

1992

Liberty Mutual Insurance v. Jaren Baxter, Joanne Baxter, Mary Ellen Boulter, Daryl Crape and John Does : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff/Appellee,

vs.

JAREN BAXTER, JOANNE BAXTER,
MARY ELLEN BOULTER,

Defendants/Appellants.

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Case No. 920049

Priority No. 16

92-0301-3A

BRIEF OF APPELLEE LIBERTY MUTUAL INSURANCE COMPANY

APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT,
JUDGE JAMES S. SAWAYA,
GRANTING SUMMARY JUDGMENT TO LIBERTY MUTUAL

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UTAH

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PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the lower court are set forth in the caption of the case on appeal.

TABLE OF CONTENTS

| | |
|---|----|
| PARTIES TO THE PROCEEDINGS | i |
| JURISDICTION | 1 |
| STATEMENT OF ISSUES PRESENTED FOR REVIEW | 1 |
| STANDARD OF REVIEW | 2 |
| DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES | 2 |
| STATEMENT OF THE CASE | 3 |
| Nature of the Case and Course of Proceedings | 3 |
| Disposition in Court Below | 4 |
| Relief Sought On Appeal | 5 |
| STATEMENT OF FACTS | 5 |
| SUMMARY OF ARGUMENTS | 16 |
| ARGUMENT | 18 |
| POINT I | |
| THE TRIAL COURT CORRECTLY DETERMINED THAT AS A MATTER OF LAW LIBERTY MUTUAL DID NOT BREACH ITS DUTY OF GOOD FAITH | 18 |
| A. <u>Liberty Mutual Responded Fairly and Promptly to the Insureds.</u> | 19 |
| B. <u>Liberty Mutual Effectively Balanced Competing Concerns in this Case.</u> | 27 |
| POINT II | |
| THE INSURED HAS SUFFERED NO COMPENSABLE DAMAGES | 29 |
| POINT III | |
| THE INSURED WAS NOT ENTITLED TO PUNITIVE DAMAGES | 33 |
| CONCLUSION | 34 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------------|
| Abraham v. Great American Ins. Co., 21 Ohio Misc. 170, 256 N.E.2d 265, 267 (Ohio 1972) | 20 |
| Amica Mutual Ins. Co. v. Schettler, 768 P.2d 950, 958 (Utah App. 1989) | 18, 29 |
| Beck v. Farmers Ins. Exchange, 701 P.2d 795, 801 (Utah 1985) | 19, 24, 29, 30, 33 |
| Callioux v. Progressive Ins. Co., 745 P.2d 838, 842 (Utah App. 1987) | 18, 23, 24, 29 |
| Canyon Country Store v. Bracey, 781 P.2d 414, 423 (Utah App. 1989) | 30, 34 |
| Craft v. Economy Fire & Casualty Co., 572 F.2d 565, 569 (7th Cir. 1978) | 28 |
| Farmers Ins. Exchange v. Call, 712 P.2d 231, 237 (Utah 1985) | 18, 25 |
| Griffith v. Farm and City Ins. Co., 324 N.W.2d 327 (Iowa 1982) | 20 |
| Harvey v. Sanders, 534 P.2d 905, 907 (Utah 1975) | 31 |
| Hendren v. Allstate Ins. Co., 672 P.2d 1137, 1140-41 (New Mex. App. 1983) | 27 |
| LaFeve v. State Farm Mut. Auto Ins., 527 F.Supp. 492 (Dist. of Alabama 1981) | 20 |
| Macaluso v. Grain Dealers Mut. Ins. Co., 188 S.2d 178, 180 (La. App. 1966) | 20 |
| Myrttil v. Hartford Fire Ins. Co., 510 F.Supp. 1198, 1203-04 (E.D. of Pa. 1981) | 23 |
| Phillips v. State Farm, 437 F.2d 365, 368-370 (5th Cir. 1971) | 23, 24 |

| | |
|--|--------|
| Pixton v. State Farm, 809 P.2d 746 (Utah App. 1991) | 29 |
| Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986) . . . | 30 |
| Squires v. Republic Ins. Co., 572 F.2d 560, 561-62 (6th Cir. 1978) | 25 |
| Western Casualty & Surety Co. v. Marchant, 715 P.2d 423, 427 (Utah 1980) | 18, 25 |

Statutes

| | |
|---|--------|
| Utah Code Ann. § 31A-22-309 | 11, 21 |
| Utah Code Ann. § 31A-26-303 | 2, 25 |
| Utah Code Ann. § 78-2-2, as amended | 1 |
| Utah Code Ann. § 78-18-1 | 2, 34 |

Rules, Regulations and References

| | |
|---|----|
| 26 A.L.R. 3d 883, 892, <i>Insurance--"Uninsured" Motorist</i> , § 4 | 20 |
| <u>Utah Insurance Regulations</u> , R 540-89-4.B | 26 |
| <u>Utah Insurance Regulations</u> , R 540-89-10, 11, and 12 | 26 |

JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j), as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. On the basis of the record before it, did the trial court correctly determine that appellee, Liberty Mutual Insurance Company, did not breach its duty of good faith to its insureds?

2. On the basis of the record before it, did the trial court correctly determine that even if Liberty Mutual had breached its duty of good faith, the insureds had failed, in answers to interrogatories and in responsive memoranda, to place before the court sufficient evidence that they had sustained damages as a result of such breach?

3. On the basis of the record before it, did the trial court correctly determine that as a matter of law the insureds were not entitled to punitive damages even if a breach of the duty of good faith by the insurer could be shown?

STANDARD OF REVIEW

The district court's conclusions of law regarding each issue are reviewed *de novo* by this Court.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. Utah Code Ann. § 31A-26-303(5) (1987):

31A-26-303. Unfair Claims Settlement Practices.

. . .

(5) This section does not create any private cause of action.

2. Utah Code Ann. § 78-18-1(a) (1989):

78-18-1. Basis for Punitive Damages Awards--Section Inapplicable to DUI cases--Division of Award with State.

(1)(a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward and a disregard of, the rights of others.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This case began as an action for declaratory relief wherein the plaintiff, Liberty Mutual Insurance Company, sought a declaration that it was not obligated to satisfy a default judgment obtained by its insureds, defendants Joanne Baxter and Mary Ellen Boulter, against an allegedly uninsured motorist, Daryl Crape. It was the insureds' position that the Judgment should be satisfied pursuant to Liberty Mutual's obligations under the uninsured motorist coverage section of its policy. Liberty Mutual asserted that it was not obligated to satisfy the Judgment because: 1) the Judgment was invalid as the court lacked personal jurisdiction over the allegedly uninsured motorist, 2) under the terms of Liberty Mutual's insurance policy, any judgment obtained by the insured against an uninsured motorist without first obtaining the prior written consent of Liberty Mutual was not binding, and 3) no reasonable evidence establishing that the other motorist, Mr. Crape, was uninsured had been submitted to Liberty Mutual.

Defendants' Answer to the Complaint for Declaratory Relief set forth as affirmative defenses the doctrines of *res judicata*, *laches* and *estoppel*. Six months later, on July 10, 1990 the defendants (the insureds) filed a Counterclaim wherein

it was alleged that Liberty Mutual had breached its duty of good faith to the insureds by "failure to timely and diligently investigate its liability exposure to its insureds." (R. 00043.)

Through the course of the litigation Liberty Mutual was not able to set aside the Default Judgment, nor convince the court that its policy language was binding. Through the efforts of a private investigator, it was discovered that Mr. Crape was uninsured. Therefore, Liberty Mutual satisfied (to the extent of its policy limits) the Judgment obtained by the insureds and paid to the insureds interest at the legal rate from the date of the Judgment to the date of payment. Thereafter all that remained was defendants' Counterclaim for bad faith.

Liberty Mutual Insurance Company filed a Motion for Summary Judgment regarding the defendants' claim for bad faith. Liberty Mutual's position was that as a matter of law, Liberty Mutual's conduct did not constitute bad faith, that the defendants had sustained no damages, and that Liberty Mutual's conduct could not, in any event, support an award for punitive damages.

Disposition in Court Below

By Minute Entry dated December 10, 1991 the Honorable James S. Sawaya granted Liberty Mutual's Motion for Summary Judgment. By Order dated December 23, 1991 the court entered

judgment in favor of Liberty Mutual Insurance Company: "For the reasons set forth in [Liberty Mutual Insurance Company's] November 15, 1991 Memorandum of Points and Authorities." (R. 00454, Minute Entry; R. 00459-560, Order and Judgment.) No memorandum decision was issued by the court.

Relief Sought On Appeal

Liberty Mutual Insurance Company requests this Court to affirm the decision of the trial court.

STATEMENT OF FACTS

At times relevant to this action, Liberty Mutual Insurance Company insured Joanne Baxter and Mary Ellen Boulter pursuant to a standard automobile liability insurance policy which contained typical Utah personal injury protection benefits coverage and uninsured motorist coverage. (R. 00337-00338.) The uninsured motorist coverage, which is most critical here, contained the following limitation with regard to suits brought by the insured against an uninsured motorist:

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

(R. 00338.)

On April 28, 1989 an automobile driven by Joanne Baxter and an automobile driven by Daryl Crape collided on the off ramp

of I-215 at Redwood Road in Salt Lake County, Utah. Joanne Baxter's mother, Mary Ellen Boulter, was a passenger in the Baxter vehicle at the time of the accident. (R. 00334.) Although on the day of the accident Liberty Mutual was informed by its insureds that an accident had occurred, the record in this case reveals that it was not until August 8, 1989 that Liberty Mutual received any indication that the other driver, Daryl Crape, may have been uninsured. The first mention of an uninsured motorist appears in the Record at page 00144 which is a letter from appellee's counsel Robert M. McRae to Liberty Mutual Insurance Company. Although the letter is dated July 12, 1989, it was not received until August 8, 1989.¹

The letter received by Liberty Mutual on August 8, 1989 stated that a Summons and Complaint and Return of Service is enclosed with the letter. That Complaint initiated the lawsuit filed by the insureds against Daryl Crape. (R. 00138.) The letter also advised Liberty Mutual that the process agent who served the Summons did not personally serve Mr. Crape and noted

¹ As is conceded by counsel in a memorandum in opposition to Liberty Mutual Insurance Company's initial motion for partial summary judgment, on August 8, 1989 during a "follow-up telephone conversation" initiated by the insureds' counsel, Liberty Mutual advised its insureds' counsel that Liberty Mutual never received the July 12, 1989 letter. (R. 00177-00178; R. 00149, letter from Liberty Mutual to insureds' counsel explaining July 12, 1989 correspondence not received until August 8, 1989.) The insureds' counsel then faxed the July 12, 1989 letter to Liberty Mutual on that date. (R. 00149.)

that Mr. Crape was in the process of moving to Oregon. Lastly, the letter stated:

We are further led to believe [Crape] was uninsured at the time of the accident.

(R. 00144.)

The record reveals that no additional information was provided to substantiate the insureds' counsel's belief that Crape was uninsured. Furthermore, the record reveals that no written consent as required by the Liberty Mutual Insurance policy was obtained by the insureds prior to bringing the suit against Crape.

On August 24, 1989, 16 days after receiving notification that there might be an uninsured motorist involved, Liberty Mutual Insurance Company sent a letter to the insureds' lawyer setting forth its position on all pertinent matters. (R. 00149.) Liberty Mutual's letter began with an acknowledgement that the letter sent by the insureds' counsel of July 12, 1989 was not received until August 8, 1989. The letter stated:

This will acknowledge our belated receipt of your letter dated July 12, 1989 and its enclosures. When you called to discuss it on August 8, I advised you that we never received the original letter and enclosures and you, therefore, faxed copies to me.

(R. 00149.) The letter then goes on to advise Mr. McRae, the insureds' lawyer, that Liberty Mutual was already processing the

insureds' no-fault claims and that Joanne Baxter had received \$3,056.10 in no-fault benefits (\$1,278.78 for medical bills and the remainder for wage reimbursement), and that Mary Ellen Boulter had received a total of \$542.24 in no-fault medical benefits as of that date. (R. 00149.) It is critical to note that as of August 24, 1989, six weeks after filing suit against Mr. Crape, neither of the insureds had reached the \$3,000 medical expense threshold requirement of the Utah No-Fault Act which must precede the bringing of a civil action for general damages. That fact and its effect relative to Liberty Mutual's position is noted in the August 24, 1989 letter:

If I understand your intentions, you are interested in placing an uninsured motorist claim on behalf of each of these two claimants, with regard to the above-captioned accident. Provided you can show reasonable evidence that the responsible party was not insured, I do not have a problem with honoring such a claim, assuming that the injured parties are shown to have crossed the Utah No-Fault threshold, which would make them eligible to place a liability claim in this state.

As the medical bills which I have paid show that your clients have not crossed the no-fault threshold by virtue of the amount of medical bills incurred to date, perhaps you are able to provide me with medical reports which show that they have crossed the threshold in one of the other possible ways.

(R. 00149.) Thus, Liberty Mutual advised its insureds, through the insureds' counsel, that once they reached the Utah No-Fault

Act threshold, either by incurring medical expense or otherwise, and when they provided reasonable evidence that an uninsured motorist was involved, Liberty Mutual would honor their claim. The letter goes on to state that an uninsured motorist claim file had been set up for each insured and closed with a statement inviting the insureds' counsel to contact Liberty Mutual should he have any questions:

If you have any questions or comments regarding this letter in the meantime, please do not hesitate to contact me. Otherwise, I will await the evidence regarding the uninsured motorist situation and the eligibility to place the liability claims from your office.

(R. 00150.)

The record reveals that no additional information regarding Mr. Crape's status as an uninsured motorist, or the insureds' status relative to the Utah No-Fault Act tort action threshold was provided to Liberty Mutual Insurance Company. The next contact between the insureds' counsel and Liberty Mutual Insurance Company came on October 30, 1989.

On that date, the insureds' lawyer sent a letter to Liberty Mutual advising it that a default judgment had been taken against Daryl Crape and enclosed a copy of that judgment with the letter. The Default Judgment was entered on October 2, 1989 along with Findings of Fact and Conclusions of Law. (R. 00156, the

letter from Mr. McRae to Liberty Mutual Insurance Company; R. 00152, Findings of Fact, Conclusions of Law and Judgment.)

Significantly, neither the Findings of Fact, nor Conclusions of Law, make any reference or mention of Mr. Crape's status as an uninsured motorist.

The Judgment awarded to Joanne Baxter the sum of \$25,000 in general damages and the sum of \$8,500 to Mary Ellen Boulter as general damages. The Judgment also noted that: "Neither plaintiff (Baxter or Boulter) makes a claim for special damages as the same have been paid by the P.I.P. insurance carrier."² (R. 00154.) The insureds' counsel, Robert M. McRae, in the letter of October 30, 1989 inquired as to whether or not Liberty Mutual would pay the Default Judgment:

Please advise as to what your attitude is going to be about paying the [Default Judgment].

(R. 00156.)

The next contact between Liberty Mutual and the insureds occurred when Liberty Mutual filed its action for declaratory relief on January 4, 1990. (R. 0002-0009.) The Complaint named Joanne Baxter, her husband Jaren Baxter who was the primary named insured on the policy, Mary Ellen Boulter,

² The personal injury protection insurance carrier was Liberty Mutual. (R. 00149.)

Daryl Crape, and John Doe. (R. 0002.) The Complaint sought a declaration as to whether:

1. Daryl Crape was uninsured at the time of the accident,
2. Daryl Crape's negligence caused the accident,
3. Baxter or Boulter had met the Utah No-Fault threshold requirements pursuant to Utah Code Ann. § 31A-22-309 so as to entitle them to maintain an action against Crape,
4. Boulter and Baxter were entitled to uninsured motorist benefits pursuant to the pertinent Liberty Mutual Insurance policy.

(R. 0006-7.) Baxter and Boulter answered the Complaint, denying most of the allegations and asserting two affirmative defenses. The first affirmative defense was that Liberty Mutual's Complaint failed to state a cause of action and the second affirmative defense was that the Complaint was barred by the doctrines of *res judicata*, *laches*, and *estoppel*. (R. 00011.)

Significantly, in the Answer the insureds admit that they failed to provide proof to Liberty Mutual that Mr. Crape was uninsured at the time of the accident. (R. 00013.)

Thereafter, the insureds took one deposition (R. 00024.) and then, on March 21, 1990 certified the matter as being ready for trial. (R. 00025.) In the Certificate of Readiness for Trial the insureds' counsel specifically certified that all required

pleadings had been filed and the case was at issue as to all parties. (*Id.*) Counsel for Liberty Mutual immediately filed an Objection to the Certification of Readiness for Trial and asserted that Daryl Crape had not yet been served³ and that additional discovery was necessary. (R. 00027-28.) The trial court granted Liberty Mutual's objection to the trial setting. (R. 00039.) Thereafter additional discovery was conducted. (R. 00032.) Then on July 10, 1990, the insureds moved to amend their Answer to add a Counterclaim for Liberty Mutual's alleged bad faith. (R. 00040, Motion to Amend; R. 00042, Amended Answer and Counterclaim.)

The only specific factual allegations set forth in the Counterclaim regarding Liberty Mutual's alleged breach of its duty to good faith is set forth in paragraph seven and states that:

[Liberty Mutual] has violated its contractual duties to counterclaimants in one or more of the following respects:

- a. Failure to timely and diligently investigate its liability exposure to its insureds.

(R. 00043.) The balance of the allegations in the Counterclaim merely set forth in conclusory fashion that Liberty Mutual

³ Mr. Crape has never been served.

breached its fiduciary duties to its insureds without specifying exactly how that breach occurred. (R. 00044.)

Then discovery was conducted by both sides. (R. 00087, the insureds' Request for Production of Documents; R. 00090, report of private investigator attempting to locate Daryl Crape.) Both sides also made motions for summary judgment. (R. 00079, the insureds' Motion for Summary Judgment dated December 24, 1990; R. 00118, Liberty Mutual's Memorandum in Support of its Motion for Partial Summary Judgment.)

Liberty Mutual asserted in its Motion for Partial Summary Judgment that the Default Judgment taken in the initial liability action by the insureds against Daryl Crape was invalid based upon improper service of process (R. 00126.) and that under the terms of the Liberty Mutual Insurance policy the original Default Judgment was not binding on Liberty Mutual.⁴ (R. 00129.) On March 6, 1991, in a short memorandum decision, the court denied Liberty Mutual's Motion for Partial Summary Judgment. (R. 00193.) Prior to filing the motion, Liberty Mutual through counsel had advised the insureds, through their counsel, that Liberty Mutual was prepared to discuss settlement of the matter rather than go through the time and expense of motions and trial. (R. 00191.)

⁴ This is not the motion from which this appeal was taken.

Following the court's decision, Liberty Mutual undertook additional discovery. (R. 00198, Liberty Mutual's Certificate of Delivery of Discovery in the form of interrogatories.) Liberty Mutual sought, through interrogatories, information regarding the insureds' damages. Ultimately, Liberty Mutual was required to file a Motion to Compel responses to those interrogatories, which was granted on July 16, 1991. (R. 00251.)

On April 3, 1991, Liberty Mutual filed a Motion to Set Aside Default Judgment in the action initiated by the insureds against Daryl Crape. (R. 00391.) In that motion, Liberty Mutual argued that service of process was invalid because personal service had not been obtained, and Mr. Crape did not reside at the location where service was attempted. (R. 00391-00406.) On August 13, 1991, Judge John A. Rokich entered the court's final order denying Liberty's motion. (R. 00407.)

After efforts to locate Mr. Crape failed, and efforts to set aside the Default Judgment and enforce certain policy provisions had failed, Liberty Mutual determined that it would not appeal the earlier rulings and paid to its insureds funds sufficient to cover the Judgment, costs, and interest at the legal rate from the date of judgment to the date of payment, November 15, 1991. (The actual release documents do not appear in the

Record of this case. However, at R. 00310 Liberty Mutual asserted in a statement of uncontested facts that the funds had been paid and that the Default Judgment had been wholly satisfied. That assertion of fact was not contested by the insureds.)

As of November 15, 1991, the only issue which remained in the suit was whether Liberty Mutual had somehow breached its duty of good faith in the so called "first party" context. On November 15, 1991, Liberty Mutual filed its motion for summary judgment. (R. 00301.)

Liberty Mutual sought summary judgment on three separate grounds. First, it asserted that neither its conduct prior to filing the Complaint for declaratory relief, nor the filing of the Complaint for declaratory relief could, as a matter of law, constitute a breach of the duty of good faith. (R. 00320-00326.) Second, it asserted that in any event the insureds had suffered no compensable damages. (R. 00326-00330.) Third, the insureds were not entitled to punitive damages as a matter of law. (R. 00319-00320.) After briefing by both parties, the court granted Liberty Mutual's motion on December 10, 1991, (R. 00454.) and on December 23, 1991 entered its Order and Judgment granting summary judgment to Liberty Mutual: "For the reasons set forth in [Liberty Mutual's] November 15, 1991 Memorandum of Points and

Authorities." (R. 00459.) No memorandum decision was issued by the court.

SUMMARY OF ARGUMENTS

In the context of a claim for uninsured motorist benefits, it is well recognized that the insured, not the insurer, must come forward with reasonable evidence that the tortfeasor was in fact uninsured. By their own admission, the insureds provided no evidence that Daryl Crape was uninsured. Thus, a condition precedent to coverage had not been met. In spite of that, Liberty Mutual timely responded to the insureds' counsel's indication that a possible uninsured motorist claim existed, requested additional information in a polite and appropriate manner, and continued to pay to its insureds the benefits that were owed pursuant to the policy.

In contrast, the insureds, through counsel, never actually made a claim, failed to provide their insurer with the requested information, filed suit against the tortfeasor without obtaining the consent of the insurer as was required by the policy, obtained a default judgment without first notifying the insurer that a default hearing was scheduled, and then simply supplied a copy of the Default Judgment to the insurer asking the insurer to pay the Judgment. Under the circumstances, rather

than constituting a breach of the duty of good faith, Liberty Mutual's conduct was exemplary and in sharp contrast to the obvious tactics of the insureds. Shortly thereafter, when faced with numerous questions regarding whether the tortfeasor was insured and whether the Default Judgment was binding, Liberty Mutual filed an action for declaratory relief seeking to adjudicate the rights and responsibilities of all parties. That litigation was diligently pursued by both sides until the issues were resolved. When Liberty Mutual learned that Mr. Crape was uninsured and that the trial court considered the Judgment binding, it satisfied the Judgment with interest. Such conduct does not, as a matter of law, constitute a breach of the insurer's duty of good faith in the "first party" context.

Additionally, it is clear from the record that the insureds suffered no compensable damages by reason of Liberty Mutual's conduct.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT AS A MATTER OF LAW LIBERTY MUTUAL DID NOT BREACH ITS DUTY OF GOOD FAITH

Although the insureds' claim has never been set forth in detail, it seems that the claim is based on Liberty Mutual's alleged delay when it initially responded to the insureds and again when responding to the presentation of the Default Judgment.⁵ Therefore, this section of this brief addresses the

⁵ In their brief at page 15 the insureds state that "The thrust, however, of Baxter and Boulter's argument is that Liberty Mutual's breach of its duty of good faith began from its conduct prior to the filing of the declaratory complaint. The failure to timely acknowledge, investigate and correspond to the claim are what gives substance to Baxter and Boulter's cause of action."

Assuming, however, that the insureds now also claim that Liberty Mutual's pursuit of the action for declaratory relief was also bad faith, Liberty Mutual asserts that in Utah, as long as there is a fairly debatable reason in support of the action for declaratory relief, then the bringing of such an action cannot support a claim of bad faith. See, *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 958 (Utah App. 1989); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah App. 1987); *Western Casualty & Surety Co. v. Marchant*, 715 P.2d 423, 427 (Utah 1980); *Farmers Ins. Exchange v. Call*, 712 P.2d 231, 237 (Utah 1985).

The "fairly debatable" reasons that supported Liberty Mutual's filing of the Complaint for declaratory relief are adequately set forth in the memorandum filed by Liberty mutual in support of its motion for partial summary judgment before the trial court in this action and its motion to set aside the default judgment in the case initiated by the insureds against Daryl Crape. (R. 00118-156, Plaintiff's Motion for Partial Summary Judgment dated December 28, 1990; R. 00391-00408, Liberty Mutual's Memorandum in Support of its Motion to Set Aside Default Judgment.) Furthermore, when the "fairly debatable" reasons for bringing the action were resolved, Liberty Mutual paid the

law applicable to an insurer's obligations when faced with a claim similar to that presented in this case and addresses the pertinent facts in light of the insurer's legal obligations.⁶

A. Liberty Mutual Responded Fairly and Promptly to the Insureds.

Even the most cursory examination of the insureds' counsel's letter of July 12, 1989 which was received by Liberty Mutual on August 8, 1989 reveals that no real claim was being made. The letter merely advised the insurer that the insureds had filed suit against the tortfeasor and that maybe the tortfeasor was uninsured. The word claim is never used. No demand for payment is set forth. All that is asked for is that the insurer undertake an investigation. (R. 00144.) As is clear from Liberty Mutual's response 16 days later, an investigation was undertaken, a file was set up, and additional information was requested. Thus, the insurer did exactly what the insureds requested.

insureds' claim, plus interest and court costs. Lastly, it should be noted that the insureds' Counterclaim did not assert a breach of the duty of good faith based upon the filing of the Complaint for declaratory relief. (R. 00042-00045.)

⁶ The insureds' claim is a so called "first party" bad faith claim. See, *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 801 (Utah 1985).

Even assuming that the July 12, 1989 letter is construed to be a claim for uninsured motorist coverage benefits, Liberty Mutual had every right to respond requesting additional information. First, the insureds had not met the Utah No-Fault Act threshold for bringing an action for general damages and second, when making an uninsured motorist claim, the burden is on the insured to come forward with reasonable evidence that the tortfeasor is in fact uninsured. Courts from across the nation have so held.

For example, in *Griffith v. Farm and City Ins. Co.*, 324 N.W.2d 327 (Iowa 1982) the court held:

It is generally recognized that in order for an insured to recover under uninsured motorist coverage, the insured bears the burden of proving the uninsured status of the other motorist or vehicle. (Numerous citations omitted.)

Id. at 329-330. Again in *LaFeve v. State Farm Mut. Auto Ins.*, 527 F.Supp. 492 (Dist. of Alabama 1981) the court held:

It is clear that a party making a claim for uninsured motorist coverage must prove that the vehicle which injured him was in fact uninsured. (Citations omitted.)

Id. at 495. See also, *Abraham v. Great American Ins. Co.*, 21 Ohio Misc. 170, 256 N.E.2d 265, 267 (Ohio 1972); *Macaluso v. Grain Dealers Mut. Ins. Co.*, 188 S.2d 178, 180 (La. App. 1966); 26 A.L.R. 3d 883, 892, *Insurance--"Uninsured" Motorist*, § 4.

In this case, the insureds presented no evidence, reasonable or otherwise, that Mr. Crape was in fact uninsured. In light of that, Liberty Mutual was under no obligation to do more than it did. A file was set up, additional information was requested, and the insureds, through counsel, were advised that Liberty Mutual stood ready to honor the claim if and when reasonable evidence of the other driver's uninsured status was provided.⁷ (R. 00149-150.) Therefore, assuming that the letter received by Liberty Mutual on August 8, 1989 was a "claim" for uninsured motorist coverage, Liberty Mutual responded in a fashion entirely consistent with its rights under the law. All that the insureds had to do was to provide some evidence, any evidence, that in fact Mr. Crape was uninsured and then submit a claim for specific damages. As is set forth in Liberty Mutual's August 24, 1989 responsive letter (R. 00149-00150.), Liberty Mutual would have honored the claim. Instead, without further notification to Liberty Mutual, the insured took a default judgment against Mr. Crape and then expected the insurer to automatically, and without further questions, satisfy that judgment, when evidence that Mr. Crape was uninsured still had

⁷ Liberty also questioned whether the Insureds were legally untitled to make a claim against Crape due to Utah Code Ann. § 31A-22-309.

not been provided. The condition precedent to coverage, i.e., the existence of an uninsured motorist, had not been established. The coverage was never implicated, and Liberty Mutual had no duty to do anything other than what is reflected in its August 24, 1989 letter. (R. 00149-00150.) See, cases cited at page 20, *supra*.

Later, after obtaining the Default Judgment, once again it is questionable whether a claim was even presented. The insureds' counsel merely requested that the insurer: "Advise as to what your attitude is going to be about paying the same." (R. 00156.) Assuming, however, that the insureds' counsel's letter is construed as a claim for uninsured motorist benefits, once again the insureds failed to provide any reasonable evidence that Mr. Crape was uninsured.

The Findings of Fact and Conclusions of Law entered by Judge Rokich contained no reference to Mr. Crape being uninsured. (R. 00152-00154.) No additional evidence was provided with the letter. (R. 00156.) Furthermore, Liberty Mutual's policy clearly and unequivocally stated that in order for any judgment obtained by the insured against an uninsured motorist to be binding upon Liberty Mutual, the insured must first obtain the written consent of Liberty Mutual. (R. 00142, which is a photocopy of the relevant page

of Liberty Mutual's policy.) No such consent was obtained.

Therefore, once again Liberty Mutual was under no obligation to take immediate action and had a lawful and fairly debateable good faith reason for its conduct. No more is required. See, *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah App. 1987) (held: "Where factual issues exist regarding the claim's validity, an insurer's refusal to pay the claim does not constitute bad faith even where the factual issues are ultimately resolved in favor of the insured." Summary Judgment in favor of the insurer upheld.).

The Utah Court of Appeals' position is **consistent** with other jurisdictions. In *Phillips v. State Farm*, 437 F.2d 365, 368-370 (5th Cir. 1971) the court held that the: "Insurer did not commit bad faith by refusing to satisfy a judgment obtained by the insured and submit it under uninsured motorist coverage where the insurer contested the validity of judgment." Summary Judgment in favor of the insurer was affirmed.). *Id.* Again in *Myrttil v. Hartford Fire Ins. Co.*, 510 F.Supp. 1198, 1203-04 (E.D. of Pa. 1981) the court held that even where the insurer loses an action for declaratory relief, if a reasonable argument was presented, then the insurer did not commit bad faith." Summary judgment in favor of the insurer was affirmed. *Id.*

It should be noted that throughout this entire process the insured was represented by competent counsel and was not at a disadvantage regarding the relative expertise of the parties.

Faced with the insureds' default judgment on one hand and the many available defenses to that judgment on the other, Liberty referred the matter to counsel on December 27, 1989 (60 days after the receipt of the Default Judgment) and on January 4, 1990 the Complaint for Declaratory Relief was filed. (R. 00295-00296, Affidavit of counsel for Liberty Mutual, Michael P. Zaccheo.)

Certainly, under *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 801 (Utah 1985) in an uninsured motorist context, both the insurer and the insured have a duty to deal with each other in good faith and from the insurer's perspective that duty includes an obligation to diligently investigate the claim. *Id.* However, when the insurer responds to an insured's overture within 16 days and requests additional information which it is entitled to and acknowledges the insured's right to bring a claim when certain lawful conditions precedent are met, that duty is fulfilled. *Callioux, supra*. Additionally, the insurer is under no obligation to immediately and without pursuing its lawful remedies pay a default judgment obtained by the insured. *Phillips v. State Farm, supra*. Finally, the duty of good faith does not prevent the insurer from exercising its legal right to

have its obligations in a delicate situation determined via an action for declaratory relief. This Court made that point clear in *Western Casualty & Surety Co. v. Marchant*, 615 P.2d 423 (Utah 1980) wherein the Court held:

It would not comport with our ideas of either law or justice to prevent any party that entertains *bona fide* questions about his legal obligations from seeking adjudication thereon in the courts. (Citations omitted.)

Id. at 427, see also, *Farmers Ins. Exchange v. Call*, 712 P.2d 231, 237 (Utah 1985).

The insureds' reliance in their brief on Insurance Commission Rules to establish a breach of the duty of good faith is misplaced. (Brief of Appellant at page 10.) First, the statute under which the Insurance Commissioner is authorized to promulgate such rules specifically states that: "This section does not create any private cause of action." Utah Code Ann. § 31A-26-303(5) (1987). Had the Utah legislature intended to control the insurer's standard of conduct for purposes of an independent civil action based upon alleged bad faith it could have done so in clear terms, as have other states, rather than excluding the standard from giving rise to an independent civil action.⁸

⁸ For example, the Tennessee legislature enacted a statutory scheme to control insurer bad faith. See, *Squires v. Republic Ins. Co.*, 572 F.2d 560, 561-62 (6th Cir. 1978) (construing Tennessee bad

Second, the Insurance Commission Rules relied on by the insureds, Rule 540-89-10, 11 and 12, are each premised upon the insured first making a "claim." The Rules specifically define "claim" as a request for a demand for payment of benefits according to the terms of the insurance policy. See, Utah Insurance Regulations, R 540-89-4.B. In this case, as has already been set forth, no "claim" as defined by the Insurance Commission Rules was ever made.

Third, each of the rules relied upon by the insured set forth times within which the insurer must respond, "unless such investigation cannot reasonably be completed within such time." Utah Insurance Regulations, R 540-89-10, 11, and 12.⁹ Thus, the Rules require the same standard of care as does the case law: reasonable conduct.

faith law, T.C.A. § 56-1105(A).)

⁹ Liberty Mutual responded to the first letter from the insured's counsel 16 days after receipt of that letter. Giving the insured every benefit of the doubt, the Insurance Commission regulation required a response within 15 days, unless some other period was required. In light of the fact that the insureds presented no evidence that the tortfeasor was uninsured, and did not make a demand for payment, a 24 hour additional delay should not be considered to form the basis of a bad faith claim. With regard to Liberty Mutual's response to the submission of the Default Judgment, Liberty Mutual asserts that even if it was required to respond within 30 days, instead of approximately 60 days, under the circumstances because Liberty Mutual intended to deny the claim in any event, the 30 day delay caused no damages to the insured beyond accrued interest, which was ultimately paid.

In summary, in this case the insureds failed to establish a condition precedent to coverage and from that point forward Liberty Mutual was entitled to await further information which would satisfy the condition precedent before responding to the claim. In spite of that entitlement, Liberty Mutual promptly responded to the insureds' counsel, advised of the need for information, and acknowledged the insureds' right to present a claim when that additional information was provided. Thereafter, the insurer filed an action for declaratory relief seeking a judicial adjudication of the rights and obligations of the parties. Liberty Mutual's conduct was appropriate and did not constitute a breach of the duty of good faith.

B. Liberty Mutual Effectively Balanced Competing Concerns in this Case.

In an uninsured motorist claim context, the insurer has a delicate balance to maintain. On the one hand the insurer must continue to deal fairly and honestly with its insured, while on the other hand the insurer is entitled to analyze and assert all defenses that might be available to the uninsured motorist. See, *Hendren v. Allstate Ins. Co.*, 672 P.2d 1137, 1140-41 (New Mex. App. 1983).¹⁰

¹⁰ The court stated: "We recognize that an insurer has a dual role with respect to uninsured motorist coverage. The hybrid nature of the role which an insurer who provides uninsured motorist coverage assumes has caused a fragmented body of case law to emerge

Liberty Mutual, in its response of August 24, 1989, appropriately maintained this delicate balance by advising the insured of the additional information which was required and the potential legal defense (the tort threshold requirement) to the claim and at the same time acknowledging that should such information be forthcoming, the insurer would honor the claim and had set up a file to do so. Unfortunately, the insureds decided to pursue their own option, that of obtaining a default judgment after arguably improper service of process, and thereby occasioned the long and issue-laden delay about which they now complain.

At every critical point in the development of this claim Liberty Mutual had a fairly debatable reason for its action. Initially, Liberty Mutual had not been presented with a proper demand. Then, no evidence of the tortfeasor's uninsured status was submitted when the burden to submit such evidence was upon the insured. Also, the insureds had not met the Utah No-Fault tort threshold, a defense that would have been available to

in which courts consider the duty owed by the insurer to the insured with varying results. (Citations omitted.) The difficulty arises because the insurer, on the one hand, sold the policy, and thus has an obligation to its insured, unlike third party coverage situations. On the other hand, however, the insurer assumes an adversary role as to questions involving the uninsured motorist's negligence and any available defenses he might have." *Id.*, see also, *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565, 569 (7th Cir. 1978).

the uninsured motorist and which the insurer was lawfully entitled to assert against the claim, assuming one had been made. Then the Default Judgment was obtained without Liberty Mutual's written consent which was required by the policy and furthermore the validity of the Judgment was reasonably challengeable on grounds of improper service of process. Finally, Liberty filed an action for declaratory relief seeking to resolve all of the issues and when those issues were resolved, satisfied the Judgment, with interest and court costs. Under the authorities set forth herein, *supra*, such conduct does not constitute, as a matter of law, bad faith.¹¹

POINT II

THE INSUREDS HAVE SUFFERED NO COMPENSABLE DAMAGES

This appeal arises from a so called first party bad faith claim. *Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Utah 1985). In the first party context, the duties and obligations of the parties are contractual rather than fiduciary. *Id.* at 800. In the first party situation, the damages recoverable for a

¹¹ Utah courts have not been reluctant to resolve the issue of insurer bad faith on motions for summary judgment. *See, Pixton v. State Farm*, 809 P.2d 746 (Utah App. 1991); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah App. 1989); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838 (Utah App. 1987).

breach of the contract are general damages and consequential damages only. *Id.* at 801; see also, *Canyon Country Store v. Bracey*, 781 P.2d 414, 423 (Utah App. 1989). No independent tort has been alleged in this case and the record would not support such an allegation. (R. 00042-00045.) In this situation, punitive damages are not available under *Beck*. See, *Beck*, 701 P.2d at 801; *Canyon Country Store*, 781 P.2d at 423. Damages for mental anguish are generally not available. *Id.* at 802. With regard to mental anguish damages, the court in *Beck* stated:

Clearly, damages will not be available for the mere disappointment, frustration or anxiety normally experienced in the process of filing an insurance claim and negotiating a settlement with an insurer.

Id. at 802.

In this case the insureds are entitled to those damages directly flowing from the alleged breach, i.e., the satisfaction of the Default Judgment plus interest which has already occurred, and those consequential damages which the parties might reasonably foresee would occur as a result of the alleged breach. *Beck*, 701 P.2d at 801.

In this case it was the insureds' burden to come forward with competent evidence that would establish with reasonable certainty the damages allegedly sustained. See, *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 774 (Utah 1986). If it

appeared to the trial court based upon the pleadings and the insureds' answers to interrogatories that no compensable damages were sustained and that the insureds could not, as a matter of law, recover regardless of their contention of damages, then summary judgment was appropriate. *Harvey v. Sanders*, 534 P.2d 905, 907 (Utah 1975) (wherein the court stated: "If from the pleadings and any appropriate supportive materials, it appears as a matter of law, that notwithstanding what a party contends, he could not recover, the trial court can so rule." *Id.*)

In this case, the insureds' Counterclaim does not spell out what actual damages were sustained by either of the insureds. The Counterclaim simply states that as a result of Liberty Mutual's failure to act in good faith, Liberty Mutual is "obligated to counterclaimants for actual and consequential damages in a sum not less than \$1 million as general damages." (R. 00044.) Therefore, Liberty Mutual attempted to discover exactly what the nature of counterclaimants damages were through interrogatories designed to explore that issue. In Liberty Mutual's first set of interrogatories the insureds were asked to outline each and every out-of-pocket expense they incurred as a result of the alleged breach of the duty of good faith. (R. 00231, interrogatory number three.) In response, not a single item of damages regarding Jaren Baxter or Mary Ellen Boulter was set

forth. Additionally, the only damages alluded to with regard to Joanne Baxter were for mental anguish without a single dollar amount specified. (R. 00231-233, the insureds' response to Liberty Mutual's interrogatories.)

Because the insureds' answers to interrogatories were inadequate, Liberty Mutual filed a Motion to Compel and the trial court subsequently ordered on July 16, 1991 that the insureds respond fully to the interrogatories. (R. 00251.) The only supplemental response that was forthcoming consisted of five handwritten pages of notes reflecting visits by Joanne Baxter to doctors and physical therapists including a mileage charge for those visits and charge for an increased rate to procure new automobile insurance. (R. 00414-00419.) Although no specific information was provided, presumably Joanne Baxter's visits to the doctor and physical therapist arose out of her physical injuries sustained in the accident with Daryl Crape. Such damages do not flow naturally and foreseeably from Liberty Mutual's alleged breach of the duty of good faith, but rather flow naturally and foreseeably from the automobile accident with Mr. Crape.¹²

¹² Pursuant to the personal injury protection benefits section of the Liberty Mutual policy, Liberty Mutual paid to Joanne Baxter a total amount of \$3,356.10 as of August 24, 1989. Whether some portion of these funds were included in the answers to

Liberty Mutual submitted the answers to interrogatories to the trial court in support of its motion for summary judgment and argued that the insureds' showing was inadequate and that as a matter of law, no entitlement to damages could be shown. (R. 00326-00329.) At that point, had the insureds wanted to present additional information to the court they could have done so. However, no such additional information was forthcoming and the trial court accurately determined that no entitlement to damages could be shown.¹³

POINT III

THE INSUREDS WERE NOT ENTITLED TO PUNITIVE DAMAGES

As has been discussed *supra* at 29. Under *Beck v. Farmers Ins. Exchange*, the insureds in this case were not entitled to punitive damages unless an independent tort had been alleged and proved. No such tort was alleged and nor could it be

interrogatories is not apparent.

¹³ Joanne Baxter's supposed claim for mental anguish was completely unsupported and under the circumstances amounted to no more than the mere disappointment, frustration and anxiety normally experienced in the process of filing an insurance claim and as such, was not compensable. *Beck*, 701 P.2d at 802.

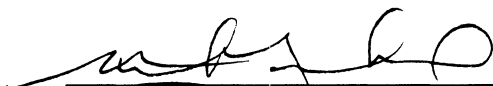
proved. (R. 00042-00046.) See also, *Canyon Country Store v. Bracey*, 781 P.2d at 423; Utah Code Ann. § 78-18-1(1)(a) (1989).¹⁴

CONCLUSION

Based upon the foregoing, Liberty Mutual Insurance Company respectfully requests that this Court affirm the trial court's decision granting summary judgment to Liberty Mutual and dismissing the insureds' claims of bad faith.

DATED this 6 day of May, 1992.

RICHARDS, BRANDT, MILLER
& NELSON

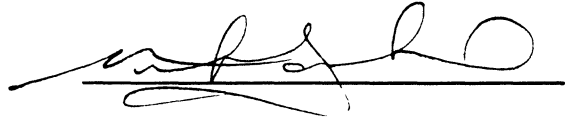

Michael P. Zaccheo
Attorneys for Appellee

¹⁴ Utah Code Ann. § 78-18-1(1)(a) (1989) requires that the insured set forth by clear and convincing evidence that the insurer's conduct manifested and knowing and reckless indifference towards and disregard of the rights of the insureds. No such allegation was set forth in the Counterclaim in this case. (R. 00042-00046.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 7th day of May, 1992, to the following counsel of record:

ROBERT M. McRAE
McRAE & DeLAND
209 East 100 North
Vernal, Utah 84078

A handwritten signature in black ink, appearing to read "McRAE", is written over a horizontal line.

lm.brf
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