

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTOINETTA DATTILO and : CIVIL ACTION  
FRANK DATTILO :  
v. :  
STATE FARM INSURANCE COMPANY : NO. 97-1842

MEMORANDUM OF DECISION

McGLYNN, J.

OCTOBER , 1997

In this diversity action, plaintiffs charge their insurer with acting in bad faith in processing an under insured motorist claim.<sup>1</sup> See 42 Pa C.S.A. § 8371. Before the Court is the defendant insurer's motion for summary judgment. "Summary judgment is appropriate only if the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c)." 2-J Corporation v. Jewel Building Systems, Inc., 3rd Cir., October 2, 1997, p.4.

After a hearing and upon consideration of the briefs and arguments of counsel, the court concludes that there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law.

The historical facts are essentially undisputed and are as follows:

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<sup>1</sup> Plaintiffs have abandoned bad faith claims with respect to wage loss and medical payments.

1. On May 19, 1987, Mrs. Dattilo was involved in an automobile accident with Florence Laub in Philadelphia, Pennsylvania.

2. On the date of that accident, the Dattilos were covered under two automobile insurance policies issued by State Farm, which provided medical, wage loss, and UIM coverage for losses incurred as a result of that accident.

3. On the date of the accident, Florence Laub was covered under a policy of automobile insurance issued by Allstate, which provided liability coverage in the amount of \$15,000.

4. Almost six years after the accident, on March 24, 1993, plaintiff's counsel notified State Farm that Allstate had tendered its \$15,000 policy limit to settle Mrs. Dattilo's personal injury claim against Mrs. Laub. Counsel requested that State Farm waive its subrogation rights against Mrs. Laub and consent to the settlement of that claim. Counsel also put State Farm on notice of Mrs. Dattilo's UIM claim, but did not make any settlement demand for that claim.

5. State Farm assigned the handling of Mrs. Dattilo's UIM claim to Deborah Purdie on May 13, 1993. Purdie immediately began an investigation of the claim, and learned that Mrs. Dattilo's claim against Laub was conferenced before a settlement master, who evaluated Mrs. Dattilo's claim at between \$10,000 and \$12,500.

6. Purdie also learned that Mrs. Dattilo's sustained, at most, soft-tissue injuries in the May 19, 1987 accident.

7. Because the settlement master evaluated Mrs. Dattilo's personal injury claim at

between \$10,000 and \$12,500, and because Mrs. Dattilo was going to receive \$15,000 from Allstate, it appeared to Purdie that Mrs. Dattilo was adequately compensated for her loss.

8. On May 14, 1993, State Farm waived its subrogation rights against Mrs. Laub and consented to the \$15,000 settlement of Mrs. Dattilo's claim against her. At the same time, State Farm offered \$1,000 to settle Mrs. Dattilo's UIM claim.

9. Purdie contacted plaintiffs' counsel on July 20, 1993 to inquire whether Mrs. Dattilo accepted State Farm's \$1,000 offer.

10. Between July 20, 1993 and January 28, 1994, State Farm contacted plaintiffs' counsel several more times to discuss settlement of Mrs. Dattilo's UIM claim.

11. Plaintiffs' counsel did not respond to these overtures.

12. On February 1, 1994, plaintiffs' counsel finally provided State Farm with a copy of a settlement memorandum that plaintiffs had submitted in connection with Mrs. Dattilo's third-party claim, which included Mrs. Dattilo's version of the accident, theory of liability, and a summary of the dates of Mrs. Dattilo's medical treatment. The memorandum disclosed that the date of Mrs. Dattilo's last medical treatment was May 12, 1988. No demand accompanied the memorandum.

13. By April 28, 1994, plaintiffs had not responded to State Farm's offer or demanded any particular amount to settle the UIM claim. Because of the lack of a response and the fact that the records showed that Mrs. Dattilo's last treatment was on May 12, 1988, and in an effort to resolve the claim, Purdie assigned the matter to defense counsel to obtain Mrs. Dattilo's statement under oath and proceed to arbitration in accordance with the terms and conditions of

the Dattilos' policy.

14. State Farm first requested Mrs. Dattilo's statement under oath on May 6, 1994, but that statement was not actually taken until February 21, 1995. Between May 6, 1994 and February 21, 1995, Mrs. Dattilo's statement was scheduled and rescheduled approximately seven times, all at the request of Mrs. Dattilo or her counsel.

15. In her statement under oath, Mrs. Dattilo testified to ongoing pain in her neck, back, and right shoulder. However, she had discontinued active medical treatment for those complaints by the Fall of 1988. Between 1988 and 1995, Mrs. Dattilo saw her family physician approximately six times for complaints which she attributed to the May 19, 1987 accident.

16. Because Mrs. Dattilo had ongoing complaints in 1995 arising out of an accident that occurred almost seven years earlier, State Farm requested an Independent Medical Examination of Mrs. Dattilo.

17. That examination was conducted on April 18, 1995 by James A. Anthony, Jr., M.D. In his report, Dr. Anthony concluded that there was objective evidence corroborating Mrs. Dattilo's shoulder complaints, but her back and neck problems had completely resolved.

18. Between May and October 19, 1995, State Farm continued to solicit a settlement demand for the Dattilos.

19. Finally, on November 3, 1995, plaintiffs' counsel demanded the \$100,000 UIM policy limits to settle the claim.

20. At no time did the Dattilos or their counsel indicate that their demand for the UIM policy limits was negotiable, or that they would accept less than \$100,000 to settle their

claim.

21. The parties selected arbitrators as provided by the policy. Plaintiffs' counsel appointed Stanley Schwartz, Esquire, and defense counsel appointed Norton Freedman, Esquire and Messrs. Schwartz and Freedman appointed the Honorable Paul Dandridge as the neutral arbitrator.

22. On December 18, 1995, State Farm offered \$5,000 to settle the Dattilos' UIM claim. That offer was based upon, inter alia, Mrs. Dattilo's testimony, Dr. Anthony's report, and the fact that Mrs. Dattilo had not been actively treated since 1988.

23. Because neither the Dattilos, nor their attorneys responded to State Farm's \$5,000 settlement offer, State Farm contacted plaintiffs' counsel on March 27, 1996 and again on April 9, 1996, to find out if their demand had changed, and to negotiate a settlement of the claim.

24. The arbitration hearing for the Dattilos' UIM was initially scheduled to take place on July 11, 1996, but the Dattilos' arbitrator, Mr. Schwartz, canceled the hearing.

25. The arbitration was held on December 5, 1996, after which a majority of the arbitrators awarded \$39,775 to the Dattilos.

26. State Farm paid the arbitration award on February 5, 1997.

27. Plaintiffs commenced this action on March 3, 1997.

## DISCUSSION

The statute in question reads:

“In an action arising under an insurance policy, if the Court finds that the insurer has acted in bad faith toward the insured, the court may take all the following actions:

(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.”

42 Pa. C.S.A. § 8371.

Under Pennsylvania law, clear and convincing evidence is necessary to prove bad faith. Poselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747 (3d Cir. 1994).

“The standard for bad faith claims under § 8371 is set forth in Terletsky v. Prudential Property & Cas. Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (1994), appeal denied, 540 Pa. 641, 659 A.2d 560 (1995). There, the Pennsylvania Superior Court applied a two-part test, both elements of which must be supported with clear and convincing evidence: (1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis.” Klinger v. State Farm Mut. Auto Ins. Co., 115 F.3d 230, 233 (3rd Cir. 1997). The Terletsky court held that where the insurer “had a rational bases for disputing [insured’s] claim ... a determination of bad faith [is] improper.” 649 A.2d at 681.

Clearly, plaintiffs have failed to show that State Farm lacked a reasonable basis for denying benefits. To the contrary, the record shows that the insurer had a rational basis for all the actions it took in processing plaintiffs’ claim.

To begin, more than five years and nine months had elapsed from the date of the accident to the first notice that State Farm had of the UIM claim. It was only at that point that State Farm learned that plaintiffs had settled their third-party claims for \$15,000 after a

settlement master had evaluated the claim at between \$10,000 and \$12,500. Moreover, the papers in the third-party case revealed that Mrs. Dattilo suffered soft tissue injury for which she received medical treatment up until May of 1988. Under these circumstances, it is reasonable for State Farm to conclude that Mrs. Dattilo was adequately compensated for her injury, particularly in light of the fact that State Farm had paid her medical bills and waived any subrogation right against the amount collected in the third-party action. Nevertheless, from May 1993 to April 1994, Purdie made repeated requests for a response to State Farm's outstanding offer without success.

Having failed to generate a response to the offer, on April 28, 1994 State Farm referred the matter to outside counsel to initiate proceedings provided by the contract of insurance to obtain Mrs. Dattilo's statement under oath and to take the claim to arbitration. As noted above, State Farm first requested Mrs. Dattilo's statement on May 6, 1994, but it was not actually taken until February 21, 1995, through no fault on the part of State Farm.

At all events in her statement, Mrs. Dattilo complained of ongoing pain in her neck, back and right shoulder, while acknowledging that she had discontinued active medical treatment for these complaints by the Fall of 1988.

Because of the lapse of time, and in the absence of treatment in the interim, State Farm requested an independent medical examination, which was conducted on April 18, 1995. The examining physician concluded that there was objective evidence corroborating Mrs. Dattilo's shoulder complaints, but that the back and neck problems had completely resolved.

Between May and October 1995, State Farm continued to solicit a settlement

demand. Finally, on November 3, 1995, plaintiffs' counsel demanded the \$100,000 UIM policy limits to settle the claim. From that day on, there was no indication that plaintiffs would accept anything less than \$100,000.

Nevertheless, primarily on the basis of the independent medical examination, on December 18, 1995 State Farm increased its offer to \$5,000 to settle the UIM claim. Again, there was no response to this offer despite telephone calls to plaintiffs' counsel on March 27, 1996 and April 9, 1996.

In the meantime, arbitration under the terms of the policy was proceeding. Each party had appointed an arbitrator and the two arbitrators appointed a third. The arbitration hearing was initially scheduled for July 11, 1996, but was canceled at the request of plaintiffs' appointee. The arbitration took place on December 5, 1996 and by a majority vote, the Dattilos were awarded \$39,775.<sup>2</sup> State Farm paid the arbitration award on February 5, 1997.

I am persuaded that no reasonable person can examine this record and conclude that State Farm acted in bad faith in processing the Dattilos' UIM claim.

Whatever delays there were, arose as a result of the unresponsiveness, dilatoriness and intransigence of plaintiffs and plaintiffs' counsel. State Farm took every reasonable step to bring this claim, which was six years old when asserted, to an early conclusion.

The request for an independent medical examination was certainly reasonable in light of the fact that the injury occurred seven years earlier and treatment for those injuries had ceased six years earlier.

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<sup>2</sup>Although not controlling, the fact is that the award was closer to State Farm's offer of \$5,000 than to plaintiff's demand of \$100,000.

Invoking the arbitration procedure to resolve the dispute is not unreasonable because of the wide gap between State Farm's offer and plaintiffs' extremely high demand. The offer of \$5,000 was not unreasonable in view of the medical history.

Finally, plaintiffs offered the testimony of an "expert," who without even looking at State Farm's file, was prepared to testify that in his opinion State Farm was acting in bad faith in handling the Dattillos' UIM claim. No reason is given except that State Farm had made "no fair offer," but there is not a clue as to what, in his judgment, a fair offer would have been.<sup>3</sup> In the final analysis, his testimony does not provide the clear and convincing evidence (1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis. His conclusion is simply not supported by the facts in the case.

In addition, there is a serious question as to whether this so-called expert should be permitted to testify. He qualified as a person experienced in claims handling and adjusting on behalf of insurers, but this is not a malpractice case in which the insurer's conduct would be judged by the standards of the insurance industry. Bad faith is a legal concept of general application which does not require that scientific, technical or specialized knowledge be presented to assist the trier of fact. The witness' opinion is nothing more than subjective speculation unsupported by any scientific or specialized knowledge.

I find on the basis of the undisputed material facts of this case that State Farm, as a matter of law, is entitled to judgment. Accordingly, its motion for summary judgment will be

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<sup>3</sup>See Terletsky, 649 A.2d at 689 where the court held that low settlement offers were not indicative of bad faith.

granted.

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O R D E R

AND NOW, this day of OCTOBER, 1997, for the reasons set forth in the accompanying Memorandum of Decision, it is hereby

ORDERED that JUDGMENT is entered in favor of the defendant State Farm Insurance Company and against the plaintiffs Antoinetta Dattilo and Frank Dattilo.

BY THE COURT:

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JOSEPH L. McGLYNN, JR. Sr. J.