



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLEE STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY'S ANSWERING BRIEF**

CASARINO CHRISTMAN SHALK
RANSOM & DOSS, P.A.

COLIN M. SHALK, ESQ.
Del. Bar ID No. 99
CATHERINE M. CRAMER ESQ.
Del. Bar ID No. 6000
405 North King Street, Suite 300
P.O. Box 1276
Wilmington , DE 19899-1276
Telephone: (302)594-4500
Fax: (302)594-4509
Attorneys for Appellee-Defendant Below
State Farm Mutual Automobile
Insurance Company

Dated: October 28, 2015

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES iii

NATURE AND STAGE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 6

ARGUMENT 9

 I. PLAINTIFF’S COMPLAINT DOES NOT ASSERT
 “THIRD PARTY BAD FAITH” CLAIMS AGAINST STATE FARM,
 BUT ASSERTS CLAIMS AS A “JUDGMENT
 CREDITOR” OF DEFENDANT BROWN. PLAINTIFF’S
 CLAIMS WERE PROPERLY DISMISSED AS THE
 STATUTE OF LIMITATIONS HAD PASSED. FURTHER,
 DELAWARE LAW DOES NOT RECOGNIZE THE RIGHT
 OF A THIRD PARTY TO BRING A CLAIM OF “BAD
 FAITH FAILURE TO SETTLE” 9

 (1) QUESTIONS PRESENTED 9

 (2) SCOPE OF REVIEW 9

 (3) MERITS OF ARGUMENT 10

 A. *The Superior Court Properly Dismissed the Claims
 Asserted by Plaintiff in her complaint, pursuant
 to the statute of limitations* 10

 B. *Delaware does not recognize the right of a third party
 to assert claims for bad faith breach of an insurance
 contract* 13

II.	THE SUPERIOR COURT CORRECTLY APPLIED THE LAW WHEN IT FOUND THAT PLAINTIFF’S CLAIMS WERE GOVERNED BY 10 <i>Del.C.</i> § 8106 AND THAT THE STATUTE OF LIMITATIONS ACCRUES AT THE TIME OF THE BREACH OR WRONGFUL ACT	18
	(1) QUESTIONS PRESENTED	18
	(2) SCOPE OF REVIEW	18
	(3) MERITS OF ARGUMENT	19
III.	THE SUPERIOR COURT CORRECTLY APPLIED THE LAW WHEN IT HELD THAT THE STATUTE OF LIMITATIONS HAD RUN AS THE COMPLAINT FILED BY PLAINTIFF ON ITS FACE ESTABLISHES THE DATE OF THE ALLEGED BREACH AS MAY 10, 2011	22
	(1) QUESTIONS PRESENTED	22
	(2) SCOPE OF REVIEW	22
	(3) MERITS OF ARGUMENT	23
	CONCLUSION	26

TABLE OF CITATIONS

CASES:	Page:
<i>Albert v. Alex. Brown Mgmt. Servs., Inc.</i> , 2005 Del. Ch. LEXIS 100 (Del. Ch. June 29, 20015)	19
<i>Bean v. Allstate Ins. Co.</i> , 403 A.2d 793 (Md. 1979)	14
<i>Clinton v. Enterprise Rent-A-Car Co.</i> , 977 A.2d 892 (Del. 2009)	9, 18, 22
<i>Gruwell v. Allstate Ins. Co.</i> , 988 A.2d 945, (Del. Super. Ct. 2009)	16
<i>Guttman v. Jen-Hsun Huang</i> , 823 A.2d 492, (Del. Ch. 2003)	10
<i>Hettwer v. Farmers Ins. Co.</i> , 118 Idaho 373 (Idaho 1990)	14
<i>Hostetter v. Hartford Ins. Co.</i> , 1992 Del. Super. LEXIS 284 (Del. Super. July 13, 1992)	11,13-16, 19-20, 24-25
<i>In re Tyson Foods, Inc. Consol. S'holder Litig.</i> , 919 A.2d 563 (Del. Ch. 2007)	19
<i>Johnson v. Beane</i> , 664 A.2d 96, 98-99 n.2-3 (Pa. 1995)	14
<i>Kranzush v. Badger State Mut. Casualty Co.</i> , 103 Wis. 2d 56 (Wis. 1981)	14-15
<i>Krauss v. State Farm Mut. Auto. Ins. Co.</i> , 2004 Del. Super. LEXIS 127 (Del. Super. Apr. 23, 2004)	10

<i>Long v. McAllister</i> , 319 N.W.2d 256 (Iowa 1982).	14
<i>McNally v. Nationwide</i> 815 F.2d 254 (3 rd Cir. 1987).	16
<i>Plant v. Catalytic Constr. Co.</i> , 287 A.2d 682 (Del. Super. 1972), aff'd 297 A.2d 37 (Del. 1972).	10
<i>Spence v. Funk</i> , 396 A.2d 967 (Del. 1978)	10,18-19, 23
<i>Rowlands v. PHICO Ins. Co.</i> , 2000 U.S. Dist. LEXIS 22377 (D. Del. July 27, 2000).	11-12,13-16
<i>Worrel v. Farmers Bank of Delaware</i> , 430 A.2d 469, 472 (Del. 1981).	19
STATUTES:	
10 <i>Del. C.</i> § 8106	4, 18-21, 25

NATURE AND STAGE OF PROCEEDINGS

On September 3, 2014 Plaintiff-Below Appellant Christina Connelly (“Plaintiff”) filed a complaint against Defendant-Below Appellee Ronald B. Brown Jr., (“Brown”) and Defendant-Below Appellee State Farm Mutual Automobile Insurance Company (“State Farm”).¹ (A13-A19). Plaintiff’s complaint alleges that State Farm breached its contract with Brown, in bad faith, by failing to accept Plaintiff’s settlement demand of \$35,000 on May 10, 2011. *Id.* at ¶¶10,16 and 18. Plaintiff alleges that as Brown’s judgment creditor, she has a right to enforce Brown’s contractual rights. *See Comp* at final paragraph. *Id.* at ¶¶ 16-21. Plaintiff seeks damages for the breach of contract “jointly and severally...” from State Farm and Brown. (A19).

On November 7, 2014, State Farm filed a Motion to Dismiss in Lieu of an Answer, on the basis that Plaintiff did not have standing to pursue claims for bad faith breach of contract, absent an assignment from Brown. (A70-A84).

On March 12, 2015, while the Motion to Dismiss was pending, Plaintiff filed a Motion to Amend the Complaint to include claims of an assignment from Brown. *See* certified docket entry no. 15. Plaintiff alleged to have obtained the assignment on

¹ State Farm was the insurer for Brown’s vehicle, which was involved in an accident with Plaintiff on October 12, 2007. The underlying case went to trial and produced a jury verdict of \$224,271.40. Brown’s policy limits for bodily injury were \$100,000.00 per individual.

March 3, 2015. (A98-A99). As part of the assignment agreement, Plaintiff agreed to collect no portion of her judgment against Brown. (A-201). On March 23, 2015, Plaintiff filed a new complaint with the same claims as original complaint and the addition of the assignment. (B4).

On March 27, 2015 State Farm filed a Response Opposing Plaintiff's Amendment to the Complaint as Futile, submitting that the proposed amendment was untimely, and further, that as the original complaint was untimely, thus any amendment to the original complaint would also be futile. Defendant also opposed the amendment as Plaintiff failed to demonstrate that the proposed amendment related back to the original complaint. (A100-A141).

On April 2, 2015 Commissioner Freud granted the amendment to the original complaint from the bench, as she could not determine that granting the amendment would be futile.(A-142).

On April 14, 2015 State Farm filed a Motion to Reconsider (A203). On April 27, 2015 State Farm filed its Answer to the complaint. Its first affirmative defense was that Plaintiff's claims were barred by the statute of limitations. (B11). On May 8, 2015 State Farm filed a Motion to Dismiss the March 23, 2015 complaint of Plaintiff, as it was untimely. (B18). On July 8, 2015 the Court consolidated the September 3, 2014 and March 23, 2015 complaints. (B27).

On July 22, 2015, the Honorable Judge Witham, of the Superior Court of Kent County issued an order granting State Farm's Motion to Dismiss. Exhibit A to Appellant's Opening Brief. The court held that Plaintiff's complaint should be dismissed as the original complaint was filed outside the three year time period pursuant to the statute of limitations. *Id.* Plaintiff's claims were dismissed. *Id.*

On August 13, 2015 Plaintiff filed an appeal of the Superior Court's decision and on September 28, 2015 Plaintiff filed her Opening Brief in support of her appeal. This is State Farm's Answering Brief.

SUMMARY OF ARGUMENT

I. Denied. In a motion to dismiss the Court was only permitted to consider the well pled allegations in the pleadings. Plaintiff did not assert a tort claim for “third party breach of contract” in her complaint, rather Plaintiff asserted a claim as a “judgment creditor” of Defendant Brown. Plaintiff’s complaint was properly dismissed by the Superior Court because the statute of limitations for the claims alleged in the complaint had passed. Further, even if Plaintiff had pled such a claim, Delaware law does not recognize the right of a third party to sue for bad faith breach of contract.

II. Denied. The Superior Court correctly applied the law when it found that Plaintiff’s claims were governed by 10 *Del. C.* § 8106. The Superior Court did not apply contract law, but applied the three year statute of limitations pursuant to 10 *Del. C.* § 8106, which both parties agree was the applicable statute. The Superior Court correctly determined that pursuant to 10 *Del. C.* § 8106 the statute begins to run on the date of the alleged harm, even if the Plaintiff was ignorant of the cause of action.

III. Denied. The Superior Court correctly applied the law when it held that the statute of limitations had run prior to Plaintiff’s filing of the original complaint on

September 3, 2014. Plaintiff alleged in the complaint that the case was one of bad faith breach of contract for failure to settle. The complaint filed by plaintiff on its face established the date of the alleged “wrong” to have occurred as of May 10, 2011, when Plaintiff’s settlement offer was not accepted. Even accepting in the alternative facts outside Plaintiff’s allegations in the pleadings, that the settlement offer was not fully rejected until June 9, 2011, the date of the expiration of Plaintiff’s time limit demand, Plaintiff’s complaint of September 3, 2014 would still have been untimely.

STATEMENT OF FACTS

This case stems from a personal injury action for a motor vehicle accident which occurred on October 12, 2007, *Christiana Connelly v. Ronald R. Brown, Jr.*, Case No. K-09C-10-016-WLW, involving Plaintiff and Brown. Brown was insured by State Farm, with a policy which carried bodily injury limits of \$100,000 per person and \$300,000 per occurrence. Plaintiff had been involved in prior motor vehicle accident involving a separate Defendant, Joanne Kingsland, and was simultaneously suing Kingsland for injuries from this prior accident which she characterized as “severe and serious”. (B28-B31). The Brown and Kingsland cases were consolidated.

On May 10, 2011, Plaintiff, through her counsel, made a time limit demand to Brown of \$35,000. (A27). Plaintiff stated that the demand expired on June 9, 2011. *Id.* This demand was not accepted.

The consolidated cases went to trial on October 24, 2011. Brown did not attend trial. On October 28, 2011, the jury awarded \$224,271.40 to Plaintiff for the claims against Brown. Following the jury award, Brown’s counsel filed three motions: a motion to amend or alter the judgment against him by remittitur, or in the alternative a motion for new trial; a motion for relief from judgment under Rule 60(b)(1) and (6); and a motion for stay or execution of the judgment under Rule 62(b). (A109-A123). These motions were denied by order of the Honorable James T. Vaughn on March 30,

2012. (A52-A65). State Farm paid Plaintiff a total of \$151,601.93 for injuries which Plaintiff and her counsel alleged to be worth \$35,000.00.(A67). There was a remaining judgment against Brown, on which no payments by Brown were made.

As of June 9, 2014, neither Plaintiff, nor Brown, had filed a complaint against State Farm. On September 3, 2014 Plaintiff filed a complaint in her own capacity, without any agreement or assignment from Brown, more than three years after the claimed breach of contract. (A13-A19). Plaintiff did not obtain an assignment of Brown's contractual rights. *Id.*

Plaintiff asserts claims for bad faith breach of contract and that "as a judgment creditor of Brown, [plaintiff] has a legal right to enforce any contractual rights that Defendant Brown has or is entitled to assert against Defendant State Farm for bad faith and wrongful adjustment of the Connelly claim". *Id.* at ¶¶ 16, 17, 18, 20 and 21. As to the alleged breach, Plaintiff's complaint on its face establishes the date of the alleged breach as May 10, 2011: "[i]n May of 2011, Defendant State Farm in bad faith, maliciously, and without any reasonable justification refused to pay \$35,000 from its \$100,000 policy" in response to Plaintiff's demand. *Id.* at ¶ 1.

State Farm moved to dismiss Plaintiff's claims, in lieu of an answer, as she failed to state a claim for which relief could be granted and lacked standing without a valid assignment of rights from Brown. (A70-A84). Plaintiff alleged to have

obtained the assignment on March 3, 2015.(A98). In exchange for the assignment of rights, Plaintiff agreed not to pursue the judgment against Brown. As the case presently stands Plaintiff has recovered \$151,601.93, and she has agreed not to pursue execution of her remaining judgment against Brown. (A-201).

ARGUMENT I

I. PLAINTIFF’S COMPLAINT DOES NOT ASSERT “THIRD PARTY BAD FAITH” CLAIMS AGAINST STATE FARM, BUT ASSERTS CLAIMS AS A “JUDGMENT CREDITOR” OF DEFENDANT BROWN. PLAINTIFF’S CLAIMS WERE PROPERLY DISMISSED AS THE STATUTE OF LIMITATIONS HAD PASSED. FURTHER, DELAWARE LAW DOES NOT RECOGNIZE THE RIGHT OF A THIRD PARTY TO BRING A CLAIM OF “BAD FAITH FAILURE TO SETTLE”.

(1) QUESTIONS PRESENTED

(A) Did the Superior Court properly apply the law when it dismissed Plaintiff’s complaint based on the allegations Plaintiff raised in the pleadings?

(B) Had Plaintiff stated a claim for third party bad faith failure to settle her claim, would Delaware law permit the third party bad faith failure to settle cause of action?

(2) STANDARD AND SCOPE OF REVIEW

The Supreme Court of Delaware reviews a motion to dismiss de novo, and examines whether the trial judge erred as a matter of law in formulating or applying legal principles. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). In reviewing the grant or denial of a motion to dismiss, the Court accepts as true all well-pled allegations in the complaint, and draws all reasonable inferences that logically flow from those allegations. *Id.* The Court does not, however, simply accept conclusory allegations unsupported by specific facts, nor does it draw unreasonable

inferences in the plaintiff's favor. *Id.*

If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). If the Plaintiff could not recover under any reasonable interpretation of facts, as alleged, a motion to dismiss is proper. *Id.*

(3) MERITS OF THE ARGUMENT

A. The Superior Court Properly Dismissed the Claims Asserted by Plaintiff in her complaint, pursuant to the statute of limitations.

When deciding a motion to dismiss all factual allegations of the complaint are accepted as true. *Krauss v. State Farm Mut. Auto. Ins. Co.*, 2004 Del. Super. LEXIS 127, at * 8 (Del. Super. Apr. 23, 2004) citing *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), aff'd 297 A.2d 37 (Del. 1972). Generally, matters outside the pleadings should not be considered in ruling on a motion to dismiss. *Guttman v. Jen-Hsun Huang*, 823 A.2d 492, 508 n.6 (Del. Ch. 2003). In deciding a motion to dismiss the court must determine whether the plaintiff may recover under any plausible circumstances capable of proof *under the complaint*. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)(emphasis added).

Plaintiff's complaint in the present case was filed on September 3, 2014. Plaintiff brought claims against Brown and State Farm, asserting standing as a judgment creditor of Brown. (A16 at ¶ 16). In her complaint, she claimed that she

had a right to assert any potential *contractual rights* of Brown against State Farm, through her position as Brown’s judgment creditor.² *Id.* at ¶ 16. She brought no cause of action for alleged third party bad faith failure to settle.

After Defendant State Farm opposed Plaintiff’s motion to amend the complaint, it became clear that the statute of limitations on such claims had expired.³ (A100). At this point, Plaintiff attempted to re-characterize her claims as “third party bad faith claims”, arguing that a different statute of limitations would apply if the court recognized this as a third party bad faith case. Plaintiff’s complaint, however, does not state such claims. (A278).

Delaware does not permit claims for third party bad faith breach of contract. *Hostetter v. Hartford Ins. Co.*, 1992 Del. Super. LEXIS 284 at * 18 (Del. Super. July 13, 1992); *Rowlands v. PHICO Ins. Co.*, 2000 U.S. Dist. LEXIS 22377 at *8 (D. Del. July 27, 2000). That matter, however, need not be addressed by the Court here, as the only issue that was decided by the Superior Court, and the only issue on appeal, is

² Plaintiff did not obtain a valid assignment, or assert the claims of Mr. Brown on his behalf within the statute of limitations. Although Plaintiff filed a motion to amend her original complaint to assert these claims, the amendment would have been futile as the original complaint was untimely. Further as Plaintiff originally chose to sue Brown to be jointly and severally liable with State Farm in her complaint, when Plaintiff obtained the assignment of Brown’s rights on March 3, 2015, and moved to amend the complaint to assert Browns’ rights as an assignee, it produced the odd result of Brown through an assignment, suing himself.

³State Farm contends that even if the statute of limitations had not expired, Plaintiff had no standing to bring the claim in the first place, as she had no valid assignment from a party to the contract.

whether the Superior Court properly dismissed Plaintiff's claims due to the expiration of the statute of limitation for the alleged wrong stated in Plaintiff's complaint. Although the Court below recognized there were substantial pleadings raising a number of issues, the Superior Court found that the key and sole issue before the Court was whether Plaintiff's complaint should be dismissed as it fell outside the three-year time period pursuant to the statute of limitations. Ex. A at 2. The Superior Court found that it did. *Id.* That is the key and sole issue for this Court to decide upon appeal.

Reviewing the allegations made in Plaintiff's complaint, she claims that State Farm breached its contract with Defendant Brown, and that the breach occurred on May 10, 2011. (A15 at ¶ 10). Plaintiff alleges that State Farm's bad faith breach was its failure to accept Plaintiff's May 10, 2011 offer of settlement. *Id.* Based on the date pled by Plaintiff in her complaint, the statute of limitations for Plaintiff's claims expired on May 10, 2014.⁴ Plaintiff's complaint filed on September 3, 2014 is still untimely. Based upon the claims which Plaintiff pled in her complaint, and utilizing the applicable statute of limitations, there was no reasonable set of facts under which Plaintiff could recover and Plaintiff's complaint was properly dismissed.

⁴If the court considered facts outside the pleadings, Plaintiff provided until June 9, 2011 for Defendant to accept this demand. Taking into account the actual expiration of Plaintiff's time limit, the statute of limitations on her claims for bad faith breach related to the State Farm's failure to accept that offer would have expired on June 9, 2014.

B. Delaware does not recognize the right of a third party to assert claims for bad faith breach of an insurance contract.

As discussed above, this issue need not be reached by the Court here, as Plaintiff does not plead third party bad faith failure to settle in her complaint. Should the Court, however, choose to analyze this issue, the Defendant will discuss its legal merits.

Plaintiff, who brought suit against Brown, along with State Farm, argues now that she has a right to bring a claim against State Farm for its handling of her suit, independent of an assignment of any contract rights of Brown, under a theory of third party bad faith failure to settle. Plaintiff asks the Court to create a new cause of action in Delaware: “[t]he facts of this case provided the opportunity for this Court to permit pursuit of such a cause of action.” Pl. Opening Brief at p.14. Plaintiff argues there is support for such a cause of action in other jurisdictions and urges the Court, to set aside current Delaware legal precedent prohibiting such claims, and allow her to bring such a claim. *Id.*

The well established legal precedent of Delaware law does not permit a third party to assert claims for bad faith in relation to an insurance contract. *Hostetter*, 1992 Del. Super. LEXIS 284 at * 18. *Rowlands* , 2000 U.S. Dist. LEXIS 22377 at *8 (D.

Del. July 27, 2000)⁵. As argued in State Farm’s original motion to dismiss in lieu of an answer, Brown would have been the only individual with standing to bring a timely claim for bad faith breach of contract in this instance.

An insurer has a fiduciary duty to its insured, but has an adversary relationship with the injured third party. *Hostetter*, 1992 Del. Super. LEXIS 284 at *20. An injured third party is not a third party beneficiary of a tortfeasor's insurance contract absent a showing of specific intent to create such a relationship. *Id.* at *18. An injured plaintiff, as a third party to the insurance contract “has no tort-based right of action because [the insurer] had no duty to negotiate in good faith with plaintiff, to use reasonable care in the investigation of her claim, to settle her claim promptly, or to refrain from ‘malicious defense’ of her claim”. *Id.* at * 30.

As was noted by the court in *Hostetter*, and contrary to Plaintiff’s claims in her brief, the majority of courts have held that an insurer owes no duty to third parties to negotiate settlements in good faith. See, e.g., *Hettwer v. Farmers Ins. Co.*, 118 Idaho 373, 374 (Idaho 1990); *Long v. McAllister*, 319 N.W.2d 256, 260 (Iowa 1982); *Bean v. Allstate Ins. Co.*, 403 A.2d 793, 795-796 (Md. 1979); *Johnson v. Beane*, 664 A.2d 96, 98-99 n.2-3 (Pa. 1995) ; *Kranzush v. Badger State Mut. Casualty Co.*, 103 Wis.

⁵Further, a judgment creditor of the insured may not proceed directly against an insurer on a claim of bad faith without an assignment of the insured's rights. *Rowlands v. Phico Ins. Co.*, 2000 U.S. Dist. LEXIS 22377 at * 15 (D. Del. July 27, 2000).

2d 56, 73 (Wis. 1981). “The special duties imposed on insurers with regard to their insureds are derived from the special fiduciary relationship between insurer and insured. No special justification exists for imposing greater duties on an insurer in dealing with an injured third party than in any other interaction between adversaries.” *Hostetter*, 1992 Del. Super. LEXIS 284 at * 20-21. A review of case law from other jurisdictions reveals Delaware is with the majority of jurisdictions in holding that a third party has no standing to assert a cause of action for bad faith breach of an insurance contract.⁶

The District Court of Delaware found that a third party cannot maintain claims for bad faith breach of an insurance contract because such claims are essentially an attempt to recover under a malicious defense theory. *Id.* “A claim for malicious defense is the mirror image of a claim for malicious prosecution”. *Rowlands*, 2000 U.S. Dist. LEXIS 22377 at *5. When an insurer has a contractual obligation to defend its insured in litigation, it automatically has an adversarial relationship with any third party that has filed suit. *Id.* at * 8. Just as a third party cannot compel the insured to negotiate and settle the loss, it is equally incapable of requiring the insurer to negotiate a favorable settlement or assume a more reasonable defensive strategy. *Id.* If this were not the rule, then an injured third party would enjoy far greater rights when

⁶ A more complete list of jurisdictional authority prohibiting third party bad faith breach of insurance contract actions is found at (B1-B3).

negotiating with the tortfeasor's insurer than when negotiating with the tortfeasor directly. *Id.* The District Court concluded, that because there is no special justification for imposing greater duties on an insurer in dealing with an injured third party than in any other interaction between adversaries, the courts which have squarely addressed this issue in the insurance context have all rejected the malicious defense claim or its equivalent. *Id.*

Plaintiff cites to *McNally* in order to support her claim that this cause of action is acceptable in Delaware. *McNally v. Nationwide*, 815 F.2d 254 (3rd Cir. 1987). The plaintiff's claim in *McNally* involved a first party breach of contract case, where the insured brought suit against his insurer for bad faith. *Id.* at 267. It provides no basis for Plaintiff's contentions that a third party would have standing to bring such claims. *Id.* Plaintiff also cites to *Gruwell v. Allstate Ins. Co.*, 988 A.2d 945 (Del. Super. Ct. 2009). Again, *Gruwell* involved an insured bringing suit against his insurance company. *Id.* *Gruwell* discussed an insured's legal basis for a bad faith failure to settle claim. *Id.* *Gruwell* did not suggest a third party had the right to sue the insurance company for bad faith failure to settle. *Id.*

Only in the initial brief does Plaintiff assert a cause of action for third party bad faith failure to settle as the basis of her claims. In her complaint Plaintiff alleges her cause of action was based on her status as a judgment creditor, and her authority to

enforce contracts held by Brown. The Superior Court analyzed the claims Plaintiff made in her complaint and determined the statute of limitations for those claims had run. Those claims were properly dismissed. Even if Plaintiff had pled third party bad faith claims, such claims would not state a claim for which relief could be granted because she would have no standing. State Farm would have moved to dismiss any such claim on this basis, and the established legal precedent cited above. Therefore, the Court should affirm the Superior Court's decision.

ARGUMENT II

II. THE SUPERIOR COURT CORRECTLY APPLIED THE LAW WHEN IT FOUND THAT PLAINTIFF’S CLAIMS WERE GOVERNED BY 10 *Del. C.* § 8106 AND THAT THE STATUTE OF LIMITATIONS ACCRUES AT THE TIME OF THE BREACH OR WRONGFUL ACT

(1) QUESTION PRESENTED

Did the Superior Court properly apply the law when it determined that 10 *Del. C.* § 8106 applied to Plaintiff’s claims, and that the statute began to accrue on the date of the alleged harm or wrong?

(2) STANDARD AND SCOPE OF REVIEW

The Supreme Court of Delaware reviews a motion to dismiss de novo, and examines whether the trial judge erred as a matter of law in formulating or applying legal principles. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). In reviewing the grant or denial of a motion to dismiss, the Court accepts as true all well-pled allegations in the complaint, and draws all reasonable inferences that logically flow from those allegations. *Id.* The Court does not, however, simply accept conclusory allegations unsupported by specific facts, nor does it draw unreasonable inferences in the plaintiff’s favor. *Id.*

If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). If the Plaintiff could not recover under any reasonable

interpretation of facts, as alleged, a motion to dismiss is proper. *Id.*

(3) MERITS OF THE ARGUMENT

A breach of contract claim related to an insurance contract is governed by 10 *Del. C.* § 8106 and subject to a 3 year statute of limitations. *Hostetter*, 1992 Del. Super. LEXIS 284, at *8 (Del. Super. July 13, 1992). The accrual of a cause action for breach of contract arises and the statute of limitations begins to run at the time of the breach, not when actual damage results or is ascertained. *Worrel v. Farmers Bank of Delaware*, 430 A.2d 469, 472 (Del. 1981).

In the context of tort, a tort injury unaccompanied by force is also governed by 10 *Del. C.* § 8106 and subject to a 3 year statute of limitations. The statute of limitations begins to run at the time that the cause of action accrues, which is when there has been a harmful act by a defendant. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007). The statute of limitations accrues at the time of the wrongful act, “even if the plaintiff is ignorant of the cause of action.” *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 Del. Ch. LEXIS 100 at *40 (Del. Ch. June 29, 2015).

Plaintiff argues that the Superior Court’s decision is invalid because it applied contract law, rather than tort law, to Plaintiff’s claims. State Farm contends that based on the specific allegations as pled by Plaintiff in her complaint, her claims sounded

in contract (as Plaintiff's sole claim to standing was rooted in enforcing Brown's contractual rights as his alleged judgment creditor)⁷.

The Superior Court in the case below, however, did not apply contract law. The Superior Court held that 10 *Del. C.* § 8106 governed Plaintiff's action. The Court, in keeping with well-settled Delaware law, found that the statute began to run *at the time of the wrongful act*, which was in this case the date Defendant denied Plaintiff's settlement demand. Ex. A at 5-6. The parties agree that the three year statute of limitations of 10 *Del. C.* § 8106 governs, which is exactly the statute which the Superior Court applied. Pl. Op. Brief at 24. The Plaintiff disagrees with the Superior Court about the date of accrual.

Whether the Court utilizes tort or contract theory makes no practical difference in this particular case. Plaintiff establishes both the nature and the date of the bad faith breach of contract, on the face of her complaint. The breach she alleges was State

⁷Defendant is cognizant that in the first party bad faith context, tort principles have been applied. In that case, the breach of good faith occurs when the insurer unreasonably refuses to pay benefits under the policy, and the tort is complete at that point. *Hostetter*, supra at * 10. The fact that damages may continue to accumulate after the point of unreasonable failure to pay does not toll the applicable statutes of limitations. *Id.*

Defendant's arguments related to the application of contract law were specific to Plaintiff's claims of standing as a judgment creditor with the right to enforce a contract. Plaintiff had no valid assignment to assert first party claims. Plaintiff alleged in her complaint that: "Plaintiff Connelly, as a judgment creditor of Defendant Brown, has a legal right to enforce any contractual rights that Defendant Brown has or is entitled to assert against State Farm for its bad faith and wrongful adjustment of the Connelly claim," that "Defendant State Farm has breached its contractual obligation....", and "Defendant State Farm breached its contractual duty and acted in bad faith...in adjusting and defending against Plaintiff Connelly's claim." Plaintiff's complaint at ¶ 16.

Farm's failure to settle in response to Plaintiff's May 10, 2011 demand. (B-10). The bad faith conduct she alleges is State Farm's failure to settle in response to Plaintiff's May 10, 2011 demand ("State Farm acted in bad faith...when it refused to settle Plaintiff Connelly's claim...") *Id.* at ¶17. Utilizing contract principles, the statute begins to run at the time of the alleged breach and utilizing tort principles, the statute begins to run at the time of the wrongful act, both of which plaintiff alleges to be failure to settle on May 10, 2011. In other words, the wrongful conduct Plaintiff alleges is the same, and thus the accrual date is the same.

The Superior Court applied the proper statute, 10 *Del.C.* § 8106, and found, in well keeping with Delaware legal precedent, that the accrual date begins on the date of the alleged harm. The only question remaining to the Superior Court was the date of the alleged harm.

ARGUMENT III

III. THE SUPERIOR COURT CORRECTLY APPLIED THE LAW WHEN IT HELD THAT THE STATUTE OF LIMITATIONS HAD RUN AS THE COMPLAINT FILED BY PLAINTIFF ON ITS FACE ESTABLISHES THE DATE OF THE ALLEGED BREACH AS MAY 10, 2011.

(1) **QUESTION PRESENTED**

Did the Superior Court properly apply the law when it determined that the statute of limitations for Plaintiff's claims had passed, when Plaintiff alleges in her complaint that the harm took place on May 10, 2011 and Plaintiff did not file a complaint until September 3, 2014?

(2) **STANDARD AND SCOPE OF REVIEW**

The Supreme Court of Delaware reviews a motion to dismiss de novo, and examines whether the trial judge erred as a matter of law in formulating or applying legal principles. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). In reviewing the grant or denial of a motion to dismiss, the Court accepts as true all well-pled allegations in the complaint, and draws all reasonable inferences that logically flow from those allegations. *Id.* The Court does not, however, simply accept conclusory allegations unsupported by specific facts, nor does it draw unreasonable inferences in the plaintiff's favor. *Id.*

If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied. *Spence v. Funk*,

396 A.2d 967, 968 (Del. 1978). If the Plaintiff could not recover under any reasonable interpretation of facts, as alleged, a motion to dismiss is proper. *Id.*

(3) MERITS OF THE ARGUMENT

As was found by the Superior Court, the Court here must first determine when the injury occurred, as the date of the injury establishes the date that the statute of limitations began to run. Ex. A to Appellant's Opening Brief at p. 6. As stated by the Superior Court, "[i]t is Plaintiff's own words that tell us when the statute of limitations began to run." *Id.* at p. 7.

Plaintiff, in her complaint, explicitly provided when she believed she was aggrieved: "[i]n May of 2011, Defendant State Farm in bad faith, maliciously, and without any reasonable justification refused to pay \$35,000 from its \$100,000 policy coverage limits to fully satisfy Plaintiff's claim". (A17 at ¶18). *See also*, Ex. A to Appellant's Opening Brief at p. 6. Plaintiff stated this again when she stated: "Plaintiff Connelly offered to settle her lawsuit against Defendant Brown for a payment of Thirty-five Thousand Dollars (\$35,000), prior to trial by letter of May 10, 2011 from Plaintiff's counsel to Defendant Brown's counsel. . . Defendant State Farm refused to accept the Plaintiff's settlement offer of May 10, 2011...". *Id.* at ¶ 10.

Plaintiff repeated this for a third time when she stated: "[d]efendant State Farm acted in bad faith and without any reasonable justification, when it refused to settle

Plaintiff Connelly's claim against its insured. . .". *Id.* at ¶ 18. She repeated it yet again when she stated: "[d]efendant State Farm acted in bad faith and without any reasonable justification, in failing to accept Plaintiff's settlement offer. . ." *Id.* at ¶ 19.⁸

Plaintiff now argues to the Supreme Court that rather than the date of the alleged wrong, which she states multiple times in the complaint, she believes that the statute of limitations began to run on April 29, 2012, which was when the date of any sort of appeal expired. This new assertion is intertwined with Plaintiff's attempt to assert third party bad faith failure to settle, as she argues that if the Court accepts her claim as a viable "third party excess verdict bad faith cause of action..." the statute of limitations "should accrue at the time the excess verdict becomes final and enforceable". As discussed in detail above, there is no precedent for a third party failure to settle, and therefore no separate accrual date should be considered on that basis.

The Superior Court, when it determined the accrual date, utilized *Hostetter*, which analyzed a claim of bad faith failure to settle. 1992 Del. Super. LEXIS 284 at * 19. The *Hostetter* court held that at the moment of a plaintiff's knowledge of a possible breach, the statute began to run. *Id.* at *11. In the bad faith context, a breach

⁸ Although Plaintiff claims that State Farm acted in bad faith to her by not paying the demand of \$35,00.00, as she is not asserting the claims of the alleged assignee Brown, than what are her damages? She received \$151, 601.93 for damages which demanded payment of \$35,000.00.

of good faith occurs when the insurer unreasonably refuses to pay benefits under the policy, and the tort is complete at that point. *Id.* at * 10. The fact that damages may continue to accumulate after the point of unreasonable failure to pay does not toll the applicable statutes of limitations. *Id.* “Viewing the record in the light most favorable to the plaintiff, the Court finds [. . .] plaintiff was sufficiently aware of [Defendant’s] position on coverage so as to put her on notice of the possible existence of her various causes of action”. *Id.* at * 11.

Plaintiff claimed multiple times in her complaint that State Farm’s “breach”, “bad faith”, and “unreasonable conduct” in this case was failure to accept the settlement demand of \$35,000 of May 10, 2011. (A13-20 at ¶¶10, 18-19). As Plaintiff established both the nature of the alleged breach and wrong she felt she sustained, and provided the date of that wrong in her complaint, the Superior Court correctly utilized the date Plaintiff herself provided when it determined the date for the motion to dismiss. Plaintiff alleged she was wronged on May 10, 2011. She filed suit on September 3, 2014. As plaintiff did not file her claims within the three years prescribed by 10 *Del. C.* § 8106 her complaint was untimely and properly dismissed.

CONCLUSION

The Superior Court correctly applied the law when it dismissed Plaintiff's claims as untimely. Plaintiff filed her complaint on September 3, 2014, alleging that as a judgment creditor she was entitled to enforce bad faith breach of contract claims against State Farm and Brown. Plaintiff established the date of the alleged breach or wrongful act as May 10, 2011, the date which State Farm declined Plaintiff's settlement offer of \$35,000. Even if the Court considered facts outside Plaintiff's allegations in the pleadings, such a claim would have expired on June 9, 2014 (three years from the date that the time limit demand expired).

As Plaintiff established on the face of her complaint that State Farm's alleged failure to settle was the wrongful act constituting the bad faith breach of contract, the Court properly utilized this date as the date of accrual for the purposes of the statute of limitations. The statute of limitations on any of Plaintiff's claims expired on May 10, 2014 (or June 9, 2014 at the latest). None of Plaintiff's claims in the present matter were brought before that date.

As such, the Superior Court correctly determined that Plaintiff's claims must be dismissed as untimely, and the Supreme Court should affirm the Superior Court decision.

Respectfully Submitted,

CASARINO CHRISTMAN SHALK
RANSOM & DOSS, P.A.

/s/ Colin M. Shalk

COLIN M. SHALK, ESQ.

Del. Bar ID No. 99

CATHERINE M. CRAMER ESQ.

Del. Bar ID No. 6000

405 North King Street, Suite 300

P.O. Box 1276

Wilmington , DE 19899-1276

Telephone: (302)594-4500

Fax: (302)594-4509

Attorneys for Appellee-Defendant Below

State Farm Mutual Automobile

Insurance Company

Dated: October 28, 2015