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Cedillo v. Farmers Insurance Co. of Idaho Appellant's Reply Brief Dckt. 43890

IN THE SUPREME COURT FOR THE STATE OF IDAHO

PEGGY CEDILLO, an individual, Cedillo-Appellant, vs. FARMERS INSURANCE COMPANY OF IDAHO, Defendant-Respondent.	Supreme Court Docket No. 43890 Ada County Docket No. 2013-08697 **APPELLANT'S REPLY BRIEF**

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Appeal of Peggy Cedillo v. Farmers Insurance Company of Idaho in the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. CV OC 1308697
Honorable Lynn G. Norton, Presiding District Judge

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I.

INTRODUCTION

This appeal comes to the Court with an eight and a half (8 ½) year long history. On May 25, 2008, Peggy Cedillo (hereafter "Cedillo") was seriously injured in a motorcycle crash caused by an underinsured motorist. See, *Cedillo v. Farmers Insurance Company of Idaho* 158 Idaho 154, 345 P.3d 213 (2015).

In *Cedillo*, the district court entered its Judgment on December 11, 2013. The Judgment confirmed Arbitrator Merlyn Clark's final award. The district court's Judgment also awarded Cedillo $5,608.^{00}$ as Farmers unpaid balance of the arbitration award, prejudgment interest of $132.^{01}$ on the unpaid balance of the arbitration award, and $121,007.^{00}$ as attorney fees.

Rather than pay the district court's judgment, Farmers Insurance Company of Idaho (hereafter "Farmers") appealed the district court's Judgment. This Court affirmed the district court's Judgment on March 05, 2015. Farmers did not pay the district court's Judgment as affirmed by this Court until March 23, 2015. R. p. 201.

Regarding the facts relevant to Cedillo's UIM claim, Farmers' sole focus on the insured's conduct, rather than its own conduct, was and is misplaced. In fact, Farmers did not pay Cedillo the amount justly due her until almost six (6) years after Farmers received Cedillo's proof of loss on July 25, 2009, which provided Farmers with sufficient information for it to investigate and pay Cedillo's UIM claim. R. p. 000201.

In its Respondent's Brief Farmers cites only facts which support its contentions that Cedillo's conduct in submitting her UIM was faulty. Farmers completely ignores Idaho case law declaring that the insured's conduct is wholly irrelevant at the summary judgment stage. Nowhere does Farmers acknowledge its quasi-fiduciary duties owed to Cedillo in adjusting her

UIM claim. Neither has Farmers cited this Court to any testimony or evidence contradicting the opinions of Cedillo's bad faith expert, Mr. Irving "Buddy" Paul, or the supporting evidence marshalled by him in support of said opinions, all of which was incorporated by Cedillo in Appellant's Brief at pp. 10-11, pp. 37-38, and pp. 40-41.

Farmers' contentions concerning Cedillo's failure to preserve issues concerning the district court's discovery rulings simply disregards the appellate record. Cedillo's Appellant Brief more than adequately recites this Court's standards of appellate review.

These repeated allegations that Cedillo has failed to preserve the discovery issues ignores the express invitations of the district court and the United States District Court of Idaho – that this Court address the unique discovery issues encountered in this litigation of a bad faith tort claim. Cedillo has requested this Court to address those issue in this case.

As it did in the district court, Farmers fails to evaluate the adequacy of its investigation, its analysis and its payment of Cedillo's UIM claim. Farmers fails to even acknowledge that once its liability is admitted, as in this case, it has the duties to fairly investigate, fairly analyze, and fairly pay such claims. The facts of this case establish a stonewalling strategy which is consistent with Farmers' complete failure to treat Cedillo's UIM claim fairly.

II.
ARGUMENT

A. Cedillo's bad faith tort claim concerns Farmers' conduct, not Cedillo's conduct.

In deciding the outcome of this appeal, the Court is asked to focus on the real issue as stated by Farmers' attorney in the summary judgment hearing, which is "...evaluating what Farmers did as they went along through the claim." Tr. of summary judgment held on January 7, 2016, p. 4 lines 12-23, and p. 7, lines 12-14.

Cedillo's claim for bad faith turns on whether Farmers handled her insurance claim in good faith, including the investigation of her claim, the evaluation of its validity, the value of her claim, any settlement decisions made by Farmers, and the defense of her claim in arbitration. Cedillo's bad faith claim does not turn on Cedillo's conduct. The district court erred in this regard.

In arbitration, Farmers could have asserted, and did assert, some of the defenses available to the underinsured tortfeasor. However, Cedillo's bad faith claim is an entirely separate claim. In Cedillo's bad faith claim Farmers is not to be "...treated just as if it was the tortfeasor." *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221, 1235 (2010). As this Court stated in *Weinstein*, "We have never held that the relationship between an insurance company providing UM coverage and its insured is the same as the relationship between its insured and the uninsured tortfeasor." *Weinstein* at 1239.

Pursuant to Idaho case law, the relationship between an insurance company and its insured does not vary depending upon whether the insured is making a claim under UM coverage, UIM coverage, or another type of coverage. Rather, "the tort of bath faith breach of insurance contract ... is founded upon the unique relationship of the insurer and the insured, the adhesionary nature of the insurance contract including the potential for overreaching on the part of the insurer, and the unique, 'non-commercial' aspect of the insurance contract." *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 100, 730 P.2d 1014, 1020 (1986), as cited in *Weinstein* at 1249. These factors apply to all types of coverage. An insurance company can certainly raise any issues and defenses that the tortfeasor could have raised, but it cannot raise frivolous issues and defenses in bad faith even though the tortfeasor could get away with such conduct. *Weinstein* at 1249. As stated in *Sullivan v. Allstate Insurance Co.*, 11 Idaho 304, 306, 723 P.2d

848, 850 (1986) (emphasis in original), "[W]e do not agree with those courts who hold that in *all* circumstances the relationship [between the insurance carrier and its insured making a claim under UM coverage] is adversarial in nature and no obligation or liability rests upon the insurance carrier until the 'legal liability' of the uninsured motorist has been either admitted or adjudicated." The insurance company has a duty to act in good faith even when its insured makes a claim under the UM coverage of the policy. *Bantz v. Bongard*, 124 Idaho 780, 785, 864 P.2d 618, 623 n. 5 (1993), as cited by *Weinstein* at 1249.

"The covenant requires the parties to perform, in good faith, the obligations contained in their agreement." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562, 212 P.3d 982, 9092 (2009). This quasi-fiduciary relationship continues even if the insured initiates a first-party lawsuit against the insurer because the lawsuit does not necessarily create an adversarial relationship between the insured and the insurer. *White v. Unigard Mut. Ins.* Co., 112 Idaho 94, 100, 730 P.2d 1014, 1020 (1986). Evaluating an action for bad faith in failing to promptly investigate and promptly settle a valid claim depends upon the particular facts of the case. *Id* at 120.

In the state of Idaho, adjustment of an UIM claim, once the claim is accepted by the insurer, is no different than any other first-party insurance claim. Despite Farmers' repeated, hyper-procedural effort to deflect the Court's attention, an arbitration clause does not change the quasi-fiduciary obligations of an insurance company. This Court has stated:

> "The existence of a right to the arbitration of genuinely disputed claims cannot shield an insurer who demands arbitration of claims that are not genuinely disputed or requests unnecessary documentation merely to delay the settlement process."
>
> *Inland Group of Companies, Inc. v. Providence Washington Ins. Co.,* 133 Idaho 249, 256, 985 P.2d 674, 681 (1999).

Under Farmers' UIM contract of insurance and the caselaw of Idaho, Cedillo's claim, once liability was acknowledged on August 25, 2009, required Farmers to treat her claim no differently than any other first-party claim. As a first-party claim, Farmers was required to give assistance to Cedillo, could not take financial advantage of Cedillo, and was required to complete a prompt and full investigation of her claim and to promptly settle her claim. Tr., p. 13 lines 17-23. *See also*, R. p. 000606, Farmers' Responses to Cedillo's Request for Admission.

Farmers could certainly have contested Cedillo's UIM claim by denying liability. But it chose not to deny liability. If Farmers had denied liability it could have contested the extent of Cedillo's injury, causation, the necessity of Cedillo's medical expenses or other economic damages, such as wage loss. Under this scenario Farmers would have had no obligation to be fair to Cedillo. Tr. p. 16, line 22 to p. 17, line 3. But the record clearly establishes Farmers' liability was never an issue: liability for Cedillo's UIM claim was accepted by Farmers on August 25, 2009.

The issue before this Court is to be resolved by focusing on Farmers' conduct in adjusting Cedillo's UIM claim, including Farmers' duties and its breach of those duties. Cedillo's conduct is wholly irrelevant.

B. The district court erred in determining what evidence and testimony would be considered in deciding whether or not Cedillo's claim was "fairly debatable."

The issue before the district court and now this Court is whether Cedillo provided the district court with sufficient testimony and evidence to demonstrate the existence of a genuine issue of material fact as to whether her claim was not fairly debatable. See, *Lakeland True Value Hardware, LLC v. Harford Fire Insurance Company*, 153 Idaho 716, 721, 291 P.3d 399, 404

(2012). Whether a genuine issue of material fact exists as to whether a claim was fairly debatable is a question of law subject to *de novo* review. *Id* at 405.

In *Lakeland* (cited by the district court in its Memorandum Decision, R. p. 002295), the district court found that "... in the value of Plaintiff's claim, that whole dispute was caused by the Plaintiff's inconsistent amounts that they claimed was due. There were different figures at different times. And it was caused – that dispute in the value of the Plaintiff's claim was also caused by the Plaintiffs not providing all the information the Defendant felt it needed, specifically, the inventory. And that is what led to the delay." *Id* at 403.

In *Lakeland* this Court affirmed the district court's grant of summary judgment to the insurer on the insured's bad faith claim. However, it did "...not do so based on the narrow ground that Lakeland made inconsistent and changing claim demands upon Hartford." *Id* at 405. This Court declined "... to follow this line of reasoning because, even though an insured may make differing requests for compensation, the claim may be not fairly debatable if the insurer possesses sufficient information to make a reasonably certain value of the claim." *Id* at 405.

The *Lakeland* court explained that "[a]t summary judgment on Lakeland's bad faith claim, *fault* upon Lakeland is wholly *irrelevant*." *Id* at 404. Yet, in this case the district court granted Farmers' summary judgment squarely on what it found to be Cedillo's faults, and disregarded Farmers' faults, such as its sloppy and slow adjustment of her claim.

The district court found fault with Cedillo's initial demand for policy limits of $500,000. R. p. 002297. The district court found fault with Cedillo's supposed failure to provide adequate information to allow Farmers to investigate her claim. R. p. 002297. The district court found fault with what it labeled as Cedillo's "shift" in the basis for her demands. R. p. 002298. The district court found fault with Cedillo's wage loss claim in that she failed to include a wage loss

claim in her first letter to Farmers. R. p. 002298. The district court found additional fault with Cedillo's inability to provide Farmers with information needed to evaluate her wage loss claim. R. p. 002298.

The district court, in its grant of summary judgment to Farmers, stated the following:

> "Thus Defendants (sic) have presented evidence that Plaintiff failed to provide information needed by Defendant to evaluate her claim. Although the Plaintiff's overall demand remained the same – policy limits – her support for such claim was slow in coming and Plaintiff did appear to include new damages in the mix as the claim investigation progressed." R. p. 002298.

The district court did exactly what this Court had forbidden in the *Lakeland* case. The district court placed fault upon Cedillo. As this Court stated in *Lakeland*, at summary judgment on Cedillo's bad faith claim, fault upon Cedillo was and is wholly irrelevant. Clearly, the district court committed a reversible error in applying this irrelevant and impermissible standard in its grant of summary judgment to Farmers. It was and is Cedillo's burden to provide the Court with specific triable facts upon which a jury may draw inferences in Cedillo's favor demonstrating that there exists genuine issues of material facts concerning whether Cedillo's claim was fairly debatable or not.

The evidence and record in this case at every level, adjustment, arbitration, confirmation in the district court and in the Idaho Supreme Court, speak loudly in support of Cedillo's bad faith claim. In arbitration the Arbitrator found that Cedillo provided a proof of loss to Farmers on July 28, 2009. This finding was confirmed by both the district court and this Court. See, *Cedillo v. Farmers* 158 Idaho 154, 345 P.3d 213 (2015). Farmers does not dispute that the proof of loss provided adequate information which obligated it to investigate and determine its rights and liabilities in a fair and accurate manner.

It is undisputed that liability was never an issue and that Farmers did not tender to Cedillo the amount justly due her or even a sum close to that amount. Farmers did not pay the amount justly due Cedillo until March 23, 2015, almost six (6) years after it received Cedillo's proof of loss. R. p. 000201. The district court's proper focus in evaluating Farmers' summary judgment motion should have been Farmers' conduct in investigation and evaluating Cedillo's claim, not Cedillo's conduct. The term "fairly debatable" means that at the time the claim was under consideration, there existed a legitimate question or difference of opinion over the eligibility, amount or value of the claim. *Robinson v. State Farm Mutual Automobile Insurance Co.*, 137 Idaho 173, 176, 45 P. 3d 829 at 833-34.

Eligibility or coverage has never been an issue in this case. Farmers and the district court erred in treating Cedillo's claim as a third-party claim. Farmers immediately determined that the driver who caused the crash was both underinsured and solely at fault. Once it had made that determination, its duty to investigate and its analysis in deciding the amount or value of Cedillo's claim was no different from its duties in deciding whether to pay any first-party claim. The fact that Farmers could have raised any issue or defenses that could have in good faith been raised by the tortfeasor does not alter the terms of the insurance policy, nor does it add provisions to the policy. *See*, *Weinstein* at 1239.

Farmers' duty to promptly investigate Cedillo's claim was and is independent of whatever Cedillo or her attorney did or didn't do. Just as in *Weinstein*, Farmers knew it owed Cedillo under her UIM coverage from the day it received her proof of loss on July 28, 2009. Just as in *Weinstein*, Farmers never debated or disputed any of Cedillo's medical expenses of $53,048.[62] submitted with her proof of loss on July 28, 2009.

In arbitration Farmers had no liability defense. Just as Farmers' liability has never been an issue in this case, likewise, comparative fault has never been an issue in this case. *See, Sullivan v. Allstate Insurance Co.*, 111 Idaho 304, 723 P.2d 848 (1986) (Insurer denied liability for insured's claim on the basis of insured's comparative negligence. Arbitrator's finding of insured's comparative negligence of 35% speaks loudly in defense of the insurer).

The district court in granting Farmers' motion also relied upon Cedillo's "complex medical" issues. (R. p. 00229) and pre-existing injury which caused her claim to be fairly debatable. R. p. 002299. Cedillo's "complex medical" issues and/or pre-existing injury issues were concocted by Farmers after retaining Dr. Richard Wilson, a well-known insurance defense doctor. Up until April 19, 2011, the date of Dr. Richard Wilson's report to Farmers' attorney (R. p. 1157), Farmers had no evidence or medical record which supported a theory of "complex medical" issues and/or a pre-existing injury.

In concluding that Cedillo's "complex medical" issues and/or pre-existing injury made Cedillo's claim fairly debatable, the district court, again, completely ignored the quasi-fiduciary relationship between Cedillo and her insurer, Farmers, which required Farmers to seek out evidence and testimony which supported, not defeated, her claim.

In granting Farmers' motion the district court relied upon the case of *Lucas v. State Farm Fire Casualty Co.*, 131 Idaho 674, 963, P.2d 357 (1998). The district court stated that it did "...not find this case to be on a par with *Lucas*, where there was no question as to whether the claim was fairly debatable." R. p. 002299. In *Lucas* the insured "...was seen by six different doctors who appeared to be in disagreement as to the cause of Lucas's neck condition. None of the doctors were able to definitely state that Lucas's neck condition was pre-existing or that it related to the motor vehicle accident. However, on March 9, 1993, in response to [the insurer's]

letter asking what was the cause of Lucas's condition, Dr. Smith unequivocally stated that "per my understanding of the circumstances, [Lucas's condition] was triggered by the accident; however, Mr. Lucas was certainly more vulnerable on the basis of his foraminal stenosis which very likely proceeded [sic] the vehicular accident." *Id* at p. 361.

This Court found that "[d]rawing every reasonable inference in favor of Lucas, we conclude that Dr. Smith's diagnosis is sufficient evidence to support Lucas's contention that his claim was not reasonably in dispute. Thus, such evidence is sufficient to defeat State Farms motion for summary judgment on the issue of whether the claim is fairly debatable." *Id* at p. 361.

It is likely that the district court was swayed by the sheer volume of Cedillo's medical records submitted by Farmers in support of its motion. See, R. p. 1203-1233, 1234-1239, 1240-1493, and 1509-1620. Yet, the district court did not need to scrutinize these hundreds of pages of medical records. The Arbitrator, Mr. Clark, had already performed that task.

Arbitrator Clark judged Farmers' and Cedillo's medical evidence and testimony upon the requirements of I.R.E. 702 and whether the scientific basis for such evidence was reliable. Arbitrator Clark judged the weight of Farmers' and Cedillo's evidence based upon the qualifications of the witness, the opportunity of the witness for observation and opinions, the overall accuracy of the statements made by the witness, and the integrity of the witness. Arbitrator Clark found that Farmers' "expert" witness testimony was inconsistent with the evidence offered by Cedillo's three (3) treating **(not retained)** medical experts. Arbitrator Clark concluded that Farmers' "expert" witness testimony lacked any evidentiary basis, was improbable, was pure speculation, and/or was based upon possibilities and not evidence. *See*, Appellant's Brief, p. 4.

With regard to medical opinions expressed by Farmers' witness, Dr. Wilson, Arbitrator Clark stated the following:

a. Dr. Wilson is primarily a defense-oriented expert witness. R. p. 2175.

b. Arbitrator Clark found that Dr. Wilson's opinion was based on speculation. Farmers' R. p. 52.

c. Arbitrator Clark found no evidence to support Dr. Wilson's opinion that Cedillo would have had surgery at C5-6 even had there been no accident. Farmers' R. p. 57.

d. Arbitrator Clark did not accept the opinion of Dr. Wilson that Cedillo's spondylosis alone caused the need for the surgery at C5-6. Farmers' R. p. 57.

e. Dr. Wilson's testimony was not supported by the medical evidence. Farmers' R. p. 52 and 57.

f. The Arbitrator did not accept the opinion of Dr. Wilson. Farmers' R. p. 57.

With regard to medical opinions expressed by Farmers' witness, Dr. Williams, Arbitrator Clark stated the following:

a. That the evidence does not support Dr. Williams' opinion. Farmers' R. p. 44.

b. That the Arbitrator will not make a finding of causation or appointment based on possibilities. Farmers' R. p. 49 and 142.

With regard to wage loss opinions expressed by Farmers' witness, Ms. Purvis, Arbitrator Clark stated the following:

a. That the Arbitrator finds no evidence to support any claim that Cedillo failed to mitigate her loss of income following the cycle accident. Farmers' R. p. 58.

b. That the opinions of Ms. Purvis are not based on or supported by the relevant evidence. Farmers' R. p. 59.

c. That Ms. Purvis did not quantify any amount of lost income. Farmers' R. p. 59.

In arbitration, each of Farmers' "expert witnesses" presented a masterful spin of selected but incomplete facts which advanced a tale that was simply unbelievable. The Arbitrator heard the full story and the complete factual scenario of this case, and rejected every piece of evidence and testimony offered by Farmers. This was not a close call for the Arbitrator, as can be seen in his decisions. Farmers' testimony was provided by paid, biased actors. The Arbitrator had the right to, and did, disregard the testimony of Farmers' experts Wilson, Williams, and Purvis. The district court, relying upon the same discredited witnesses and false testimony as offered by Farmers in arbitration, instead found that Cedillo's claim was not fairly debatable. In doing so, the district court erred.

In this case, at the summary judgment stage, the essential facts are not what Cedillo did or did not do. The essential facts are not whether Cedillo's medical history presented "complex medical" issues or a preexisting injury. The facts to be considered by the district court at summary judgment are what Farmers did or did not do to fairly investigate, and in the process, substantiate Cedillo's UIM claim. The district court obviously erred in its grant of summary judgment to Farmers.

C. The Arbitrator's rulings are *Res Judicata.*

The district court not only erred in finding fault on Cedillo's part, but it also erred in failing to conclude that the issues raised by Farmers in its summary judgment motion had been resolved in Cedillo's favor in binding arbitration.

As this Court stated in *Cedillo*, "[t]he matter went to **binding** arbitration under Cedillo's policy's requirement to arbitrate." *Cedillo* at 217 (emphasis added). The *Cedillo* Court intentionally and purposely used the term "**binding** arbitration" as Farmers' UIM contract of insurance required **binding** arbitration. Farmers UIM contract of insurance requiring **binding**

arbitration is found in the *Cedillo* Clerks Record at Farmers R. p. 000391, and states the following:

> "The decision in writing of the arbitrator will be **binding** subject to the terms of this insurance." *Emphasis added.*

In the Arbitrator's *Prehearing Order No. 1 Re: Scheduling,* the arbitrator stated the following:

> "The dispute is submitted to **binding** arbitration pursuant to the Arbitration Clause in the Insurance Policy used by the Respondent and by agreement of the parties through their respective legal counsel." *Emphasis added.* Farmers R. pp. 000016-000109.

In the Arbitrator's Decision and Interim Award, the arbitrator stated the following:

> "The dispute has been submitted to **binding** arbitration pursuant to the agreement to arbitrate, which is contained in the insurance policy." *Emphasis added.* Farmers R. pp. 000065 and 000508 - 00600), the *Arbitrator's Amended Final Award* (00173, 000565,000249,000266, 000270).

In *Cedillo* the district court's *Memorandum Decision and Order on Motions on Arbitration Award* stated "[t]he matter was ultimately submitted to **binding** arbitration pursuant to the agreement to arbitrate contained in the insurance policy" (Emphasis added) Farmers R. p. 000644.

In this appeal, the term "**binding** arbitration" is found in the Clerk's Record at R. pp. 000387, 00521, 000523, 000546, 000582, 000638, 000867, 000881, 001134, 001696, 002185, 002187, and 002286. *Emphasis added.*

The rule of *res judicata* is "in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436-37, 849 P.2d 107, 109-10 (1993) (quoting *Joyce v. Murphy Land and Irrigation Co.*, 35

Idaho 549, 553, 208 P.241, 242-43 (1922)). *Res judicata* precludes the relitigation of the same claim even if there is new evidence to support it. The review of a trial court's ruling on whether an action is barred by *res judicata* is a question of law over which this Court has de novo review. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

The issues raised in Farmers' motion for summary judgment were resolved in arbitration. The Arbitrator considered Farmers' contentions and found them to be unsupported by any evidence. The district court confirmed the Arbitrator's decision. This Court affirmed the district court.

Farmers' UIM contract binds it to the results of the arbitration. Farmers' UIM arbitration clause is intended to simplify and provide a speedy, less expensive conclusion to legitimate disputes between Farmers and its insureds. Binding arbitration, which weighs the evidence, the credibility of witnesses, the bias and demeanor of witnesses, just as in a court of law, is intended to resolve claims – not to perpetuate claims. Whether Cedillo's claim was fairly debatable or not has been conclusively resolved in Cedillo's favor and should not be an issue in this case.

In the case of *H.S. Cramer & Co. v. Washburn-Wilson Seed Co.*, 68 Idaho 416, 422, 195 P.2d 346, 350 (1948) this Court cited the following with approval:

> "The award of arbitrators, acting within the scope of their authority, determines the rights of the parties as effectually as judgment secured by regular legal procedure, and is as binding as a judgment, until it is regularly set aside or its validity questioned in a proper manner. Their decision on **matters of fact** and law is conclusive, and all matters in the award are henceforth res judicata, on the theory that the matter has been adjudged by a tribunal which the parties have agreed to make final, a tribunal of last resort for that controversy. And this has been held true even in a case in which one of the parties neglected to present portions of his claim. He had his chance, and, after the award, was concluded hereby, and could secure no relief." [Emphasis added]

As this Court stated in *Hill v. American Family Mutual Insurance Company*, 150 Idaho 619, 249 P.3d 812, 820 (2011), "public policy favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation." Nevertheless, Farmers has persisted in continuing to litigate this case, even contending that Cedillo's appeal is frivolous. In the true light of the applicable law, these contentions serve only to prolong this overly drawn-out litigation and further support Cedillo's claim of bad faith on the part of Farmers. In this regard, this Court also stated in *Hill,* that the insured need not endure needless delay and expensive litigation or lose his/her benefits. *Hill* at 820.

This Court's reasoning in *Hill* also considered that:

> "...Idaho's courts will have to contend with unnecessary litigation merely so that UIM claimants can preserve their benefits. *Schmidt v. Clothier*, 338 N.W.2d 256, 260 (Minn. 1983) (superseded by statute); *Augustine v. Simonson*, 940 P.2d 116, 120 (Mont. 1997). As this Court and the U.S. Supreme Court have held in cases discussing collateral estoppel and *res judicata*, reducing repetitive or unnecessary litigation is a legitimate goal, as it frees up judicial resources for legitimate disputes. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 415 (1980) (stating that both collateral estoppel and *res judicata* conserve judicial resources); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649 (1979) (similar); *Brown v. Felson*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979) (holding that res judicata "frees the courts to resolve other disputes"); *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 617, 114, P. 3d 974, 987 (2005) (collateral estoppel); See also *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct. App. 1998) (collateral estoppel)."

Hill at 820.

The district court should have found Farmers' witness testimony to be seriously flawed, unsupported by the evidence, and simply unbelievable as found by the Arbitrator. R. pp. 2095-2233. The factual findings of the Arbitrator prove that Cedillo's UIM claim was not fairly debatable. By reason of contract and *res judicata*, these factual findings are binding on Farmers in Cedillo's bad faith case and should not be an issue.

D. Cedillo's expert opinion testimony concerning the fairly debatable issue created genuine issues of material facts precluding summary judgment on the "fairly debatable" issue.

Not only did the district court err in finding fault with Cedillo's conduct and in ignoring the Arbitrator's findings of fact, the district court also ignored the testimony of Cedillo's bad faith expert, Mr. Buddy Paul.

Opinion testimony from experts in the insurance industry regarding the fairly debatable issue and an insurer's conduct being an extreme deviation from industry standard practices is routinely offered to establish claims of breach of contract, bad faith, and support claims of punitive damages. Just as in the district court, Farmers failed in their Respondent's Brief to contest or rebut Mr. Paul's opinions or his testimony. Cedillo expressly referenced and incorporated Mr. Paul's expert opinion and deposition testimony in her opening brief. For the Court's ready reference, Mr. Paul's expert opinions and relevant deposition testimony are attached to this brief as Appendix A.

Idaho Code §41-1329 addresses the standards of the insurance industry and may be considered by the jury (and should have been considered by the district court) in its deliberations to determine whether Cedillo's claim was fairly debatable or not, and whether there was an extreme deviation from industry standards which warrant punitive damages. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221, 1235 (2010).

Mr. Paul is an attorney with over forty (40) years of experience in the field of insurance. He has intimate knowledge of insurance claims handling and adjustment. Mr. Paul's opinions are qualified by decades of specialized experience, knowledge and skill and are based upon his

review of hundreds of pages of Farmers' claim file. Yet, his opinions and testimony were disregarded by the district court.

Mr. Paul's knowledge, experience, and review of Farmers' claim file lay the ground work for his opinions that Farmers breached recognized industry standards and departed therefrom in a deliberately harmful manner in the adjustment of Cedillo's claim thereby warranting a finding that Farmers acted in bad faith.

The district court found fault with Mr. Paul's acknowledgment that some aspects of Cedillo's claim were fairly debatable. But, as this Court will find, Mr. Paul's expert report and his deposition testimony create more than a genuine issue of material fact concerning the fairly debatable issue.

Mr. Paul's opinions and testimony were offered to assist the district court in understanding the industry standard of care and customary practices to which Farmers should be held in connection with Cedillo's claim. Mr. Paul's Expert Report cites numerous actions of Farmers' failure to fairly and timely adjust and pay Cedillo the amount justly due her. Such actions are cited in Cedillo's *Memorandum in Support of Plaintiff's Motion for Leave to Amend Complaint and to Add Claim for Punitive Damages and Negligent Adjustment of UIM Claim* which is found in the record at 00182-001100.

These actions include the following:

1. Farmers' overall conduct in dealing with Cedillo's claim constitutes an extreme departure from norms in the insurance industry in Idaho;

2. Farmers' overall conduct could not be characterized as reasonable;

3. At every turn, Farmers repeatedly challenged everything Cedillo did, everything the arbitrator did, everything the District Court did, and apparently everything the Idaho Supreme Court did;

4. Farmers' investigation was slow and sloppy by any measure of industry standards;

5. Farmers fought the Proof of Loss date (July 28, 2009) in every imaginable forum and lost every time;

6. Time after time Farmers conducted file• reviews and concluded nothing more was owed;

7. Farmers deviated substantially from industry norms in failing to gather sufficient information to fairly evaluate Cedillo's lost income claim;

8. Farmers failed to use the medical authorizations executed by Cedillo to obtain her medical records;

9. Farmers failed to seek objective medical opinions;

10. Farmers purposely ignored the medical opinions of Cedillo's three treating physicians;

11. It is clear that Farmers had no interest in being fair to Cedillo;

12. There is also evidence that Farmers' behavior was the result of malice and constituted outrageous conduct;

13. Farmers' files include evidence that its conduct was self-serving and malicious;

14. Farmers, instead of asking for objective medical opinions, hired Dr. Wilson, a well-known insurance defense doctor, to rebut conclusions of Cedillo's treating doctors;

15. Farmers' conduct was an extreme example of putting its own interests ahead of its policy holder (Cedillo);

16. Farmers repeatedly delayed payment of amounts fairly owing to Cedillo due to lack of investigation and outright intransigence as opposed to honest mistake;

17. Considering the totality of the circumstances, Farmers overwhelmingly showed an intent to deny as opposed to an evenhanded evaluation of Cedillo's claim.

18. Farmers' conduct demonstrates outrageous and malicious behavior.

19. Farmers' conduct violated" the Idaho Unfair Claim Settlement Practice Act, Idaho Code §41-1329, in the following manner:

Section (3): Failing to adopt and employ reasonable standards for the prompt investigation of claims arising under insurance policies;

Section (4): Refusing to pay claims without conducting a reasonable investigation based upon all available information;

Section (6): Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

Section (7): Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought against the insureds.

In summary, Mr. Paul's testimony establishes Farmers' duties to Cedillo and that Farmers' failure to comply with its duties was a breach of contract as well as a violation of industry standards. Farmers' duties include the following:

a. Duty to Reasonably Investigate

Mr. Paul testified that Farmers had the obligation to timely and properly investigate Cedillo's claim and, based upon his experience, Farmers failed entirely to timely or properly investigate Cedillo's claim according to industry standards. For example, it is not disputed that Farmers, with no investigation, simply closed its file. Mr. Paul's testimony is that Farmers' investigation conduct is not consistent with its obligation to reasonably investigate Cedillo's claim, was a breach of the UIM contract of insurance and is evidence of bad faith.

b. Duty to Settle Claims Where Liability is Reasonably Clear

Mr. Paul provides testimony regarding Farmers' obligation to reasonably settle claims for which liability is reasonably clear and Farmers' failure to do so. For example, as cited in Cedillo's opening brief, days after receiving Cedillo's proof of loss Farmers' adjuster (Ramsey) inquired of Farmers' attorney (Thomson) whether Cedillo's proof of loss complied with Idaho

Code §41-1839. Even though Farmers' attorney Thomson advised Farmers' adjuster Ramsey that Cedillo's proof of loss complied with Idaho Code §41-1839 Farmers continued to concoct reasons to deny that Cedillo's proof of loss complied with Idaho Code §41-1839 and directed counsel to litigate Cedillo's claim to conclusion resulting in multiple adverse rulings in arbitration, in district court and in this Court. Farmers' conduct was contrary to industry standards, was a breach of the UIM contract of insurance and is evidence of bad faith.

c. Duty to Timely and Reasonably Assist Cedillo in Establishing Her Claim.

Mr. Paul provides expert testimony regarding Farmers' duty to timely and reasonably assist Cedillo in establishing her claim. Here Farmers completely failed to assist Cedillo in any way and intentionally and deliberately searched for ways to defeat Cedillo's claim and that based upon his experience Farmers' conduct was well outside the standard for the industry, was in breach of the UIM contract of insurance and is evidence of bad faith.

The record discloses that Mr. Paul's opinions were not contested by Farmers. The issue of fairly debatable was obviously considered by Mr. Paul in reaching his conclusions. As he found Farmers' conduct to be taken in bad faith and to justify an award of punitive damages it can only be concluded that Cedillo's UIM claim was not fairly debatable.

E. Cedillo's expert opinion and testimony concerning her motion to amend to allow a claim for punitive damages meets the requirements of Idaho Code §6-1604(1).

When considering Cedillo's motion to amend her complaint, the question before the district court was whether there was a "reasonable likelihood" that Cedillo would be able to "prove, by clear and convincing evidence, oppressive, fraudulent, malicious, or outrageous conduct." Idaho Code §6-1604 (1), (2).

Considering the quasi-fiduciary obligations of Farmers and the evidence submitted by Cedillo to support her punitive damages claim, this Court should conclude that there is a reasonable likelihood that Cedillo can prove Farmers' conduct to be oppressive, fraudulent, or outrageous conduct. This is especially in light of the evidence that Farmers has failed to even acknowledge its duties to Cedillo in adjusting her UIM claim.

The only opposition offered by Farmers to refute Cedillo's entitlement to present a punitive damage claim to the jury was the two (2) page affidavit of Mr. Anderson, a Boise attorney. R. pp. 2234-2236. Mr. Anderson's affidavit fails to include any factual basis for his conclusion that Cedillo is not entitled to present her punitive damage claim to the jury.

Mr. Paul's Expert Opinion and deposition testimony concerning Cedillo's punitive damage claim more than satisfies the quantum of evidence required by Idaho Code §6-1604. Cedillo requests that this Court reverse the district court's denial of her motion to amend and find that Cedillo may amend her complaint and present her punitive damage claim to the jury.

F. Discovery issues before the Court.

Pursuant to Cedillo's *Motion for in Camera Review* (R. pp. 000395-000469), Farmers lodged documents for the district court's *in camera* review to determine if the documents or redacted portions of the documents are protected from disclosure by Farmers in this action. Those same documents have been lodged with this Court.

The district court's *Memorandum Decision and Order Granting in Part Plaintiff's Renewed Motion to Compel* (R. p. 00490-00507) is a very thorough analysis of the legal issues applicable to this discovery dispute. It was and is Cedillo's contention that due to the nature of a bad faith claim "...all analysis and communications are fair game for discovery." R. p. 000495.

The district court found no "...case law in Idaho on the issue of whether the nature of bad faith claim overcomes privilege and the work-product doctrine." R. p. 000495. For that reason the district court considered the analysis of the Washington Supreme Court, *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash. 686, 295 P.3d 239 (2013). The *Cedell* case has been relied upon in two unpublished opinions in the Idaho Federal District Court. R. p. 498 to R. p. 499. As Judge Winmill stated in the *Stewart Title* case (R. pp. 000222-000235), "There is no Idaho Supreme Court decision addressing the issue faced by Cedell," and as the court noted it was, "essentially guessing what the Idaho Supreme Court would do under such circumstances." R. p. 000230 and 000498.

The district court, having analyzed the documents claimed as privileged then carefully listed the documents which were not privileged (R. pp. 000501 and 000503), the documents which contained both disclosable and protected information (R. pp. 000501-000502) and privileged documents (R. pp. 000502 and 000504).

Cedillo, in her *Renewed Motion to Compel* (R. p. 000020 to R. p. 000310), urged the district court to find, that under the facts of this case, Farmers had waived any objections it may have had to Cedillo's discovery. In ruling upon Cedillo's motion, the district court stated, "absent instruction from the Idaho Supreme Court that late objections are waived, the Court does not accept that the Idaho discovery rules mandate late objections be waived." R. p. 000392.

As detailed in *Appellant's Brief* at pp.8-13, and in Mr. Paul's expert report, Farmers has been less than cooperative in the discovery process. Mr. Paul, who has been involved on both sides of well over 100 cases with bad faith allegations has "...never seen a carrier be less forthcoming or cooperative in producing its basic claims file." R .p. 001681.

For instance, Farmers has produced its reserve history on Cedillo's UIM claim showing that Farmers initially set its reserve at $33,000, then increased its reserve to $180,000, then increased its reserve to $280,333, and then increased its reserve to $382,332.[95]. R.p. 000197.

But, despite repeated letter requests (R.p. 000172, 000200) and Cedillo's numerous motions to compel, Farmers has yet to disclose the dates these reserves were set.

It is Cedillo's contention that under the unique facts of this case, this Court should find that Farmers has waived any privilege claim. In the alternative, it is Cedillo's contention that this Court will adopt the *Cedell* reasoning and order Farmers to produce all documents concerning Cedillo's UIM claim and her bad faith claim.

Cedillo requests that this Court review the sealed documents which have been lodged with the Court and order disclosure of those documents (1) which are related to Cedillo's UIM claim and her bad faith claim; and (2) which are related to Farmers' investigation and evaluation of Cedillo's claim.

III.
CONCLUSION

The record proves that Farmers made an inadequate, careless, if not shiftless investigation of Cedillo's UIM claim. The record proves that Farmers never was in a position to exercise fair, sound, or good judgment in evaluating Cedillo's UIM claim. The record conclusively proven in arbitration, establishes that Farmers deliberately and intentionally failed to conduct any fair investigation of Cedillo's claim and that it actively sought out information and witnesses to defeat Cedillo's claim. The record proves Farmers' deliberate, lengthy, and extreme efforts to ignore, delay, deny, and defend against Cedillo's UIM claim which was not fairly debatable.

Cedillo urges this Court to reverse the district court's grant of summary judgment, to reverse the district court's denial of Cedillo's Motion to Amend concerning punitive damages, to order the production of Farmers' entire claim file, and to award Cedillo attorney fees and costs in this appeal.

DATED this 5th day of December 2016.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JOHN L. RUNFT
Attorney for Respondent

By: _____
JON M. STEELE
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2016 I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** in the above-captioned matter by the method indicated below and addressed to the following:

Jack Gjording
Julianne Hall
Gjording & Fouser, PLLC
121 N. 9th St., Suite 600
P.O. Box 2837
Boise, ID 83701
Attorney for Farmers Insurance Company Of Idaho

____ Via Facsimile
____ Via Personal Delivery
X Via U.S. Mail
____ Via E-mail

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Cedillo-Appellant

APPENDIX A

TO APPELLANTS REPLY BRIEF

A) The report of Cedillo's bad faith expert, Mr. Irving "Buddy" Paul, is dated November 9, 2015 and is found in the record at 001065-00169 and at 001878-001886. Mr. Paul's expert report is also set out below:

IV. Opinions and Basis for my Opinions

All of my opinions are based upon my training and years of experience as well as the materials I reviewed. In my opinion, Farmers' overall conduct in dealing with Ms. Cedillo's claim constituted an extreme departure from norms in the insurance industry as conducted in Idaho, and for that matter, throughout the Northwest. Taken as a whole, Farmers unreasonably and intentionally delayed payment to Ms. Cedillo of portions of her claim. While some individual acts were based on fairly debatable issues, others were not, and the totality of Farmers' conduct could not be characterized as reasonable.

I use the term "Golden Rule" to refer to an insurance company's obligation to treat its policyholder fairly. As described in abundant case law, a carrier can never put its own financial interest ahead of the legitimate interest of its insured. Yet in this case, at every turn, Farmers repeatedly challenged everything Ms. Cedillo did, everything her counsel did, everything the arbitrator did, everything the district court did, and apparently everything the Supreme Court did. No entity can be wrong that often if fairly looking out for the interests of the insured. No carrier should be satisfied with a case still active today when the accident occurred in 2008.

Farmers' investigation was slow and sloppy by any measure of industry standards. I will give some examples. Farmers' file and actions claim that it did not know whether Mr. Steele had paid any of Ms. Cedillo's medical bills until his testimony in the arbitration. This was objective information very easy to obtain. Farmers could have and should have obtained this information much earlier. It was not a valid excuse for delay in evaluation.

The arbitrator has already ruled that Farmers had enough information to evaluate this claim when it received the Proof of Loss on July 28, 2009. Farmers didn't and doesn't like this ruling, and so has consistently fought it in every imaginable forum-and lost every time. On October 18, 2012, well over four years after the accident, Farmers made an uncontested payment of $155,000. This was

immediately before the arbitration. Yet time after time up to October 18, Farmers conducted file reviews and concluded nothing more was owed. What changed between September 18 and October 18? Or August, July, June, May, and April...for that matter? Ms. Cedillo had her second surgery on February 15, 2012. While I will agree that both parties have a role in the timing of a case, I am firmly of the opinion that Farmers did not perform an adequate or timely evaluation of damages in this case, and thereby caused significant delay ... first in delaying payment of the $155,000, but also in consistently undervaluing the case, and putting up excuses through arbitration. Throughout the file (p. 733 for example) there were notations that the arbitration forum tended to value cases higher than juries and to disregard preexisting arguments.

I was asked to review Farmers' discovery objections and have seen the courts' rulings on discovery. I have been involved on both sides of well over 100 cases with allegations of bad faith, and have never seen a carrier be less forthcoming or cooperative in producing its basic claims file. Taken together with asking for reconsideration and appeal at every turn, it is clear Farmers had no interest in being fair to its own insured.

The evaluation appearing on page 613 is typical of the way Farmers failed to adequately investigate and evaluate the file. How could Farmers believe Ms. Cedillo had absolutely zero lost income? Income tax returns are an important element of evaluating lost income, but not the only or best tool. Farmers deviated substantially from industry norms in failing to gather sufficient information to fairly evaluate lost income.

V. Extreme Behavior

I have already indicated that Farmers' overall behavior in nitpicking every ruling and in fighting discovery was an extreme deviation from industry standards. There is also evidence that Farmers' behavior was the result of malice and constituted outrageous conduct. After all was said and done, the arbitrator had ruled and Farmers was finally going to pay, it insisted on putting Blue Cross on the check. This, in my opinion, was unconscionable. While putting potential lien holders on SETTLEMENT checks is sometimes appropriate, that is not the case where there has been an award by a tribunal. The Farmers' file makes note that this was-an old case; some charges may have been compromised or even written off. By putting Blue Cross on the payment check, it would force Ms. Cedillo to go to Blue Cross and potentially wake up sleeping dogs. The carrier does have a right to be free of liens, but the way to do so would be to make the check payable to Mr. Steele's trust account and insist that liens be satisfied prior to disbursement. This would have protected both Farmers and Cedillo. Instead, Farmers again chose to put its own interest ahead of its insured.

Additional evidence that Farmers' self-serving actions were malicious appears throughout the file. For example, when first called in the agent sent a

"warning" for the carrier to watch this claim closely. (p. 733) Why was this (captive) agent warning the carrier rather than helping his client? What about this claim required additional scrutiny? The answer may well be that Farmers was upset because it thought Mr. Steele was somehow going to profit from his own negligence. See, for example, page 581. Another example appears at page 1404, a letter to a potential medical expert. Instead of asking for an objective opinion-always the duty of a carrier-Farmers' representative is specifically asking that the expert rebut the conclusions of a treating doctor. Amazing a letter like this got through proofreading, but eloquent testimony as to Farmers' true objectives.

VI. Conclusion

It is my opinion that the totality of Farmers' conduct was an extreme example of the carrier consistently putting its own interest ahead of the interest of its policyholder. Farmers repeatedly delayed payment of amounts fairly owing due to lack of investigation and outright intransigence, as opposed to honest mistake. While some specific decisions could be characterized as fairly debatable, others were not, and the totality of the circumstances overwhelmingly showed an intent to deny as opposed to an evenhanded evaluation of the issues. Putting Blue Cross on the check went even further, in my opinion showing outrageous and malicious behavior. In my opinion, the conduct of Farmers violated the following provisions of Idaho Code: IC 41-1329(3), (4), (6) and (7).

Respectfully Submitted,
Irving "Buddy" Paul

Idaho Code §41-329, sections 3, 4, 6, and 7 provide the following:

Section (3): Failing to adopt and employ reasonable standards for the prompt investigation of claims arising under insurance policies;

Section (4): Refusing to pay claims without conducting a reasonable investigation based upon all available information;

Section (6): Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

Section (7): Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought against the insureds.

B) In Mr. Paul's deposition taken by Farmers on December 4, 2015 (R.p. 001819-001876), Mr. Paul testified as follows:

Page 43, lines 1-22

Q. In addition to lost income, should the carrier inquire as regards any other possible damage or loss that you can think of?
A. Well, yeah. I mean, just going back to that same template, are you taking any medications,- are you missing work, are there things that you used to do that you can't do, all of those types of questions that a competent adjuster would automatically inquire of at the beginning of the claim and continuing through it.
Q. In your opinion, is it bad faith if they don't ask those questions?
A. Absolutely.
Q. And why is it bad faith?
A. Because the statute in Idaho says that in I'm paraphrasing, it's phrased in terms of can't deny a claim, but you have to do an investigation: based upon all the information available. And that's in the statute. And if a carrier is choosing to ignore some of the information, it's not in compliance with the statute, all the information available.

Page 44, lines 14-22

Q. Okay. And I think I remember from reading the arbitrator's decision that something to the effect that the company was in a position as of the date of the filing of the proof of loss to evaluate all of Ms. Cedillo's claims. Is that right?
A. That's my understanding of what the arbitrator said we are bound by.
Q. Okay. Do you agree with that?
A. I haven't tried to- I'm forced to agree with it because it's already been determined. I . don't think it's my position to second guess a court, second guess an arbitrator

Page 45, lines 1-25

I mean, those are decision makers, and frankly what bothers me is I think that Farmers wants to continue to say- to go behind that. We are all bound by it, and that's where I am on it.
Q. Okay. And I got that because you told me three or four times. Despite the fact that you are quote, "bound by it," unquote, do you have an opinion as to whether or not the company was in a position to evaluate all of Ms. Cedillo's claims as of the date of the filing of the proof of loss?
A. My own opinion is they were on notice to where they either could evaluate or could continue to investigate in order to fully evaluate. I think there were things that happened after the day of that proof of loss that Farmers should have continued to follow and investigate.
They could not possibly have known things that hadn't happened yet, but they could know that those things were in the future. For example, medical records that say she's needing surgery, even with big words should know even before the surgery took place.
Q. So I assume -well, you tell me whether I'm assuming correctly or not. I assume that you wouldn't say that Farmers was guilty of bad faith by

Page 46, lines 1-25

continuing to investigate as you have explained?
A. Had they continued to investigate as I've,- explained, I would have been much happier with their performance. I still think it suffered from some problems, but I think they did a very poor job of investigating.
Q. But would you agree that they weren't guilty of bad faith because they didn't pay the entirety of Mrs. Cedillo's claim within a reasonable time after she filed a proof of loss?
A. Well, I can't agree with that.
Q. You think they were in bad faith for not paying that?
A. I think they were in bad faith at the period of time for a number of reasons, including for investigation.

Q. Okay. But not because they didn't pay the whole claim as of that date?
A. I don't know- not because they didn't- okay. I can agree not because they didn't pay the entire amount that the arbitrator found. They should have paid more. They should have continued to investigate more. They should have made additional payment more promptly. I will never say the carrier can know in advance the exact

Page 47, line 1

amount.

Page 49, lines 19-25

Q. And from the point of view of your evaluation of Farmers' performance in this case, is it appropriate for them to go to arbitration or to court?
A. It was appropriate to arbitrate certain issues, many fewer than they chose to arbitrate. They should have paid much more money much sooner

Page 50, lines 1-3

based upon their investigation and arbitrated general damages. I don't know that there's much else to arbitrate other than general.

Page 50, lines 24-25

A. If it is sufficient to support their contentions and if their contentions are based upon

Page 51, lines 1-25

a full and fair investigation as opposed to writing a letter to a doctor saying we are looking for a doctor to refute what a treating doctor said. So, you know, if you do it fully, fairly and completely, you are going to - in many cases there can be a dispute over what is and isn't preexisting.
a. And is that dispute part of what we in the law call fairly debatable?

A. In some cases that's fairly debatable. In other cases it's not.
Q. Okay. So you are not saying that, and again, I'm putting words in your mouth so make sure that I'm not incorrect.
A. I'm very careful.
Q. Yes, you are.
Q. You are not saying that it is inappropriate or bad faith across the board for an insurance company to take a dispute to arbitration or to court?
A. No. There are many times that's necessary.
Q. Okay. And can I go - can I say it is not, in your opinion, bad faith across the board for an insurance company to take a dispute to

Page 52, lines 1-25

arbitration or to court?
A. No. That's why we have courts and arbitration is to solve legitimate disputes.
Q. Okay, So in the context of our discussion here, what is fairly debatable and what isn't?
A. General damages are fairly debatable, which was the - I go back to what the arbitrator found as the arbitrator reviewed. The arbitrator found that the evidence did not support Farmers' position on what's standard. It wasn't there. I also point out that Farmers was. continuing to say it was zero lost income even when; their own expert was saying there was at least lost income for the surgery. I don't think that- it's possible that that was partially debatable, but certainly not debatable the way it was handled and presented, and more should have been paid.
Q. The lost income claim was partially debatable?
A. Could have been. I don't know enough to say that. I know that the arbitrator has said the position of Farmers was simply not supported by the' evidence. Why didn't Farmers' own investigation reach that same conclusion?

Page 53, lines 2-25

the arbitrator came back and said 150, that could have been a fairly debatable issue between 150 and 112. There is not a fairly debatable issue between zero 150.
Q. Okay.
A. So you have to quantify when you say fairly debatable.
Q. Okay.
A. I thought you said maybe partially.
Q. I follow what you are saying. In your example, if the carrier said 112 and the arbitrator said 150, is that bad faith that they didn't pay 150 to begin with?
A. It depends on where the 112 came from. it came from a fair, objective investigation, it's not bad faith. If it came from going out and looking for argument to support a minimal bad faith excuse me, a minimal lost income, yes. The carrier's argument has to be based on fair, impartial, objective investigation. It can't go out and try to hire people to lower the damages. If it does, it's bad faith. If the arguments are based on a fair, open inquiry supported by the evidence, that's okay.

Page 55, lines 3-25

phrasing that you are comfortable with. You used the word "malice."
What is the evidence -what is - first of all, what was their- what was their malicious , conduct, let's start with that, what was their malicious conduct?
A. As I read the file as a whole, it seems to me that Farmers went out of its way to throw numerous roadblocks into Ms. Cedillo's path. It refused to accept that it was wrong and did everything it could to avoid paying a fair amount for her claim. It began as early as the agent warning : Farmers, Farmers' agent, hey, let's look really closely at this claim. I find that really bad behavior, and it seems to typify what happened from then on.
And we can talk about other specific

examples, but every place I looked, Farmers is trying to get out of paying a fair amount for this; claim.
Q. You know, you said all along the way, every place I look, and what I would really like to know is what are the specifics that support that. Besides the one you identified here, the agent, as

Page 56, lines 1-25

you said, warning the carrier.
A. Yeah, I'll give you some good examples.
Q. All right. .
A. That's only one, we started with one. Number two, the letter that Mr. Thomson wrote, or letters, asking for a doctor who will opine against the policyholder.
Q. Is that what his letters said?
A. It said I'm looking for someone to refute Dr. whatever's opinion that the shoulder was related.
Q. Okay.
A. I have never seen a letter that going that far looking for a favorable opinion as opposed to looking for an honest, objective opinion.
Q. Okay.
A. That is very, very, very bad
Q. Okay.
A. I think that putting Farmers - excuse me,: Farmers putting Blue Cross on one of the payment checks without ever talking to Mr. Steele and figuring is that the appropriate way to protect Farmers' subrogation lien interest was malicious and went beyond the bounds of normal conduct
Q. Why was it malicious?

Page 57, lines 1-25

A. Because all it wanted to do was protect itself from the subrogation without any evaluation of what it would do to Ms. Cedillo's position. They should have said, okay, we need to protect ourselves. I have no problem with that. Call Mr. Steele and say how do you want to do it, do you want us to put Blue Cross on the check or do you want us to make the check payable to your trust

account with your promise that, even in writing, to hold harmless, that you will pay- that you will satisfy any liens?
Q. Okay.
A. The problem is there's a difference between satisfying liens and paying liens, and what Farmers does put Cedillo in a position where it was losing all of its bargaining position as far as satisfying liens, and there were many other routes that Farmers could have protected itself without a negative impact on the policyholder.
Q. Okay. I think that Farmers asking - hiring a lawyer and asking is this letter an adequate proof of loss at the beginning was at least bizarre, but in the context of what's happening, looks to be pretty malicious.
Why even worry about attorneys fees when

Page 58, lines 1-25

they first get a claim? They should be worrying about evaluating and paying the claim. And instead, it looks like they are setting the thing up for litigation from the very beginning and wondering if this is going to cost us, Farmers, in attorneys fees; I can't understand why they were doing that if it wasn't part of this, well, we want to really tough this one out.
Q. Okay. And just so I've got the right thing written down here, it was asking the lawyer at the outset if the proof of loss was -
A. Adequate.
Q. Sufficient, okay.
A. Under the attorney fee statute.
Q. All right. Okay.
A. objecting to Mr. Steele acting as attorney after allowing him to participate in the arbitration. The Supreme Court ruled that they didn't care whether there was a waiver or not if the representation was appropriate.
I'm more interested in the waiver issue because that shows they are trying to trap him. They are saying, okay, we have had years of arbitration but now we don't think we should pay because you were representing her even though we

Page 59, lines 1-2

agreed you could represent her. I think that's
really bad conduct.

Page 61, line 1-22

A. Yeah. What I tried to do so far, I think,
is point out five that to me are evidence of
malicious behavior.
Q. Okay.
A. I have not thought of any other that I
think of evidence of intent as much as evidence of
how that intent was carried out.
The ongoing appeals, motions for
reconsideration, even losing 7-0 in the Supreme
Court, which takes a mighty lapse in judgment to get '
there, to me, the whole course of appeal,
reconsideration, on and on, while not necessarily
malicious, was certainly outrageous and extreme,.
The closing the file while there was a
pending reserve to me is pretty bizarre. It's, to
me, is evidence that there is something about this
file that something was driving this file other
than an effort to fairly adjust it.,
Was that malice, incompetence, I don't
know, but it struck me as a real extreme deviation
from normal practice to close a file while there was
pending -while there was reserves on it.

Page 62, lines 12-25

Q. Now, as a lawyer, I'm intrigued with your
conclusion that appealing a case to the Supreme
Court is extreme behavior.
A. Not in and of itself, but when coupled
with evidence of malice and coupled with evidence of
the way this case has strung out, strung out, strung
out, and strung out with - I think it was extreme.
Did it go as far as Rule 11? I don't
know, but this was the most protracted UIM case I've
ever seen, and there was indications of bad motive.
And it's really pretty hard to say on
an insurance case, I mean, that says a lot about the
inadequacies in the argument made, but, yeah, that-
I think that the whole pattern was extreme and

Page 63, line 1

outrageous.

Page 63 line 14-25

Q. And that's part of your analysis here is that- that the fact that the Supreme Court ruled unanimously is part of your criticism of the way this case was handled?
A. A small part, a small part, 'but you have the arbitrator ruling that there's no evidence to support this, the arbitrator ruling that certain of the positions raised by Farmers was pure speculation.
You have Farmers' evaluation of lost income inconsistent with their own effort- excuse me, their own expert. You have a lot of things that

Page 64, line 1-25

are part and parcel of this just on, on, on, on, on
And if it were a split decision, I would be much more convinced that the objective was completely open-ended, but here I see so many indications that Farmers just wants to settle all the time, like as far as trying to disqualify the attorney. Look at that, I mean, there's a lot of evidence of malice.
And what did that result in? It resulted in an extremely long, slow process. You go back to the definition, is there unreasonable delay. I think this met unreasonable delay.
Q. The whole thing?
A. The whole thing from beginning to end, yeah.
Q. So, you know, as I hear you explain your position by referencing the arbitrator's decision, if you lose, you are guilty of bad behavior?
A. Absolutely not. If you lose and you lose and you lose and you lose and you lose and you still are fighting, that is evidence of bad behavior.
Q. How many times do you have to lose before it becomes bad behavior?
A. Well, if the file was open, had nothing to

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Q. How about same question with regard to Mr. Thomson, Jeff Thomson, the lawyer?
A. Without seeing a completely unredacted set of his correspondence, I can't opine whether he was malicious or not. He was pretty intransigent and hard-nosed about this.
I don't know where that came from, and it seems that Farmers disregarded many suggestions that would have ameliorated the situation.

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Q. Such as?
A. Such as he said that this was a they took a proof of loss so why the hell did they continue to litigate that all the way to the Supreme Court. If they had just listened to him in the first place, we would have been done a year or two ago.
Q. What do you mean they continued to litigate the proof of loss all the way to the Supreme Court?
A. The issue, one of the issues in the Supreme Court was the prejudgment interest, which goes back to whether that was proof of loss ..

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A. The main misdemeanor is an ongoing failure to gather information and fully evaluate the case in a timely manner.
There - I think it's very, very unusual. and inconsistent with industry standards to have basically the same evaluation in the file month after month, well after Ms. Cedillo's second surgery, and then all of a sudden spring from, I can't remember, was it 8,000 at that time or 7,000, I can't remember the number, but all of a sudden it bumps up to $155,000 evaluation. The reserve goes up and the check is written.
I don't have any problem with issuing that check for 155. I have a big problem with why that wasn't done in one or more payments well before

then.
I'm very critical of the way that the file
evaluates lost income saying there was no lost
income. I'm very critical of the way that somehow
other in the file they are saying we are waiting to
find out if Mr. Steele paid any of these bills
himself.
It's a legitimate question, but it could
have been answered time and time again much, much
earlier than that. Find out. You can't say, oh, we

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just found out and somehow that excuses our slow
behavior.
I'm critical of what looks like getting
five medical authorizations, I might be wrong, it's
really hard when you are reviewing the file and you
see 12 copies of the same thing, but it looked like.
they again and again and again asked for medical
authorizations.
It seemed like they may have needed
whatever it was for the hospital, the hospital
wanted something on their own form, but it seemed
like there were just many, many.
Q. Numerous medical releases?
A. Yeah.
Q. Okay. So we are going to go back to
number one in a minute, but number one was the
ongoing failure to investigate in a timely manner,
number two was getting numerous medical releases.
Continue with the list of misdemeanors.
A. I thought I already had a third one.
Q. Well, maybe the lost income?
A. Lost income I have as one.

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or I want to say it was later on, but issuing the,-
check with the letter saying we have the right to
collect this back.
They needed a way to protect themselves in
the event they won. They needed a way to protect.
themselves if they won, but this was a pretty heavy-
handed.
Again, if they just call Mr. Steele and

say do you want to post a bond, do you want to put the money in the court, but I think sending the check with a threat of seeking reimbursement was, again, a misdemeanor, but it was causing additional harm. I think those are ones I can think of right now.
BY MR. GJORDING:
Q. All right. Going back to further investigate a couple of those. With regard to the lost income, what in your opinion did Farmers fail to do with regard to lost income that puts this in the misdemeanor category?
A. They failed to overlook the repeated - indications from the treating doctor that the surgeries were related, that her injury was related. They put undue emphasis on her income tax returns saying that she made more the year of the

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accident than the year before and then totally discounted the fact that it crashed the next year and, oh, that was just due to the economy. They didn't they were looking for ways to fight the claim rather than evaluate the claim.
And then again their own witness at the time of the arbitration said that she would have lost income at least for the times of the surgeries, but they didn't even quantify that.
Well, they should have quantified it and paid it. Again, all they were trying to do was fight their own policyholder. They didn't try to figure out what is a fair amount, they just wanted, to zero it.

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I would like for you to identify for me the occasions - the occasions when Farmers delayed payment such that in your mind it was evidence of misconduct..
A. I think the original amount of payment was $25,000, was way low, and I'll call that a delay because eventually after the arbitration more was paid. I think the 155 was slow, late, and still , low.

13. The arbitrator's award came out and it was.
14. paid in two checks, one with Blue Cross's name on.
15. it. I think that delayed and slowed things down.
16. I think the attorneys fees were, when it
17. got to that stage, were then paid with the threat
18. that we are going to seek reimbursement; so there .
19. was no ability to use that money. The check might.
20. have been written, but the money wasn't really
21. transferred and so there was delay and up to the
22. Supreme Court on that..
23. So those are specific examples of delays,
24. and the exact amount, at least the first exact
25. amount paid, I think the 155 was pretty low as well,

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11. Q. Let's take the appeal in this case. Was
12. that clearly something they should not have done?
13. A. In my opinion, it clearly should not have
14. been done given everything that came before. If
15. this was two years earlier, if there hadn't been two
16. motions for reconsideration, if the district court
17. hadn't ruled against you, there are situations where
18. a case should go to the Supreme Court, but not on
19. this prolonged history.