1967

Edward Wilson Ammerman, by His Guardian Ad Litem, La Verne Bruce Ammerman, and Eddie Soliz v. Farmers Insurance Exchange : Appellant's Brief

Utah Supreme Court

Hanson & Garrett; Attorneys for Defendant and Appellant

IN THE SUPREME COU
of the
STATE OF UTAH

EDWARD WILSON AMMERMAN, by his Guardian ad Litem, LaVer
Bruce Ammerman, and EDDIE
SOLIZ,

Plaintiffs and Respond

vs.

FARMERS INSURANCE
EXCHANGE,

Defendant and A

APPELLANT'S B

Appeal from the J
District Court
Honorable A.

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IN THE SUPREME COURT
of the
STATE OF UTAH

EDWARD WILSON AMMERMAN, by his Guardian ad Litem, LaVerne Bruce Ammerman, and EDDIE SOLIZ,
Plaintiffs and Respondents,
vs.
FARMERS INSURANCE EXCHANGE,
Defendant and Appellant.

No. 10,574

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action brought by Eddie Soliz, the judgment creditor, and Edward Wilson Ammerman, the judgment debtor, in a previous action against the insurer, Farmers Insurance Exchange, to recover the amount of money by which a judgment secured by Eddie Soliz against Edward Wilson Ammerman exceeds the policy limits of a policy of insurance issued by the defendant and appellant herein, upon the theory that the defendant and appellant herein was guilty of bad faith in failing to settle the lawsuit brought by Soliz against Ammerman for $9,000.00 prior to the trial of that action or for $10,000.00 at the time of the trial.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury. From a verdict and judgment in favor of both plaintiffs the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and judgment in its favor as a matter of law or, that failing, a new trial.

STATEMENT OF FACTS

The case out of which this case grows, Soliz v. Ammerman, was previously before this court. See *Soliz v. Ammerman*, 16 Utah (2d) 11, 395 Pac. (2d) 25. In order to understand the issues in this case a brief review of some of the facts of that action is necessary.

On March 21, 1962 at about 8:15 A.M. the plaintiffs herein were involved in an automobile accident at the intersection of Second West Street and 200 North Street in Salt Lake City, Utah. Plaintiff Soliz was examined shortly after that accident by Dr. David E. Smith, Jr., who found no injuries other than minor cuts and bruises (Soliz Dep. 13). Dr. Smith had treated Soliz on two occasions prior to the accident for complaints of low back pain and numbness in his right arm. This prior treatment was not known to defendant until it was brought out in testimony during the trial (R. 189, 214). Prior to the trial Soliz in his deposition, taken by the defendant Farmers, had not disclosed this prior trouble when

asked if he had had prior illnesses (R. 213). Subsequent to the accident Soliz complained of low back pain and neck pain to Dr. Smith, who thereafter referred him to Dr. Irwin F. Winters for x-rays. Dr. Winters' report indicated no abnormality. Soliz was then referred to Dr. D. C. Bernson, a neurosurgeon, who made his first examination on May 23, 1962 and reported Soliz' systems to be all within normal limits and found him well developed, nourished, healthy and not in any acute distress nor suffering from illness (Exh 7). Dr. Bernson examined the x-rays taken by Dr. Winters and had additional x-rays taken by Dr. Winters, who reported them as being normal. Dr. Bernson agreed that the x-rays were essentially normal, but did feel some slight increase in motion of the 5th and 6th cervical vertebrae was indicated by the last x-rays (Exh. 7). Soliz was examined again on June 20, 1962 and August 4, 1962, during which time Dr. Bernson noted a change in grip strength and reflexes, but could find no other changes in Soliz' condition (Exh. 7). Soliz was then advised by Dr. Bernson to enter the hospital for a discogram, which he did on September 24, 1962. Based upon his clinical observations and the results of the discogram (which Dr. Bernson notes was administered with insufficient dye) he concluded that Soliz had two ruptured cervical discs. However, he did not recommend surgery since both he and Soliz felt the symptoms were not severe enough to warrant surgery (Exh. 7). There was no further evidence of

further treatment by Dr. Bernson from that time up until the trial, one year later (R. 210).

On September 11, 1962 the plaintiff Soliz filed a Complaint naming plaintiff Edward Wilson Ammerman as one of the defendants for recovery in the amount of $30,000.00 general damages and $1,000.00 special damages. The defendant Farmers Insurance Exchange employed the law firm of Hanson & Garrett to defend the action under the contract of insurance (R. 198.) On January 18, 1963 the defendant notified Ammerman that he had the right to employ his own counsel to be associated with Farmers' counsel in the defense of the suit (Exh. 12). Ammerman thereafter employed Mr. Reed Richards, an attorney practicing in Salt Lake City, to represent him in the action (R. 185). On September 27, 1962 Mr. Richards notified Farmers of the Complaint and expressed a desire that the Ammermans would not have to pay on any judgment (Exh. 4). And on September 16, 1963 Mr. Richards made demand upon Farmers to settle the case for $10,000.00 (Exh. 5). However, Mr. Richards had indicated agreement with Farmers' counsel that the verdict would be around $2,500.00 to $5,000.00 (R. 229). At no time did he express an opinion as to the specific settlement value of the case. At the time the case was submitted to the jury Mr. Richards expressed satisfaction at the defense conducted by Farmers and rendered the opinion that he did not think there was any possibility of an excess verdict (R. 196A).

On April 24, 1963 the plaintiff Soliz mailed to the defendants' counsel Answers To Interrogatories which contained a statement of the medical expenses incurred to that date and the amount of time off work, all of which amounted to special damages of approximately $450.00 (R. 167). Also submitted pursuant to interrogatory was the medical report submitted by Dr. Bernson on December 8, 1962 (Exh. 7, R. 319). Thereafter on April 29, 1963 the defendants' counsel took the deposition of Soliz (Exh. 14).

Based upon the information acquired to that date, defendants' counsel on April 5, 1963 advised that liability was probable and recommended as a preliminary settlement value the amount of $6,-000.00, it being a compromise between a $8,500.00 value if Bernson were correct and a $3,500.00 value if he were not correct (Exh. 3). However, the evaluation was contingent upon what would be revealed by the independent medical examination which at that time had not been made (Exh. 3). Pursuant to the information and recommendation received from its counsel, the defendant Farmers put a value of $7,500.00 on the claim as it presently stood without a medical examination by another doctor (Exh. 9). However, final evaluation was deferred until an independent medical was obtained. Meanwhile Soliz had made an offer to settle the case for $9,000.00 (R. 163), to which defendant countered with an offer of $4,500.00 (R. 165) before any independent med-

ical information was obtained. Defendant's offer was rejected by the plaintiff Soliz. Further negotiations did not take place until the day of the trial (R. 229), at which time Soliz offered to settle for the policy limits of $10,000.00. However, prior to that offer the defendant had had plaintiff Soliz examined and had received a report from Dr. Reed S. Clegg, an orthopedic surgeon, who examined Soliz shortly before the trial in September of 1963. After an extensive examination Dr. Clegg concluded that plaintiff Soliz showed no evidence of an intervertebral disc injury, but rather showed a moderate degenerative condition of osteoarthritis, a chronic condition existing before the accident in question, which in his opinion would account for the symptoms of which Soliz complained before and after the accident (Exh. 6). In light of this information and counsel's conclusion that Dr. Bernson's report was inconsistent — in that he reported no abnormality on the initial visit of Soliz and then when he did report an abnormal condition he substantiated it with a discogram test which he himself said was administered without sufficient dye (R. 224-225) — defendant's counsel in his final evaluation dropped his evaluation of the case from $6,000.00 down to $3,500.00 (R. 205). Counsel noted that even if Bernson were completely believed he would place a top value at no more than $8,500.00 on the case (R. 205).

Plaintiff Soliz' offer remained at $9,000.00 until the $10,000.00 offer was made at the time of

trial. The case went to trial and both Dr. Clegg and Dr. Bernson testified. Defendant Farmers' counsel and plaintiff Ammerman's counsel both concluded that the evidence had gone well and that the verdict could not possibly exceed the policy limits (R. 196A). However, the jury brought back a verdict of $15,-446.25. The policy limit of $10,000.00 plus interest was paid by the defendant after its appeal to this court (*Soliz v. Ammerman*, 16 Utah (2d) 11, 395 Pac. (2d) 25) was unsuccessful. The remaining judgment was never satisfied.

The present action was subsequently filed by the plaintiffs to recover the amount of the judgment still owing. Plaintiff Eddie Soliz was present and represented by the law firm of Kipp & Charlier. The plaintiff Edward Wilson Ammerman did not appear at the trial and his counsel, Reed Richards, appeared only briefly but did not participate.

On January 10, 1966 the case came up for trial before the Honorable A. H. Ellett. The court made three initial determinations to which the defendant objected, to-wit: That the confidential report from defendant's counsel to defendant was not privileged (R. 147), that bad faith could be found from the refusal to settle for either $9,000.00 or $10,000.00 (R. 146) and that the judgment creditor, Eddie Soliz, was a proper party.

The evidence in the trial was directed towards establishing the reasonable settlement value of the

prior case and what other defense attorneys would have done in like circumstances. At this point it should be stated parenthetically that the elements of bad faith require more than a mere error in judgment deviating from what is considered the reasonable settlement value. However, the evidence as outlined below appears to not even indicate a deviation from reasonableness and a fortiori no bad faith.

The plaintiffs called as their first witness the defendant's claims manager, Russell J. Hadley. He testified as to the general history of the first case and as to his evaluations and negotiations. He stated that before the independent medical report was received he had given an initial evaluation of $7,500.00, assuming Dr. Bernson's prognosis was confirmed (Exh. 9). He had made an offer of $4,500.00 based upon the assumption that there would be conflicting medical testimony and upon his experience that jurys tend to compromise the verdict where the medical testimony conflicts. His final evaluation was based on the two conflicting medical reports and, therefore, did not differ from his prior offer which was grounded on an assumption of such conflict (R. 189). His opinion did not change in favor of a higher value during the trial as he felt the evidence went better than expected (R. 187), especially the testimony from Soliz that he had had low back pain and numbness in his right arm prior to the accident (R. 189).

Plaintiffs' second witness was Don J. Hanson,

defendant's counsel and a specialist in personal injury defense work (R. 221). He outlined the procedure used in processing such defenses (R. 222), which procedure was followed in the prior case (R. 224). He explained the initial phase as being preliminary fact gathering on liability and damages. In this case he had the plaintiff's medical expenses, Dr. Bernson's report, the police report, other miscellaneous information gleaned from the plaintiff by interrogatories and information obtained from the defendant. With this he arrived at a preliminary evaluation of the case of $6,000.00 based substantially upon Dr. Bernson's report (Exh. 3). He found that Dr. Bernson's report was rather indefinite in that the initial examinations and x-rays indicated no injury and that the unequivocal conclusion of Dr. Bernson was based upon an inconclusive test and upon the subjective symptoms of Soliz (R. 225). He placed a value of $8,500.00 on the case if Soliz did have two herniated discs, but he felt that an independent medical would be necessary in order to place a final evaluation on the case (Exh. 3). If it were found that Soliz did not have two herniated discs the settlement value of the case, in his opinion, would be $3,500.00. Thus the preliminary evaluation was a compromise ($6,000.00) between the two medical possibilities (Exh. 3). The second phase of the defense was to get further information, in this case an independent medical examination and the deposition of the plaintiff. The purpose of the second phase

is to allow for changes in the preliminary evaluation if further information justifies such change (R. 223). Upon receipt of Dr. Clegg's report Mr. Hanson felt such a change was called for, and therefore in his final evaluation put the settlement value at $3,500.00 (R. 227). Dr Clegg's report not only ran contrary to Dr. Bernson's but also gave a reason for Soliz' symptoms, i.e. the chronic osteoarthritis condition which he found in Soliz' back. This, coupled with the inconsistencies in Bernson's report and the fact that Dr. Clegg is generally agreed to be a very forceful medical witness (R. 252), was considered to be sufficient to lower the value of the case considerably (R. 227). He also felt that the testimony as to Soliz' limited activities would support just as well the report of Dr. Clegg and, therefore, would not weigh in Soliz' interest (R. 233). During the trial Mr. Hanson was of the opinion, as was Mr. Richards, attorney for Ammerman, that the evidence was going well and that the verdict would be no more than $3,500.00 to $5,000.00 (R. 229, 196A). He was never aware of any offer for less than $9,000.00 from Soliz (R. 229).

Plaintiffs' first expert witness was Louis E. Midgley. He stated that in his opinion the settlement value at the time of Dr. Bernson's report was $7,500.00 (R. 238), but he would have settled before trial for $10,000.00 rather than take the chance of trying it inasmuch as he felt the medical outlook had not changed after Dr. Bernson's report (R. 117)

and it was his opinion that in cases of liability the jurys do not tend to compromise but tend to believe the attending physician (R. 262). His computations were based on a formula of "10 times the specials", which led him to the conclusion that the probable verdict would have been $15,000.00 since the "specials" were approximately $500.00 and the cost of the future operation was $1,000.00 (R. 239). However, he admitted that a possible operation was not a "special" and that if the specials were only $450.00 then the probable verdict would be $4,-500.00 (R. 251). Mr. Midgley said that his evaluation would be $2,500.00 to $3,000.00 if the jury believed Dr. Clegg (R. 241). However, he stated that although Dr. Clegg was an excellent witness, one of the best in the Salt Lake area (R. 252), he felt there was only a "faint" chance that the jury would believe him since he had not seen Mr. Soliz as many times as Dr. Bernson had (R. 252-253), even though he personally felt that Dr. Clegg would be better informed of Soliz' condition (R. 255). However, he also stated that this favorableness towards Dr. Bernson would be overcome if there was anything in the record to indicate that the plaintiff had been inconsistent in reporting his prior medical history (R. 249). When it was pointed out to him that Soliz had not disclosed his prior pains and treatment until the time of trial, he denied this as being important (R. 267), although admitting that defendant's evidence had turned out very well on

the issue of the prior condition (R. 267).

The plaintiffs' second expert witness was Mr. Tel Charlier, one of the attorneys for the plaintiff Soliz in both suits (R. 319). Mr. Charlier testified that it was his opinion that the reasonable settlement value of the case would have been from $10,000.00 to $12,000.00 (R. 309) and that he would have settled for the amount that his firm had offered, to-wit, $9,000.00 before trial and $10,000.00 at the time of trial (R. 312). He enumerated the factors he would consider in coming to the valuation on plaintiffs' Exhibit 16. However, he also admitted that losing this action would be adverse to his own interests (R. 322). He also stated that defendant had procured all the information the plaintiff had as to injuries, loss of wages, expenses and medical reports and, therefore, had before it as much information as did the plaintiff (R. 320).

Defendant put on two expert witnesses who testified as to evaluations essentially the same as had Mr. Hadley, Mr. Hanson and Mr. Midgley, however differing with the latter as to their confidence in going to trial with the case. The first witness was Gordon Strong, a specialist in insurance defense work whose work is about 60% neck injuries (R. 280). In his opinion the settlement value of the case prior to trial was $5,000.00 to $6,000.00 (R. 281). The facts upon which he based his opinion were: Probable liability (R. 281); the report of Dr. Bernson and his prognosis that surgery was not im-

mediately required (R. 282); Dr. Clegg's report; expenses of trial (R. 285); expenses incurred (R. 290); the fact that no fusion had been accomplished, which in his opinion would cut down on the weight given pain, suffering and disability (R. 292); and the possible exposure of the insured to liability (R. 293). He testified that the value of the case based on Dr. Bernson's report alone would be $7,500.00 (R. 282) and $2,500.00 if Dr. Clegg's report were considered alone (R. 283). His conclusion was that the jury would probably compromise at around $5,000.00 to $6,000.00. However, he would have rejected an offer for $9,000.00, and indicated that in regard to such an offer he would have indicated to the plaintiff that he would have to get down to around $5,000.00 before there could be a settlement (R. 296). He seriously doubted whether any defense attorney would have recommended settlement for $9,000.00 (R. 297) and would have been shocked at a verdict in excess of $10,000.00 (R. 289).

Defendant's second witness was Harold Christensen, also a specialist in insurance defense work. He placed the settlement value of the case before trial at between $6,000.00 and $7,500.00 (R. 332). In his evaluation he considered the following factors: The actual out-of-pocket expense of the plaintiff (R. 332); Dr. Bernson's report, which he considered to be too certain coming from a doctor who had not yet operated (R. 343); Dr. Clegg's report, which he concluded would be given more weight by the jury

due to Dr. Clegg's superior qualifications and ability as a witness (R. 333-334); probable liability, which was not, however, a flagrant or aggravated case of negligence (R. 334); remoteness of an operation (R. 345); and the tendency of jurys to compromise where there are conflicting claims (R. 348). He unequivocally stated that he would have rejected an offer for $9,000.00 prior to trial (R. 335) and the offer for $10,000.00 during trial (R. 336). He discounts the "treating physician" advantage to Dr. Bernson on the ground that he didn't consider him the treating doctor in this case since it appears that Dr. Smith was the treating physician (R. 339). Mr. Christensen also pointed out that in the "horse trading" procedure that takes place in such cases some defense counsel and insurance companies will offer and counter-offer until a middle ground is found, whereas others will determine what the case is worth and offer to settle if the plaintiff will come down to that area, there being no single method in negotiating (R. 344).

Mr. Charlier was recalled to the stand as a rebuttal witness and testified in relation to a prior suit with Mr. Gordon Strong in order to impeach Mr. Strong as an expert witness. However, Mr. Charlier admitted that the facts were different from the present case in that there were no issues as to the incidence of the ruptured disc (R. 354) and that Mr. Strong's evaluation of that case had been proven correct at $9,500.00 (R. 354-355).

At the close of the evidence the defendant moved for a directed verdict, which was denied. The jury returned a special verdict against the defendant. Subsequently the defendant moved for a new trial or a judgment notwithstanding the verdict. Both were denied.

POINT I

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE, THE EVIDENCE BEING WHOLLY INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH THE CLAIM OF BAD FAITH.

The defendant contends that the verdict of bad faith is without any factual support and that it should be dismissed as a matter of law. The seriousness of the charge is apparent. The plaintiffs are seeking to hold the insurer liable for damages not covered by the insurance contract. In effect the plaintiffs are asking that an impossible burden be placed upon the defendant — that not only must it conduct the defense of any action against the insured as per the insurance contract but that it must be omniscient in its trial judgment. It is a well recognized rule of law that the insurer has a duty to conduct the defense of the insured in good faith, giving equal consideration to both interests, but the plaintiffs are asking for relief due to bad faith merely because the defendant refused to settle for the policy limits. Upon an examination of the law and the facts it is clear that neither contention can stand.

Negligence is conceded to be an element of bad

faith, but negligence alone is not the standard of the insurer's duty. In an excellent survey of the cases concerning an insurer's good faith in 40 A.L.R. (2d) 168 it is concluded that the "great majority" of the courts apply the "good faith test", while only a "few courts" apply the negligence test. The modern trend is that the tests of good faith and negligence have coalesced, with negligence a consideration of whether bad faith was present. Nevertheless, a showing of bad faith is necessary. In numerous landmark cases the negligence test has been expressly rejected. *Brown v. Guarantee Insurance Co.*, 155 Cal. App. (2d) 679, 319 Pac. (2d) 69 (1958); *Baker v. Northwestern National Gas Co.*, 125 N. W. (2d) 370, 22 Wis. (2d) 77 (1963); *City of Wakefield v. Glove Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929); *Johnson v. Hardware Mutual Casualty Co.*, 108 Vt. 269, 187 Atl. 788 (1936).

The trial court correctly adopted the bad faith test in this case, but incorrectly instructed the jury pursuant thereto, i.e. in Instructions 12 and 14 wherein the court equates bad faith with the mere failure to settle within the policy limits. This is a novel question in Utah, although in *Paul v. Kirkendall*, 311 Pac. (2d) 376, 6 Utah (2d) 256 (1957) the court implied acceptance of the good faith test.

The cases on this subject clearly indicate what factors are necessary for finding bad faith. In the landmark case of *Brown v. Guarantee Insurance Co.*, supra, the court summed up the prior cases on bad

faith and laid down the following seven factors as the constituent parts of bad faith:

1. Attempts by the insurer to get the insured to contribute to the settlement.

2. Failure of the insurer to investigate the case sufficiently to ascertain the evidence against the insured.

3. Rejection by the insurer of its agent's or attorney's advice.

4. Failure of the insurer to inform the insured of the settlement offers.

5. Participation by the insured by acquiescing in the insurer's conduct of the defense, or misleading the insurer as to the facts.

6. The amount of financial risk each party is exposed to.

7. The strength of the respective sides as to liability and damages.

An examination of the evidence in this case shows that there is a clear lack of substantial evidence to support a finding against the defendant on any of the above seven factors. The first six factors can be dismissed summarily.

1. There is not a scintilla of evidence in the record that the insurer made an attempt to have the insured contribute to the settlement.

2. Negligent investigation isn't at issue here

since it was not alleged by the plaintiffs. However, even had it been alleged, the record clearly shows that the defendant made adequate investigation of the evidence against it. The plaintiffs' own attorney, Tel Charlier, testified that the defendant had obtained all the information that was known to them concerning plaintiff's injuries, wage losses and expenses (R. 320). Defendant's attorney, Don J. Hanson, testified that he had given this case the same care he does all his cases (R. 224), making a preliminary investigation with the help of the defendant and following that up with the final investigation and report (R. 222). There was no evidence otherwise presented which would indicate that defendant did not make a sufficient investigation of the case.

3. There likewise is a dearth of evidence in the record that the defendant rejected its counsel's advice. While it is true that its attorney gave a preliminary evaluation of $6,000.00 the defendant did not by any means reject such advice by offering $4,500.00. As indicated many times in the trial record, the offering of a given amount is part of the "horse trading" that goes on in such cases and thus is not usually meant as a final offer if the other side responds by lowering its offer. Both defendant and its counsel were aware that the value of the case could drop below even $4,500.00 depending upon the results of the independent medical examination. Thus, prudence would dictate against offering the full preliminary evaluation amount when it could be subject to considerable change downward.

In 40 A.L.R. (2d) 168 cases are cited where rejection of the attorney's advice was the primary basis of bad faith. However, in those cases the attorneys had usually made repeated warnings to the insurer to settle at an amount presently acceptable by the plaintiff because of their prognosis that the verdict would exceed the policy limits. That is far from the present case. Here the record fails to indicate any disagreement between the defendant and its attorney about whether or not to settle the case. It must be remembered that defendant is guilty of bad faith here only if it had knowledge or reason to believe that the verdict would exceed the policy limits. The fact that the defendant offered in its initial bargaining offer $4,500.00 rather than the $6,000.00 recommended as an eventual settlement figure is of no relevance in ascertaining the ultimate issue here for two reasons: First, there was no evidence that defendant would not have settled for $6,000.00 had the plaintiff showed an inclination to descend from his $9,000.00 offer. It should be noted that the plaintiff at no time offered to settle within even the upper range of value set by defendant and its attorney assuming Dr. Clegg's report was given no weight. Secondly, defendant cannot be guilty of bad faith towards the insured unless in its bargaining process it contemplated a verdict in excess of the policy limits. If the defendant honestly believed, for example, that the verdict would not be over $5,000.00 but acted with reckless disregard of its own rights in not ac-

cepting an offer for $4,000.00, the insured could not claim bad faith for at no time did the insurer knowingly endanger the insured's interests, but rather endangered its own interests. The defendant in the present case was merely being prudent in keeping its initial offer within the scope of what the final evaluation would support. There obviously was not any substantial evidence upon which to base an adverse finding against the defendant.

4. There was not a scintilla of evidence in the record that the plaintiff Ammerman or his attorney, Reed Richards, were not informed of the settlement offers. What evidence was introduced showed that Ammerman's attorney was present when the $10,000.00 offer was made on the first day of trial.

5. The factor of the insured's acquiescence not only works in the defendant's favor by vitiating bad faith but also presents an absolute defense to the action. This is not a case where the insured was without counsel of his own choosing and thus dependent upon the insurer's counsel, but rather in this case Ammerman had his own attorney who was present at the pre-trial hearings and at the trial. Ammerman's counsel made no objection to the conduct of the defense nor to the refusal of the offers of settlement. In fact he praised defendant's counsel for the good job done in defending the action (R. 196A). True, he sent the standard demand for settlement to the defendant, but at no time does the evi-

dence disclose his dissent to any of the defendant's decisions.

Plaintiff Ammerman is in an inconsistent position. He was fully represented in the defense of the action — yet he now seeks to hold the defendant accountable for the manner in which the defense was made, clearly an estoppel situation. In *Royal Transit v. Central Surety & Insurance Corp.*, 168 Fed. (2d) 345 (CA 7th Wis. 1948) the court said it was difficult to see how the insurer in any case could be guilty of bad faith in refusing to make a settlement when such refusal was agreed to or joined in by the insured. And in *New Orleans & C. R. Co. v. Maryland Casualty Co.*, 114 La. 153, 38 So. 89 the court said that the insured would have to prove not only that it urged the acceptance of the compromise and protested against defending the suit but that it absolutely declined to have anything to do with the defense; and that if such were not shown the insured was barred from recovery. And in *Lawson & Nelson Sash & Door Company v. Associated Indemnity Corp.* 204 Minn. 50, 282 N.W. 481 at 483-484 the court held, in affirming a directed verdict for the insurer:

> "We think defendant's conduct of the case from beginning to end bespeaks good faith on its part and that it acted upon reasonable grounds in proceeding as it did. After all, the probabilities and even the possibilities were as well known to the plaintiff as to the defendant. Both parties had full knowledge of all the facts. Plaintiff's proof does not even suggest that it was misled by reason of any suppres-

> sion of facts on the part of the defendant nor of any fraud being practiced by it. The most that can be said about the whole situation retrospectively is that Mr. Watson's judgment was better than that of Mr. Sawyer's. . ."

The same rule obviously applies to plaintiff Soliz who, if validly a party to the action, is subject to the rights and limitations existing between the defendant and plaintiff Ammerman.

The evidence when viewed most favorably to the plaintiffs discloses Ammerman's approval of the defendant's conduct of the defense, including the rejection of the settlement offers, and thus bars both plaintiffs from recovering for alleged bad faith in connection with such defense. For this reason alone the trial court was obligated to direct a verdict in defendant's favor.

6. The factor of financial risk is an inchoate factor because it usually is of importance only where some of the other elements of bad faith are established. In essence what the courts are requiring is that the interests of the insured should not be abandoned merely because the insurer faces the prospect of full loss. *Southern Fire and Casualty Co. v. Norris*, 35 Tenn. App. 657, 250 S.W. (2d) 785 (1952). An examination of the cases in 40 A.L.R. (2d) 168 shows no correlation between amounts of risk per se and bad faith. In the present case the amount of risk to both parties, when considered from the viewpoint of what was claimed and what the defendant thought the case was worth, is clearly not unreasonable. The

defendant had a right to look after its own interests. There is no rule of law that the insurer must automatically pay the policy limits merely to protect the insured from possible liability. The insurer has a duty to consider the interest of the insured equally with that of its own, but has no duty to sacrifice its own interest. The general rule is that the insured must give equal consideration to both interests, not sole consideration to the interests of the insured. See *Brown v. Guarantee Insurance Co.*, supra, and 40 A.L.R. (2d) 168. The California Supreme Court in *Hodges v. Standard Accident Insurance Co.*, 18 Cal. Rptr. 17, 24, 198 Cal. App. (2d) 564 (1961) correctly expresses the respective rights as:

> "To extend liability based upon bad faith to include every case where an insurer rejects an offer of settlement below policy limits, regardless of the exercise of its honest judgment, is not necessary for the adequate protection of the insured's interests under the policy. The effect of such extension would be only to permit the injured plaintiff to hold the insurance carrier for the full amount of any verdict or judgment and without reference to the amount of the insurance carried or purchased by the insured. . ."

The test was set down in *Larson v. Anchor Casualty Co.*, 82 N.W. (2d) 376, 384, 249 Minn. 339 (1957), to-wit:

> "The insurer is under no duty to compromise a claim for the sole benefit of its insured if to continue the fight offers a fair and reasonable prospect of escaping liability under

its policy or of getting off for less than the policy limit. . ."

In that case the settlement offer was $8,500.00 and the verdict was for $62,000.00, but the court found no bad faith because the insurer had reasonable and probable cause for rejecting the offer of settlement. The amounts in the present case are not nearly as extreme and, therefore, the same conclusion is more easily arrived at. The evidence in the present case discloses that all of the witnesses but one put a value on the case at no higher than $8,500.00, assuming Dr. Bernson's prognosis to be correct and discounting completely Dr. Clegg's findings. Mr. Charlier put a value of $10,000.00 to $12,000.00 on the case, but his interest in the case alone should be sufficient to reduce considerably the weight of his testimony. It has been held that although an attorney with an interest in the case is competent to testify, little weight should be given to it. *Johnson v. Nevenhoven*, 100 N.E. (2d) 60, 344 Ill. App. 125 and *Jonas v. Meyers*, 101 N.E. (2d) 509, 410 Ill. 213 (1951).

Mr. Midgley, plaintiffs' other expert witness, gave his opinion as to the settlement value before trial, based on Dr. Bernson's report, at $7,500.00 (R. 238). He indicated, however, that he would have settled for the policy amounts rather than take the risk of trying the case. He based this apprehension upon his belief that the jury could return a verdict in the amount of ten times the special damages, which he computed to be $1,500.00. However, he admitted

on cross examination that $1,000.00 of the special damages figure represented an item not properly considered as a special damage, i.e. the cost of an operation which had not yet been performed nor prescribed. Mr. Midgley agreed that if the damages were limited to the $500.00 which had been proved, by this theory the probable verdict would be approximately $5,000.00. Mr. Midgley, therefore, essentially agreed with the other four witnesses who put their upper value at between $8,500.00 and $6,000.00 based on Dr. Bernson's report alone. This evidence clearly establishes the fact that an evaluation with an upper limit of $8,500.00 was in this case reasonable and honest, as was also the dropping of that upper limit to between $3,500.00 to $6,000.00 when Dr. Clegg's findings became known.

As Mr. Christensen pointed out in his testimony, many times lawyers can agree as to the value of a case, as in cases of conflicting medical opinions, by assuming that a jury will try to compromise to the middle ground (R. 348).

It appears obvious from the record that all the experts but one agreed generally as to the value of this case, all of which were under the policy limits even when considering Dr. Bernson's report alone. It hardly can be said that the defendant acted in bad faith in not settling for the policy amount when its honest and reasonable evaluation of the case was considerably lower than the policy amount. The contrariness of this particular verdict is em-

phasized by the fact that all the witnesses, including Mr. Charlier, were proven to be wrong in their appraisals of the case. However, recovery for bad faith must be bottomed on a foundation other than mere mistake in judgment, or even upon negligent judgment. Rather there must be a showing that the insurer acted dishonestly or fraudulently or with such marked disregard to the realities of the situation that bad faith is necessarily inferred. Defendant asserts that the evidence does not substantiate a finding that defendant took even an unreasonable risk with its insured's interest, let alone an abandonment of those interests.

7. The relative strength of each side of the case is the most important element in this case, as in most other cases, for it involves the state of mind of the defendant as to the strength of its case and to the probable consequences of asserting that case. The courts in applying this factor have generally demanded only that the insurer honestly believe it has a good case, not that it in fact does. The courts have been hesitant to interpose their hindsight in place of the insurer's judgment. In *Hodges v. Standard Accident Ins. Co.*, supra, the court said, in reversing a finding of bad faith:

> "The art of appraising a case is, of course, not an exact science and there is room for variety of honest judgments. The insurer must appraise the case prior to the trial upon its general experience and the insurer should not be penalized for its failure to predict ac-

curately the action of a jury. . .

> ". . . We do not believe the test of bad faith should be determined by hindsight. Experience shows that in looking ahead no one can predict what any particular jury will do."

In that case the insurer believed that, even assuming liability, the damages would be not more than $3,500.00. The offer to settle was for $5,000.00. The verdict was for $35,000.00. In the finding no bad faith, the court said if the insurer "sincerely believed any probable verdict would be substantially less than $10,000 then it was not in the position of playing or gambling with the interests of the insured". (Supra, at 24)

The facts as conceded above do show an honest mistake in judgment by everyone concerned. However, there is no evidence in the record that either the defendant or its attorney acted contrary to their honest and reasonable evaluation of the settlement value of the case. At most the record merely shows that the defendant had an opportunity to settle the case within the policy limits and refused to do so upon the belief derived from experience that the jury would compromise between the two medical witnesses, especially where the collateral evidence substantiates either one of the medical prognoses.The testimony of the witnesses in the present action confirms that the defendant was not operating under unreasonable optimism. Both Mr. Strong and Mr. Christensen unequivocally stated that they would

not have settled the case at any time for $9,000.00 or $10,000.00. Mr. Strong, a veteran of many years of personal injury defense practice, stated that he would have been shocked by a verdict above the policy limits. (R. 289). The fact that the witnesses were also proved wrong is not the point. The point is that the defendant defended this action under what has been established by the record as a reasonable prognosis, it being in accordance with what other experts in this field would have done under like circumstances.

This court in its opinion on the appeal of the first action referred to the question of damages as a "sharp disagreement between the medical testimony of the plaintiff's and defendants' doctors concerning the meaning and effect of what the x-rays show". *Soliz v. Ammerman*, supra. In his dissent Justice Callister said, "There was serious dispute among the expert witnesses as to the proper interpretation of the various x-ray films". (Supra at 28) This obvious conflict was known fully to the defendant. Defendant knew that Dr. Bernson had found no abnormality in his first examination of Soliz and in the x-rays taken by Dr. Winters on two different occasions (Exh. 7), and that when he finally did conclude that Soliz had two ruptured discs he relied upon a discogram which he admittedly administered with insufficient dye (R. 225). Defendant knew at the trial that Soliz had complained of low back pain and numbness in his right arm prior to the accident in

question (R. 263). Defendant was aware of the fact that the independent medical examination which was made a year after Dr. Bernson's last examination had found no trace of a ruptured disc, had found a chronic degenerating condition of osteoarthritis which was in no way connected with the accident. Defendant knew, as did plaintiff's own witness (R. 252) that Dr. Clegg was a more forceful and more effective medical witness than Dr. Bernson. Defendant knew that Dr. Bernson had not prescribed corrective surgery since the symptoms did not justify it (Exh. 7), and thus the cost of an operation would not be included in the special damages. And defendant also knew that liability was probable and took that into consideration in its evaluation (R. 201). And from his deposition and answers to interrogatories the defendant knew the expenses claimed by Soliz from loss of wages and medical expenses.

Collating this information with its experience, defendant concluded that in such a case the jury would probably compromise the damages between what it felt the damages were solely under Dr. Bernson's report and those solely under Dr. Clegg's report. Both Mr. Strong and Mr. Christensen confirmed this belief that the jury would compromise (R. 283, 348), and both stated that they would not have settled at any time for $9,000.00 or more (R. 283, 284, 335, 336). There was no evidence that plaintiff, even in response to defendant's initial offer, ever lowered his offer from $9,000.00.

Can it reasonably be concluded upon any basis that defendant acted dishonestly or fraudulently by not taking an offer higher than the value ascribed to the case assuming no contrary medical testimony from an independent medical examination? Clearly not. Yet the plaintiff has presented no other evidence relevant to the issue of bad faith. When plaintiffs rested their case they had merely proved that they made an offer near the policy limits, which offer was rejected by a lower counter-offer. They failed to even bring up the other elements of bad faith herein discussed simply because there was no evidence to support them.

When the defendant rested its case it had shown that the rejecting of the offer to settle for the policy limits was not only reasonable under the circumstances but was the prudent course to follow. With the evidence in that posture the trial court should have granted defendant's request for a directed verdict.

The recent cases on the subject of bad faith indicate that much more must be shown by the plaintiffs than was shown below in order to present a triable issue of bad faith for the jury. In *Frank B. Connet Lumber Co. v. New Amsterdam Casualty Co.*, 236 Fed. (2d) 117, 127 (CA 8th 1956) the court affirmed a directed verdict against the plaintiff insured on the basis that

> ". . . where the evidence is conflicting or gives rise to conflicting inferences (it) does not, in our opinion, justify a finding of bad faith."

There the policy limit was $15,000.00 and the offer was $12,500.00. The verdict was for $35,000.00. The doctor for the plaintiff testified that the plaintiff had incurred a ruptured intervertebral disc and required surgery. The defendant's doctor testified that his x-rays showed no evidence of such injury. The court said that to allow the insured to prevail under such circumstances, where the insurer justifiably believed the action to be without merit, would be to grant unlimited coverage on a limited coverage policy. The situation there is clearly analagous with the present case.

In the case of *Murach v. Massachusetts Bonding And Insurance Co.*, 339 Mass. 184, 158 N.E. (2d) 338 (1959) the situation was again very similar. There the policy limit was $10,000.00 and the offer after the second trial was $9,300.00. The verdict was $29,000.00. The plaintiff claimed that she had lost her sense of smell and had suffered a fractured skull due to the accident. The insurer admitted liability, but alleged no skull fracture. The court said the test to be applied was whether the insurer considered the offer as it would had there been no policy limit. In affirming a finding of no bad faith the court said

> "It appears from the record that the insurer caused detailed investigations to be made into both the circumstances of the accident and the facts relative to damage. These investigations tended to corroborate the claimant's contention that she had lost her sense

> of smell as a result of the accident, but as to the seriousness of the other injuries medical opinion was divided, and the insurer's information was that the claimant had not sustained a fracture of the skull as a result of the accident." (Supra, at 341)

Thus, where the medical opinion is divided over the extent and cause of the damages it would appear that there is no bad faith unless the insurer has acted dishonestly or fraudulently. This test of bad faith is clearly expressed in the following cases.

In *Olson v. Union Fire Insurance Co.*, 118 N.W. (2d) 318, 174 Neb. 375 (1962) the Supreme Court of Nebraska reversed the trial court's refusal to not grant a directed verdict for the insurer. The policy limit there was $10,000.00 and the verdict was for $50,000.00. The offer was for the policy limit. The suit was brought under the guest statute. The insurer said it honestly believed there was no gross negligence. The test of bad faith used by the court was

> ". . . Bad faith implies dishonesty, fraud and concealment . . . Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith." (Supra, at 322)

Using that test, the court found that the plaintiff insured had not established a prima facie case of bad faith by the insurer's refusal to settle within the policy limits. In coming to that conclusion the court reasoned:

> "Whether or not the evidence was sufficient to sustain a finding of gross negligence

> was a close question as shown by the meticulous care with which the facts were considered by the court in (the prior case). Courts as well as attorneys sometimes differ on the law applicable to a given state of facts (citation omitted). We find none of the elements of negligence or bad faith existed in the making of these determinations. The conclusion of the insurance company that it had a valid defense, although wrong, is not in itself evidence of negligence or bad faith." (Supra, at 322)

The rule could not be more clear as applied to the facts in the present case. Where none of the other factors of bad faith are present, and where there is no showing that the insurer's faith in its case was dishonest or fraudulent but was merely a close question of fact, the court should direct a verdict in favor of the insurer. Two recent cases are right on point.

In *Baker v. Northwestern National Gas Co.*, supra, the policy limit was $25,000.00 and the verdict was for $40,000.00. The insurer moved for a summary judgment which was refused. The Supreme Court remanded to the trial court to determine three issues raised by the amended complaint, to-wit, whether the insurer had been diligent in its investigation; whether insured was informed of the possible excess; and whether the insured was informed of the settlement offers. But the court then went on to say

> "Therefore, if Baker (plaintiff) had grounded his cause of action against Northwestern solely on the facts: (1) that North-

> western had rejected an offer by Walker to settle the latter's negligence action for the policy limit of $25,000.00; and (2) that the final judgment recovered by Walker against Baker and Northwestern was in excess of $40,000; Northwestern would have been entitled to summary judgment under the rule of the Maroney and Berk cases. The facts before the circuit court were not so limited. . ." (Supra, at 372)

However, in the present case the facts are so limited in the complaint and in the record, merely alleging that the defendant had refused to settle and that the final judgment was in excess of the limit. Under the Wisconsin court's rule a directed verdict should be granted in the present case. The defendant recommends that the court adopt the rule used by the Wisconsin court, which is

> "It is not bad faith if counsel for an automobile liability insurer refuses to settle the claim of an injured person under the bona fide belief that the insurer might defeat the action or keep the verdict within the policy limits, and even though it may be that the insurer acted negligently, exercising poor judgment, it is not enough to show that the insurer acted negligently in deciding to litigate rather than to settle the case, bad faith being a species of fraud requiring clear, satisfactory and convincing evidence to sustain a finding thereof." (Supra, at 372)

The case of *Radio Taxi Service, Inc. v. Lincoln Mutual Insurance Co.*, 157 A. (2d) 319, 31 N.J. 299 (1960) is even more explicit in its holding, applying

the rule recommended as dictum in the *Baker* case. The policy limit was $5,000.00 and the verdict was for $13,500.00. The offer was made before trial for $3,600.00. The trial court granted a dismissal to the insurer on the grounds that no jury question had been raised as to the insurer's acting in bad faith. This was a novel question before the New Jersey court, which adopted the bad faith test and affirmed the dismissal. The court gave these reasons for not allowing the question to go to the jury:

> ". . . There was a sharp issue as to the credibility of Mrs. Meyer's testimonial assertion of her injury, and an equally sharp issue among the medical witnesses on the same subject. But more important, the proof provides substantial support for defendant's view when settlement was discussed that on all the circumstances of the case Mrs. Meyer's adjustment demand of $3,600 should be rejected.
>
> "On the whole record we find nothing in the facts to warrant an inference sufficient to raise a jury question that the insurer did not exercise good faith in reaching the conclusion that Mrs. Meyer's case did not have a settlement value of $3,600. . . .
>
> "The ultimate question is not whether a verdict in excess of the policy limits should have been anticipated, but whether the insurer lacked good faith in deciding not to meet the settlement demand. Mere failure to settle within the policy limit when there was an opportunity to do so before or during trial is not *evidence* of bad faith. . . .
>
> "In this case, no facts were presented

> which would warrant a finding that the defendant was unduly venturesome at the expense of the insured, or that the danger of an adverse verdict in the accident case was so great as to create an inference of bad faith in rejecting the settlement offer, or that the decision not to meet the settlement demand sprang from optimism unrelated to the realities of the case. In such a situation, to allow a jury to review the decision not to accept the settlement offer is to subject every such case where the verdict exceeds the policy limit to reappraisal by their uninformed judgment. Such a course would empty of significant content the contractual stipulation which places control of settlement in the hands of the insurer." (Supra, at 325, 326, 327)

The rule is sound, and the policy argument is fair and logical. The insured should have to allege and show more than mere refusal to settle as a basis for bad faith. The insured contracted with the insurer for insurance only up to the policy limit. Had the insured wanted more protection it could have been obtained for a nominal amount. The point, therefore, is that the insured wants his cake and to eat it too. He wants the insurer to insure him up to a certain limit, defend all actions and then pay the excess merely because it refused to settle before trial where it honestly believed that it could prove the damages resulting from the accident to be less than the policy limit.

The defendant contends, therefore, that under the above tests for bad faith the plaintiffs did not

raise substantial evidence in support of any of the elements of bad faith. The record shows, and this Court agreed, that the back injury and its cause was a close question. The defendant honestly believed that the jury would compromise the conflicting damage claims, which belief was affirmed by Mr. Strong, Mr. Christensen and Mr. Hanson. The optimism of the insurer was in line with the realities of the situation. The record fails to show even negligence or poor judgment. It merely shows a close question of injury which was decided in favor of the plaintiff Soliz for an amount in such excess above each witness' prognosis that it can only be explained as a fruit of the vagaries within our jury system. However, as the cases point out, the case should not be submitted to the jury unless there is a clear question of fact with supporting evidence as to the constituent elements of bad faith, and not when the question is merely whether or not the insurer acted wisely or reasonably in refusing to settle for the policy limits. The unwarranted danger to the insurer is obvious where the jury is given carte blanche in passing upon the techical matters of judgment involved in the negotiation and trial of a lawsuit in a context outside mere negligence. In 40 *A.L.R.* (2d) 173 the commentator notes that where the jury is given such discretion the insurer has only a "tenuous chance" of escaping liability in "any case" where a sizeable judgment results after the rejection of a settlement. Defendant merely asks that the court require bad faith to be proved as a matter of law rather than allowing a verdict of

bad faith to stand where the evidence at most shows a honest misjudgment as to what a particular jury would do.

The probability of such a verdict was compounded by the court's Instruction 12, wherein the court equates bad faith with merely the failure to settle within the policy limits when such an opportunity avails itself. The court instructed in part:

> "The *only issue* before you is whether or not defendant is liable to plaintiffs . . by reason of the fact that the defendant was *guilty of bad faith in that it failed to settle the Soliz claim prior to trial when it could do so* for $9,000 or, when that offer was withdrawn, at the trial, *it failed to settle* before the jury returned the verdict of $10,000."

This instruction undoubtedly encouraged the jury to find against the insurer merely upon its refusal to settle, notwithstanding the defendant's good faith in such refusal.

Defendant respectfully contends that the trial court erred in not granting defendant's motion for a directed verdict on the ground that plaintiffs were estopped due to their acquiescence in the defendant's conduct of the defense; and because the findings, when viewed most favorably to the plaintiffs, are, in the words of this Court (*Lemmon v. D. & R. G. W. R.*, 9 Utah (2d) 195) "not supported by any substantial evidence, or the evidence is so clear that all reasonable minds would find one way, so that a verdict contrary thereto must have resulted from passion

or prejudice, or *misconception of the law or the evidence, or in arbitrary disregard thereof.*"

POINT II

THE TRIAL COURT ERRED IN PERMITTING INTO EVIDENCE, OVER THE OBJECTION OF THE DEFENDANT, THE CONFIDENTIAL COMMUNICATIONS BETWEEN THE DEFENDANT AND ITS ATTORNEY.

The trial court, prior to trial, took under advisement and denied defendant's objection to the introduction into evidence of the confidential report sent to the defendant by its attorneys, Hanson & Garrett. The court reasoned that the material issue of this case revolved around what was contained in that report. Therefore, it would be allowed in as evidence (R. 147).

It is the contention of the defendant that the communications between defendant's counsel and the defendant are confidential and privileged by Section 78-24-8, *Utah Code Annotated* 1953. That statute specifically states that a witness cannot be examined as to communications made between attorney and client in the course of professional employment. It would naturally follow that this privilege would apply equally to documents containing such privileged communications. The court seemingly construed Rule 30(b), *Utah Rules of Civil Procedure,* as being applicable in this case when it allowed in evidence the communications on the ground that they were relevant to the material issue of the case. Surely the absolute privilege given in Section 78-24-8, *Utah Code Annotated* 1953 is not to be emasculated by

such a broad reading of Rule 30(b). However, even under Rule 30(b) the communications would be undiscoverable since the confidential report was a work product of the attorney, containing his conclusions as to the settlement value of the case, which are expressly covered by the statute:

> ". . . The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories. . . ."

There are a number of cases which expressly grant a privilege to such communications when made by the insurer's attorney to the insurer.

In *Farm Bureau Mutual Insurance Company v. Anderson,* 360 S.W. (2d) 314 (Missouri, 1962) the court held a communication between insurer's attorney and its branch claims manager in reference to contemplated litigation was privileged, but the court said it would not be if it had been a communication in the ordinary course of business.

The case of *Melco System v. Receivers of Trans America Ins. Co.*, 105 So. (2d) 43 (Alabama, 1958) involved an action in equity by receiver to accept a compromise settlement with a reinsurer. The creditors of the insurer in receivership resisted the settlement. An attorney for the receiver and one for the insurer assessed a value to each case, some of which were still pending, in order to get a compromise value. The receiver's attorney refused to answer, on exam-

ination, as to the value given each case. The court sustained the lower court's ruling that the testimony was privilegd.

In *Continental Casualty Co. v. Pogorzelski*, 82 N.W. (2d) 183 (Wisconsin, 1957) the insurer sued the insured to collect attorney fees for settling the claim against the insured. The insured requested the production of a letter from the attorney to the insurer which contained advice on the claims against the insured and the present action. The court refused to allow the production of such letter, it being privileged.

The case of *General Accident Fire and Life Assurance Corp. Ltd. v. Mitchell*, 259 Pac. (2d) 862 (Colorado, 1953) was a garnishment action against the insurer. Prior to trial the lower court allowed the production of letters between the insurer's attorney and the home office. The court said that the contents of the letters showed a complete disregard for ethics and admissions which would seriously hamper the present defense, but held that despite its disapproval of the contents the letters were nevertheless privileged from production.

In *Emerson v. Western Automobile Indm. Association*, 182 Pac. 647 (Kansas, 1919) a trustee in bankruptcy sued the insurer for indemnity of a judgment of $2,500.00 which was obtained against the bankrupt insured, which judgment was never satisfied due to the bankruptcy. The court held that the insurer was not liable except as to amounts actually

paid by the insured. The trustee then claimed that the insurer's attorney had advised insured to take out bankruptcy. The lower court allowed evidence to show this communication. The court held this to be error, that the communications were privileged and such privilege was lost only if there were fraud involving moral turpitude.

The defendant, by arguing this point, does not infer that the contents of the communication indicated bad faith on the part of the insurer. However, it did contain information that the defendant's attorney made a preliminary recommendation of $6,000.00 as the value of the case. To the jury it obviously meant that the insured had disregarded its attorney's advice by offering $4,500.00 and, therefore, was evidence of bad faith. It seems clear that the defendant was prejudiced in this action by the error of the trial court in violating the confidential communications between the attorney and client.

It should be noted in this respect that Ammerman cannot claim here that he was also the client of defendant's attorney and has, therefore, given authority to disclose such information. He had his own attorney and was in no way associated with defendant's attorney on an employment basis. Defendant concedes that had Ammerman had no attorney there may be reason to hold that Ammerman had adopted defendant's attorney as his own. This seems to be the usual situation where the courts have let in similar communications. However, in the present

case the communication was solely between defendant and its attorney, as was also the employment relationship.

The court obviously violated defendant's privilege by ordering production of the documents, and their use as evidence in the trial caused irreparable prejudice against the defendant in the minds of the jurors.

POINT III

THE COURT ERRED IN NOT DISMISSING THE PLAINTIFF SOLIZ FROM THIS ACTION, HE BEING WITHOUT ANY RIGHTS AGAINST THE DEFENDANT FOR AN AMOUNT IN EXCESS OF THE POLICY LIMITS.

Defendant contends that Soliz was an improper party in this suit and prejudicial error was committed by the trial court in allowing Soliz to prosecute the action. The case file and transcript of the record show that Soliz' attorneys were the only active participants for the plaintiffs in the pleading, discovery and trial stages. Ammerman's attorney did not participate in the pre-trial conference, in the various hearings of motions before the court or in the trial of the action.

The rule applicable to this issue has been clearly defined by this Court, as well as many others. In *Paul v. Kirkendall*, supra, the court expressly held that the judgment creditor had no rights in a garnishment action against the insurer for its alleged bad faith in not settling the prior suit within the policy limits. Although the action here is a direct

suit and not a garnishment action, the principles enunciated by this Court would appear to be equally applicable. The Court pointed out in the *Paul* case that an action against an insurer for bad faith was an unliquidated tort claim and, therefore, the cause of action belonged only to the insured. The court noted this result if the judgment creditor were allowed to prosecute the garnishment action:

> ". . . To do so compels the garnishee to enter into combat with an adversary other than its insured and battle with one who had never had any contract relation with him." (Supra at 260)

This reasoning applies equally to the present action where the defendant had to do battle with a party having no contract relation to it. The various cases which have dealt with this specific issue have made it clear that without some special statute or provision in the insurance contract giving the judgment creditor equal rights with the insured the judgment creditor could not sue the insurer for an amount in excess of the policy limits.

In the recent case of *Dillingham v. Tri-State Insurance Co.*, 381 S.W. (2d) 914 (Tenn. 1964) the court pointed out that in the cases allowing the judgment creditor to sue there was a provision in the insurance contract entitling the judgment creditor to recover to the same extent that the insured could have had he paid the judgment. The court distinguished that provision from the one before it, which afforded the judgment creditor the right to recover under the

policy to the extent of the insurance afforded. In reference to the former provision the court said:

> ". . . Typical policies now in use do not contain this provision; in the absence of such a policy provision the courts have declined, as to the cause of action in excess of policy limits, to permit direct recovery by claimant against the company. The excess liability of the company arises out of the relationship between insured and company. Claimant is a stranger to that relationship. Not only is the company without any duty to claimant to accept claimant's reasonable settlement offer, but also, if there is a sizeable disparity between the settlement offer and the amount of the judgment obtained in the trial which follows refusal of the offer, claimant is benefited rather than harmed by the company's refusal to settle. It therefore would be anomalous to permit claimant to recover directly against the company in his own right (in the absence of a policy provision, such as the italicised phrase above, clearly having that meaning)."

The court affirmed the dismissal of the action.

The same rule has been applied in various other cases, towit: *Frances Newlon*, 75 Ga. App. 341, 43 S.E. (2d) 282 (1947); *Duncan v. Lumberman's Mutual Casualty Co.*, 91 N.H. 349, 23 A. (2d) 325 (1941); *Traders & General Ins. Co. v. Hicks Rubber Co.*, 140 Tex. 586, 169 S.W. (2d) 142 (1943); *Chittick v. State Farm Mutual Auto. Ins. Co.*, 170 F. Supp. 276 (DC Del.); *Murray v. Mossman*, 355 Pac. (2d) 985, Wash.; *Wesing v. American Indemnity Co.*, 127 F. Supp. 775 (DC Mo.).

There have been several cases allowing the judgment creditor to maintain a bad faith action, but those cases involve either a provision similar to the one referred to and distinguished in the *Dillingham* case, supra, *Auto. Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938) or an assignment under a specific state statute allowing tort claims to be assigned, *Communale v Traders & General Ins. Co.*, 50 Cal. (2d) 654, 328 Pac. (2d) 198.

The provision in the present case is similar to that which was before the *Dillingham* court, it merely gives the judgment creditor a right to recover against the insurer subject to the terms and limitations of the policy. The provision reads:

> "(6) ACTION AGAINST THE COMPANY . . . As respects the insurance afforded under Coverages A and B, whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the Company on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment . . ."

Thus Soliz was not assigned under the contract itself the right to recover for bad faith of the insurer, nor can he claim rights under an assignment from Ammerman for two reasons: First, there was no such assignment from Ammerman; and, secondly,

such a tort claim is not assignable in Utah. See *Mayer v. Rankin*, 91 Utah 193, 63 Pac. (2d) 611.

The prejudice resulting to the defendant from this error was substantial. Soliz' attorneys in the present action were the firm of Kipp & Charlier, who had also tried the original suit for the plaintiff. In the trial the court repeatedly admonished counsel that this suit was not to be a retrial of the original action. However, the record is replete with inquiry by Soliz' counsel as to the details of Soliz' injuries, his inability to perform his job and other activities and the medical treatment he received—thus a retrial of issues now irrelevant in deciding defendant's good or bad faith. Additional prejudice was engendered by the absence of Ammerman throughout the trial and the presence of Soliz at the counsel table as a party plaintiff, thereby impressing upon the jury that what they were really deciding was whether the injured plaintiff should get what a prior jury had awarded him. It appears obvious that under such circumstances the jury could not objectively weigh the claim of bad faith when it appeared that they were redetermining the prior case with the same contending parties—Soliz as plaintiff and Farmers defending. In a bad faith case the trial court must take every precaution to prevent the retrial of the prior cause of action and limit the inquiry into the elements of bad faith. The trial court here failed to prevent such appearance by allowing Soliz to prosecute the action.

The defendant, therefore, contends that the

plaintiff Soliz was an improper party in this action for two reasons: First, he had no rights by assignment or otherwise over and above the policy amount; and, secondly, he suffered no damage since had the insurer settled for the $9,000.00 amount Soliz would have received $1,000.00 less than he has already collected. The error of the trial court was clearly prejudicial to the defendant and, therefore, a new trial should be granted if the Court denies the relief prayed for under Point I.

CONCLUSION

The evidence presented in this case was woefully lacking in proof of the basic elements of bad faith. The defendant has no quarrel with the application of the bad faith standard to its defense of cases. However, the defendant believes that in the present case the court did not adequately consider the evidence before submitting it to the jury. This was not merely a question of negligence which offers an expansive field of consideration by the jury. It was rather an inquiry as to whether certain narrowly defined elements of bad faith were present. It has been pointed out clearly by the many courts facing this problem that bad faith is composed of a fraudulent intent or dishonesty. In order to have a prima facie case of bad faith there must be substantial evidence that such intent was present. The jury should not be

allowed to speculate as to the insurer's intent merely upon evidence that an offer was made and rejected. However, in the present case the jury was allowed to speculate upon such evidence, notwithstanding a complete lack of evidence that the insurer had exhibited any of the objective elements of bad faith set out in the *Brown* case as being essential to a finding of bad faith. An examination of the cases in 40 A.L.R. (2d) 168 where bad faith has been found will disclose that there was objective proof of the insurer's dishonesty, not merely proof that an offer was made which, when viewed retrospectively, would have been accepted. The plaintiff may have shown a prima facie case of mistake, but has failed to establish any evidence going beyond that point to an establishment of fraudulent or dishonest intent. In light of this clear lack of evidence and defendant's absolute defense based on Ammerman's acquiescence in the conduct of the defense, defendant respectfully petitions the Court to reverse the judgment of the lower court and enter judgment that as a matter of law plaintiffs failed to establish a prima facie case of bad faith.

In the event the Court does not grant the above relief, the defendant submits that a new trial is necessary in order to cure the prejudicial errors committed by the trial court in allowing the plain-

tiff Soliz to prosecute this action without any rights against the defendant and in allowing in as evidence confidential communications between defendant and its counsel.

Respectfully submitted,

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