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IN THE UTAH SUPREME COURT

CHAD JONES, Plaintiff and Appellant vs. FARMERS INSURANCE EXCHANGE, dba FARMERS INSURANCE COMPANY, Defendant and Appellee	Case No. 20100951

APPEAL FROM A FINAL JUDGMENT
THIRD JUDICIAL DISTRICT COURT
THE HON. MARK S. KOURIS

BRIEF OF APPELLANT

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FILED
UTAH APPELLATE COURTS

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PARTIES TO THE PROCEEDING

The caption of the case on appeal contains the names of all parties to the proceeding.

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DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

U.R.Civ.P. 56(c):

> (c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

1. **Did the trial court err in defining and applying the appropriate legal standard for the fairly debatable doctrine in this insurance case involving an alleged breach of implied duties of good faith and fair dealing?**

Standard of Review: Determining legal standards are reviewed for correctness, with no deference being given to the trial court. *Martin v. Lauder,* 2010 UT App 216, ¶ *4; Cabaness v. Thomas,* 2010 UT 23, ¶ 18).

Preservation: This issue was raised below in the parties' briefing at R.261-271, 415-423, 548-560, 582-585, 593-604, and 637-641; at the hearing on the joint motions of summary judgment, R. 686, pp. 2-60; and in the Order Granting Defendant's Motion for Summary Judgment, R. 676-677.

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2. **Did the trial court err in concluding that if one aspect of the insurer's conduct was fairly debatable, this alone must trump all other wrongful conduct of the insurer and requires the dismissal of all other causes of action?**

Standard of Review: Determining and applying legal standards are reviewed for correctness, with no deference being given to the trial court. *Martin v. Lauder,* 2010 UT App 216, ¶ 4; *Cabaness v. Thomas,* 2010 UT 23, ¶ 18).

Preservation: This issue was raised below in the parties' briefing at R.261-271, 415-423, 548-560, 582-585, 593-604, and 637-641; at the hearing on the joint motions of summary judgment, R. 686, pp. 2-60; and in the Order Granting Defendant's Motion for Summary Judgment, R. 676-677.

3. **Did the trial court err in ruling as a matter of law that the plaintiff's UIM claim was fairly debatable, and therefore that his entire bad faith claim was barred?**

Standard of Review: Review for correctness, granting some deference to the trial court and viewing the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party. *Billings v. Union Bankers Ins. Co.* 918 P.2d 461, 464 (UT 1996); *Martin v. Lauder,* 2010 UT App 216, ¶ 4; *Cabaness v. Thomas,* 2010 UT 23, ¶ 18).

Preservation: This issue was raised below in the parties' briefing at R.261-271, 415-423, 548-560, 582-585, 593-604, and 637-641; at the hearing on the joint motions of summary judgment, R. 686, pp. 2-60; and in the Order Granting Defendant's Motion for Summary Judgment, R. 676-677.

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STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below.

This case arises out of the alleged failure of defendant/appellee Farmers Insurance Exchange ("Farmers") to timely and adequately adjust and pay underinsured motorists coverage ("UIM") benefits to its insured, plaintiff/appellant Chad Jones ("Jones"). Jones filed this action claiming, among other things, that Farmers had breached its duties of good faith and fair dealing. (R. 69-75.)

Jones was seriously injured in a head on collision in Big Cottonwood Canyon on October 11, 2001. (R. 427-428.) After settling in the fall of 2005 with the at-fault driver's liability insurer for the $25,000.00 policy limit, Jones made a UIM claim against Farmers for his own $30,000.00 policy limit. (R. 255.) During the next nearly three years, Jones received only a single $5,000 offer from Farmers. (R. 318-319.) Shortly before expiration of the statute of limitations on the UIM claim, Jones hired counsel and demanded arbitration. (R. 462-463.) Jones prevailed in the arbitration and was awarded $18,500.00. (R. 562-563.)

On December 18, 2009, Jones filed this action against Farmers and Stephanie Stewart ("Stewart"), the Farmers claims adjuster who had handled Jones' claim. (R. 1.) After amending his complaint, Jones alleged the following causes of action: (a) breach of the implied duties of good faith and fair dealing; (2) breach of written contract; (3) intentional infliction of emotional distress; and (4) prima facie tort. Jones later agreed to voluntarily dismiss Stewart. (R. 69-84.)

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Farmers filed a partial motion for summary judgment claiming that Jones's fourth cause of action (prima facie tort) was not a recognized cause of action under Utah law. (R. 107-110.) The trial court agreed and dismissed this cause of action. (R. 376-377.) That dismissal is not an issue on appeal.

Based upon the claim file and Farmers's admissions to Jones's Request for Admissions, Jones filed a motion for partial summary judgment on his cause of action for breach of good faith duties. (R. 254-271.) Farmers countered with its own motion for summary judgment, claiming that Farmers's actions were fairly debatable as a matter of law, requiring the dismissal of Jones's bad faith cause of action in its entirety. (R. 398-424.)

After the motions were fully briefed, the trial court held oral argument. (R. 686.) The court denied Jones's motion and granted Farmers's motion, finding that Jones's claim was fairly debatable as a matter of law and all causes of action, therefore, had to be dismissed. (*Id.* pp. 59-60.) The trial court entered an order accordingly on October 6, 2010. (R. 676-677.) This appeal followed on November 1, 2010. (R. 679-680.)

B. Statement of Facts.

On October 11, 2001, Chad Jones ("Jones") was driving his truck down Big Cottonwood Canyon. A car going up the canyon lost control, crossed center and collided head on into Jones's truck. (R. 428.) The investigating sheriff deputy determined that the driver who crossed center was at fault in causing the accident. (R. 427-428.)[1]

[1] Farmers conceded from inception of the claim that Jones had no fault in the accident. (R. 280, 346.)

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The at-fault driver was insured by Allstate Insurance Company, which offered its policy limit of $25,000 in full settlement of all claims against its insured. (R. 255, 341, 404.) In November 2005, Jones accepted the offer. (R. 341.)

Jones was insured by Farmers with an under-insured motorist ("UIM") policy limit of $30,000. (R. 404.) Jones made a UIM claim with Farmers on November 3, 2005. (R. 341.) As part of his UIM claim, he presented evidence of his injuries with medical bills of approximately $30,000. His injuries included damage to his teeth, which had been discovered recently by Dr. Richard Hughes. (R. 405.)

Farmers opened its claim file and met with Jones on November 3, 2005. Jones gave the Farmers adjuster copies of his medical bills, explaining that most of the bills were in collection due to his inability to pay the same. He explained his injuries and signed a medical authorization for Farmers to obtain his medical records. Upon returning to the office, the adjuster noted in the claim file, "If injuries and specials are as insured states they are, this will be UIM limits case". Farmers then set reserves at $30,000 to pay the claim. (R. 341.)

Over the next few months, Farmers collected the medical records which were slow in coming. The only questions raised by the adjuster during Farmers's investigation were whether the following were related to the accident: (a) a wrist fracture, and (b) the cracked teeth. (R. 330.)

On March 9, 2006, the adjuster received a report from Dr. Anthony S. Gordon and noted in the file,

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> Rec letter from Dr. Gordon, he relates insured wrist condition to this accident, Insured had an old ulnar styloid fracture but he [w]as asymptomatic until this accident occurred which caused significant aggravation of the fracture and the TFCC tear which is what required surgery. In regard to future treatment, he may need a trigger thumb release which is a small operation and not very expensive.

(R. 324.) From that point, the adjuster accepted causation on the wrist, which is not an issue in this matter.

To confirm that the cracked teeth were caused by the accident, the adjuster sent a letter to Dr. Hughes (Jones's treating dentist) on January 23, 2006, requesting certain information. After acknowledging that she had received a prior report dated September 21, 2005, and that Dr. Hughes had seen Jones nearly four years after the accident, the adjuster states that she is

> unclear on the cause of Mr. Jones extensive teeth damage and his need for future care....The purpose of this letter is to get your professional opinion on the cause of Mr. Jones teeth damage and to get the following questions answered:
>
> 1. Has Mr. Jones been a patient of your in the past and if so, we would like his entire history with your facility.
> 2. Did you review over Mr. Jones prior dental records (from another facility, if one exists) and if so, please explain his dental history.
> 3. If the damage is caused by this accident, was the damage made worse by Mr. Jones failure to get it taken care of promptly after the accident occurred? What damage could have been prevented had he promptly had the problem fixed?
> 4. What it [sic] the approximate cost for the procedures you recommended?

(R. 460.) There was no question in the letter regarding the basis of Dr. Hughes's opinion of causation or whether he was basing his opinion only on Jones's statements to him. (R. 330, 460.)

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On April 20, 2006, the adjuster received a report from Dr. Hughes and summarized his opinions in the claim file:

> Rec report from dentist, states that there is no way to know if the damage was made worse by insured waiting 4 years. States the teeth were cracked during the accident and are still cracked requiring the same treatment regardless of the time frame. Approximate cost for recommended treatment is $14,000. The dentist basically relates his problems to this accident, stating that he would have needed the treatment whether he did it 4 years ago or today.

(R. 325.) The adjuster refused to accept Dr. Hughes's opinion, and from that time, never mentioned Dr. Hughes again, as if his reports did not exist. There was no further follow-up, and no other questions were asked of Dr. Hughes until more than two years later in the arbitration proceeding.

On May 9, 2006, the adjuster noted, "Insured called and left message, he is frustrated and stated it seems we are putting him off as it has been 7 months since we first met and this still isn't settled." (R. 322.) Although she wrote in the claim file that it was difficult for her to get verification of some of the medical bills, when the adjuster called the collection agency (Express Collections) that same day, it took only two days to get the bills. (R. 322, 320.)

After concluding its investigation, Farmers prepared an evaluation of the UIM claim on May 15, 2006, but, notably, omitted both of Dr. Hughes' reports. After outlining Jones's other injuries from the accident, including injuries to his neck, left wrist, thumb, left knee, left ankle, and aggravation of Ulnar styloid, the adjuster wrote:

> Roundtable claim with supervisor, the biggest issue on this claim is the teeth damage which will require $14,000 in future treatment. We have no support, other than the insureds statement, that the damage to his teeth

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> resulted from this loss. Insured makes no mention of his teeth until he sees the dentist 4 years after the accident, there is no facial trauma noted in the ER report, Dr. Gordon's report or the PT reports. His mouth problems could just have likely been caused by something other than this accident, we don't have enough support to include the $14,000 in future treatment. Will evaluate without.
>
> * * *
>
> Outstanding medical bills at $7,635.26, Insured has received $25,000 through [Allstate] leaving $17,364.74 for general damages. We are not allowing the tooth damage as we don't have sufficient proof that it was caused by this accident. I think the underlying limit pretty much compensates Insured for his injures but I am going to offer $5,000 on the UIM, will explain this does not include the teeth damage.

(R. 320, 319.) (Emphasis added.) The adjuster conveyed the offer of $5,000 to Jones on May 19, which Jones did not accept. (R. 318.)

It is undisputed that cracked teeth are caused by trauma, and that since the 2001 accident, there was no other evidence of trauma in the file. (R. 568-572.)

Farmers's supervisor reaffirmed the adjuster's evaluation on June 12, 2006, noting that there was an additional claim for a few more treatments for the thumb, knee and ankle, but the $5000 offer remained unchanged. He, too, ignored Dr. Hughes' reports:

> However, the largest part of this claim is dental. Multiple teeth fx's are included in the demand and an additional 14K in future specials. However, the teeth issue was not treated until 4 yrs post loss. I would have expected multiple fractured teeth to cause some pain or discomfort during the 4 years. ie cold drinks, chewing, etc. In addition, the ER report mention the other injuries, but does not even mention a blow to the head, facial bruise, contusion or anything like it. Nor does the clmt mention a bump or blow to the head or face during ER visit. I cannot see how the dental damage is related causally to our loss.

(R. 317.)

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The evaluation did not mention records from Alta View Hospital indicating that, although Jones did not strike his jaw in the accident, he was examined and treated for head and neck injuries. (R. 562; R. 437, emergency room records attached to Farmers memorandum ("ASSESSMENT": "c/o pain upper thoracic area 'head crack'...."); R. 448 (in "PAIN DRAWING GRID ASSESSMENT," Jones draws a circle around the affected areas including the jaw).) Nor did Farmers inquire of any health care providers about those references or other issues relating to Jones's treatment.

On July 17, 2006, Farmers lowered its reserve on the claim from $30,000 to $10,000. (R. 314.) Farmers based its evaluation on the adjuster's own opinion that if Jones had really cracked his teeth in the accident: (a) there would have to be medical records confirming head or mouth injuries, or at least an impact to the head or face; and (b) cracked teeth would automatically be so symptomatic that Jones would have complained and sought treatment. (R.317.) Farmers did not consult a medical expert to verify these assumptions, or in any other way to address Dr. Hughes' opinion as to causation. (R. 277-350, 353-355.) Instead, it summarily dismissed both of Dr. Hughes' reports.[2]

Had Farmers engaged in such consultation as part of its investigation, it would have learned that its assumptions about cracked teeth were faulty. (R. 538-539, affidavit

[2] For example, on August 20, 2007, Farmers's supervisor ignores Dr. Hughes report and notes in the claim file, "advise clmt he can have the check the day he accepts the offer, otherwise he must prove the dental damage is related to the loss - which is hard given 4 years without a complaint." (R. 293.) Again on November 26, 2007, another adjuster writes, "Problem with the dental issue is that there is no mention until 4 years post loss. obviously the clmt needs to support the dental causation." (R. 285.)

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of Dr. Richard Hauley: "[I]t is not unusual for a person with cracked teeth to: a) not feel any pain or symptoms of the cracked teeth; and b) to be totally unaware that they have cracked teeth." *Id.*)

Over the ensuing two years, Farmers telephoned Jones and wrote a few letters offering the same $5,000. (R. 279-318.) At no point did Farmers ever disclose to Jones that it was contesting Dr. Hughes's opinions because Dr. Hughes implied in his report of September 21, 2005, that he was basing his causation opinion solely on Jones's statement to him that he injured his mouth in the accident. Indeed, Farmers never mentioned Dr. Hughes in the claim file after April 20, 2006. Instead, Farmers only referred to the late treatment and the lack of mention of mouth injury in the medical records. *See, for example* Farmer's letter to Jones dated January 7, 2008[3], which stated,

> I received your voice mail regarding our underinsured motorist settlement offer of $5,000.00; you do not feel our offer is fair and requested we extend a new offer.
>
> We still feel our $5,000.00 offer is fair given the injuries you sustained in this loss. The offer is based upon review of your medical records in which you were diagnosed with a triangular fiber cartilage tear in your left wrist (in which surgery was required), neck strain, left knee contusion, and left ankle sprain. You have received $25,000.00 from Allstate which after the medical bills leaves $17,364.74 in general damages (money that goes directly to you); we are offering an additional $5,000.00 making your general damage settlement $22,364.74. As discussed, we are unable to include your teeth fractures as these were not reported, or documented, until four years after this accident occurred. The emergency room report made no mention of any injuries to your mouth or face; under face, the reports states [sic] atraumatic meaning no injury was sustained.

[3] There is only one letter in the record from Farmers to Jones, though there are references in the claim file to telephone conversations between Farmers and Jones. See e.g. R. 315-318, 310-311, 301-308, 297, 291, 289, 283-285, 281, 298-279. There is no reference in the claim file to Dr. Hughes's reliance on Jones's statements.

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(R. 457.)

Shortly before the statute of limitations would expire, Jones made one last attempt to get Farmers to offer more than the $5,000. On August 25, 2008, the adjuster reported that, in a telephone conversation, she again offered only $5,000, which Jones rejected. When the adjuster advised him that the statute of limitation would run on September 29, 2008, Jones indicated he would be hiring an attorney. (R. 279.)

On September 24, 2008, Jones hired attorney Ed Wells, who immediately made demand for arbitration. (R. 277, 462-463.) The arbitration concluded on December 21, 2009, with an award in Jones's favor of $18,500, nearly four times higher than the only offer ($5,000) ever made by Farmers. (R. 562-563.)

After attorney Wells initiated the arbitration process in September 2008, Farmers consulted for the first time with a medical professional, Dr. Richard Elggren. Dr. Elggren deferred to Dr. Hughes's opinion. (R. 563 (Arbitration award: "The defense had a records review done by Dr. Elggren and he deferred to the plaintiff's treating physician, Dr. Hughes regarding causation and damages.").)

Jones filed this action on December 18, 2009. (R. 001.) After Farmers produced its claim file and admitted certain requests for admissions, Jones filed a motion for partial summary judgment based on undisputed facts, asking the court to rule as a matter of law that Farmers breached its covenant of good faith and fair dealing by failing to diligently and objectively investigate the claim and fairly evaluate the claim. (R. 257-261, 264, 267-269.)

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In sum, Farmers admitted the following facts:

(a) On April 20, 2006, Farmers had a supplemental report of a treating dental professional, who opined that the accident caused the cracks to Jones's teeth, and that the repairs would cost $14,000. (R. 325.)

(b) Farmers completed its investigation and evaluation by May 15, 2006. (R. 319.)

(c) Farmers made its only offer of $5,000 on May 19, 2006, and never negotiated beyond that amount until it paid the arbitration award more than two and a half years later. (R. 318.)

(d) Prior to the arbitration, Farmers never sought or obtained any medical opinions that: (1) addressed or refuted Dr. Hughes's opinions that the cracked teeth were caused by the accident in question; (2) the cost of repairing the cracked teeth would not be $14,000; or (3) before there could be such damage to Jones's teeth, there would have to be head trauma or injury. (R. 352-355.)

Farmers opposed Jones's motion and filed its own motion for summary judgment as to all claims, arguing that Jones' claim was fairly debatable and, therefore, all of Jones's bad faith claim must be dismissed. (R. 398-425.) Farmers argued that its position was fairly debatable because:

(a) The arbitrators' award allegedly validated Farmers's position regarding causation of the teeth damage. In making this argument, Farmers misrepresented to the court that the arbitrators had in fact found that the

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damage to Jones teeth was not caused by the accident. However, the document cited by Farmers to support this representation was an unsigned draft on the letterhead of one of the arbitrators, which stated, "The evidence does not preponderate that the plaintiff hit his jaw or damaged his teeth in the accident." (R. 471-472, emphasis added.) The emphasized language about damaged teeth was not part of the signed arbitration award, which only stated, "The evidence does not preponderate that the plaintiff hit his jaw in the accident." (R. 562-563.)[4]

(b) Farmers questioned Jones's credibility when he claimed his teeth were damaged in the accident, since he did not report any damage to his mouth until four years later, and there was no record that he hit his head in the accident.

(c) Farmers employed "common sense" and logic when evaluating Jones's claim.

In reply to Farmers's contention that the arbitration award supported Farmers's position, Jones argued that the drafts and final arbitration award support Jones's position instead. The language in the original draft (that the damaged teeth were not related to the accident) was removed from the final award, which made a monetary award without specifying whether it included the damaged teeth. When added to the specific finding

[4] Farmers largely abandoned this argument when it became apparent that it was using an unsigned draft to support its argument, rather than the final signed copy that did not contain the language cited by Farmers. This argument did not appear to be relevant to the judge during the hearing.

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about Farmers's expert deferring to Dr. Hughes on causation and future repair, it appeared the award did include an amount for the damaged teeth. (R. 548, n. 1; and 592, n. 1.)

The trial judge adopted Farmers's position and held that Farmers's conduct was fairly debatable as a matter of law, compelling dismissal of Jones's entire bad faith claim. (R. 686. pp. 59-60.)

SUMMARY OF ARGUMENT

Under Utah law, an insurance company is entitled to assert a "fairly debatable" defense, *i.e.,* to argue that a plaintiff cannot prove that its denial of benefits was unreasonable. Citing that principle, Farmers incorrectly argued in this case that an insured cannot maintain a bad faith claim unless he can establish entitlement to summary judgment as a matter of law. That assertion is unsupported by Utah law and would function as a *de facto* bar to nearly all bad faith claims.

For example, in some instances, a bad faith claim may hinge upon oral communications between an adjuster and the insured or a third party. If the content of those conversations is disputed, the insurance company would automatically be immunized from liability, even if a reasonable jury could conclude that the adjuster's version of events is inaccurate.

Farmers' argument turns dispositive motion practice on its head – if an insurer sought summary judgment on a bad faith claim, the trial court would be required to resolve all factual disputes and draw all inferences in favor of the *moving* party. As other courts have observed, to impose such a burden upon an insured is "unworkable."

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The trial court's ruling in this case is also erroneous because it allows a "fairly debatable" defense to trump an insurer's "*Beck* duties," *i.e.*, the duty to diligently investigate, fairly evaluate the claim, act promptly and reasonably in rejecting or settling the claim, deal with laypersons as laypersons and not insurance experts, and to refrain from actions that will injure the insured's ability to obtain the benefits of the policy. Under the ruling, Farmers was allowed to avoid liability for bad faith entirely, even though Jones argued (and adduced evidence) that Farmers's investigation was inadequate, that the insurer did not fairly or promptly evaluate the claim, and that it lowballed Jones.

The *Beck* duties are owed to all insureds, including those who submit debatable claims. Accordingly, an insured may maintain a claim for breach of such duties regardless of a "fairly debatable" defense. Moreover, the breach of some *Beck* duties precludes an insurer from even arguing that a claim was fairly debatable; for example, an insurer cannot claim to have engaged in a "fair" debate if it conducted an inadequate investigation in the first place.

When the correct principles of law are applied it is evident that the trial court erred in dismissing Jones's claims in this case. Numerous factual issues exist with respect to the claims, including: whether the substitution of an adjuster's preconceived (and erroneous) notions for a treating physician's unchallenged medical opinion of causation was reasonable, whether Farmers diligently investigated the case, whether Farmers treated Jones as a layperson, and whether Farmers improperly forced Jones into arbitration rather than fairly evaluate the claim two and a half years earlier.

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ARGUMENT

Introduction

As noted above, this claim is for alleged breach of the implied duties of good faith and fair dealing in an insurance policy. (These claims will be referred to generally as "bad faith claims.") This Court has held that, if a claim is fairly debatable, an insurance company is entitled to debate it. *Prince v. Bear River Mutual Insurance Company*, 2002 UT 68, 56 P.3d 524.

While the Court has applied the "fairly debatable" doctrine to a number of factual situations, it has not clarified two important issues:

1. Is a first-party insured only permitted to bring a bad faith claim if he can establish his underlying entitlement to benefits as a matter of law? That contention, successfully argued by Farmers in the court below, is contrary to the view of other jurisdictions. *See* p. 20-23, *infra*.

2. Does the "fairly debatable" doctrine trump an insurer's "*Beck* d uties"? Stated differently: If an issue of fact exists as to whether an insurer breached its implied-in-law duties to insured, may the insurer nonetheless argue that a claim was fairly debatable as a matter of law and thereby avoid liability for its other breaches?

The first Utah case to formally recognize the fairly debatable doctrine was *Callioux v. Progressive Insurance Company*, 745 P.2d 838 (Utah Ct. App 1987). In that case, Callioux made a claim for a fire loss. Progressive denied the claim based upon an arson exclusion, relying upon opinions of the State Fire Marshal and other fire experts, which opinions also led the county attorney to prosecute Callioux for arson. A jury

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subsequently found Callioux not guilty, after which Progressive immediately paid the full claim. Being unsatisfied, Callioux filed a bad faith claim.

The Court of Appeals affirmed the trial court's conclusion that the uncontroverted evidence reasonably supported the insurer's denial of the claim, which made the claim fairly debatable as a matter of law:

> If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby eliminating the bad faith claim. "When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." [citing an Alabama case]
>
> * * *
>
> An expert's report generally provides a good faith basis for an insurer's defense of a bad faith claim. [citing a Georgia case]

Id. at 842.

This Court later recognized the "fairly debatable" doctrine in *Billings v. Union Bankers Insurance Company*, 918 P.2d 461 (Utah 1996). In that case the court stated that, "Whether an insured's claim is fairly debatable under a given set of facts is also a question of law. . . . However, because of the complexity and variety of the facts upon which the fairly debatable determination depends, the legal standard under which this determination is made conveys some discretion to trial judges....Therefore, although we will carefully review a trial court's conclusion that an insured's claim is or is not fairly debatable, we will grant the trial court's conclusion some deference." *Id.* at 464.

The *Billings* court explained the rationale and policy behind the doctrine:

> The answer lies in the nature of the duties imposed by the covenant on an insurer: when confronted with a claim for benefits by a first-party insured,

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> the insurer must "*diligently* investigate the facts ..., *fairly* evaluate the claim, and ... act *promptly* and *reasonably* in rejecting or settling the claim." [citation omitted] The terms used to characterize these duties plainly indicate that the overriding requirement imposed by the implied covenant is that insurers act reasonably, as an objective matter, in dealing with their insureds....[T]he insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so.

Id. at 465 (italics and quotation in original), *citing Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 801 (Utah 1985).

The Court also emphasized that whether an insurer has acted reasonable is "an objective question to be determined without considering the insurer's subjective state of mind." It does not require a "'bad faith' state of mind" to show a breach of the good faith duties. *Id.* at 465, n. 2.

A few years later, the Court issued its opinion in *Prince*. In that case, the trial court faced a narrow issue: Were all of an insured's chiropractic expenses "necessary" as defined in the no-fault personal injury protection statute? Bear River obtained a report from a local physician, Dr. Stephen Marble, who concluded that only part of the chiropractic services were necessary. In reliance thereon, Bear River denied coverage for the remaining expenses. Prince sued, asserting breach of good faith duties and other causes of action.

The *Prince* court affirmed the trial court's dismissal of all but breach of contract, ruling that Bear River's actions were fairly debatable as a matter of law because it relied upon a legitimate expert report:

> If an insurer denies an " 'insured's claim [that] is fairly debatable, [then] the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so.'"

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Id. ¶ 28. (Quotations and brackets in original.)

> A 'debatable reason' for purposes of determining whether a first-party insurer may be subjected to bad-faith liability, means an arguable reason, a reason that is open to dispute or question.

Id. ¶ 34, (citing *Couch on Insurance* 3d §204:28 (1999).

> Denying benefits under an insurance policy in reliance on an expert's report...is not a bad faith denial because the expert's report creates a legitimate factual question...making the insured's claim at least fairly debatable. ...The validity of Prince's claim was fairly debatable because Bear River denied continued benefits in reliance on the doctor's opinion.

Id. ¶ 35.[5]

In adopting the fairly debatable doctrine, *Billings* defined the underlying policy upon which the defense is based: whether the insurer acted reasonably. If the facts are uncontroverted – for example, if the insurer relied upon an independent evaluation – the issue may properly be one of law. But if the facts are not so clear, resolution of those facts should be for the jury. Consistent with the provisions of U.R.Civ.P. 56(c), the central issue should be whether the *undisputed facts* allow the legal conclusion that the insurer's conduct was fairly debatable, based upon what it knew or should have known.

Confusion arises, however, when a trial judge concludes that, if any facts are disputed, the matter must be fairly debatable as a matter of law. *Callioux* and *Prince* illustrate this. In both cases, the denial of insurance benefits was based on a narrow

---

[5] An insurer's report would, of course, have to pertain to the issue being debated. For example, under an insurance policy, an insured might be entitled to restoration of his home to pre-fire condition. If an insurer retained an expert, but limited the expert's evaluation to structural soundness or habitability, rather than pre-fire condition, the report would not provide the basis for a "fair debate" of the latter issue.

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issue, and it was undisputed that the insurers relied on valid expert opinions directly related to those issues. If, for example, Callioux had also alleged that, after he was acquitted, the insurer then failed to properly investigate, evaluate and/or pay for the fire damage, the insurer's earlier reliance on the fire experts would have been irrelevant.

I. IT IS NOT THE LAW IN UTAH THAT AN INSURED CAN ONLY PURSUE A BAD FAITH CLAIM IF HE CAN PROVE ENTITLEMENT TO HIS UNDERLYING CLAIM AS A MATTER OF LAW.

Although this Court has never so held, many trial courts in Utah assume that a claim is automatically "fairly debatable," and therefore that no bad faith claim can be maintained, unless a plaintiff can establish his entitlement to summary judgment as a matter of law. Farmers successfully made that argument here:

> I think the other piece of that that's important to understand is that whether or not there's a – whether or not there is a fair debate and therefore a right to have the matter be denied and subject to later dispute resolution be [it] arbitration or trial is not – the way that's framed in the cases is, could be on the basis of the evidence grant summary judgment for the other side.
>
> In other words, is the evidence so clearly in favor of the opposition that there is no debate, there's no reasonable juror who would find it the insurance company's on the basis of the evidence, and therefore I'm comfortable that I could grant summary judgment for the other side.
>
> Because if you couldn't do that, if you couldn't grant summary judgment for the other side on the issue, on the strength of the evidence that's in front of the Court, there's a fair debate.

(R. 686, p. 17.)

Under this contention, if any question of fact is found in a subsequent lawsuit, then the claim is deemed to have been fairly debatable. Only if the judge rules as a matter of

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law that the insurer's conduct was *not* fairly debatable may a plaintiff pursue a bad faith claim. Either way, the issue can never be presented to a jury.

Farmers' contention reads too much into this Court's precedent – the Court has not addressed a situation in which an insurer asserted a fairly debatable defense in the face of an inadequate investigation or other breach of implied duties. Farmers's argument also allows an insurer to escape liability entirely if the insurer can come up with one aspect of a claim that was debatable, even if the insurer breached other duties owed to the insured.

Barring an insured from pursuing a bad faith claim unless he can establish entitlement to judgment as a matter of law is, in many instances, a virtual bar to bad faith claims. In *Skaling v. Aetna Insurance Co.*, 799 A.2d 997 (R.I. 2002), the Rhode Island Supreme Court recognized this reality, overturning a 1988 case in which it had imposed such a standard upon plaintiffs. The Court began its analysis by recognizing the problem created by its earlier decision:

> We are now confronted with the question of whether, in the context of first-party claims, an insurer is insulated from a claim of bad faith simply because plaintiff was unable to obtain a judgment as a matter of law in the underlying breach-of-contract action. This issue is particularly compelling in cases in which the issue rests upon a disputed fact or the claim is denied based upon a disputed oral conversation between the insured and the claims examiner. These factual disputes cannot be determined as a matter of law. If the claims examiner's testimony is untruthful and rejected by the jury, plaintiff has established a breach of the insurance contract; however, because the issue was resolved by a finder of fact and not the trial justice at the close of evidence, the insurer is insulated from bad faith, notwithstanding its reckless conduct and oppressive tactics. We are of the opinion that the directed verdict standard of proof in this context is unworkable and unjust[,] a situation that has been recognized in other jurisdictions.

Id. at 1003.

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"It makes little sense," the court observed, "that an insurance company may deny a claim, assert a coverage issue in a reckless and oppressive fashion, fail to timely respond to its obligations, or otherwise behave in a manner inconsistent with its implied duties of fair dealing and be insulated from tort liability for its bad faith conduct because it fortuitously survives a motion for summary judgment as a matter of law, yet is ultimately found to have breached the insurance contract. Such a holding conflicts with the public policy of this state that imposes implied-in-law obligations of good faith and fair dealing upon insurers doing business in Rhode Island." *Id.* at 1004.

The *Skaling* court noted that its conclusion was supported by case law from other jurisdictions. For example, in originally adopting a directed-verdict measure for bad faith claims, the Rhode Island court had borrowed from a standard adopted by the Alabama Supreme Court. In ensuing years, however, the latter court had ended up creating so many exceptions that "the exceptions have swallowed the rule." *Id.* at 1007. Alabama law now recognized that, "when the question of insurer bad faith hinges on a disputed issue of fact, or a disputed oral conversation between the insurer and insured," the insured's inability to obtain summary judgment does not bar a bad faith claim. *See also id.* at 1007-1010 (examining case law from other jurisdictions), and cases cited; *Niver v. Travelers Indemnity Company of Illinois*, 412 F.Supp.2d 966, 976-980 (N.D. Iowa 2006) (summarizing Iowa law rejecting directed-verdict standard for bad faith claim).

Several bad faith decisions in Utah have implicitly recognized this principle, indicating that summary judgment is improper if there are material issues of fact. *See, e.g., Pugh v. North American Warranty Services*, 2000 UT App 121, ¶¶ 22-23, 1 P.3d

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570, (addressing the *Beck* duties; "Whether the implied covenant of good faith performance was breached by North American is a fact-intensive inquiry, ordinarily left for the fact-finder."); *Horrell v. Utah Farm Bureau Insurance Company*, 909 P.2d 1279, 1283 (Utah Ct. App 1996) (recognizing that the jury would decide whether or not defendant's actions were fairly debatable).

In a non-insurance case involving the breach of the covenant of good faith and fair dealing, *Brown v. Weis*, 871 P.2d 552 (Utah Ct. App. 1994), the court similarly rejected the defendants' argued that the factual dispute would preclude a finding of breach of good faith duties:

> Defendants' argument...is essentially that no breach of the covenant occurred because of the claimed existence of various facts. This position, however, ignores the principle that whether a breach of the covenant has occurred is ordinarily a question for the jury.
>
> * * *
>
> This broad review required to determine whether a breach has occurred is generally one of fact, not law, and thus is ordinarily left to the jury or finder of fact.

Id. at 564-565 (citations omitted).[6]

In sum, Farmers incorrectly argued that Jones could not maintain a bad faith claim unless he could show entitlement to summary judgment as a matter of law. That concept is neither supported by Utah law, nor consistent with U.R.Civ.P. 56.

---

[6] Jones notes that the drafters of the Model Utah Jury Instruction 21.8 crafted language that captures the appropriate standard for triable issues in this context. The proposed instruction is based upon what a reasonable insurer would have done under similar circumstances, and/or the reasonable likelihood that the insurer's position would be upheld in court. The jury is to consider the controverted evidence on both sides when making the decision.

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II. THE "FAIRLY DEBATABLE" DOCTRINE MUST BE APPLIED IN CONJUNCTION WITH AN INSURER'S *BECK* DUTIES.

Over the years, the Court has consistently recognized certain duties of insurance companies in first-party claims. ("First-party" claim refers to claims made *against an insurer* by its own insured; in "third-party" claims which are made against the insured by a third party.)

Upon receipt of a first-party claim, an insurance company must affirmatively take certain steps. At a minimum, it must:

1) "diligently investigate the facts";

2) "fairly evaluate the claim";

3) "act promptly and reasonably in rejecting or settling the claim";

4) "deal with laymen as laymen and not as experts in the subtleties of law and underwriting"; and

5) "refrain from actions that will injure the insured's ability to obtain the benefits of the contract." *Beck*, 701 P.2d 795 at 801 (internal citations omitted).

An insurer who has diligently investigated the facts will have an appropriately complete file. The insurer must then fairly evaluate the claim – which may include fairly debating it – if it does so promptly, and treats the insured as a layperson. The insurer cannot skip or breach one of its duties yet escape liability by arguing later that the claim was fairly debatable.

Courts recognize that breach of the *Beck*-type duties may support a claim for bad faith apart from the failure to pay a fairly debated claim. In *Farmland Mutual Insurance*

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Co. v. Johnson, 36 S.W.3d 368 (Ky. 2001), for example, the insured stipulated that the dollar amount of his claim was fairly debatable. That did not excuse the insurer from meeting its other obligations to him, the court concluded:

> Farmland's position thus reflects an erroneous interpretation of the "fairly debatable" language. Although matters regarding investigation and payment of a claim may be "fairly debatable," an insurer is not thereby relieved from its duty to comply with the mandates of the [Kentucky Unfair Claims Settlement Practices Act]. Although there may be differing opinions as to the value of the loss and as to the merits of replacing or repairing the damaged structure, an insurance company is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner. In other words, although elements of a claim may be "fairly debatable," an insurer must debate the matter fairly.

Id. at 376.

The insurer's offer of some amount on a debatable claim does not preclude liability, the court continued:

> [C]oming up with an amount that is within the range of possibility is not an absolute defense to a bad faith case. The carrier has an obligation to immediately conduct an adequate investigation, act reasonably in evaluating the claim, and act promptly in paying a legitimate claim. It should do nothing that jeopardizes the insured's security under the policy. It should not force an insured to go through needless adversarial hoops to achieve its rights under the policy. It cannot lowball claims or delay claims hoping that the insured will settle for less. Equal consideration of the insured requires more than that. The court of appeals therefore erred in concluding that fair debatability is both the beginning and the end of the analysis.

Id., quoting Zilisch v. State Farm, 196 Ariz. 234, 995 P.2d 267 (2000). *See also Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (under similar "reasonably clear" standard, "An insurer will not escape liability merely by failing to investigate a claim so that it can contend that liability was never reasonably clear. Instead, we reaffirm

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that an insurance company may also breach its duty of good faith and fair dealing by failing to reasonably investigate a claim.")

The *Skaling* court similarly observed:

> Although we decline to abandon the fairly debatable standard and recognize that an insurer is entitled to debate a claim that is fairly debatable, we are not persuaded that an insurer is relieved of its obligations to deal with its insured consistent with its implied in law obligations of good faith and fair dealing simply because the claim is fairly debatable. . . . The insurer's failure to conduct an appropriate and timely investigation may subject the insurer to bad faith liability notwithstanding the merits of the claim. Although a fairly debatable claim "is a necessary condition to avoid liability for bad faith, it is not always a sufficient condition."

799 A.2d at 1011 (internal citations omitted).

As an example, suppose an insurer has not investigated a claim at all, or has done so halfheartedly. An insurer cannot assert that a debate was "fair" if it is based upon an inadequate investigation. *See, e.g., S. W. Energy Corp. v. Continental Ins. Co.*, 974 P.2d 1239, 1243 (Utah 1999) (affirming summary judgment on "fairly debatable" claim, noting that "[n]othing in the record suggests that the insurer was dilatory or otherwise unreasonable in its investigation of [the] claim or in its determination to deny coverage").

For that reason, a trial court cannot resolve a "fairly debatable" defense as a matter of law if an issue of fact exists as to whether the insurer conducted a diligent investigation. *See, e.g., Dakota, Minnesota & Eastern Railroad Corp.*, 771 N.W.2d 623, 629-630 (S.D. 2009) ("Courts which apply the fairly debatable standard have held that the adequacy of the investigation and consideration of the claim by the insurer is relevant in determining whether a claim is fairly debatable"), and cases cited; *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2003 WI 46, ¶¶ 33-34, 661 N.W.2d 789 ("The

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'fairly debatable' test requires a claim to be investigated properly and the results of that investigation to be subject to reasonable evaluation and review.").

Suppose, further, that an insurer waits two years after concluding its investigation to deny a claim. If a jury finds that the denial was not "prompt," and the delay caused harm to the insured, the insurer could not escape liability by claiming that two years earlier, the claim was fairly debatable – indeed, at this point, the legitimacy of the debate at an earlier point in time would be irrelevant.

Suppose, further, that an insurance company questions an insured or his treating physician based upon an adjuster's alleged "experience," without explaining the nature of that experience or what information would be responsive to it. (*E.g.,* R. 370 Response to ¶ 9 (Farmers citing "experience" as basis for denial).) A jury could consider that a breach of the insurer's duty to treat insureds as laypersons rather than insurance experts, regardless of whether the insurer could otherwise argue that the claim was fairly debatable.

Additionally, with respect to fair evaluation, in some instances it might be disputed whether the insurer reasonably relied on an expert. *See, e.g., Nelson v. Safeco Ins. Co.*, 396 F.Supp.2d 1274, 1280-81 (D. Utah 2005) (insurer's reliance on fire expert's opinions that were "based on assumptions and speculations and unreliable" was unreasonable; "[T]here are many questions of fact as to whether Defendant diligently investigated the facts to enable it to determine whether the claim was valid, whether it fairly evaluated claim, and whether it acted promptly and reasonably in rejecting the

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claim. Thus, a jury must decide if the denial was reasonable, or, in other words, 'fairly debatable.'")

Typically, the conduct of the insurer is judged based on the facts as they then existed at the time of the alleged bad faith. However, subsequent events may also be relevant or even determinative. For example, if a bad faith claim is based on a failure to diligently investigate, relevant evidence may include what would have been discovered had the adjuster performed adequate investigation.

Later determinations of the loss as found by appraisers, arbitrators or jurors may also evidence an unreasonable evaluation. *See, e.g., McGee v. State Farm Fire and Cas. Co.*, 315 Ill.App.3d 673, 734 N.E.2d 144, 154 (2000) (disparity between insurer's offer and appraisal award did not *per se* establish unreasonableness, but created an issue of fact); *Anderson v. State Farm Mutual Insurance Co.*, 2 P.3d 1029, 1036 (Wash. App. 2000) ("[The plaintiff] alleges that State Farm should have responded to her claim by making a reasonable offer of settlement instead of forcing her into arbitration. . . . The ultimate issue of the reasonableness of the offer is for the finder of fact to determine"); *Thomas v. State Farm Mut. Auto. Ins. Co.*, 181 W.Va. 604, 383 S.E.2d 786, 791 (1989) (insured was entitled to consequential damages and attorney fees where amount insurer offered for repairs was only one half of the actual amount of loss); *Firemen's Ins. Co. of Newark, N.J. v. Allmond*, 105 Ga.App. 763, 125 S.E.2d 545, 548 (1962) (where insurer only offered $2,250 for replacement of property and jury determined actual amount of loss was $4,000, it was a question for the jury as to whether amount offered was so small as to constitute bad faith).

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In short, while many bad faith cases may properly be resolved on summary judgment, doing so in some cases would require improper resolution of issues of fact, in contravention to U.R.Civ.P. 56(c) (moving party must show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.")

III. THE TRIAL COURT IMPROPERLY DISMISSED JONES'S BAD FAITH CLAIMS IN THIS CASE.

With the proper standard for fair debatability set forth, we now turn to the actions of the trial court in this case. As noted above, Farmers advanced the overly broad principle that anything short of summary judgment for the insured renders a claim fairly debatable as a matter of law. Farmers even attached an opinion by U.S. District Judge Ted Stewart which appeared to support its position that almost any dispute establishes the defense as a matter of law. (R. 646-656; "[T]he mere existence of a legitimate factual question makes an insurance claim fairly debatable and eliminates a cause of action for bad faith." (R. 654.).)

Farmers cited the trial court to language in an initial report by Dr. Hughes in September 2005 that appeared equivocal as to causation, and could be interpreted as though Dr. Hughes's opinions were based solely on Jones's report. (R. 686, pp. 30, 35,-36.) Jones countered, however, that Dr. Hughes submitted a supplemental report on April 20, 2006 that was neither equivocal nor based upon alleged statements by Jones (R. 325). Jones further argued that, in any event, the supplemental report would not justify Farmers' total rejection of Dr. Hughes's opinions without at least performing some

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additional investigation, such as obtaining an opposing medical opinion. (R. 686, pp. 36-38.) The trial court nonetheless stated, "Well, that—then that leaves us with an issue of fact, right?" which formed the basis for his conclusion that Farmers's position was fairly debatable as a matter of law. (R. 686, pp. 36, 55)

If affirmed, Farmers's position in this case would essentially eviscerate the *Beck* duties. An insurer would not need to do much investigation on a claim. It would only need to say that it didn't believe the insured, a witness or an unchallenged medical expert, force the insured into an expensive arbitration after years of refusing to negotiate, yet still escape liability through a fairly debatable defense.

A review of the claim file shows without dispute that Farmers only questioned the UIM claim on two issues (R. 330): first, the causation of the wrist injury and symptoms, which it satisfied itself by obtaining Dr. Gordon's report (R. 324); and second the causation of the damaged teeth. Because Farmers claims that it questioned causation based on language in Dr. Hughes's September 2005 report, it had a duty to *diligently* investigate. It claimed it fulfilled this duty by requesting that Dr. Hughes provide additional information in a supplemental report, but that report removed any reasonable grounds to deny the claim.

Though Jones filed a motion for partial summary judgment to have the court determine that, as a matter of law, Farmers's conduct was a breach of the covenants of good faith (because it did not further investigate and denied this part of the claim with no objective counter-evidence); at the very least, this created an issue of fact for the jury, which precluded summary judgment in Farmers's favor. These charges and counter-

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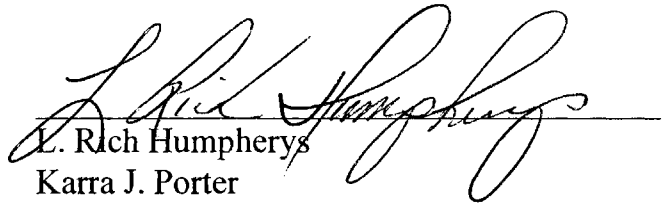
charges simply demonstrate that the evidence can be viewed differently; accordingly, the issue was one for the jury to decide.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that the Court reverse the judgment of the trial court and either direct partial summary judgment in appellant Jones's favor or remand the case for trial on the issues of whether Farmers's conduct breached the duties of good faith and fair dealing.

DATED this 6th day of June, 2011.

CHRISTENSEN & JENSEN, P.C.



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Edward T. Wells

Attorneys for Appellant

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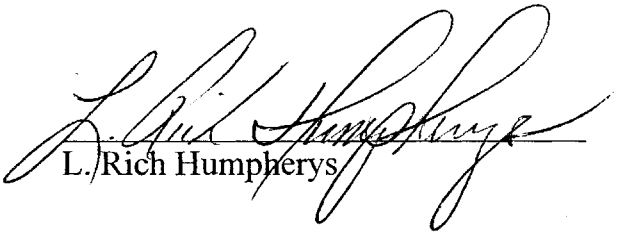
CERTIFICATE OF SERVICE

This is to certify that on the 6th day of June, 2011, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were mailed, postage prepaid, to:

John Lund
Murry Warsank
Snow Christensen & Martineau
PO Box 45000
Salt Lake City, Utah 84145-5000



L. Rich Humpherys

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ADDENDUM

1. Order Granting Defendant's Motion for Summary Judgment – October 6, 2010

2. Transcript of Hearing, September 7, 2010, pp. 59-60

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

WEST JORDAN DEPARTMENT, STATE OF UTAH

CHAD JONES, Plaintiff, vs. FARMERS INSURANCE EXCHANGE (incorrectly sued as FARMERS INSURANCE EXCHANGE dba FARMERS INSURANCE COMPANY), Defendant.	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Civil No. 090426057 Judge Mark S. Kouris

This matter having come before the Court on September 7, 2010, before the Honorable Mark Kouris, on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, Edward T. Wells of The Personal Injury Law Firm appearing on behalf of Plaintiff and John R. Lund of Snow, Christensen & Martineau appearing on behalf of Defendant, and the Court having considered the briefing and arguments of counsel, it is hereby

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ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED; and it is further

ORDERED that Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Complaint is hereby dismissed with prejudice, each party to pay its own attorneys' fees and costs.

DATED this 6 day of ~~September~~ October, 2010.

BY THE COURT

Mark Kouris
District Court Judge

Approved as to form:

Edward T. Wells
Attorney for Plaintiff

John R. Lund
Attorney for Defendants

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of September, 2010, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** to be delivered via first class mail, postage prepaid, upon the following:

The Personal Injury Law Firm
Edward T. Wells
10808 South River Front Parkway, Suite 392
South Jordan, Utah 84095

23640-22

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IN THE THIRD JUDICIAL DISTRICT COURT-WEST JORDAN
OF SALT LAKE COUNTY, STATE OF UTAH

CHAD JONES,

Plaintiff,

vs.

FARMERS INSURANCE EXCHANGE,

Defendant.

ORIGINAL

Case No. 090426057

Motion for Summary Judgment Hearing
Electronically Recorded on
September 7, 2010

BEFORE: THE HONORABLE MARK KOURIS
Third District Court Judge

APPEARANCES

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issue up to the Court of Appeals on what Utah's rule is on fairly debatable, and what is and isn't objective evidence.

So I would ask the Court, no matter how you rule on the totality of it, that you certify the question and let us go have the appellate Court take a look at it.

THE COURT: That would be fine. So if that's the case, then what I'm going to do is I'm going to grant, then, Mr. Lund's motion deny -- dismissing the good fait argument, as well, your summary judgment, obviously, I'm denying. If you'd prov -- if you'd please provide an order reflecting that --

MR. WELLS: All right.

THE COURT: -- I will sigh off on that. Are we all clear here; have I left some things undone?

MR. WELLS: I think it's pretty clear.

THE COURT: Is there more than one claim besides good faith in your argument?

MR. WELLS: No.

THE COURT: That's it?

MR. LUND: Yeah, our motion was for an order dismissing the claims under Rule 56 on a theory that received all of the benefits, which I don't think is disputed now the arbitration award paid the benefits, and that his extra contractual gains, which would be the bad faith claims, all fail under the fairly debatable doctrine.

THE COURT: Okay, so that would -- that does make

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sense, then. Okay, so based on that, then, Mr. Lund's motion on a -- on summary judgment is granted, and I guess that would -- is the case then dismissed?

MR. LUND: I think that will result in a --

THE COURT: Okay.

MR. LUND: -- a final order in the case.

THE COURT: Okay, if that's the case, then, once you file that order, then obviously you'll be able to file your appeal right after that, okay?

MR. LUND: Thank you, your Honor.

THE COURT: Okay?

MR. WELLS: Thank you.

(Hearing concluded)

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