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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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INTRODUCTION

In its answering brief, State Farm offers a quote from Churchill, assailing the veracity of his predecessor, Prime Minister Stanley Baldwin. Few wartime statesmen are more celebrated than Churchill, and perhaps none more quotable. But Churchill was also a politician, and quoting him on the subject of truth can be a tricky business. For example, Wikipedia's (heavily footnoted) entry on Churchill includes this information:

> Churchill opposed Gandhi's peaceful disobedience revolt and the Indian Independence movement in the 1930s, arguing that the Round Table Conference [bringing together British and Indian delegates to discuss the prospect of Indian home rule] "was a frightful prospect." Later reports indicate that Churchill favoured letting Gandhi die if he went on a hunger strike.
>
> ***
>
> Churchill permanently broke with Stanley Baldwin over Indian independence and never again held any office while Baldwin was prime minister. *** Another source of controversy about Churchill's attitude towards Indian affairs arises over what some historians term the Indian "nationalist approach" to the Bengal famine of 1943, which has sought to place significant blame on Churchill's wartime government for the excessive mortality of up to three million people. ***
> In response to an urgent request by the Secretary of State for India, Leo Amery, and Viceroy of India, Wavell, to release food stocks for India, Churchill responded with a telegram to Wavell asking, if food was so scarce, "why Gandhi hadn't died yet."[1]

[1] Http://en.wikipedia.org/wiki/Churchill (last visited August 20, 2013).

All of which tends to suggest that perhaps Prime Minister Baldwin was not such a bad sort after all.

As to State Farm's claim of "manufactured facts," the Court may wish to consider the following facts, each of which appeared in Mr. Price's opening brief:

- As an elevator mechanic Mr. Price enjoyed a healthy income at the time of his accident, earning roughly $70,000 to $100,000 annually.
- Mr. Price's employment situation and approximate annual earnings were readily ascertainable by State Farm through investigation.
- As a result of the injuries suffered by Mr. Price in the accident, he is unable to return to his former employment as an elevator mechanic.
- Mr. Price's education, skills and experience do not qualify him for any livelihood that will ever produce the level of income he previously enjoyed.
- Three established Delaware personal injury mediators have opined that Mr. Price's injury was worth from $75,000 to $150,000 ***exclusive of his claim for lost future earnings***.
- Nowhere did the State Farm policy alert Mr. Price that lost future earnings are part of the policy's UM coverage.

Not one of these facts was contested in State Farm's answering brief. State Farm does not deny that prior to the accident, Mr. Price was a career elevator mechanic with a healthy annual income. It does not contest the expert testimony of Mr. Price's orthopedic surgeon, Dr. Leo Raisis, establishing that the accident has forever limited Mr. Price to sedentary duty. *See* B149-50, B174 (Raisis at 30-31, 55). It does not deny that the mediators polled by Mr. Price's insurance expert all valued a total knee replacement in the $75,000 to $150,000 range for pain and suffering only, without regard to lost future earnings. It does not claim that the policy's UM wording makes any mention of lost future earnings. Instead, it argues that all these facts -- indeed, virtually every fact favorable to Mr. Price -- should simply be ignored.

These, then, are not "manufactured" facts, but uncontested facts. A reasonable juror could thus conclude that State Farm knew that the claim was worth far more than the policy's $100,000 UM limit, but seized on the circumstances to claim a $50,000 windfall at its insured's expense. Such conduct cannot properly support a claim of voluntary and informed settlement.[2]

[2] In a litigation setting, the settling of disputes is not a matter of gamesmanship. As this Court noted in a case regarding a contested release, "Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process." *E.I. duPont de Nemours and Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 2000). In a society that bemoans its over-litigiousness, an insured should not be given less protection from sharp practice simply because he dealt with his insurer outside the courthouse, and without the benefit of counsel.

ARGUMENT

I. STATE FARM HAS NO ANSWER TO THE CONTROLLING LEGAL STANDARDS ON IMPLIED-IN-FACT CONTRACTS

The legal standard for implied-in-fact contracts is front and center on this appeal. The Superior Court found as a matter of law that Mr. Price's "conduct manifested his acceptance of [State Farm's] settlement offer." Memorandum Opinion at *6.[3] State Farm asserts that Mr. Price "unquestionably accepted the $50,000 settlement based upon his conduct . . . ." Answering brief at 3. Thus, both the trial court and State Farm rely solely on Mr. Price's conduct, as opposed to any words of acceptance, in finding the existence of a "settlement contract."

As Mr. Price established in his opening brief, a contract inferred from a party's conduct is an implied-in-fact contract. *Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1098 (Del. 2002) (citations omitted). State Farm does not dispute (for how could it dispute?) that "no implied-in-fact contract can be found when, as here, the parties have an express agreement dealing with the same subject." *In re Penn Central Transp. Co.*, 831 F.2d 1221, 1229 (3d Cir. 1987) (citations omitted). Nor does it dispute that an implied-in-fact contract must be "entirely unrelated to the express contract." *ITT Fed. Support Serv. v. United States*, 531 F.2d 522, 528 n.12 (Ct. Cl. 1976). Unable to overcome these controlling legal standards, State Farm

[3] As in Mr. Price's opening brief, we refer to the order on appeal as the "Memorandum Opinion." A copy of the Memorandum Opinion appeared as Exhibit B to the opening brief.

argues (first) that they should simply be ignored, and (second) that they will produce absurd results when applied to insurance settlements.

More specifically, State Farm contends that Mr. Price's argument on appeal "is different than his argument in the trial court," and should therefore be ignored. Answering brief at 16. Yet even State Farm must concede that Mr. Price has argued throughout that nothing he did or said ever gave rise to a "settlement contract." To say (as Mr. Price said below) that no meeting of the minds occurred is to categorically rule out the existence of an implied-in-fact contract. Further, since State Farm argued "acceptance by conduct" as part of its summary judgment motion below, and since Mr. Price squarely opposed that motion, the implied-in-fact issue is not new to the case -- regardless of whether State Farm employed the relevant term of art in its motion papers.

State Farm next argues that since insurance settlements always presuppose the existence of a prior (written) insurance contract, Mr. Price's analysis would preclude any insurance settlement that is not in writing and signed by both sides. To be sure, any responsible insurance operation would require signed, written settlement agreements as a matter of practice. Neither in the trial court nor in this Court has State Farm ever explained why no such settlement agreement exists here. But Mr. Price's position deals only with contracts created ***by conduct***. Nowhere does Mr. Price claim that parties can never contract without a signed writing; for

clearly an offeree can create a contract simply by speaking words of acceptance to an offeror. Mr. Bell's testimony, however, does not claim that words of acceptance were ever spoken; and (as shown above) State Farm relies, not on any oral settlement contract, but on a claim of acceptance by conduct. In short, Mr. Price's arguments work no change on existing law; and there is nothing anomalous about applying existing law (including the controlling standards for implied-in-fact contracts) to insurance settlements.

The trial court thus erred in finding that Mr. Price's conduct created a settlement contract. At the time of that conduct, State Farm and Mr. Price were already parties to an express written contract requiring payment for covered UM claims. The alleged settlement contract is by no means "entirely unrelated to the express contract," *ITT Fed. Support Serv.*, 531 F.2d at 528 n.12; and for this reason Mr. Price's conduct could not possibly give rise to an implied agreement.

II. EVEN IF ACCEPTANCE -BY-CONDUCT COULD PROPERLY BE CONSIDERED, STATE FARM'S CLAIM OF ACCEPTANCE BY CONDUCT IS SUBJECT TO GENUINE ISSUES OF FACT

As State Farm acknowledges, Mr. Price testified that he did not regard the company's $50,000 offer as full and final payment. A192 (Price at 71). State Farm criticizes Mr. Price, however, for not asking whether more money was on its way. Answering brief at 11. Yet State Farm cites no authority to suggest that policyholders are subject to a "duty to implore," and no such duty exists. Indeed, as noted in Mr. Price's opening brief, Delaware law expressly permits partial payment of insurance proceeds on a without-prejudice basis for both sides. *See* 10 *Del. C.* § 4317 (providing that "[n]o advance payment or partial payment of damages made by any person or his or her insurer as an accommodation to an insured person . . . because of an injury . . . shall be construed as . . . an admission of liability . . . or the insurer's recognition of such liability . . . .") As Mr. Bell confirmed, State Farm routinely makes such advance payments. A56 (Bell at 52).

State Farm asks, *If no settlement was reached on May 18, 2010, then what did happen?* Mr. Price did not move for summary judgment, and the burden of proving what happened lies, in the first instance, with State Farm. But Mr. Price's position is no secret: on May 18, 2010, Mr. Bell, having taken well over a year to conduct a cursory and deficient investigation, tried (unsuccessfully) to get Mr. Price to speak words of acceptance in response to a lowball settlement offer.

Finding himself in serious financial straits, Mr. Price was naturally pleased at the prospect of receiving funds from State Farm; but he spoke no words of acceptance at any time. When he thereafter cashed State Farm's check, he acted in a manner consistent with section 4317 (the "partial payment" statute); but his conduct did not create a contract, because 1) the parties already had an express written contract on the same subject matter, and 2) the circumstances under which he cashed the check did not signal an acceptance.

State Farm challenges this account, saying that "nothing in the record" suggests that Mr. Price was under financial stress in May 2010. Answering brief at 18. In fact, Mr. Price's deposition offers ample proof of his money troubles:

> Q. And you said, It was about time things got moving. What did you expect to get moving?
>
> A. Something. I mean, I -- I mean, I didn't get nothing. I had a mortgage to pay. I am putting my son through college, you know.
>
> Q. Well, I mean --
>
> A. My whole entire life got turned upsidedown (*sic*).
>
> ***
>
> Q. So, why did you deposit the check, by the way?
>
> A. Because I needed the money.
>
> ***

> Q. *** Why did you not tell the person offering you the money that [the claim] was worth more?
>
> A. I just got excited, you know. It was like, hey, I can pay my bills; I can pay my son's college tuition this month; I can go buy food, you know.

A188, A205, A208 (Price at 67, 84, 87). A reasonable jury could interpret this testimony to mean what it (obviously) says in substance: that after waiting 15 months for his insurance company to pay something on his admittedly covered claim, Mr. Price was in desperate need of funds. State Farm may disagree, but such disagreements are for juries to decide.

III. BECAUSE STATE FARM FILED NO CROSS-APPEAL, ITS "ACCORD AND SATISFACTION" DEFENSE HAS BEEN FINALLY ADJUDICATED

The Superior Court properly found that the first element of accord and satisfaction -- the existence of a bona fide dispute as to the amount owed, based on mutual good faith -- was lacking, so that no accord and satisfaction existed as a matter of law.[4] Curiously, State Farm insists that though "the Superior Court concluded that there was not an accord and satisfaction, this [issue] has been preserved on appeal." Answering brief at 3. Yet State Farm filed no cross-appeal, and it fails to explain how the issue was preserved.

State Farm accuses Mr. Price of misstating the trial court's holding, saying that while "[t]he trial court ruled that there was no bona fide dispute of a debt," there was "simply no discussion by the court below of any lack of mutual good faith." Answering brief at 20. To be clear, the trial court discussed this issue under a heading titled, "There was no Bona Fide Disputed Debt to Support an Accord and Satisfaction." Memorandum Opinion at *8. Within the same section of the

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

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

Acierno, 693 A.2d at 1068.

Memorandum Opinion, the trial court concluded "that there was never a *bona fide* dispute regarding the amount owed." *Id.* The term "bona fide" means, of course, "good faith." The trial court thus found, as a matter of law, that prior to May 18, 2010 no good-faith dispute ever existed between the parties regarding the amount owed by State Farm to Mr. Price. Mr. Price stated that holding accurately in his opening brief, and he has done so again here.

IV. WHETHER STATE FARM LOWBALLED MR. PRICE IS A QUESTION OF FACT FOR THE JURY

As Mr. Price demonstrated in his opening brief, a reasonable juror could conclude that by purporting to settle Mr. Price's UM claim for just $50,000 -- entirely ignoring his seven-figure claim for lost future earnings -- State Farm breached the implied covenant of good faith and fair dealing. State Farm's arguments to the contrary, which we address below, are unavailing.

- *The claim for lost earnings did not exist until Mr. Price's attorneys secured an expert report from an economist.* Were this Court to hold that an insurance claim (or component thereof) is not legally cognizable until the claimant retains an expert to support the claim in litigation -- a wild proposition for which State Farm cites no authority -- then no insurance claim could ever be resolved outside the courthouse. But State Farm does not dispute that Mr. Price raised the issue of lost future earnings months before his knee replacement surgery even took place. *See* A35, A39 (Mr. Price advises State Farm that he is "looking for wages after his surgery," and that "he [is] concerned over loss of work if he has surgery.") Moreover, the record is devoid of evidence that State Farm conducted any investigation of the prospect of lost future earnings. Indeed, State Farm does not claim to have conducted such an investigation, even though lost future earnings are a fundamental component of UM coverage. It is thus not the case that the

claim for lost future earnings "did not exist" in May 2010; State Farm simply ignored the claim, both then and after.

- *When asked on his PIP application, "Did you lose wages or salary as a result of your injury?", Mr. Price checked off "No."* This is a bit of misdirection. The PIP application's query was stated in the past tense; and since Mr. Price was temporarily laid off at the time of the accident, his (truthful) negative response sheds no light on the problem of lost ***future*** earnings. In fact, Mr. Price advised State Farm in February 2009 (more than a year before its $50,000 payment) that he was subject to periodic layoffs. *See* A35 (State Farm activity log note, noting that Mr. Price "has been laid off most of 08[.]") Mr. Price's deposition testimony confirmed that fact:

> Q. I understand. Now, it appears to me, from looking at some of your tax returns, that things started to slow down somewhere around 2007, 2008?
>
> A. Right.
>
> Q. And from your perspective, what was the problem?
>
> A. It was the economy, that's when it started to tank, and buildings were putting off work on the elevators, you know, air-conditioning, you know, they were cutting back. You know, and it still goes on today, that there is just no money for it.

A142-43 (Price at 21-22).

- *Though State Farm's PIP adjuster advised Mr. Price that documentary support would be needed in order to qualify for lost earnings under PIP, Mr. Price could not state definitively whether he ever provided such documentary support.* Again, lost wages are payable under PIP only ***after*** the loss is suffered. *See* 21 *Del. C.* § 2118(a)(2)(a) (requiring payment of PIP benefits, including net lost earnings, only as the expense is "incurred"). The PIP adjuster's inquiry thus had nothing to do with future earnings under the policy's separate UM coverage. As to the latter, State Farm had merely to contact Dr. Raisis to learn the doctor's conclusions regarding Mr. Price's prospects for future employment:

> Q. And did you say, you can say repeated or amplify, what did you think he could do as of September 2, 2009?
>
> A. He could do a sitting or sedentary occupation.
>
> ***
>
> The patient, as far as the knee replacement, the patient could work a sedentary occupation. *** So, again, to my knowledge, he had a significant [unrelated] medical problem with his left ankle, low back, both of which I did not treat, which makes him more difficult to be employed. With regard to the right knee, he was capable of a sedentary occupation.
>
> ***
>
> Q. Have you expressed an opinion as to whether the patient has had any permanent impairments into the future?

> A. He has a permanent impairment by virtue of having the knee replacement, yes.

B149-50, B174 (Raisis at 30-31, 55). Dr. Raisis also explained that employment as an elevator mechanic is far from sedentary: "Elevator mechanics normally work in cramped positions, lift heavy equipment at awkward angles." B174 (Raisis at 55). This means that in September 2009 (eight months before State Farm's $50,000 payment) State Farm could have determined ***simply by contacting Mr. Price's doctor*** that 1) Mr. Price had suffered a permanent impairment to his right knee, 2) this impairment would forever leave him unable to return to his former (fairly lucrative) job, and 3) henceforward, the only jobs available to him would be in the nature of sedentary employment (at dramatically lower compensation).

- *Mr. Price would require insurance companies to consult jury verdicts or Delaware lawyers before ever making a settlement offer.* Mr. Price has argued no such requirement. He does contend, however, that payment for a covered claim should be reasonable in amount, and not simply an arbitrary number. Still less should it be a number designed only to serve the insurance company's pecuniary interest. As a practical matter, then, insurance companies will be guided by their special expertise and vast experience in claims handling; and this base of experience naturally includes

past experience with jury verdicts and prior settlements in similar cases. When an offer is roughly 4% of the value established by the personal injury marketplace, that is compelling evidence of unreasonableness.

- *When it comes to explaining the basis for an offer, how far does the insurer's obligation go?* The answer to this question is provided by statute. Delaware's unfair claims practices statute provides that "[n]o person shall engage in this State in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." 18 *Del. C.* §2303. Under section 2304 of the statute, an insurer engages in an unfair practice by "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement . . . ." 18 *Del. C.* §2304(16)(n). The undisputed record shows that Mr. Bell failed to provide Mr. Price with a reasonable explanation of the basis for its $50,000 offer "in relation to the facts or applicable law." *See* A61 (Bell at 70) (Mr. Bell admits that he never explained to Mr. Price why State Farm offered $50,000 rather than the $100,000 policy limit). Indeed, State Farm has never explained the basis for its $50,000 offer -- not during its May 2010 phone call with Mr. Price, not in the trial court, and not in this Court.

- *A covered UM claim does not automatically trigger an obligation to pay the full UM limits.* Mr. Price does not contend otherwise. However, he does contend that Delaware law requires that fair value be paid, and lowballing be avoided. *See, e.g.*, *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1366 (Del. 1996) (the implied duty of good faith and fair dealing "would create liability on the part of [an insurer] for unreasonable delay in recognizing [a] rightful claim.") *See also* 18 *Del. C.* §2304(16)(f) (insurer engages in unfair practice by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear . . . .")
- *There is no particular type of surgery that automatically triggers a policy limits offer.* Mr. Price agrees that each claim must be evaluated on its own unique facts. But the critical facts here are undisputed. First, State Farm accepted coverage for the claim. Second, it never disputed the reasonableness or medical necessity of any treatment. Third, it knew, or could have known (simply by phoning Dr. Raisis) that Mr. Price would henceforth be limited to sedentary employment. It had plenty of time, and more than enough resources, to investigate both the existence and value of Mr. Price's claim for lost future earnings. The reasonableness of State Farm's conduct should therefore have been left for the jury.

- *Mr. Price's insurance expert opined 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."* This is a mischaracterization of Ms. Saville's opinion, because her $75,000 valuation was exclusive of lost future earnings. Notwithstanding, Mr. Murphy's view that a total knee replacement alone (exclusive of special damages) is worth more than $75,000 simply aligns him with former Superior Court Judge Bifferato, former Superior Court Commissioner White, and the various other respondents who all assessed that value at $100,000 or more.
- *Mr. Price's counsel spoke to the survey respondents in advance.* This theme contradicts State Farm's claim that Ms. Saville's valuation favors State Farm; for if counsel cherry-picked valuations that he regarded as favorable to Mr. Price, why was Ms. Saville's valuation included? In any event, State Farm's criticism goes to the weight, not the admissibility, of the survey.
- *Prior to May 2012 Mr. Price never contended that State Farm did anything wrong.* As Mr. Price demonstrated in his opening brief, his attorneys alerted Mr. Bell to the dispute prior to filing the original complaint. A90-91. The complaint itself was filed in July 2011. Both events placed State Farm on notice that it had done something wrong.

V. WHETHER STATE FARM ENGAGED IN UNREASONABLE DELAY IS A QUESTION OF FACT FOR THE JURY

On the issue of delay, State Farm says that it is "typical" for plaintiffs "to wait a year post-surgery to see the results." Answering brief at 19. There are several problems with this argument. First, it is accompanied by no citation to authority, medical or otherwise. Second, what State Farm regards as "typical" is by definition not universal; and as insurers are fond of reminding us, each claim must be evaluated on its own facts. For this Court to rule, as a matter of law, that an insurer may always delay payment by at least one year post-surgery would not only be arbitrary, but would risk gross injustice in cases of severe injury.[5]

Whether and how long an insurer may properly delay payment of an admittedly covered claim is highly fact-specific. That is why the issue of delay here -- whether State Farm should have tendered payment no later than October 2009, when it either knew or (through reasonable investigation) should have known that Mr. Price's future earning capacity had diminished dramatically, is a question for the jury.

State Farm next says that unlike PIP claims, covered UM claims are not subject to a statutory payment deadline. While this is true, Delaware law requires

[5] Suppose, for example, that a motorist with $15,000 in UM limits suffers a covered accident, and as a result suffers three amputations. Would the insurer be exempt from liability for unreasonable delay if it waited a year post-surgery before tendering the $15,000?

that all covered claims be paid within a reasonable time. *See Pierce*, 671 A.2d at 1366; 18 *Del. C.* §2304(16)(f).

Finally, State Farm says that Mr. Price's amended complaint never pled unreasonable delay. In fact, Count III of the amended complaint was titled "Bad-Faith Breach of Contract" -- a cause of action defined by unreasonable delay or denial of coverage. *Cf. VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611-12 (Del. 2003) (pleadings in contract must be liberally construed).

CONCLUSION

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

Respectfully submitted,

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