

2016

Fire Insurance Exchange, Respondent, vs. Robert Allen Oltmanns, Petitioner.

Utah Supreme Court

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IN THE UTAH SUPREME COURT

FIRE INSURANCE EXCHANGE,	
Respondent,	
vs.	Case No. 20160304
ROBERT ALLEN OLTMANNS,	
Petitioner.	

BRIEF OF RESPONDENT
FIRE INSURANCE EXCHANGE

Appeal from Judgment of the Utah Court of Appeals, 2016 UT App 54

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JURISDICTION

The Utah Supreme Court has jurisdiction to review the court of appeals' decision pursuant to Utah Code Ann. §79A-3-102(3)(a).

STATEMENT OF THE ISSUES

ISSUE #1: Was Robert Oltmanns' claim on his homeowners insurance policy fairly debatable as a matter of law? This was the only issue on which this Court granted the Petition for Certiorari as set forth in its July 8, 2016 Order.

STANDARD OF REVIEW: On a writ of certiorari, this Court reviews the decision of the court of appeals and applies "the same standard of review used by the court of appeals." *Clark v. Clark*, 2001 UT 44, ¶ 8, 27 P.3d 538. "The correctness of the court of appeals' decision turns on whether it accurately reviewed the trial court's decision under the appropriate standard of review." *Id.* "Whether an insured's claim is fairly debatable under a given set of facts is . . . a question of law." *Jones v. Farmers Ins. Exch.*, 2012 UT 52, ¶ 6, 286 P.3d 301. However, because of "the complexity and variety of facts upon which the fairly debatable determination depends, the legal standard under which this determination is made conveys some discretion to trial judges." *Id.* "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.* "The trial court's application of law to the facts is reviewed for abuse of discretion." *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc.*, 2005 UT App 326, ¶ 16, 121 P.3d 24, 28 *aff'd*, 2006 UT 45, ¶ 16, 143 P.3d 278.

ISSUE #2: Was the trial court's grant of summary judgment proper when no genuine issue of material fact existed regarding the conduct of Fire Insurance in handling Oltmanns' claim?¹

STANDARD OF REVIEW: Summary judgment shall be granted if "there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "In determining whether the trial court correctly found that there were no genuine issues of material fact, [this Court views] the facts and all reasonable inferences in a light most favorable to the party opposing the motion." *Neiderhauser Builders and Dev. Corp. v. Campbell*, 824 P.2d 1193, 1196 (Utah Ct. App. 1992) (internal quotation marks omitted). Furthermore, summary judgment on the fairly debatable issue "should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail." *Jones v. Farmers Ins. Exch.*, 2012 UT 52 at ¶ 8.

This Court stated that summary judgment is not precluded simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted. *Hegler Branch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980). In cases such as this, where the non-moving party bears the burden of proof at trial, if the movant shows through pleadings, depositions, and other evidence that there are no issues of material fact, and judgment on the law is proper, the burden shifts to the non-moving party, "who may not

¹ To the extent this Court considers Issues # 2 and # 3 as set forth by Robert Oltmanns, Fire Insurance submits that Issue #2 is framed more appropriately as detailed in the Respondent's brief.

rest upon the mere allegations or denials of the pleadings,” to present evidence, beyond bare pleadings, to demonstrate a genuine issue of material fact. *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600 (2008).

In addition, mere inferences are not sufficient to withstand summary judgment. Any inferences must be taken from “material” facts, and furthermore, those inferences must establish a “genuine” issue.

Summary judgment requires only that there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The word “genuine” indicates that a district court is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party. Instead, it is required to draw all *reasonable* inferences in favor of the nonmoving party. . . .

IHC Health Services, Inc. v. D & K Mgmt., Inc., 2008 UT 73, ¶ 19, 196 P.3d 588 (emphasis added).

STATEMENT OF THE CASE

NATURE OF THE CASE and COURSE OF PROCEEDINGS

Petitioner Robert Oltmanns (hereinafter “Oltmanns”) and Brady Blackner were involved in an accident that occurred on July 11, 2006, when Oltmanns was the operator of a Honda F-12 AquaTrax personal watercraft. (R. at 2.) Oltmanns was towing a tube on which Brady Blackner was riding. (R. at 2.) The tube collided with a rock, resulting in injury to Brady Blackner’s leg. (R. at 2.) Thereafter, Brady Blackner sued Oltmanns for damages that resulted from the alleged negligence of Oltmanns in the accident. (R. at 2.) The case was titled *Brady Blackner v. Keith Joseph Caserio, Robert Allen Oltmanns, et*

al., Davis County Civil No. 070700309 (hereinafter “Blackner lawsuit”). (R. at 2.) At the time of the accident, Oltmanns was insured under a homeowners policy issued by Fire Insurance Exchange (“Fire Insurance”). (R. at 2.) In September 2006, Fire Insurance agent, Sherrie Eichmeier, offered to assist Oltmanns in filing a claim on his homeowners insurance policy for the accident. (R. at 500.) Oltmanns declined this offer. (R. at 500.) In 2009, more than three years after the accident, Oltmanns made a claim under his homeowners policy and tendered the defense of the lawsuit brought against him by Brady Blackner, claiming the suit was covered under the liability section of the homeowners insurance policy issued by Fire Insurance. (R. at 500.)

After Oltmanns made a claim on his homeowners insurance policy for defense of the Blackner lawsuit, Fire Insurance thoroughly investigated the facts and fairly evaluated the circumstances to determine if the claim made by Oltmanns was covered under his homeowners policy. (R. at 501–05.) In reviewing the language of Oltmanns’ homeowners insurance policy, Fire Insurance noted an exclusion for bodily injury resulting from the use of jet skis. (R. at 2–3.) In December 2009, due to the language in Oltmanns’ homeowners insurance policy and without denying Oltmanns’ claim, Fire Insurance filed a declaratory relief action to have the court determine the rights and responsibilities of the parties as they related to the language in Oltmanns’ homeowners insurance policy. (R. at 1–4, 501–05.) Fire Insurance moved for summary judgment to have the trial court declare Oltmanns’ accident was not covered by the homeowners insurance policy. (R. at 29–80.)

The trial court granted summary judgment in favor of Fire Insurance, concluding that the term “jet skis” in Oltmanns’ homeowners insurance policy included the Honda F-12 AquaTrax personal watercraft which Oltmanns was operating when the accident occurred. (R. at 181–83.) Oltmanns and Brady Blackner appealed the trial court’s decision. (R. at 184–85.) The Court of Appeals reversed finding the term “jet skis” was ambiguous, “even discounting the bizarre possibility that [the term] meant to refer only to one Kawasaki watercraft model.” (R. at 211–22.) The Court of Appeals concluded that the language in the homeowners policy was not effective to exclude coverage for Oltmanns’ accident. (R. at 217.) Thereafter, Fire Insurance immediately accepted coverage and settled the Blackner lawsuit on behalf of Oltmanns.² (R. at 504.)

Thereafter, in 2013, Oltmanns filed his First Amended Counterclaim against Fire Insurance seeking an award of attorney’s fees and costs from defending the declaratory judgment action. (R. at 226, 244.) Fire Insurance filed a Motion for Judgment on the Pleadings. (R. at 352–62.) The Court denied Fire Insurance’s Motion for Judgment on the Pleadings and converted it to a Motion for a More Definite Statement, pursuant to Rule 12(e) of the Utah Rules of Civil Procedure, which was granted. (R. at 398–400.) Thereafter, Oltmanns filed his Second Amended Counterclaim. (R. at 403–08.) Fire Insurance answered the Second Amended Counterclaim denying the claims for relief in their entirety. (R. at 412–19.) The parties proceeded to discovery, which included

² The Court of Appeals incorrectly states that “A year later, the brother-in-law sued Oltmanns for negligence and won, obtaining a judgment against him.” *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, ¶ 3. The Blackner Lawsuit was settled prior to any judgment

interrogatories and requests for production of documents, but no depositions. (R. at 458, 464, 484.) Initially, fact discovery was to be completed by February 28, 2014 (R. at 435–36), however, the parties stipulated to extend fact discovery an additional 60 days until April 30, 2014. (R. at 480–81.)

After discovery ended, Fire Insurance filed a motion for summary judgment that Oltmanns' claim was fairly debatable as a matter of law. (R. at 494–626.) After a hearing on the motion, the trial court granted Fire Insurance's Motion for Summary Judgment, concluding that Oltmanns' claim was fairly debatable as a matter of law.³ (R. at 863–73.) Oltmanns appealed the trial court's order on October 20, 2014. (R. at 876.) The court of appeals affirmed the trial court's order. *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, 370 P.3d 566.

DISPOSITION IN THE LOWER COURTS

The trial court concluded that Fire Insurance, in relation to the claim made by Brady Blackner against Oltmanns, diligently investigated the facts to determine if the claim was valid. (R. at 863–73.) The trial court found Fire Insurance fairly evaluated the claim. (R. at 863–73.) The trial court concluded Fire Insurance acted promptly and reasonably by first filing a declaratory relief action and ultimately settling the claim against Robert Oltmanns on his behalf. (R. at 863–73.) This included paying Oltmanns'

being entered. The case was then dismissed.

³ The trial court allowed Fire Insurance to withdraw its separate motion to dismiss based on the statute of limitations. Oltmanns' counterclaim was filed beyond the three-year statute of limitations as found in Utah Code Ann. §31A-21-313. The trial court allowed the motion to dismiss to be withdrawn without prejudice. (R. at 850, 872.)

legal fees and costs in defending the Blackner lawsuit. (R. at 863–73.) The trial court concluded that Fire Insurance was faced with a fairly debatable question surrounding the coverage of Brady Blackner’s claims against Oltmanns. (R. at 863–73.) The trial court concluded the definition of “jet skis” as found in Oltmanns’ homeowners insurance policy presented a fairly debatable claim. (R. at 863–73.)

Thus, the trial court concluded Fire Insurance was entitled to seek a declaratory judgment as to its obligations to Oltmanns and its duties under the insurance contract. (R. at 863–73.) The trial court, therefore, concluded that Fire Insurance did not breach the implied covenant of good faith and fair dealing owed to Oltmanns. (R. at 863–73.) Further, the trial court concluded that Fire Insurance did not breach the insurance contract with Oltmanns. (R. at 863–73.) Just the opposite, the trial court concluded that Fire Insurance continually acted in good faith and performed its duties under the homeowners insurance contract with Oltmanns. (R. at 863–73.)

Therefore, the trial court granted Fire Insurance’s Motion for Summary Judgment and dismissed Oltmanns’ causes of action as found in Oltmanns’ Second Amended Counterclaim. (R. at 863–73.) The Court of Appeals affirmed the trial court, concluding that “an insurance company may reasonably and fairly rely . . . upon a coverage opinion from qualified outside counsel, received in the course of careful investigation and evaluation of a claim. *Fire Ins. Exchange v. Oltmanns*, 2016 UT App 54, ¶ 15, 370 P.3d 566. The Court of Appeals went on and concluded that “submitting the issue to a court for interpretation in declaratory judgment action is a prudent, reasonable step toward the

resolution of a legitimate dispute over a coverage term or exclusion. *Oltmanns*, 2016 UT App 54, ¶ 15.

STATEMENTS OF FACT

The Petitioner has not identified any statements of fact actually considered by the trial court. Rather, Petitioner's statement of facts read as additional argument that do not reflect the facts of this matter. The following statements of fact are necessary for a court to consider the conduct of the insurer and to allow the trial court deference when making a fairly debatable determination.

1. This action concerns a policy of homeowners insurance issued by Fire Insurance to Oltmanns. (R. at 2.)
2. Oltmanns was sued by Brady Blackner for injuries he sustained while Oltmanns was operating a Honda F-12 AquaTrax personal watercraft in Case No. 070700309. (R. at 2.)
3. In September 2006, Oltmanns went to his insurance agent, Sherrie Eichmeier, to inquire about his homeowners insurance policy. (R. at 533–35.)
4. In September 2006, Oltmanns and Sherrie Eichmeier read the exclusions in Oltmanns' homeowners insurance policy. Both Oltmanns and Sherrie Eichmeier thought that Oltmanns' accident that occurred on July 11, 2006, was probably not covered due to the language contained in the exclusion regarding "jet skis." (R. at 533–35.)

5. Sherrie Eichmeier told Oltmanns the only way to determine if coverage was provided under his homeowners policy for his July 11, 2006, accident was to submit a formal claim on his homeowners insurance policy so that an investigation could be conducted. (R. at 533–35.)
6. Sherrie Eichmeier offered to assist Oltmanns in making a formal claim on his homeowners insurance policy so that a formal investigation could be conducted on Oltmanns' July 11, 2006 accident, to see if coverage was available. (R. at 533–35.)
7. Robert Oltmanns declined Sherrie Eichmeier's offer to assist him in making a formal claim on his homeowners insurance policy for the July 11, 2006 accident. (R. at 533–35.)
8. In September 2006, Robert Oltmanns decided he did not want to make a claim on his homeowners insurance policy to see if coverage was provided for his July 11, 2006, accident. (R. at 533–35.)
9. Robert Oltmanns never asked Sherrie Eichmeier to assist him in making a formal claim on his homeowners insurance policy in September 2006 to determine if his July 11, 2006, accident was covered under his homeowners insurance policy. (R. at 533–35.)
10. The Blackner lawsuit was filed against Oltmanns the following year in June 2007. (R. at 403.)

11. On August 26, 2009, Oltmanns tendered defense of *Blackner v. Caserio*, Case No. 070700309, Second Judicial District Court, Davis County, State of Utah, to Fire Insurance. (R. at 403, 538, 543.)
12. The next day on August 27, 2009, Shawn Stephens, Litigation Claims Specialist for Fire Insurance, contacted Oltmanns' counsel, Don Dalton, to discuss the language of Oltmanns' homeowners insurance policy. (R. at 537–41.)
13. Shawn Stephens told Mr. Dalton that if Oltmanns was seeking coverage for the accident that occurred on July 11, 2006, that Fire Insurance would complete a thorough investigation of the loss and how coverage would potentially apply. (R. at 537–41, 545.)
14. Shawn Stephens specifically told Don Dalton that his email on August 27, 2009, was not to be misconstrued as a denial of any kind, regarding Oltmanns' insurance claim due to the accident. (R. 545).
15. In response to Shawn Stephens' August 27, 2009 email, Mr. Dalton informed Fire Insurance that Oltmanns was making a claim on his homeowners insurance policy. (R. 537-41, 548).
16. Starting the next day on August 28, 2009, Fire Insurance began a coverage investigation and evaluation regarding the accident in July of 2006 that involved Oltmanns. Shawn Stephens, in conducting the investigation and evaluation, requested and received the summons and complaint filed against Oltmanns (Case No. 070700309), the cross-claim against Oltmanns from the rental companies, a

copy of the rental agreement for the personal watercraft, and the deposition transcript of Robert Oltmanns regarding the facts of the accident. (R. at 537–41, 551.)

17. It took several weeks for Fire Insurance to obtain the necessary documents needed to complete a coverage investigation and evaluation. (R. at 537–41.)

18. Fire Insurance held a meeting in the claims litigation department, which included supervisors, about Oltmanns' claim and demand for coverage. As a result of the meeting, Fire Insurance decided to send the matter to outside counsel for a coverage opinion. (R. at 537–41.)

19. Oltmanns made the following statement of additional fact (No. 1), which was based on Fire Insurance's response to Oltmanns' interrogatories: "Before sending the claim for a coverage evaluation, Plaintiff determined that it needed a copy of the vehicle title and registration at the time of the accident to determine how the jetski [sic] is classified. Plaintiff wanted to know if the vehicle was classified as a 'watercraft.'" The claim summary log stated, "This information is needed before sending out for coverage opinion [sic]." However, the vehicle title and registration were not secured. Fire Insurance objected on the same basis that it objected to the interrogatories. At the same time, Fire Insurance repeated the complete answer it gave to the interrogatories: "Fire Insurance Exchange did not need said information prior to sending the matter out for a coverage opinion. However, said information may have assisted coverage counsel in understanding how the Honda

F-12 personal watercraft was classified. In addition, the registration may have provided technical language, including to whom the watercraft was registered to. Fire Insurance Exchange sought to provide coverage counsel with as much information as possible within the time constraints. It was determined that the identified information would be helpful, but it was not felt to be critical. If coverage counsel felt the information was essential for a coverage opinion, additional efforts to obtain said information would have been made.” (R. at 667–68, 674–81.)

20. On November 20, 2009, Fire Insurance sent a copy of their file to coverage counsel for a coverage opinion as to whether the July 2006 accident was a covered occurrence under Oltmanns’ policy. The documents Fire Insurance sent to coverage counsel for the coverage opinion included: the summons and complaint against Oltmanns in case no. 070700309; the filed answers to the complaint for case no. 070700309; a copy of the rental agreement for the personal watercraft; Oltmanns’ Deposition transcript detailing the facts of the accident; and correspondence with Mr. Dalton. (R. at 537–41, 555–56.)
21. On November 20, 2009, Fire Insurance also sent a letter to Don Dalton to inform him that the matter was sent to outside counsel for a coverage opinion. Fire Insurance asked Mr. Dalton to continue defending Oltmanns and told him that in the event coverage was extended for the July 2006 accident, Fire Insurance would reimburse him for the costs and fees incurred by Oltmanns. (R. 539, 558).

22. On December 11, 2009, Fire Insurance received the coverage opinion from coverage counsel. Coverage counsel indicated a general search of court cases found that many courts referred to various brands of personal watercrafts as jet skis. Coverage counsel indicated that Wikipedia and Google showed that the term “jet ski” was often used as a generic term for all personal watercraft. Based on coverage counsel’s research regarding the term “jet ski,” he believed that Fire Insurance had a 75% chance of prevailing in a declaratory relief action. In the coverage opinion, coverage counsel sought authorization to file a declaratory relief action. (R. at 540, 560–79.)
23. Fire Insurance relies on outside counsel to assist in making coverage determinations if there is a question regarding the language of an insuring agreement. (R. at 750.)
24. On December 14, 2009, Fire Insurance authorized coverage counsel to file the declaratory relief action. (R. at 540.)
25. The declaratory relief action was filed on December 18, 2009. (R. at 2.)
26. Fire Insurance moved for summary judgment on the declaratory judgment action. (R. at 29–80.) The trial court granted summary judgment for Fire Insurance, declaring there was no coverage for Oltmanns’ accident. (R. at 181–83.) Oltmanns appealed the declaration that there was no coverage for the accident. (R. at 184.) The Court of Appeals reversed finding the term “jet skis” was ambiguous, “even

discounting the bizarre possibility that [the term] meant to refer only to one Kawasaki watercraft model.” (R. at 211–22.)

27. Oltmanns’ homeowners insurance policy, which is at issue in this matter, does not provide attorney’s fees for Oltmanns for representation against Fire Insurance when Fire Insurance files a declaratory relief action. (R. at 581–619.)

28. In 2013, Oltmanns filed a counterclaim and subsequently a Second Amended Counterclaim, seeking damages for alleged breach of contract and the alleged breach of the implied covenant of good faith and fair dealing. Specifically, Oltmanns alleged “Plaintiff did not fairly evaluate the claim, and unreasonably rejected it, in violation of Utah law, thus breaching the implied covenant of good faith and fair dealing.” In addition, Oltmanns alleged he was entitled to attorney’s fees and damages for “severe emotional distress caused by the coverage denial” (R. at 403.)

29. Oltmanns never sought nor received any medical treatment for his alleged severe emotional distress. (R. at 621–26.)

30. After the Court of Appeals remanded this case to the district court, Fire Insurance settled the underlying claims against Defendant Oltmanns. The Blackner lawsuit was dismissed on October 30, 2012. (R. at 403.)

31. Fire Insurance reimbursed Oltmanns for his costs and attorney’s fees incurred in the defense of the Blackner lawsuit. (R. at 403.)

32. No party requested a jury trial nor did any party pay the jury fee as required by law.

Therefore, the trial court is the trier of fact in the matter. (R. at 2, 9, 19, 23.)

SUMMARY OF THE ARGUMENT

This Court should affirm the granting of Fire Insurance's Motion for Summary Judgment. Under Rule 56, summary judgment shall be granted only if "there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." Here, Oltmanns failed to show that genuine issues of material fact exist. Oltmanns' claim regarding his 2006 watercraft accident was fairly debatable as a matter of law. Fire Insurance diligently investigated the facts, evaluated the claim fairly and acted promptly and reasonably by filing a declaratory relief action. Fire Insurance's reliance on coverage counsel's opinion and advice was reasonable. Furthermore, Fire Insurance continued to show its good faith by accepting coverage and settling the Blackner lawsuit when the Court of Appeals reversed the trial court's grant of summary judgment. Fire Insurance also reimbursed Oltmanns for the legal fees and costs incurred in defending the Blackner lawsuit. Thus, Oltmanns' claims of breach of contract and breach of the implied covenant of good faith and fair dealing fail as a matter of law.

In addition, the trial court properly rejected Oltmanns' Utah R. Civ. Proc. 56(f) declaration. The declaration was filed after discovery ended and even after the parties extended discovery. The declaration presented no facts. Oltmanns chose not to depose coverage counsel during the discovery period and Oltmanns' declaration that the deposition of coverage counsel was necessary was untimely, conclusory, and based upon

purely speculative facts. Thus, the trial court properly rejected the declaration and denied Oltmanns' request to depose coverage counsel.

For these reasons, this Court should affirm the grant of summary judgment. The court of appeals was correct in affirming the decision of the trial court which concluded that Oltmanns' claim was fairly debatable as a matter of law.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE ROBERT OLTMANN'S CLAIMS ARE FAIRLY DEBATABLE AS A MATTER OF LAW.

Fire Insurance is entitled to summary judgment on Oltmanns' breach of contract and breach of the implied covenant of good faith and fair dealing claims. The implied covenant of good faith and fair dealing "inheres in all contractual relationships." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 27, 56 P.3d 524. "In the first-party insurance context, this implied covenant of good faith performance contemplates, at the very least, 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.* "[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." *Id.* ¶ 28. "This is because the duties imposed by the implied covenant of good faith plainly indicate that the overriding requirement imposed . . . is that insurers act reasonably, as an objective matter, in dealing

with their insured.” *Jones v. Farmers Ins. Exch.*, 2012 UT 52, ¶ 7, 286 P.3d 301 (internal citations omitted).

“When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact *or law*.” *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah Ct. App. 1987) (emphasis added); *see also* 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 204:28 (1999) (“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.”). In this case, the debate concerned the interpretation of the term “jet skis” in Oltmanns’ homeowners policy and how it applied to the July 2006 accident. “Interpretation of an insurance contract presents a question of law.” *Bear River Mut. Ins. Co. v. Williams*, 2006 UT App 500, ¶ 7, 153 P.3d 798. “Therefore, an insurer cannot be held to have breached the covenant of good faith on the ground that it wrongfully denied coverage if the insured’s claim, although later found to be proper, was fairly debatable at the time it was denied.” *Jones*, 2012 UT 52, ¶ 7, 286 P.3d 301 (internal citations omitted).

A. Oltmanns’ Claim Was Fairly Debatable As A Matter Of Law Because The Interpretation of “Jet Skis” in Oltmanns’ Policy Presented A Fairly Debatable Issue.

Fire Insurance acted continually in good faith while investigating Oltmanns’ claim and in the filing of the declaratory judgment action. Oltmanns’ claim was fairly debatable, and therefore, Fire Insurance was justified in filing a declaratory judgment action to determine its rights and obligations under the contract of insurance.

“An analysis of whether an insurance claim is fairly debatable is closely related to an analysis of whether an insurer fulfilled its duty . . . to evaluate the claim fairly.” *Jones v. Farmers Ins. Exch.*, 2012 UT 52, ¶ 12, 286 P.3d 301. In *Jones*, this Court stated:

When making the determination of whether a claim is fairly debatable, a judge should remain mindful of an insurer’s implied duties to diligently investigate claims, evaluate them fairly, and act reasonably and promptly in settling or denying claims. Only when there is a legitimate factual issue as to the validity of the insured’s claim, such that reasonable minds could not differ as to whether the *insurer’s conduct* measured up to the required standard of care, should the court grant judgment as a matter of law.

Id. (emphasis added) (internal quotation, citation omitted). “Interpretation of an insurance contract presents a question of law.” *Bear River Mut. Ins. Co. v. Williams*, 2006 UT App 500, ¶ 7, 153 P.3d 798. Thus, Fire Insurance was entitled to set forth its position in relation to the “jet skis” exclusion contained in Oltmanns’ policy of insurance in the declaratory judgment action. This conduction was reasonable and permitted by Utah law. “When an insurance company proceeds in a reasonable way to resolve a difficult coverage question, its eventual loss at the appellate level does not foreclose a determination that an issue of interpretation was fairly debatable.” *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, ¶ 15, 370 P.3d 566. Such is the case here. Such was the case in *Western United Insurance Company v. Heighton*, No. 2:14CV435DAK, 2016 WL 4916785, at *4, n.3 (D. Utah Sept. 14, 2016), wherein the court concluded that the interpretation of an “earth movement” exclusion in a policy of insurance presented a fairly debatable claim. Thus, the insurance company did not contravene the implied

covenant of good faith and fair dealing by debating the language of the policy and filing a declaratory judgment action. *See id.*

Oltmanns' claim was fairly debatable because the facts and circumstances of the accident along with the policy language and the meaning of "jet skis" presented an issue which Fire Insurance was entitled to debate. Therefore, Fire Insurance was justified in filing a declaratory judgment action to determine its rights and obligations under the contract. Under Utah law, "A person with an interest in a . . . written contract, or whose rights, status, or other legal relations are affected by a . . . contract . . . may request the district court to determine any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations." Utah Code Ann. § 78B-6-408 (2008). "When faced with a decision as to whether to defend or refuse to defend, an insurer is *entitled* to seek a declaratory judgment as to its obligations and rights." *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 237 (Utah 1985) (emphasis added). Where the Plaintiff (insurer) merely states its position and initiates a declaratory relief action for "determination of . . . a justiciable controversy, it would not comport with our ideas of either law or justice to prevent any party who entertains a bona fide question about his legal obligations from seeking adjudication thereon in the courts." *W. Cas. & Sur. Co. v. Marchant*, 615 P.2d 423, 427 (1980). Trial courts are granted some discretion in deciding whether a claim is fairly debatable, "because of the complexity and variety of the facts upon which the fairly debatable determination depends." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 33, 56 P.3d 524.

In two notable cases, Utah appellate courts have upheld grants of summary judgment in favor of insurers on fairly debatable grounds. In *Prince*, a PIP insurance claim was fairly debatable as a matter of law when a doctor retained by the insurance company opined that some of the medical bills claimed were for treatment of an unrelated condition. 2002 UT 68, ¶¶ 35–36. The doctor opined in the case and stated, “I do not *think* that the chiropractic care exceeding 12 weeks was medically necessary.” *Prince*, 2002 UT 68, ¶ 4 (emphasis added). This is similar to coverage counsel stating there was a 75% chance of summary judgment being granted regarding the coverage issue.

In *Callioux v. Progressive Ins. Co.*, 745 P.2d 838 (Utah Ct. App. 1987), a denial of a claim under a homeowners policy was fairly debatable where the insured had been bound over for trial on criminal charges of arson and insurance fraud, even though the insured was eventually acquitted, and where the insurance company’s retained investigator determined that arson was the cause of the fire. *Id.* at 842. The *Callioux* court reasoned that an “expert’s report generally provides a good faith basis for an insurer’s defense of a bad faith claim.” *Id.* In *Callioux*, the insurer conducted its own investigation by hiring an arson expert. *Id.* at 839. The arson expert concluded that the loss was of incendiary origin and caused by the insured, David Callioux. *Id.* As a result, the insurer denied the claim. *Id.* Although the trial of Cailloux resulted in acquittal to the arson charges, the insurance company’s prompt payment following the verdict was indicative that the insurance company had denied the claim in good faith. *Id.* at 840.

The Callioux filed suit against Progressive for breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.* at 839. The trial court granted Progressive's motion for summary judgment, despite Callioux's counsel asking to depose the arson expert pursuant to Rule 56(f) before the court ruled on the summary judgment motion and the Callioux appealed. *Id.* at 840. The Utah Court of Appeals affirmed the trial court's grant of summary judgment stating, "If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim, and eliminating the bad faith claim." *Id.* at 842. Furthermore, the court of appeals concluded that "an expert's report generally provides a good faith basis for an insurer's defense of a bad faith claim." *Id.* The court reasoned that the claim was fairly debatable as indicated by a judicial finding of probable cause when David Callioux was bound over for trial for arson and insurance fraud. *Id.* Finally, the Court concluded that a "final indication of Progressive's lack of bad faith in denying the Callioux's claim is that, upon David Callioux's acquittal for arson and insurance fraud, Progressive immediately paid the claim in full." *Id.*

In the case at hand, Oltmanns' claim presented a similar legitimate factual (the circumstances of the accident) and legal issue (the meaning of the "jet skis" exclusion) as to whether his homeowners policy covered his accident. This is a case where legitimate factual and legal issues show that Oltmanns' claim was fairly debatable as a matter of law. Specifically, the meaning of the exclusion for "jet skis" was at issue both factually and legally. Similar to *Callioux*, after thoroughly investigating the facts and relying in

good faith upon a thorough coverage opinion provided by outside counsel, Fire Insurance decided to file the declaratory relief action. Relying on a coverage opinion by seasoned coverage counsel is the same as relying on a doctor for the reasonableness of treatment or relying on an arson expert to determine a fire was intentionally set.

The declaratory relief action was filed only after Fire Insurance investigated the facts of the accident by obtaining the documents related to the accident, including the summons and complaint filed against Oltmanns (Case No. 070700309), the rental companies' cross-claim against Oltmanns, a copy of the rental agreement for the personal watercraft, and the deposition transcript of Robert Oltmanns regarding the facts of the accident in the Blackner lawsuit. Fire Insurance communicated directly with Oltmanns' attorney, Mr. Dalton, throughout this process.

On November 20, 2009, Fire Insurance sent a letter to Mr. Dalton to inform him that the matter was sent to outside counsel for a coverage opinion. Fire Insurance asked Mr. Dalton to continue defending Oltmanns and told him that in the event coverage was extended for the July 2006 accident, Fire Insurance would reimburse him for the costs and fees incurred by Oltmanns. Oltmanns provides no case law or citation which supports his argument that Fire Insurance was required to accept the defense of Blackner lawsuit. Ultimately, Fire Insurance paid for all of Oltmanns' costs and attorney's fees incurred in the Blackner lawsuit, in addition to settling the Blackner lawsuit on behalf of Oltmanns. Any argument that Fire Insurance should have or was required to assume the defense for a

fairly debatable claim prior to the court determining its obligations under the contract is incorrect. Fire Insurance fulfilled its obligations as set forth in the contract for insurance.

Coverage counsel determined that Fire Insurance had a 75% chance of prevailing in a declaratory relief action. This determination was made after extensive research of case law nationwide and the use of the term “jet skis” as well as the plain and ordinary usage of the term “jet skis.” Similar to the court’s finding in *Callioux* of a fairly debatable claim based on probable cause, the trial court’s grant of summary judgment for Fire Insurance regarding coverage prior to the appeal demonstrates that Oltmanns’ claim was fairly debatable. The trial court concluded that the “jet skis” exclusion in Oltmanns’ policy included the Honda F-12 AquaTrax personal watercraft which Oltmanns was operating when the accident occurred. The Court of Appeals recognized this fact by stating, “we find it very persuasive that the district court initially accepted Fire Insurance’s theory and argument in this case, i.e., in the first round of judicial consideration, not only was there a debate, but Fire Insurance actually won the debate.” *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, ¶ 13. Thus, this fairly debatable issue eliminates Oltmanns’ bad faith claim. Fire Insurance’s good faith was further demonstrated by its decision to file a declaratory judgment action with the promise to pay if coverage was extended, instead of simply denying Oltmanns’ claim. Immediately following the Court of Appeals’ reversal of the trial court’s grant of summary judgment to Fire Insurance, Fire Insurance accepted coverage. Fire Insurance paid the claim on behalf of Oltmanns and the Blackner lawsuit was settled and dismissed. In addition, Fire

Insurance paid all of Oltmanns' costs and attorney's fees for defending the Blackner lawsuit. These facts are undisputed.

Oltmanns takes issue with Fire Insurance's response to Oltmanns' interrogatories: "Before sending the claim for a coverage evaluation, Plaintiff determined that it needed a copy of the vehicle title and registration at the time of the accident to determine how the jetski [sic] is classified. Plaintiff wanted to know if the vehicle was classified as a 'watercraft.'" The claim summary log stated, "This information is needed before sending out for coverage opinion [sic]." However:

Fire Insurance Exchange did not need said information prior to sending the matter out for a coverage opinion. Said information may have assisted coverage counsel in understanding how the Honda F-12 personal watercraft was classified. In addition, the registration may have provided technical language, including to whom the watercraft was registered to. Fire Insurance Exchange sought to provide coverage counsel with as much information as possible within the time constraints. It was determined that the identified information would be helpful, but it was not felt to be critical. If coverage counsel felt the information was essential for a coverage opinion, additional efforts to obtain said information would have been made.

(R. at 735.)

Ultimately, the vehicle registration was not obtained by Fire Insurance before sending the matter to coverage counsel. Coverage counsel did not say the registration was needed for his coverage opinion. By this time (late 2009), over three years had passed since the July 2006 accident. Fire Insurance sought to diligently investigate the claim, evaluate it fairly, and act reasonably and *promptly* in settling or denying claims. *See Jones v. Farmers Ins. Exch.*, 2012 UT 52, ¶ 12, 286 P.3d 301 (emphasis added). In seeking to

promptly resolve the coverage issue, Fire Insurance provided coverage counsel with as much information as possible within time constraints. Speculating about what the registration may have contained three years prior to Oltmanns' claim is irrelevant. It creates no issue of fact. Rather, had coverage counsel felt the information essential for its coverage opinion, additional efforts would have been made to acquire the registration. To suggest that this would have substantially changed coverage counsel's opinion or advice is speculative at best. Moreover, "because of the complexity and variety of facts upon which the fairly debatable determination depends, the legal standard under which this determination is made conveys some discretion to trial judges." 2012 UT 52, ¶ 6. Here, the trial court used its discretion to determine that speculating about what the registration may have contained three years prior created no genuine issue of fact.

Oltmanns acknowledged and conceded that Fire Insurance conducted an investigation regarding Oltmanns' July 2006 watercraft accident.⁴ It was undisputed by Oltmanns that in September 2006, Fire Insurance offered to help Oltmanns file a claim on his homeowners insurance policy so that a formal investigation could be conducted regarding his July 2006 watercraft accident. Oltmanns declined this offer. Therefore, Fire Insurance did not deny any claim made by Oltmanns in 2006 because no claim was made. Rather, Oltmanns first tendered defense to Fire Insurance and made a claim on his homeowners policy in 2009. Thereafter, Fire Insurance immediately contacted Oltmanns to inform him that a thorough investigation of the loss would be conducted to determine

⁴ No questions of fact were identified at the trial court level.

how Oltmanns' insurance policy would potentially apply. It was further undisputed that Fire Insurance, in conducting the investigation and evaluation, requested and received the summons and complaint filed against Oltmanns (Case No. 070700309), the rental companies' cross-claim against Oltmanns, a copy of the rental agreement for the personal watercraft, and the deposition transcript of Robert Oltmanns, which detailed the facts of the July 2006 accident.⁵ It was undisputed that Fire Insurance determined it needed a coverage analysis from outside counsel. It was undisputed that Fire Insurance sent the matter to outside counsel for a coverage opinion and relied, in good faith, on that coverage opinion in filing a declaratory judgment action. In addition, it was also undisputed that Oltmanns' insurance policy does not provide for attorney's fees for declaratory judgment actions. From these undisputed facts, Oltmanns failed to show that Fire Insurance breached the insurance contract or breached the implied covenant of good faith and fair dealing in any way.

This conduct shows that Fire Insurance continually acted in good faith over the course of this claim. By thoroughly investigating the facts and fairly evaluating Oltmanns' claim, filing the declaratory judgment action over a fairly debatable issue, and ultimately accepting coverage and reimbursing Oltmanns for his defense costs and attorney's fees, Fire Insurance did not breach its contract with Oltmanns. Nor did Fire Insurance breach the implied covenant of good faith and fair dealing. Thus, no reasonable minds can differ in concluding that Fire Insurance's conduct was reasonable as an

⁵ This abrogated any need to Fire Insurance to obtain the registration of the watercraft.

objective matter when Fire Insurance investigated the facts, fairly evaluated the claim, and acted reasonably and promptly in filing the declaratory judgment action. In addition, no reasonable minds can differ in concluding that Oltmanns' claim was fairly debatable, given the research and analysis conducted by coverage counsel on the term "jet skis" as contained in Oltmanns' insurance policy. Moreover, there is no reasonable probability that Oltmanns could prevail in the matter. *See Jones*, 2012 UT 52, ¶ 8. The trial court is the fact finder in this case. The trial court used its discretion recognized by this Court in *Callioux*, *Prince*, and *Jones* and concluded that Fire Insurance acted reasonably as an objective matter. This conclusion will not change given the trial court is the trier of fact and the facts are undisputed. The facts the trial court relied on in concluding Oltmanns' claim was fairly debatable would be the same facts the trial court would hear and rely on if this case were to advance to trial. Thus, there is no reasonable probability Oltmanns could prevail in this matter. Therefore, summary judgment was appropriate and Oltmanns' claims were dismissed as a matter of law.

B. Fire Insurance, In Good Faith, Reasonably Relied On The Coverage Opinion.

Fire Insurance reasonably relied on the coverage opinion of counsel.⁶ This is the same as the insurance company in *Prince* relying on a doctor's report regarding the treatment of the insured. *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 35, 56 P.3d 524. Oltmanns takes issue with the coverage opinion, contending that the reasonableness of the insurer's conduct is synonymous with the quality of the counsel. *See Pet'r's Br.* 36.

However, Oltmanns provides no support, citation, or otherwise from any jurisdiction to support the proposition. The Court of Appeals was correct in concluding “an insurance company may reasonably and fairly rely . . . upon a coverage opinion from qualified outside counsel, received in the course of careful investigation and evaluation of a claim.” *Oltmanns*, 2016 UT App 54, ¶ 15. Thus, the content of the analysis given by coverage counsel in the coverage opinion is relevant to show Fire Insurance’s diligence in investigating the claim and its good faith decision to file a declaratory judgment action, not the declaratory action’s ultimate success or failure.

“An insurer may defend itself against allegations of bad faith and malice in claims handling with evidence the insurer relied on the advice of competent counsel.” *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 228 Cal. App. 3d 721, 725, 279 Cal. Rptr. 116, 117 (Ct. App. 1991), *modified* (Mar. 21, 1991). The defense of “advice of counsel” is offered to show the insurer had proper cause for its actions even if the advice it received is ultimately unsound or erroneous. *Id.* (internal citations omitted).

Insurers often bring in an attorney to review a particular claim file to determine the claim's validity or to litigate the case on behalf of the insured. After reviewing the claim, the attorney may give his or her opinion regarding it and may advise the carrier on what action to take: whether to pay the claim or not. Such advice, if followed in good faith, may itself help immunize the insurer from tort liability. Obtaining and following an attorney's advice may tend to show that the insurer lacked an improper motive—or bad faith—in its conduct vis-a-vis the claim.

16 Am. Jur. Proof of Facts 3d 419 (Originally published in 1992).

⁶This should be considered to be a legal expert opinion.

Some courts have held that not following the advice of counsel is evidence of bad faith. *See Henke v. Iowa Home Mut. Cas. Co.*, 250 Iowa 1123, 97 N.W.2d 168, (1959) (affirming the insurer was guilty of bad faith when it failed to accept and heed the recommendations of its own attorneys); *see also Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1957) (concluding the insurer's rejection of advice of its own attorney was evidence of bad faith). Jurisdictions throughout the country consider that when an insurer in good faith relies on the advice of counsel it is a defense to bad faith claims.⁷

This Court held that the advice of counsel is a defense to a claim for malicious prosecution arising out of either an unsuccessful civil or criminal action, if the action was instituted in good faith in reliance on counsel's advice, given after a full and fair disclosure of the facts to counsel. *Perkins v. Stephens*, 503 P.2d 1212, 1213 (Utah 1972); *see also Hodges v. Gibson Products Co.*, 811 P.2d 151 (Utah 1991) ("An accuser may justifiably rely on the advice of counsel . . ."). There is "no significant distinction between malicious prosecution cases and insurance bad faith cases in the pleadings context."

⁷ *See generally State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 228 Cal.App.3d 721, 725, 279 Cal.Rptr. 116 (1991) (an insurance company's good faith reliance on advice of counsel negates allegations of bad faith); *Szumigala v. Nationwide Mut. Ins. Co.*, 853 F.2d 274, 282 (5th Cir.1988) ("good-faith reliance upon advice of counsel may prevent imposition of punitive damages"); *Western Line Consol. School Dist. v. Continental Cas. Co.*, 632 F.Supp. 295, 304 (N. D. Miss.1986) ("This court is persuaded that good faith reliance on the advice of counsel is in fact a defense to an award of punitive damages . . ."); *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1, 8 (Ala.1981) (advice of counsel, while "not necessarily an absolute defense," is relevant to the bad faith issue); *Cotton States Mut. Ins. Co. v. Trevethan*, 390 So.2d 724, 728 (Fla. App.1980) (holding "that reliance on the advice of counsel is similarly evidence to be considered on the issue of bad faith).

Dalrymple v. United Services Auto. Assn., 40 Cal. App. 4th 497, 515, 46 Cal. Rptr. 2d 845, 854 (1995), *as modified* (Dec. 13, 1995) (internal citations omitted). Therefore, as in malicious prosecution cases, this Court should conclude that Fire Insurance's good faith reliance on coverage counsel's advice is a defense to Oltmanns' claim of bad faith, especially when the interpretation of the language of the insurance contract is fairly debatable.

It is undisputed that Fire Insurance relied on coverage counsel to assist in making a coverage determination regarding the language of the insuring agreement. Fire Insurance thereafter followed the advice of counsel by filing a declaratory judgment action, rather than simply denying Oltmanns' claim. Oltmanns essentially reargues his memorandum in opposition to Fire Insurance's Motion for Summary Judgment regarding the coverage issue which was filed in early 2010. R. 152-59. This is the same argument that was heard by the trial court in 2010 and then by the Court of Appeals. *See Id.* Oltmanns acknowledges that coverage counsel was qualified to render the coverage opinion. *See* Petitioner's Brief at 37. In addition, a review of the coverage opinion shows that the analysis was thorough. Even the Court of Appeals recognized coverage counsel's analysis was "quite a thorough coverage opinion." *Oltmanns*, 2016 UT App. 54, ¶ 4. It must be noted, again, that the trial court in the declaratory judgment action did grant summary judgment for Fire Insurance on the coverage issue declaring that the "jet skis" exclusion applied to Oltmanns' accident and was not covered by the policy. This cannot be ignored and pushed aside because the trial court is the fact finder in this matter as no demand for a

jury was made by either party and no jury fee was paid to the court. Moreover, coverage counsel's opinion was not misplaced in stating, "Unless the language of an insurance contract is ambiguous or unclear, the court must construe it according to its plain and ordinary meaning." R. 565. Even Oltmanns, in September 2006 after his accident, thought his homeowners policy did not cover the accident due to the "jet skis" exclusion. This is why he declined Sherrie Eichmeier's offer to assist him in making a claim on his homeowners policy. Oltmanns believed he was operating a jet ski at the time the accident occurred. R. 564. Thus, Fire Insurance's reliance on coverage counsel was reasonable. There is no reasonable probability that Oltmanns can prevail in this matter as the trial court is the finder of fact in this case. Furthermore, Fire Insurance, heeding the advice of coverage counsel, acted in good faith in filing the declaratory judgment action on a fairly debatable claim.

C. The Coverage Letter Was Offered To Show Fire Insurance Acted In Good Faith.

Oltmanns objected to the coverage opinion in the trial court contending that the coverage opinion was inadmissible hearsay. "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement." *State v. McNeil*, 2013 UT App 134, ¶ 44, 302 P.3d 844; *see also* Utah R. Evid. 801(c). "Hearsay is generally inadmissible because the witness 'is acting as a conduit to relay' the personal knowledge or observations of others." *Id.* (quoting *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388, 390 (1957)). However, Fire Insurance did not offer the coverage opinion to prove the truth of the matter asserted in the coverage opinion. Rather, Fire Insurance offered the coverage

opinion to show its effect on the hearer. *See Mangrum & Benson on Utah Evidence* 684 (2012) (stating “statements may be relevant to the issues of any particular case because of their effect on the hearer.”). In other words, Fire Insurance offered the coverage opinion to show that Fire Insurance reasonably relied on the coverage opinion and authorized the filing of the declaratory judgment action in good faith.

In *State v. Sorensen*, 617 P.2d 333 (Utah 1980), a theft by deception case, a promoter made an out-of-court statement to a financier “that financing was available.” *Id.* at 337. The trial court excluded the statements as inadmissible hearsay. *Id.* The Utah Supreme Court concluded that “[w]hen an out-of-court statement is offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule.” *Id.* This Court continued stating, “Evidence of a statement by a third person is . . . admissible, irrespective of the fact that it was made out of court, if it is offered to support a *defense of good faith*.” *Id.* (emphasis added).

In *Barton v. Barton*, 2001 UT App. 199, 29 P.3d 13, a mother failed to attend an order to show cause hearing. *Id.* at ¶ 3. The trial court held her in contempt. *Id.* At the contempt hearing, the trial court excluded as hearsay the testimony of the mother that her out of state attorney told her that she did not need to attend the order to show cause hearing. *Id.* at ¶ 16. The mother appealed the trial court’s ruling. *Id.* The Utah Court of Appeals reversed concluding that the “Mother sought to introduce her conversation with her California counsel as proof of a *good faith* reason for not attending the hearing.” *Id.* (emphasis added). Such testimony “was admissible to show a *good faith defense*.” *Id.*

(emphasis added). Both of these cases show the effect the out of court statements had on the hearer.

Just as in *Sorenson* and *Barton*, Fire Insurance introduced coverage counsel's opinion to show that Fire Insurance reasonably relied on the opinion and thereafter acted in good faith in filing a declaratory judgment action on the advice of counsel. The coverage opinion indicated that a general search of court cases found that many courts referred to various brands of personal watercrafts as jet skis. The coverage opinion also indicated that Wikipedia and Google showed that the term "jet ski" was often used as a generic term for all personal watercraft. Based on the research regarding the term "jet skis," coverage counsel believed that Fire Insurance had a 75% chance of prevailing in a declaratory judgment action. As a result, Fire Insurance authorized the filing of the declaratory relief action.

Fire Insurance's good faith belief that a declaratory judgment action would be successful is not unfounded. In fact, the trial court initially granted summary judgment for Fire Insurance based on the same analysis and argument contained in the coverage opinion. This cannot be ignored as the Court of Appeals stated, "we find it very persuasive that the district court initially accepted Fire Insurance's theory and argument in this case, i.e., in the first round of judicial consideration, not only was there a debate, but Fire Insurance actually won the debate. *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, ¶ 13, 370 P.3d 566. Thus, Fire Insurance reasonably relied on the coverage opinion from counsel in filing its declaratory judgment action. "Submitting the issue to a court for

interpretation in declaratory judgment action is a prudent, reasonable step toward the resolution of a legitimate dispute over a coverage term or exclusion.” *Id.* ¶ 15. Such action falls far short of bad faith. To conclude otherwise would be akin to concluding the insurer in *Callioux* committed bad faith by relying on a court’s finding of probable cause that a fire was intentionally set by the insured in denying the insured’s claim. Likewise, to conclude that Fire Insurance committed bad faith by reasonably relying on coverage counsel’s opinion and advice in filing a declaratory judgment action would be akin to concluding the insurer in *Prince* committed bad faith by relying on an expert opinion of a doctor to deny an insurance claim. Such a conclusion would essentially abrogate the fairly debatable doctrine. Therefore, the trial court’s conclusion and the Court of Appeals affirmation that Oltmanns’ claim was fairly debatable as a matter of law was proper. As a result, Oltmanns’ claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law and this Court should affirm.

II. THE DISTRICT COURT PROPERLY REJECTED THE RULE 56(f) DECLARATION OF OLTMANNS’ COUNSEL.

The Court of Appeals declined to consider this issue, concluding that the term “jet ski” as used in Oltmanns’s insurance policy presented a “fairly debatable” interpretation as a matter of law. Likewise, this Court should decline to consider this issue as there truly was a “fairly debatable” issue regarding the interpretation of the “jet skis” term in the insurance policy. *Fire Ins. Exch. v. Oltmanns*, 2016 UT App 54, ¶ 16 n.4, 370 P.3d 566.

However, in the event the issue is considered, the district court properly rejected opposing counsel’s Utah R. Civ. Proc. 56(f) declaration. The declaration was filed after

discovery ended and even after the parties extended discovery. The declaration presented no facts. Rather the declaration only set forth the opinions of opposing counsel. Such opinions are not admissible evidence.

Affidavits opposing a motion for summary judgment must “be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Utah R. Civ. P. 56(e). “These requirements mirror those that apply to all evidence, and our case law on excluding affidavit evidence supports this.” *In re Gen. Determination of Rights to Use of All Water v. Springville Mun. Corp.*, 1999 UT 39, ¶ 26, 982 P.2d 65. Thus, trial courts have a “broad grant of discretion” in determining whether to strike an affidavit. *Id.* ¶ 25. A trial court does not abuse this discretion when it strikes an affidavit that is “largely conclusory in form,” or consists “entirely of inadmissible . . . evidence.” *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (citations omitted). Also, affidavits should be disregarded when the party is “merely on a fishing expedition for purely speculative facts after substantial discovery has been conducted.” *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah Ct. App. 1987) (citations omitted).

A. The Declaration Is Conclusory and Speculative.

It is well established that affidavits that are “largely conclusory in form” are not “admissible in evidence and may not be considered on summary judgment under Rule 56(e).” *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983). The Declaration here was conclusory and was properly rejected. In response to Fire Insurance’s Motion for

Summary Judgment, Oltmanns submitted the Declaration of Donald L. Dalton, Oltmanns' counsel. Throughout the Declaration, Mr. Dalton offered purely conclusory statements that were speculative at best. For example, Mr. Dalton stated in his affidavit that "It appears to have been based on *dictum* from the case." (R. at 682–84). These conclusory and speculative forms of statements appear throughout the Declaration. Mr. Dalton cannot be a witness for Oltmanns. Oltmanns, in bearing the burden of proof, did not identify any expert witness to opine about the coverage opinion.

Mr. Dalton was simply making bald statements in an attempt to manufacture an issue of fact. However, coverage counsel's thought process regarding his analysis of the "jet skis" issue was not the question before the court and was immaterial. This was not allowed. Utah law is clear that "bald statements do not suffice to establish a genuine issue of material fact. In responding to defendants' motion for summary judgment, [Oltmanns was] required to set forth specific facts showing that there [was] a genuine issue for trial." *Rawson v. Conover*, 2001 UT 24, ¶ 33, 20 P.3d 876 (citations omitted). In Utah, "a party puts the legitimacy of a fact, supported by affidavits . . . , in dispute by presenting equally meaningful, sworn testimony in the form of affidavits" *Johnson v. Hermes Associates, Ltd.*, 2005 UT 82, ¶ 21, 128 P.3d 1151. As the U.S. Supreme Court has noted, the purpose of the requirement in Rule 56(e) that an adverse party must set forth specific facts "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

Thus, the Declaration is not “equally meaningful, sworn testimony” and was properly rejected.

B. The Declaration Does Not Conform to Rule 56(f).

The Declaration does not conform to Utah R. Civ. P. 56(f). Mr. Dalton set forth the Declaration as a means to further discovery by taking the deposition of coverage counsel. However, fact discovery ended and Mr. Dalton chose not to take the deposition of coverage counsel.

Rule 56(f) provides that, a party opposing summary judgment may submit an affidavit stating the reasons why he is presently unable to present evidentiary affidavits essential to support his opposition to summary judgment. *See* Utah R. Civ. P. 56(f); *see also Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 840 (Utah Ct. App. 1987). A commentator has succinctly described the Rule 56(f) standard:

The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures.

Callioux, 745 P.2d at 840 *quoting* 2 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* par. 56.24 (2d ed. 1987).

In *Cox v. Winters*, 678 P.2d 311, 312–14 (Utah 1984), the Utah Supreme Court delineated several factors to consider under Rule 56(f): (1) Were the reasons articulated in the Rule 56(f) affidavit “adequate” or is the party against whom summary judgment is sought merely on a “fishing expedition” for purely speculative facts after substantial

discovery has been conducted without producing any significant evidence? (2) Was there sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party? (3) If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response? *Id.* at 312–14.

Although the courts recognize that this requirement should be applied liberally, the courts are also unwilling to “spare the litigants from their own lack of diligence.” *Callioux*, 745 P.2d 838, 841 (Utah Ct. App. 1987) (citations omitted). In *Callioux*, a case directly on point, the court was presented with the same situation that the party opposing summary judgment wanted to conduct further discovery and asked for a continuance pursuant to Rule 56(f). *Id.* at 840. In applying the forgoing legal principles, the court in *Callioux* denied the motion for continued discovery, concluding that the party opposing summary judgment was afforded ample time to conduct the discovery sought. *Id.* at 841.

Like the motion for continuance in *Callioux*, Oltmanns made “a conclusory claim of need for further discovery, but [the Declaration] was not accompanied by the required Rule 56(f) affidavit setting forth the reasons why [he] could not present facts essential to justify [his] opposition” *Id.* (internal citations omitted). The court of appeals further concluded that the “conclusory assertion that the scheduled depositions were “expected to produce matters essential to resolution of defendant's motion” smacks of a “fishing expedition” for purely speculative facts. *Id.* Likewise, Oltmanns’ Declaration for wanting to depose coverage counsel smacks as a fishing expedition. This was based upon the

purely speculative facts declared by Mr. Dalton in his Declaration. Furthermore, in *Callioux*, the court of appeals concluded the district court correctly denied the motion for continued discovery because the party opposing summary judgment had been afforded ample opportunity to discover and present evidence in opposition to Progressive's motion for summary judgment. *Id.* The same is true for Oltmanns. Oltmanns had ample time to discover and present evidence through depositions. In fact, Oltmanns was in possession of coverage opinion from the very beginning of fact discovery. Nothing in the Declaration showed that Oltmanns was conscientious about pursuing the deposition of coverage counsel. Rather, Oltmanns chose not to take *any* depositions in this matter to try to prove his case. This is clearly why Mr. Dalton failed to address in his Declaration what steps were taken to obtain the desired information pursuant to discovery procedures under the Rules in accordance with Rule 56(f). To declare that the deposition of coverage counsel was necessary was untimely, conclusory, and based upon purely speculative facts. Thus, the trial court properly rejected the Declaration and denied Oltmanns' request to depose coverage counsel.

CONCLUSION

There is no reasonable probability that Oltmanns can prevail in this matter. The trial court is the fact finder. The facts are undisputed. The trial court properly granted Fire Insurance's Motion for Summary Judgment and the Court of Appeals correctly affirmed. Oltmanns' claim relating to the 2006 accident was fairly debatable as a matter of law. Fire Insurance reasonably relied on coverage counsel's opinion and advice. This was done in

good faith and is undisputed. As a result, Oltmanns' claims for breach of contract and breach of the implied covenant of good faith and fair dealing fail as a matter of law. Opposing counsel's declaration was improper and created no issue of material fact. The trial court properly rejected the Rule 56(f) declaration. Therefore, the trial court's October 10, 2014, order granting summary judgment should be affirmed. For these reasons, the trial court's order of dismissal as to all issues presented on appeal should be affirmed by this Court, as was done by the Court of Appeals.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1), because it contains 11,755 words, according to the word processing systems used to prepare the same.

DATED this 17th day of October, 2016.

PLANT, CHRISTENSEN & KANELL



STEWART B. HARMAN

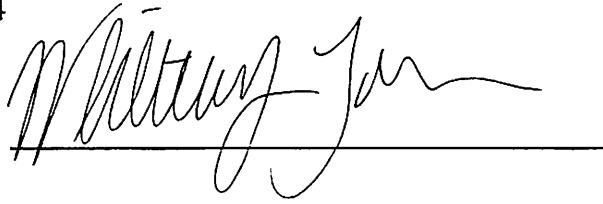
JOEL D. TAYLOR

Attorneys for Appellee Fire Insurance Exchange

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, this 17th day of October, 2016 to the following:

Donald L. Dalton
DALTON & KELLEY, PLC
Post Office Box 58084
Salt Lake City, Utah 841589-0084

A handwritten signature in cursive script, appearing to read "Donald L. Dalton", is written over a horizontal line.