of the insurer. These third-party cases implicate separate bad faith concerns. We have had no occasion to pass upon the cognizability of such claims and do not do so here. *Id.at 264*

The facts of this case provided the opportunity for this Court to permit the pursuit of such a cause of action. As evidenced by the Court decisions in other jurisdictions, as noted at page 19 *infra*, this Court should recognize such an action to protect the interests of insureds when their insurers have acted in bad faith, breached their duty of good faith and have burdened their insured with financial and economic harm.

ARGUMENT II

II. THE SUPERIOR COURT ERRED IN TREATING THE INSURED'S CLAIM AGAINST ITS INSURER AS A BREACH OF CONTRACT CLAIM, AS A THIRD PARTY EXCESS VERDICT BAD FAITH CLAIM AGAINST AN INSURER IS BASED ON TORT PRINCIPLES, EVEN THOUGH IT ARISES FROM A CONTRACTUAL UNDERTAKING.

(1) QUESTION PRESENTED

Whether the pursuit of a third-party bad faith cause of action against an insurer is rooted in principles of tort or contract law, see A85-97; A287-391; A210-232.

(2) SCOPE OF REVIEW

On appeal from a Motion to Dismiss granted pursuant to Delaware Superior Court Civil Rule 12(b)(6), this Court reviews the matter *de novo*. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1996); *Alston v. Hudson*, 748 A.2d 406 (Del. 2000). The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* It is the Court's duty to draw all reasonable inferences in favor of the non-movant, Christina Connelly in the instant matter.

(3) MERITS OF ARGUMENT

Both the Delaware Supreme Court and the Third Circuit have specifically stated that a claim alleging an insurer's failure to use good faith or due care in settlement negotiations with a plaintiff prior to trial is "one sounding in

tort." *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958). *Stilwell* involved an injured pedestrian following a collision between two motor vehicles, operated by Parsons and Lockerman. *Id.* at 399. Allstate insured Lockerman with a liability insurance policy covering Lockerman with $10,000 for each person suffering bodily injury. *Id.* at 402. The matter proceeded to trial and a verdict was entered against Lockerman for $20,000. *Id.* The plaintiff tried to pursue the excess verdict through a writ of garnishment against Allstate, which the court did not allow. In holding that such a writ was not enforceable, the court stated:

> "[I]f Lockerman has any claim against Allstate....**that claim is one sounding in tort based on Allstate's failure to use good faith or due care in settlement negotiations** with plaintiff prior to trial." *Id.* (*emphasis added*)

The court continued by providing the following:

> "It seems to be clear that liability of an insurance carrier to its policyholder in excess of policy limits is clearly based upon the **tortious conduct of the insurance carrier**, which under the policy has sole control of the defense."[1] *Id.* (*emphasis added*)

Delaware is not alone in stating that such a cause of action is rooted in principles of an economic tort. Delaware's neighbor, Maryland, performed an "extensive review of authority" and deemed this claim a tort cause of action. *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 656 (Md.1994), citing to *State Farm*

[1] The recognition that such action is tortuous was recognized in both *McNally* and *Gruwell*.

v. White, 236 A.2d 269 (Md. 1967). In *Campbell*, Robert Campbell was involved in an accident when he struck a vehicle driven by Kimberly Baptiste. *Campbell*, 639 A.2d at 652, 653. Baptiste filed a negligence suit against Campbell for the injuries she sustained. Allstate Insurance Company hired counsel on behalf of Campbell. Baptiste offered to settle the claim within the limits of Campbell's policy. *Id.* at 653. Allstate rejected the offer and Allstate's counsel recommended to Campbell that he retain independent counsel with respect to any excess liability. *Id.* Campbell did just that and Allstate subsequently settled Baptiste's claim for $20,000, which represented the limits of Campbell's Allstate policy. *Id.* Campbell then filed for Declaratory Relief, claiming that Allstate breached its tort duty to make a good faith attempt to settle within policy limits. *Id.* at 654.

The Court of Appeals of Maryland was faced with deciding whether this third-party cause of action against Allstate Insurance was based on principles of tort or contract law. *Id.* at 654. The Court, in finding this a tort claim, "recognized that an insurer is not obligated to accept an offer simply because it is within policy limits, but noted that an insurer is obligated to negotiate and settle a claim with 'proper regard' for the insured's interests and is liable for damages for a bad faith refusal to settle within policy limits. *Id.* It further noted that an insurer must use 'reasonable care' in defending the insured and that a refusal to settle must be based upon ' an informed judgment based on honesty and diligence.'" *Id.* at 654-655. In

short, it was decided that an insurer does not have an absolute duty to settle simply because a settlement offer is extended prior to trial that falls within an insured's policy limits. However, an insurer is obligated to negotiate in good faith and with due care to protect its insured's interests, and if it fails to do so, it may be held liable for breaching its tort duty.

In order to properly address third-party bad faith claims, Maryland adopted a "good faith" theory, finding that an insurer has "a tort duty to exercise good faith in making a decision not to settle a claim within policy limits." *Id.* at 656.[2] Maryland adopted a good faith test and finds that an "insurer remains bound by a continuing duty to negotiate in good faith to settle the claim within policy limits. If the insurer should ultimately violate its duty regarding settlement, the insured's remedy lies in a tort action against the insurer for a bad faith failure to settle. *Id.* at 396. Maryland courts recognize that the action has a contractual undertaking, but

[2] Maryland identified several factors for its courts to apply when analyzing this good faith test. These factors include the following: "the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits; lack of proper and adequate investigation of the circumstances surrounding the accident; lack of skillful evaluation of plaintiff's disability; failure of the insurer to inform the insured of a compromise offer within or near the policy limits; pressure by the insurer on the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer; and actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament. *Id.* at 656.

nevertheless, this type of action is rooted in principles of tort. *Sweeten v. Nat'l Mut. Ins. Co.*, 194, A.2d 817, 818 (Md. 1963).

A multitude of other jurisdictions recognize that a third party excess verdict bad faith action relies upon tort principles, including but not limited to Arizona at *Taylor v. State Farm*, 913 P.2d 1092 (Ariz. 1996), Oklahoma at *Wirtz v. State Farm*, 2009 U.S. Dist. LEXIS 60714 (D. Okla., July 13, 2009), New Mexico at *Torrez v. State Farm*, 705 F.2d 1992 (10th Cir. 103 So.2d 711 (Ala. 1958) 1982), Alabama at *Dalrymple v. Alabama Farm Bur. Mut. Ins. Co.*, 103 So.2d 711 (Ala. 1958) , California at *Brehm v. 21st Cent. Ins. Co.*, 166 Cal. App. 4th 1225 (2008), Georgia, at *Camacho v. Nationwide Mut. Ins. Co.*, 13 F. Supp. 3d 1343 (N.D. Ga. 2014), Massachusetts at *Abrams v. Factory Mut. Liab. Ins. Co.*, 10 N.E. 2d 82, 84 (Mass 1937), New York at *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E. 2d 849, 856 (1972), North Carolina at *Thomas v. Nationwide Mut. Ins. Co.*, 177 S.E. 2d 286, 288 (N.C. 1970), Ohio at *Slater v. Motorists Mut. Ins. Co.*, 187 N.E. 2d 45, 48 (1962) and Pennsylvania at *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8 (1966).

The reasoning these jurisdictions find third-party excess verdict bad faith claims to be rooted in tort is based on the underlying concepts and duties of good faith and fair dealing. These duties are implied in all contracts and certainly in Delaware contracts. DOUGLAS R. RICHMOND, INSURANCE BAD FAITH AND INSURERS' DUTY TO COMMUNICATE WITH INSUREDS REGARDING SETTLEMENT at

499; *Price v. State Farm Mut. Auto. Ins. Co.*, 2013 Del. Super. LEXIS 102, *39-40 (Del. Super. Ct. Mar. 15, 2013). The duty of good faith requires that neither party act in a manner that would damage the rights of the other party to receive the benefits flowing from the underlying contractual relationship. Thus, although the underlying contract provides the basis for a bad faith action, the insurer's breach of the duty of good faith creates a tort action. *Taylor*, 913 P.2d at 1094.

In summary, while the relationship between an insured and his insurer may stem from a contract, the duty owed by an insurer to its insured with respect to good faith and fair dealing in settlement negotiations is one rooted in principles of tort.

ARGUMENT III

III. THE SUPERIOR COURT ERRED IN FINDING THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN WHEN THE INSURER DENIED PLAINTIFF'S SETTLEMENT DEMAND PRIOR TO TRIAL.

(1) QUESTION PRESENTED

Whether the statute of limitations for a third-party excess verdict bad faith action begins to accrue upon the finality of the excess judgment against the insured, at the time the settlement offer is extended, at the time the settlement offer is rejected, or some other time period, see A210-232; A278-287.

(2) SCOPE OF REVIEW

On appeal from a Motion to Dismiss granted pursuant to Delaware Superior Court Civil Rule 12(b)(6), this Court reviews the matter *de novo*. *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1996); *Alston v. Hudson*, 748 A.2d 406 (Del. 2000). The Court will "accept all well-pleaded allegations as true," but will "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* It is the Court's duty to draw all reasonable inferences in favor of the non-movant, Christina Connelly in the instant matter.

(3) MERITS OF ARGUMENT

The governing statute of limitations for a third party excess verdict bad faith cause of action should accrue at the time the excess verdict becomes final and enforceable. A final judgment has been defined in Delaware as "one which

determines the merits of the controversy or the rights of the parties and leaves nothing for future determination or consideration." *Augusiewicz v. State*, 2009 Del. Super. LEXIS 323, *3 (Del. Super. Ct. Aug. 31, 2009); *see also Braddock v. Zimmerman*, 906 A.2d 776, 780 (Del. 2005).

There are several reasons why the statute of limitations should not accrue until the excess verdict becomes final. These reasons include: (1) the judgment is speculative until it becomes final; (2) a conflict of interest between insurer and insured is likely to arise with an earlier statute of limitations; (3) an insured would be forced to incur the expenses associated with retaining independent counsel with an earlier statute of limitations; and (4) judicial resources would be wasted with an earlier statute of limitations. These reasons will be discussed below *seriatim*.

Jurisdictions that have specifically addressed the third-party excess verdict bad faith claim against an insurer have identified the statute of limitations as one accruing upon the entry of a final judgment. These courts have pointed out that the economic injury to an insured remains "uncertain and speculative" until a final judgment is established. *Taylor*, 913 P.2d at 1096. Basing this finding upon "sound judgment and public policy" have led to "the final judgment accrual rule." *Id.* at 1097. Until a final judgment exists, the insured's injury and liability for an excess verdict may go away, rendering the issue moot. Also, at a practical level, it is impossible to determine whether a bad faith cause of action even exists, and if

one does exist, the extent of the insured's damages cannot be determined until a final judgment is rendered. *Id.* It is quite conceivable that after a verdict is announced, and upon the insurer's request through post-trial motions, the verdict is reduced to an amount within the policy limits. Alternatively, the insurer may come to a resolution with the injured party while the parties await rulings on any post-trial motions such that the insured never becomes personally exposed.

To hold otherwise and rely on a statute of limitations that begins to accrue at a time before a judgment ever becomes final creates a potential conflict of interest between the insured and his insurer. The insured essentially must seek a claim against his own insurer, all the while expecting his insurer to zealously represent him. The insurer has exclusive control over the investigation, defense and settlement of the insured's claim. Their interests may be at odds with each other. As pointed out in *Taylor*, if an earlier accrual date exists, "a client would constantly be required to second-guess his attorney and would be forced to obtain other legal opinions on the attorney's handling of the case. Nothing could be more destructive [to] to the attorney-client relationship. *Id.*

Creating an earlier statute of limitations period also allows for a premature cause of action to be filed, as occurred in *Allstate*, 639 A.2d 652. As mentioned above in *Campbell*, the insured retained additional counsel, at the recommendation of Allstate's appointed counsel. His additional counsel filed for Declaratory Relief

before the matter proceeded to trial. Allstate moved to dismiss Campbell's complaint, "maintaining that the issue of bad faith was raised prematurely." *Id.* at 653-654. This scenario depicts one of the precise problems created by an earlier statute of limitations for bad faith claims. The insured will be forced to incur the financial expenses of retaining separate counsel to protect his interests, and will likely be forced into filing for Declaratory Relief prematurely, before it is even known whether an excess verdict will result. Furthermore, judicial resources must be made available for these lawsuits, despite the fact that these lawsuits may never come to fruition. This is a clear waste of judicial resources.

The statute of limitations for a third-party excess verdict bad faith in tort action is three (3) years pursuant to 10 *Del. C.* § 8106(a), which provides, in part, that "no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of three (3) years from the accruing of the cause of action." As the cause of action accrues upon the judgment's finality, it would begin to accrue once the judgment can no longer be appealed, and nothing remains for consideration. Thus, in the present matter the cause of action accrued on April 29, 2012 when the excess verdict became final. The action filed against State Farm was timely since it was filed prior to April 29, 2015.

Although this issue is one of first impression in Delaware with respect to third-party bad faith claims, Delaware's worker's compensation law supports such an approach with respect to the finality of judgments. "A valid and final personal judgment is generally 'one which reaches and determines the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, jurisdiction or form.'" *Maravilla-Diego v. MBM Constr. II, LLC*, 2015 Del. Super. LEXIS 348, *12 (Del. Super. Ct. July 21, 2015). In order for an IAB decision to have a "definitive effect," the period for appeal must run so that the award has reached its final and conclusive stage. Once an award is "unappealable," there is "nothing for future determination or consideration" and it is considered to be a final judgment. *Id.* at *13. This is akin to the instant matter.

There are numerous grounds available for a jury award to be disallowed, reversed, reduced or otherwise modified by the trial court or the appellate court. Until a jury award in excess of the insured's policy limits becomes final, its very existence is at risk. Said another way, if the excess verdict is pending an appeal, the exposure to actual harm to the insured is uncertain and may never actually occur. Rather, the insured must await at least until the post-trial appeal period runs, and if an appeal were filed, await the final determination of any such appeal before the insured has incurred economic damages entitling him to seek redress from his insurer.

For all the reasons mentioned above, the statute of limitations for third-party excess verdict bad faith actions should not begin to accrue until the excess judgment becomes final and binding upon the insured. To hold otherwise would only serve to waste judicial resources and create an abundance of speculative, premature lawsuits. Lastly, neither State Farm not the lower court cited a decision from any jurisdiction holding that a third-party excess verdict bad faith action's statute of limitations accrues before trial of the underlying liability claim.

CONCLUSION

For the aforementioned reasons, the Superior Court's Order granting State Farm Mutual Insurance Company's Motion to Dismiss as being time barred, should be reversed, and the case remanded to Superior Court for trial by jury, to allow a jury to determine whether State Farm acted in bad faith in its refusal in resolve the underlying litigation within its insured's policy limits when it had the opportunity to do so.

Respectfully submitted,

SCHMITTINGER & RODRIGUEZ, P.A.

BY: 

WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
414 S. State Street
SHAE CHASANOV
Bar I.D. No: 4995
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Plaintiff, Below,
Appellant Christina Connelly

Dated: September 28, 2015