

1988

# William Ray Gagon v. State Farm Mutual Automobile Insurance Company : Brief in Opposition to Certiorari

Utah Supreme Court

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## Recommended Citation

Legal Brief, *Gagon v. State Farm*, No. 880060.00 (Utah Supreme Court, 1988).

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UTAH SUPREME COURT  
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 880060 ---000O000---

WILLIAM RAY GAGON,

:

Plaintiff,

:

v.

:

~~Case No. 20777~~

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

:

:

Priority 13

880060

Defendant/Petitioner.

:

---000O000---

APPELLANT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM RAY GAGON,	:	
Plaintiff,	:	
v.	:	Case No. 20777
STATE FARM MUTUAL	:	
AUTOMOBILE INSURANCE	:	
COMPANY,	:	Priority 13
Defendant/Petitioner.	:	

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

---oooOooo---

WILLIAM RAY GAGON,	:	APPELLANT'S BRIEF IN
	:	OPPOSITION TO PETITION
Plaintiff,	:	FOR WRIT OF CERTIORARI
v.	:	Case No. 20777
STATE FARM MUTUAL	:	
AUTOMOBILE INSURANCE	:	
COMPANY,	:	Priority 13
Defendant/Petitioner.	:	

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**IDENTITY OF PARTIES**

The only interested parties are named in the caption.

**PUBLISHED OPINION**

The opinion of the Court of Appeals of which Respondent seeks review is *Gagon v. State Farm Mutual Automobile Insurance Company*, 73 Utah Adv. Rep. 83, 476 P.2d 1194 (1987), *reproduced infra* at A-2.

**PRIOR HISTORY**

This civil action was filed on December 21, 1983, in the District Court in and for Salt Lake County. A jury trial was held on May 16 and 17, 1985, during which the Honorable John A. Rokich granted the motion of Defendant/Respondent for a directed verdict on the "bad faith" issues, thus limiting any recovery by Plaintiff to the amounts owed by the insurer under the terms of its policy. A copy of the Judgment entered on June 3, 1985, is reproduced *infra* at A-9.

Plaintiff/Appellant appealed to this Court and this Court deferred the matter to the Utah Court of Appeals pursuant to its "pour-over" jurisdiction. Oral argument was held on the 29th day of October, 1987, and the Court of Appeals entered its decision on December 18, 1987.

The Court of Appeals held that the trial judge had erred in directing a verdict against Plaintiff/Appellant on the "bad faith" issues, reversed, and remanded the case to the District Court for trial on those issues. Defendant/Respondent/Petitioner now seeks further review of the matter by this Court pursuant to a Writ of Certiorari.

#### **STATEMENT OF FACTS**

At all relevant times, Appellant William Ray Gagon (hereinafter "Mr. Gagon") was protected under a policy of automobile insurance that specifically included so-called "collision" coverage. (Answer, paragraph 1, R. at 14.) That automobile insurance policy was issued by Respondent/Petitioner State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"). (*Id.*)

On September 17, 1983, Mr. Gagon was driving his insured vehicle along a frontage road adjacent to Interstate 15 by the Great Salt Lake west of Salt Lake City, Utah. (R. at 281, 282, and 290.) Mr. Gagon was following behind a pickup truck loaded with assorted junk and scrap. (R. at 283.) A metal object fell from the pickup (R. at 283) and, although he attempted to avoid it by swerving, Mr. Gagon's vehicle "straddled" the object, which struck the underside of the vehicle. (R. at 284). Mr. Gagon immediately pulled to the right side of the road, stopped his car, and got out to inspect for

damage. (R. at 285-286.) He looked under the front of the vehicle and noted that the spoiler under the front grill had been broken but could see no oil or other evidence of damage to the engine. (R. at 285-286.) Mr. Gagon loaded the broken spoiler into his car, got back in the car, and proceeded on. (R. at 285-286.)

As he gained speed, Mr. Gagon noted that the engine somewhat seemed to lack power, as if it had "bad gas." (R. at 287-88.) After he had proceeded only a short distance, he noted that the engine was losing power and making a little unusual noise. (R. at 288 .) At this same time he observed that the oil light was on. (R. at 289.) He immediately shut off the engine and coasted. (*Id.*) He then attempted to push the car (*Id.*) until he realized that this was not possible (R. at 290). Concerned about being stranded in what he considered a remote area (R. at 289-90), Mr. Gagon briefly attempted to restart the engine, but abandoned this effort before the engine actually started because he heard the motor make an unusual noise. (R. at 290.) He secured the vehicle by replacing the convertible top and locking the doors. (R. at 291.) Mr. Gagon then sought assistance and had the vehicle towed to Steve Harris Imports, where repairs were effected. (R. at 291, 293, and 315.)

Upon inspection, it was discovered that the impact had disabled the oil pump (which is located inside the oil pan) (R. at 296), thus depriving the engine of lubrication. As a result of this loss of lubrication, the engine was severely damaged, necessitating repairs costing \$1,517.99. (*See*, Exhibit 4.)



Mr. Gagon reported the incident to State Farm (R. at 295 and 434) and, on September 23, 1983, State Farm sent a damage appraiser to look at the vehicle (R. at 439). But on September 26, 1983 (R. at 39), the appraiser prepared a damage estimate only with respect to those parts of the vehicle that had made direct contact with the object in the road (*i.e.*, the spoiler, oil pan, etc.) (R. at 436), stated in his written notes that coverage would not exist for the mechanical damage, and so informed the service manager at Steve Harris Imports (*Id.*). Thereafter, on October 5, 1983, Mr. Gagon was interviewed by State Farm's claims department and signed a written statement prepared by State Farm detailing the circumstances under which the damage had occurred. State Farm has acknowledged that, at the time the statement was signed and at the time of the trial, the statement accurately reflected the events that had transpired. (R. at 448 and 464.)

The claims representative handling the file, Doug Nelson, apparently felt that coverage could be denied for the mechanical damage to the engine. (R. at 444.) Accordingly, he went to claims supervisor Leon Maxwell and recommended that State Farm not pay for any of the mechanical damage. (*Id.*) Mr. Maxwell prepared a "Claims Committee Report" in which he recommended that State Farm "deny engine damage sustained after initial collision as mechanical failure--wear & tear." (R. at 472). A "claims committee," composed of various State Farm claims personnel, met on October 12, 1983, and denied the claim based upon the policy's "wear and tear" exclusion (R. at 473 and 476), instructing Mr. Maxwell to hold the decision for a week and then notify Mr. Gagon of the denial of his claim (R. at 447). Prior to this decision, State Farm made no investigation of the incident other

than to accept and rely upon the written statement signed by Mr. Gagon. (R. at 444-45.) On October 18, 1983, Mr. Maxwell wrote to Mr. Gagon, informing him that, based upon the "wear and tear" exclusion, State Farm would not pay for any of the engine damage and that it would pay only for the damage to the spoiler and the dented oil pan.

At trial, Mr. Nelson acknowledged that State Farm's internal procedures allowed for Mr. Gagon to submit information or argument in support of his claim to the claims committee (R. at 475) and claimed that his letter of October 18, 1983, served to notify Mr. Gagon of this right (*Id.*). Of course, at the direction of the claims committee, the letter was, in actuality, mailed six days *after* the claims committee's "final decision." (R. at 476.)

At trial, Mr. Nelson testified that there were no set criteria to determine whether or not State Farm would pay for loss of lubrication damages under its policy. (R. at 441.) In fact, however, State Farm provides to its claims personnel, in an effort to help them understand the terms and provisions of State Farm's automobile policy, a "claims handling manual." (R. at 446.) Both of the State Farm employees handling Mr. Gagon's claim admitted, however, that they had not consulted the "claims handling manual" in connection with this claim. (*Id.* and R. at 482-83.) In its discussion of losses such as Mr. Gagon's, State Farm's own claims handling manual specifically states:

Claims for damage to the motor caused by the loss of oil following a roadbed collision will qualify for payment under any form of Collision Coverage . . . .

. . . .

This has the effect of treating motor damage following a roadbed collision as a part of the direct damage, instead of indirect damage. . . .

Exhibit 9-P.

The only ground ever given by State Farm (before this litigation was commenced) for its denial of Mr. Gagon's claim for the mechanical damage to his engine was the policy exclusion of coverage for damage "due to and limited to wear and tear . . . ." (*See, e.g.*, denial letter of 18 October 83.) At trial (R. at 474), however, as well as in an earlier deposition (Maxwell Depo. at 89), State Farm's claims supervisor, Leon Maxwell, admitted that he knew Mr. Gagon's engine was damaged because it was not getting oil and that the lack of oil was caused by the inoperable condition of the oil pump. He also acknowledged that he knew that the oil pump had become inoperable because of the impact with the object in the road and that he knew that the oil pump had not worn out. (R. at 474 and Maxwell Depo. at 89.) Thus, Mr. Maxwell acknowledged both at trial and in an earlier deposition that he *knew* that the damage to Mr. Gagon's engine was the result of the impact with the object in the road and that the damage was *not* the result of an engine component wearing out.

When Mr. Gagon's car had been repaired, he was unable to pay for the repairs and the dealer refused to release the car until the charges were paid for in full. (R. at 315-19.) In the course of conversations with the dealer, it was suggested to Mr. Gagon that he should consult with an attorney since State Farm was refusing to pay his claim. (R. at 321-24.) Acting on this advice, Mr. Gagon consulted with Val Antczak, an attorney with the law firm of Parsons, Behle & Latimer, who wrote a demand letter to State Farm

pointing out that denial based upon the "wear and tear" exclusion of the policy was entirely without merit. (R. at 323-24.) Nevertheless, State Farm persisted in its denial of the claim. Mr. Antczak referred Mr. Gagon to Appellant's present counsel and this suit ensued. (R. at 324.)

It was only after suit was filed that State Farm first raised the question of the reasonableness of Mr. Gagon's conduct. In its Answer, it alleged that Mr. Gagon had been contributorily negligent. (R. at 16.) In response to Mr. Gagon's Motion for Partial Summary Judgment, State Farm contended that Mr. Gagon had been negligent and had unreasonably continued to operate his vehicle once he knew that the lubrication system had been damaged. However, State Farm still made no investigation of this contention and admittedly continued to accept Mr. Gagon's statement as being correct.

It was acknowledged at trial (R. at 450) as it had earlier been by Mr. Maxwell in his deposition (Maxwell Depo. at 69), that it was State Farm's practice to "compromise" rather than pay in full claims of its insureds for engine damage resulting from loss of lubrication. Mr. Maxwell testified at trial that he knew of no such claim that had been paid in full (R. at 458), although he admitted that the local State Farm office handles one or two such claims per month (R. at 456). Similarly, Mr. Nelson, who has been with State Farm for 23 years (R. at 441), testified that he, personally, had never paid a loss of lubrication claim (R. at 442). Thus, despite the fact that during discovery State Farm had refused to provide information with respect to its denial of other similar claims, and the trial court denied Mr. Gagon's motion to compel State Farm to provide that information (R. at 232-33), there is substantial and unrefuted evidence of a continuing practice by State Farm

to deny the claims of its insureds for engine damage as a result of loss of lubrication following an impact with an object in the road.

At trial, the court refused to allow any testimony and refused to admit any evidence relating either to counsel fees as consequential damages or to the measure of punitive damages. (R. at 409-11.) At the conclusion of Plaintiff's case, State Farm moved for a directed verdict on the "bad faith" issue. This motion, argued after Defendant had rested, was then granted. (R. at 539.) While the jury found, of course, that coverage existed for the internal damage to Mr. Gagon's engine and that Mr. Gagon's conduct had not contributed to that damage (R. at 234), the jury was, nevertheless, unable to award any damages beyond the cost of repairing the vehicle. Mr. Gagon was, therefore, left without any meaningful redress since his costs and counsel fees far exceeded his recovery.

The opinion of the Court of Appeals, authored by Judge Greenwood with which Judges Billings and Bench both concurred, while abbreviated, is entirely consistent with these facts. 746 P.2d at 1194.

## **ARGUMENT**

### **POINT I: REVIEW BY WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE.**

The considerations governing the granting of a Writ of Certiorari by this Court to review a decision of the Utah Court of Appeals are set forth in Rule 43 of the Rules of the Utah Supreme Court. That rule makes clear

that a Writ of Certiorari will be granted only infrequently and in truly extraordinary cases:

Review by a Writ of Certiorari is not a matter of right, but judicial discretion, and will be granted *only when there are special and important reasons therefor*.

Rule 43, R.U.S.C. (emphasis added).

This case meets none of the four criteria set forth in the rule because there is no conflict between panels of the Court of Appeals; there can be no contention that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings . . ." as to require review of its decision; the legal questions decided by the Court of Appeals fall squarely within the holding of this Court in *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985); and, for the same reason, there is no conflict between the decision of the Utah Court of Appeals in this case and any prior decision of this Court.

There is nothing unusual or extraordinary about this case; it is simply a case in which a simple insurance claim was made and improperly denied by the carrier. Legally and philosophically, the facts of the case fall squarely within the principles articulated by this Court in *Beck*. The Court of Appeals simply applied those principles in determining that the trial judge in this case had erred when he ruled as a matter of law that no reasonable mind could have believed the insurance carrier's conduct to have been in breach of the three-pronged duty set forth in *Beck* for the carrier to diligently investigate, fairly evaluate, and promptly handle claims. In this case, the facts demonstrate that the carrier failed to fairly evaluate and made little, if any, investigation of the claim. Accordingly, the fact that the

carrier acted promptly and courteously in denying the claim constituted no defense to Plaintiff's claims and the Court of Appeals correctly reversed the trial judge who had ruled to the contrary.

In an effort to bring this case within the extremely narrow parameters of Rule 43, Defendant/Respondent/Petitioner State Farm attempts to create artificially a tension or inconsistency between the Court of Appeals' decision in this case as compared with this Court's decision in *Western Casualty and Surety Company v. Marchant*, 615 P.2d 423 (Utah 1980), and the Court of Appeals' decision in *Callioux v. Progressive Insurance Company*, 745 P.2d 838 (Utah Ct.App. 1987). Both of those cases, however, stand merely for the proposition that an insurance carrier has a right to dispute or deny coverage in those cases in which a legitimate, real, and good faith question exists as to the insured's entitlement to coverage. Mr. Gagon recognizes and does not dispute this obviously true proposition. In the present case, however, Mr. Gagon presented to the trial court a strong showing that there existed no real question as to his entitlement to coverage. For example, State Farm's own claims manual said that there was coverage under these circumstances; State Farm's claims manager testified that he knew that the engine damage had resulted from loss of lubrication as a result of the impact and that he knew that the oil pump had not simply worn out; and State Farm's employees admitted at trial that they never paid claims similar to Mr. Gagon's. Accordingly, in this case, State Farm denied a claim that it *knew* it should have paid and that its own claims handling manual *mandated* should be paid. Factually, then, this case is entirely distinguishable from the *Marchant* and *Callioux* cases in which the carrier successfully demonstrated

reasonable, legitimate, good faith reasons to doubt coverage.<sup>1</sup> Under these circumstances, this case does not fall within the narrowly defined parameters under which review by Writ of Certiorari should be granted.

To allow further review in this case is merely to protract the litigation process. The Utah Court of Appeals was not intended to create yet a third step in the litigation process, it was intended to reduce the insurmountable workload of this Court. To allow review by Writ of Certiorari in this case would be to wholly defeat that beneficial purpose.

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<sup>1</sup>For example, in *Callioux*, the insured was charged with arson although found not guilty at the criminal trial. Similarly, in *Marchant*, there was a real question as to the identity of the actual employer of the injured claimant. No such legitimate questions existed in this case.



**POINT II: THE DECISION OF THE COURT OF APPEALS IS  
CORRECT AND FURTHER REVIEW IS UNNECESSARY.**

A review of the opinion of the Utah Court of Appeals indicates the thoroughness with which the Court reviewed and the care with which the Court considered this matter. After surveying the applicable facts, the Court of Appeals noted:

It was undisputed that State Farm denied coverage for plaintiff's claim because "the damages sustained to the internal parts of the engine were not a result of a collision loss but rather a result of a mechanical failure, wear and tear." However, State Farm's claims manual states:

**MOTOR DAMAGE FROM LOSS  
OF OIL:**

. . . .

Claims for damage to the motor caused by the loss of oil following a roadbed collision will qualify for payment under any form of Collision Coverage.

. . . .

At trial[,] plaintiff testified that he was in the wholesale jewelry business and had never worked on cars other than adding windshield washer fluid, radiator fluid and oil. He testified that he had stopped his car after hitting the metal object, looked under the car and did not see any oil. After inspecting the car, he drove for another three miles before he noticed a loss of power, observed that the oil light was on and stopped the car. In addition, there was conflicting testimony as to whether the loss of lubrication occurred within seconds of impact with the metal object or whether plaintiff caused the damage by continuing to operate the vehicle.

. . .

Based on these facts, . . . we conclude that reasonable persons could reach different conclusions as to whether State Farm fairly evaluated the claim and

acted reasonably in rejecting or settling the claim. Therefore, we hold that, in light of *Beck*, the directed verdict on the bad faith issue was improperly granted, and the issue should have been decided by the jury.

746 P.2d at 1196-97. Given the fact that State Farm's own claims handling manual mandated that it *pay in full* the claim that it *denied*, how could the Court of Appeals have ruled otherwise?

Not only did State Farm fail to "fairly evaluate" this claim (which it denied when its own claims manual said it should have been paid), but its investigation failed to reveal a single fact that could have supported a denial based upon the wear and tear exclusion. At the time it denied the claim, State Farm had only Mr. Gagon's statement and it acknowledged at trial that it had no reason to doubt that statement. That statement contains no fact or implication that would support a denial of the claim. If the duty to "diligently investigate" is to have any meaning, it must mean that the carrier at least has the duty to investigate to determine whether there are facts to support its denial. In this case, State Farm's investigation wholly failed to offer any support for a denial under the wear and tear exclusion. As its claims personnel admitted at trial, State Farm knew that the engine had been damaged because the oil pump was not working and that the oil pump was not working because of the impact with the object in the road. State Farm knew that the oil pump had not simply worn out. Under these circumstances, State Farm has acknowledged that it knew that there was no factual support for a denial under the wear and tear exclusion.

Not only is the Court of Appeals' decision correct with respect to the question of "bad faith," it is a correct application of this Court's decision

in *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985), with respect to the types of damages recoverable by the insured victim of an insurer's "bad faith" conduct. On this issue in *Beck*, this Court noted:

In adopting the contract approach, we are not ignoring the principal reason for the adoption of the tort approach -- *to provide damage exposure in excess of the policy limits and thus remove any incentive for breaching the duty of good faith . . . .*

701 P.2d at 801 (emphasis added). This Court, perhaps in order to remove even the possibility of any lingering doubt as to whether damages in excess of the coverage defined by the policy contract might be recovered by the insured in a "bad faith" action in Utah, again reiterated:

In an action for breach of a duty to bargain in good faith, *a broad range of recoverable damages is conceivable*, particularly given the unique nature and purpose of an insurance contract. An insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss; *damages for losses well in excess of the policy limits*, such as for a home or a business, *may therefore be foreseeable and provable. . . .*

*Id.* at 802 (emphasis added, citation omitted).

In this case, there was evidence before the trial court that State Farm had refused to pay Mr. Gagon's claim even though its claims manual mandated such payment; that State Farm knew that there was no factual basis for application of the "wear and tear" exclusion; and that State Farm had a long-established pattern of denying such claims. As recognized by this Court's decision in *Beck*, the most important social policy furthered by the "bad faith" concept (whether based in tort or based in contract) is the discouragement of the repetition of reprehensible and irresponsible conduct by insurers. When the amount of the claim the carrier refuses to pay is

relatively large, the insured has reasonable recourse to the courts and to justice because the size of the claim not only justifies, but actually makes possible, the retention of legal counsel and the litigation, through trial if necessary, of the insured's claim. However, where the amount of the claim that the carrier has refused to pay is relatively small -- such as the claim in this case, which was less than \$1,500.00 -- the insured is left, as a practical matter, with no effective redress or recourse whatsoever. He can complain to the insurer, who will disregard his protestations; he can complain to the Insurance Commissioner, who will listen to his complaints and sadly inform him that, although justified, payment cannot be compelled; he can seek attorneys, who will listen to him and tell him that he has a valid claim, but that he cannot afford their time. It is only through punitive damages that two important purposes can be furthered. First, the insured can be made whole and compensated for his loss and for his courage in pursuing a small claim that others would have been forced to decide was "too small" to pursue. Second, the insurer can be discouraged from attempting to perpetrate against others such pernicious conduct. The Court of Appeals was, therefore, correct in directing that the question of punitive damages be reached if, on retrial, State Farm is found to have acted in "bad faith."

Punitive damages are also appropriate in this case because State Farm's conduct meets the standard articulated by this Court in *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah 1983). Before this Court in that case was a widow's action for the wrongful death of her husband, who had died when the defendant, an alcoholism treatment center, had given him a safety razor with which to shave but with which he instead committed

suicide. This Court held that punitive damages might be awarded without a showing of actual malice:

Such damages may . . . be appropriate to take the profit out of wrongdoing where compensatory damages are small in relation to the resources of a defendant and can be subsumed as a cost of doing business . . .

675 P.2d at 1187. Since the compensatory damages to which Mr. Gagon is entitled are small (even when his counsel fees are included as an element of damages), State Farm can easily treat those compensatory and consequential damages as merely a "cost of doing business." Accordingly, the Court of Appeals was correct in its determination that the question of punitive damages should be reached in the event that the jury, on remand, should find that State Farm acted in "bad faith."

### CONCLUSION

This case falls far short of meeting the very narrowly defined parameters under which this Court should grant a petition for review of a decision of the Utah Court of Appeals by Writ of Certiorari. The Court of Appeals was intended to reduce this Court's insurmountable workload, not to add a third step to the litigation process. Accordingly, only in infrequent and truly extraordinary cases should *certiorari* be granted. The decision of the Court of Appeals in this case is entirely consistent with the law announced by this Court in a recent decision squarely on point. Further review is not appropriate.

Moreover, the decision of the Utah Court of Appeals, in this case, is correct and appropriate under the facts of the case. Further review is not appropriate and the petition for Writ of Certiorari must be denied.

**RESPECTFULLY SUBMITTED** this 10th day of March, 1988.

**PARKEN & KECK**

By 

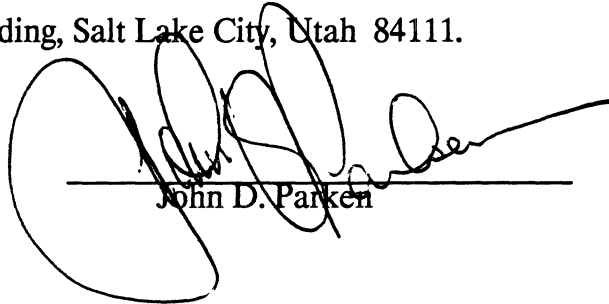
John D. Parken  
Attorney for Plaintiff/  
Appellant

**ORIGINAL SIGNATURE**

John D. Parken

### MAILING CERTIFICATE

I hereby certify that on the 10<sup>th</sup> day of March, 1988, I caused four (4) true and correct copies of the foregoing Appellant's Brief in Opposition to Petition for Writ of Certiorari to be mailed, postage prepaid, to Paul M. Belnap, Strong & Hanni, Attorneys for Defendant/Respondent/Petitioner, Sixth Floor Boston Building, Salt Lake City, Utah 84111.



John D. Parken

ORIGINAL SIGNATURE

\_\_\_\_\_  
John D. Parken

Addendum

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Gagon v. State Farm Mutual Insurance Company	
Case No. 860137-CA	
Judgment . . . . .	A-9



IN THE UTAH COURT OF APPEALS

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William Ray Gagon, )  
 )  
Plaintiff and Appellant, )  
 )  
v. )  
 )  
State Farm Mutual )  
Automobile Insurance Company, )  
a/k/a State Farm )  
Insurance Companies, )  
 )  
Defendant and Respondent. )

OPINION  
(For Publication)

Case No. 860137-CA

**FILED**

DEC 18 1987

Before Judges Greenwood, Billings and Bench.

Timothy G. Shea  
Clerk of the Court  
Utah Court of Appeals

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GREENWOOD, Judge:

Plaintiff, William Ray Gagon, brought this action against defendant, State Farm Mutual Automobile Insurance Company (State Farm), for payment of his insurance claim and for alleged bad faith refusal to pay his claim. Plaintiff appeals from the trial court's directed verdict against him on the bad faith issue. We reverse and remand.

On September 17, 1983, plaintiff was driving his 1979 Fiat Spider when a metal object fell out of the back of a pickup truck he was following and struck the underside of his car. Plaintiff stopped his car and noted that the plastic spoiler under the front grill had been broken, but he could see no oil or other evidence of damage to the car. Plaintiff then restarted the car and drove about three miles. While driving, he noticed that the car lacked power and that he was unable to drive faster than forty-five or fifty miles per hour. Towards the end of the three miles, he observed that the oil light was on. He stopped the car, tried to push it and briefly attempted to restart it. When the car would not start, plaintiff had it towed to Steve Harris Imports where inspection revealed that the oil pump was broken. Because the oil pump stopped functioning, the engine was damaged due to loss of lubrication, costing \$1,517.99 to repair.

Plaintiff reported the incident to State Farm on September 19, 1983. On September 23, State Farm's appraiser examined the vehicle and prepared a damage estimate indicating that State Farm would only cover the external damage to the car and not the internal damage due to loss of lubrication. On October 5, 1983, plaintiff went to State Farm's office and signed a statement explaining the circumstances of the incident. On October 12, 1983, State Farm's claims committee determined that plaintiff's claim would be denied "for internal repairs to the engine because of mechanical failure - wear and tear." On October 18, 1983, State Farm informed plaintiff of its decision to deny coverage for internal repairs and allow coverage for only the external damage. In December 1983, plaintiff initiated this action alleging that State Farm's refusal to pay his claim was in bad faith.

On the first day of trial, the parties stipulated that the case would be tried on the bad faith issue, and if the jury found bad faith, plaintiff could then submit evidence of punitive damages. On the second day of trial, the court disallowed plaintiff's evidence of attorney fees with the proviso that he would reconsider the admissibility of attorney fees if the jury found bad faith. After the parties had presented their evidence, both parties moved for a directed verdict. The trial judge granted State Farm's motion on the issue of whether State Farm acted in bad faith in refusing to pay plaintiff's insurance claim and denied plaintiff's motion regarding coverage under the policy for engine damage. The judge then allowed the jury to determine whether plaintiff was entitled to all the damages resulting from the accident. The jury awarded plaintiff \$1,517.99, less plaintiff's insurance deductible of \$200, plus ten percent interest from September 17, 1983. Plaintiff appeals claiming that the trial court erred in granting State Farm's motion for a directed verdict on the bad faith claim since reasonable minds could have found that State Farm acted in bad faith. Plaintiff also contends that the trial court erred in excluding evidence of punitive damages and consequential damages including attorney fees.

#### I.

In reviewing a directed verdict, the court must examine all the evidence in the light most favorable to the losing party. Acculog, Inc. v. Peterson, 692 P.2d 728, 732 (Utah 1984). If the evidence permits reasonable persons to reach different conclusions on the issues, the directed verdict should not be granted. Little Am. Ref. Co. v. Leyba, 641 P.2d 112, 114 (Utah 1982); Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 611 (Utah 1982).

After the trial court granted State Farm's motion for a directed verdict on the bad faith issue, the Utah Supreme Court rendered Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985).<sup>1</sup> In Beck, the Court held that "as parties to a contract, the insured and the insurer have parallel obligations to perform the contract in good faith." Id. at 801. The Court then defined the obligation of good faith as contemplating that "the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." Id. In addition, the Court stated that the duty of good faith "requires the insurer to 'deal with laymen as laymen and not as experts in the subtleties of law and underwriting' and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract." Id.

With these principles in mind and viewing the evidence in the light most favorable to plaintiff, we examine whether reasonable minds could differ as to whether State Farm breached its obligation of good faith. It was undisputed that State Farm denied coverage for plaintiff's claim because "the damages sustained to the internal parts of the engine were not a result of a collision loss but rather a result of a mechanical failure, wear and tear." However, State Farm's claims manual states:

MOTOR DAMAGE FROM LOSS OF OIL:

. . . .

Claims for damage to the motor caused by the loss of oil following a roadbed collision will qualify for payment under any form of Collision Coverage.

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1. Beck overruled Lyon v. Hartford Accident and Indemnity Co., 25 Utah 2d 311, 480 P.2d 739 (1971) to the extent that Lyon was philosophically inconsistent with the Beck Court's recognition of a cause of action in contract for the insurer's failure to perform the contract in good faith and noted that Lyon considered only the question of whether a claim of bad faith gave rise to a tort cause of action. Beck, 701 P.2d at 798 n.1. The Court characterized the ruling in Lyon as leaving "an insured without any effective remedy against an insurer that refuses to bargain or settle in good faith with the insured." Id. at 798.

A roadbed collision shall be deemed to be any contact between the insured vehicle and the roadbed, or any object fixed, frozen or imbedded in the road such as a rock, stump, or any other stationary object.

There should be a reasonable compliance with that condition of the policy which provides, 'When loss occurs the named insured shall use every reasonable means to protect the damaged property covered by this policy from any further damage.'

This has the effect of treating motor damage following a roadbed collision as a part of the direct damage, instead of indirect damage. Reference to the Conditions Section is made because the payment should not include any amount for damage resulting from the further operation of the vehicle after damage to the oil pan or to the motor has become known to the operator, or after the existence of damage should have become known by the operator exercising reasonable care.

At trial plaintiff testified that he was in the wholesale jewelry business and had never worked on cars other than adding windshield washer fluid, radiator fluid and oil. He also testified that he had stopped his car after hitting the metal object, looked under the car and did not see any oil. After inspecting the car, he drove for another three miles before he noticed a loss of power, observed that the oil light was on and stopped the car. In addition, there was conflicting testimony as to whether the loss of lubrication occurred within seconds of impact with the metal object or whether plaintiff caused the damage by continuing to operate the vehicle. Plaintiff's witness, Gary Majnik, who repaired his car, testified that an engine in a Fiat Spider could be damaged by loss of lubrication within seconds of hitting an object. Plaintiff also called another mechanic, Steve Crane, who testified that a person without general knowledge of mechanics, who hit something on the underside of a 1979 Fiat and dented the oil pan, would not know whether to continue driving the car other than as indicated by the warning systems in the car. He also stated that the warnings systems can malfunction.

Based on these facts, we find that reasonable minds could differ as to whether plaintiff, exercising reasonable care, knew or should have known that the oil pump was damaged and that he should not continue to drive the car. Further, we conclude that reasonable persons could reach different conclusions as to whether State Farm fairly evaluated the claim and acted reasonably in rejecting or settling the claim. Therefore, we hold that, in light of Beck, the directed verdict on the bad faith issue was improperly granted, and the issue should have been decided by the jury.

## II.

The second issue is whether the court improperly excluded evidence of punitive damages and consequential damages including attorney fees. Immediately prior to the trial in this case, the judge stated on the record that the parties and the court agreed to exclude evidence of punitive damages unless and until the jury found that State Farm had acted in bad faith. No objection was voiced by plaintiff. Therefore, we find no merit in plaintiff's claim that evidence of punitive damages was improperly excluded. On the second day of trial, the court stated that it would exclude evidence of attorney fees but would reserve the right to later admit evidence of attorney fees if the jury found bad faith. Generally, attorney fees are not chargeable to an opposing party unless there is contractual or statutory liability for them. Espinoza v. Safeco Title Ins. Co., 598 P.2d 346, 348 (Utah 1979). However, according to Beck, consequential damages such as attorney fees may be recoverable in an insurance carrier lack of good faith case. Beck, 701 P.2d at 801-02. Therefore, we find no error in the exclusion of attorney fees until after plaintiff established that State Farm breached its implied obligation of good faith. If lack of good faith is found on remand, consideration of punitive damages and consequential damages will be appropriate.

Reversed and remanded.

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Pamela T. Greenwood, Judge

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WE CONCUR:

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Judith M. Billings, Judge

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Russell W. Bench, Judge

COVER SHEET

CASE TITLE:

William Ray Gagon,  
Plaintiff and Appellant,

v.

State Farm Mutual Automobile  
Insurance Company, aka State Farm  
Insurance Companies,  
Defendant and Respondent.

Court of Appeals No. 860137-CA

Trial Court No. C 83-8753

PARTIES:

John D. Parken (Argued)  
Marcella L. Keck  
Dart, Adamson & Parken  
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Paul Belnap, Esq. (Argued)  
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Attorney for Defendant and Respondent  
Sixth Floor, Boston Building  
Salt Lake City, UT 84111

TRIAL JUDGE:

Hon. John A. Rokich  
Third District Judge

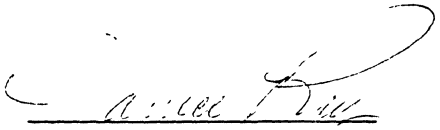
December 18, 1987. OPINION

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the trial court herein be, and the same is, reversed and remanded for further proceedings in accordance with the views expressed in the opinion filed herein.

Opinion of the Court by PAMELA T. GREENWOOD, Judge; JUDITH M. BILLINGS and RUSSELL W. BENCH, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of December, 1987, a true and correct copy of the foregoing OPINION was mailed to each of the above parties.

  
Case Manager

TRIAL COURT:  
Third District Court  
Salt Lake County  
240 East 400 South  
Salt Lake City, UT 84111

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

WILLIAM RAY GAGON,	:	
Plaintiff,	:	JUDGMENT
v.	:	
STATE FARM MUTUAL AUTOMOBILE	:	Civil No. C83-8753
INSURANCE COMPANY, a/k/a	:	
STATE FARM INSURANCE COMPANIES,	:	Judge John A. Rokich
Defendant.	:	

---oooOooo---

This action came on for trial before the Court and a Jury, the Honorable John A. Rokich, District Judge, presiding, commencing on May 16, 1985, and concluding May 20, 1985. After the evidence was presented, the Court granted Defendant's motion for a Directed Verdict on Plaintiff's cause of action for bad faith including Plaintiff's claim for punitive damages and



attorney fees. The remaining matter was submitted to the Jury on special Interrogatories. The Jury answered both of the following questions in the negative:

1. Under the policy of insurance, coverage is excluded for damages due to and limited to mechanical failure - wear and tear. With the exception of the parts broken when the car impacted the object in the roadway, was the Plaintiff's damage to the internal components of his engine due to and limited to mechanical failure - wear and tear, within the meaning of the insurance policy exclusion?

2. Under the facts and circumstances of this case, and as defined in these instructions, did the Plaintiff fail to protect his vehicle and thereby fail to mitigate his damage?

This issue having been duly tried and the Jury having duly rendered its special verdict and the parties having stipulated that the sum of \$1,517.99 is a reasonable sum for the repairs to Plaintiff's automobile, which repairs were at issue in this action, less plaintiff's insurance deduction of \$200.00.

IT IS HEREBY ORDERED AJUDGED AND DECREED that Plaintiff William Ray Gagon recover from the Defendant State Farm

Mutual Automobile Insurance Company the sum of \$1,317.99 in special damages together with interest thereon at the rate of 10% per annum from September 17, 1983, (the date of the occurrence of the act giving rise to the cause of action) to the date of this judgment and Plaintiff's costs of action. The total amount of this judgment shall bear interest at the rate of 12% per annum from and after the date hereof.

DATED this 3 day of ~~May~~ <sup>June</sup>, 1985.

BY THE COURT:

/s/  
John A. Rokich  
District Judge

Approved as to form:

Paul Belnap  
Paul Belnap  
Attorney for Defendant