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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

KIMBERLY K. ZILISCH, a single person, Plaintiff-Appellant/ Cross-Appellee, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Defendant-Appellee/ Cross-Appellant.	No. 1 CA-CV-96-0610 Maricopa County Superior Court No. CV 93-05652 *AMICUS CURIAE* BRIEF OF FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS AND UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S MOTION TO PUBLISH

AMICUS CURIAE BRIEF

The *amici*, Foundation for Taxpayer and Consumer Rights ("FTCR") and United Policyholders ("UP"), in conjunction with their motion seeking this Court's permission to file an *Amicus* Brief, request that the Court publish its memorandum decision in this matter. The memorandum decision addresses important issues of state law pertaining to the discoverability and admissibility of evidence in insurance bad faith litigation. Publishing this opinion would provide guidance to litigants, trial courts, and appellate courts. The absence of any published opinion is, in part, the result of the historical development of insurance bad faith law in Arizona, which is of relatively recent origin.

Arizona has recognized third-party bad faith claims (i.e., a liability insurance carrier's liability for an excess judgment when it fails to reasonably settle a claim within the policy limits when given an opportunity to do so) since 1957. Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957). See also, General Accident Fire & Life Assurance Corp., Ltd. v. Little, 103 Ariz. 435, 443 P.2d 690 (1968). The early third-party cases, however, do not appear to have involved issues of corporate policy and corporate practices. Instead, the

early third-party cases simply address the issue of whether the insurance company's rejection of a settlement offer within policy limits was reasonable under the particular facts of the case.

First-party bad faith liability is a much more recent development in Arizona. The Arizona Supreme Court first recognized the tort of first-party bad faith in Noble v. National American Life Ins. Co., 128 Ariz. 188, 624 P.2d 866 (1981). Since that time, both the legal standards applicable to bad faith, as well as the methods of proving bad faith, have evolved and changed. Evidence has come to light that certain insurance companies utilize standardized practices which are relevant to damages claimed by both first-party and third-party claimants. Consequently, insureds in such cases have increasingly sought discovery into corporate practices and policies. Insureds seek such information as claims manuals, guidelines, internal procedures, etc. However, insurance companies routinely refuse disclosure and strenuously resist this discovery.

Arizona cases have touched upon the discoverability and admissibility of such information. For example, in Miel v. State Farm Mut. Auto. Ins. Co., 185 Ariz. 104, 912 P.2d 1333 (App. 1995), the court of appeals affirmed the

admissibility of claims manuals and articles from State Farm's in-house newsletter. See also, Maxwell v. Aetna Life Ins. Co., 143 Ariz. 205, 693 P.2d 348 (App. 1984). These cases also affirm the admissibility of witness testimony regarding prior bad faith claims against insurers. However, no published decision in this jurisdiction has directly addressed the admissibility of corporate practice and/or corporate policies under Rule 404 in the field of insurance bad faith to the extent that this Court's memorandum decision addresses these matters.

As a consequence, litigants, trial judges, and appellate judges have been left with little guidance in this area. Indeed, as State Farm points out in its opposition to motion for publication and its motion for reconsideration, the absence of any meaningful authority has resulted in a wide disparity of rulings among the trial bench. For example, the trial judge in this case ruled that evidence of State Farm's standardized practices and policies was admissible on the issues of bad faith and punitive damages. On the other hand, the Wright v. State Farm memorandum decision, cited by State Farm, shows that the trial court excluded pattern and practice evidence without analysis of relevant case law and

granted summary judgment for State Farm by telling the plaintiff to take her complaint to the governor and the Arizona Department of Insurance, rather than to the courts. Some trial courts are therefore confused as to the evidence relevant to bad faith/punitive damage issues and of the role of the courts in providing remedies for tortious misconduct.

Further, due to the lack of any guidance for the trial bench, litigants in bad-faith cases are devoting enormous resources to this issue. Insureds seek discovery of corporate practices, policies, and claims manuals, as well as evidence of other "bad acts." Insurance companies make enormous efforts to resist such discovery. Often the only manner of resolution is through extensive litigation of discovery motions. Such discovery motions not only drive up the cost of litigation for the parties but also consume an inordinant amount of court time which could be substantially reduced through publication of this Court's memorandum decision.

The lack of guidance in this area is not limited to the parties in bad faith litigation and the trial bench, but is further manifested at the appellate level. State Farm cites to the Court certain unpublished memoranda decisions, such as

Schrader v. State Farm and Wright v. State Farm, which State Farm contends take a more restrictive view of the admissibility of such evidence.[1] On the other hand, this Court has also authored the memorandum decision in Olson v. State Farm (copy attached as Exhibit 1), which is consistent with the Court's opinion in this matter.[2] However, since such memorandum decisions cannot be cited as authority, even this Court is left without authority upon which to draw in future cases.[3]

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[1]Based upon the *amici's* reading of these memorandum decisions, it appears that State Farm may well have overstated the scope and holdings of those cases. Nonetheless, the fact that State Farm continues to argue that these cases stand for the inadmissibility of evidence which has now been determined to be admissible by this Court, demonstrates the extent to which guidance is necessary for litigants and the courts.

[2]The Olson and Zilisch decisions appear to be more consistent with established Arizona precedent regarding the admissibility of prior acts evidence, as illustrated in Hawkins v. Allstate, 152 Ariz. 490, 733 P.2d 1073 (1987) and Lee v. Hodge, 180 Ariz. 97, 882 P.2d 408 (1994). The Wright and Schrader memorandum decisions, on the other hand, fail to cite to any Arizona authority to support the conclusions in those opinions.

[3]The *amici* do not cite cases such as Olson, Schrader, and Wright as authority for any legal position. Instead, *amici* cite these cases simply to show the unresolved nature of important legal issues and the need for future guidance for litigants and courts.

State Farm opposes publication simply for one reason: it is not happy with the outcome. However, in opposition to publication, State Farm simply reargues the same unsuccessful arguments advanced in its brief. Those arguments continue to lack merit.

CONCLUSION

In light of the foregoing concerns, *amici* respectfully request that the Court publish its memorandum decision in this matter in order to provide the public with much-needed guidance in the area of bad-faith insurance practices.

RESPECTFULLY SUBMITTED this 27th day of September, 2000.

LAW OFFICES OF JOHN L. TULLY, P.C.

By Barbara S Burstein

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, the undersigned certifies that this brief is double spaced, uses 14 point proportionally spaced roman typeface and contains 1,114 words.

Dated this 27th day of September, 2000.

Barbara S Burstein

John L. Tully
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CERTIFICATE OF SERVICE

I, Barbara S. Burstein, do hereby certify that on the 27th day of September, 2000, a copy of the foregoing AMICUS CURIAE BRIEF OF FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS AND UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S MOTION TO PUBLISH was served upon the following persons at the addresses listed below and in the manner described:

ORIGINAL and six (6) copies of the foregoing hand-delivered this 27th day of September, 2000, to:

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TWO (2) copies of the foregoing mailed this 27th day of September, 2000, to:

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EXHIBIT 1

EXHIBIT 1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BETTY OLSON, Plaintiff-Appellee, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	1 CA-CV 99-0172 DEPARTMENT C MEMORANDUM DECISION (Not for Publication - Rule 28, Ariz. R. Civ. App. Proc.)

Appeal from the Superior Court of Maricopa County

Cause No. CV 96-06105

The Honorable John Foreman, Judge

AFFIRMED

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P A T T E R S O N, Judge

State Farm Mutual Automobile Insurance Company (State Farm) appeals from the trial court's entry of judgment in favor of Betty Olson (Olson). We have jurisdiction over this matter pursuant to

Arizona Revised Statutes Annotated (A.R.S.) section 12-2101(B) (1994). For the reasons discussed below, we affirm.

FACTS AND BACKGROUND

This case arises out of an insured's bad faith claim against an insurer for declining to "total" the insured's vehicle after an automobile accident. Specifically, the insured, Olson, leased a new Cadillac in 1993 with a list price of $42,328. A few months later, Olson's Cadillac was involved in an accident that caused serious front-end damage to the vehicle and she presented a claim to her insurer, State Farm. A day after the accident, State Farm decided to repair the vehicle (based in part on the opinion of the tow truck driver) and asked Olson to take the Cadillac to a repair facility.

Once Olson's vehicle was at the repair facility, State Farm performed a repair estimate. This initial estimate of approximately $12,700 neglected necessary components and labor costs. In light of the extensive damage to her car and the burden of continuing lease payments while awaiting repairs, Olson requested that State Farm declare the vehicle a total loss. State Farm reminded Olson that, by the terms of the insurance contract, it alone controlled the decision to repair.

After the initial estimate, State Farm wrote several supplemental estimates that brought the final cost of repairing Olson's vehicle to over $31,000. Olson was not notified of the

extreme difference between the initial and final estimates until the repairs were complete. Indeed, the final repair cost was approximately $10,000 more than the latest estimate that Olson received.

Olson's lease agreement with General Motors Acceptance Corporation (GMAC) contained an insurance clause which provided that, in the case of her car being declared a total loss, GMAC would accept the total loss settlement in satisfaction of Olson's lease obligation. State Farm neglected to consider this in its decision to repair Olson's vehicle.

The other driver involved in the accident with Olson's Cadillac was determined to be at fault. Thus, State Farm made a subrogation claim against Farmers, the other driver's insurer. Throughout the claim process, Farmers considered Olson's vehicle a total loss based on its own loss evaluation. State Farm, however, continued to refuse to declare the car a total loss when dealing with its own insured, Olson.

During the seven months that it took to repair Olson's Cadillac, Olson allowed her lease payments to lapse. GMAC repossessed the car, sold it at auction, and filed a deficiency action against Olson. State Farm knew of the deficiency action against Olson and also knew it could protect Olson by declaring the Cadillac a total loss. However, State Farm still refused to declare the car a total loss. Instead, State Farm intervened in

the GMAC suit and argued that the Olson Cadillac was not a total loss.

Olson sued State Farm for breaching the covenant of good faith and fair dealing in its handling of her claim. A jury awarded Olson $1,000,000 in compensatory damages and $5,000,000 in punitive damages. The trial court remitted the compensatory damages to $500,000. State Farm timely appealed.

DISCUSSION

On appeal, State Farm raises the following issues:

(1) Whether State Farm is entitled to judgment as a matter of law on Olson's bad faith claim;

(2) Whether, due to attorney misconduct, the trial court's admission of scientific testimony and alleged errors while instructing the jury, and an erroneous verdict, State Farm is entitled to a new trial;

(3) Whether the trial court committed reversible error in admitting evidence;

(4) Whether the damages awards were properly given to the jury and supported by the evidence;

(5) Whether the jury's punitive damages award improperly punished State Farm for conduct in other states or was a violation of due process;

(6) Whether the trial court's award of attorneys' fees to Olson was proper.

While discussing the issues, we must view all facts and inferences in the light most favorable to sustaining the verdict. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 414, 758 P.2d 1313, 1316 (1988).

I.

The Trial Court Did Not Err in Denying State Farm's Motions for Judgment as a Matter of Law on Olson's Claim of Bad Faith.

During trial, State Farm filed a motion pursuant to Rule 50(a), Arizona Rules of Civil Procedure, asserting that it was entitled to judgment as a matter of law. The trial court denied the motion. After the jury's verdict, State Farm renewed the motion. Again, the motion was denied. State Farm now claims that the trial court erred by not granting the motion for judgment as a matter of law. Although the trial court's denial of the motion is reviewed *de novo*, we will view the evidence and all reasonable inferences therefrom in the light most favorable to upholding the verdict. *See Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1998).

Tort of Bad Faith

In every insurance contract, a legal duty is implied that the insurance company must act in good faith while dealing with its insured on a claim. *See Noble v. National Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981). A violation of that duty of good faith is a tort. *See id.* Evidence of questionable tactics detrimental to an insured's interests suggests bad faith. *See, e.g., Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 597, 734 P.2d 76, 82 (1987) (finding that an insurer's act of bad faith arose from asserting "groundless or inadequately investigated" reasons for delaying settlement). The law also requires an insurer

to "play fairly" with insureds. *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 507, 838 P.2d 1265, 1268 (1992) (quoting *Rawlings v. Apodaca*, 151 Ariz. 149, 154, 726 P.2d 565, 570 (1986)). An insurer breaches the covenant of fair dealing when it "for its own profit . . . breache[s] its duty to play fairly with its insureds and to give their legitimate interests equal consideration." *Rawlings*, 151 Ariz. at 157, 726 P.2d at 573. In addition, we must determine whether "in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable." *Zilisch v. State Farm Mut. Auto. Ins. Co.*, No. CV-98-0535-PR, slip op. at ¶ 22 (March 3, 2000).

To establish a bad faith claim, a plaintiff must demonstrate that the insurer (1) lacked a reasonable basis for denying or failing to process a claim and (2) was either aware of or recklessly disregarded that lack of a reasonable basis. *See Deese*, 172 Ariz. at 506-07, 838 P.2d at 1267-68.

Lack of Reasonable Basis

When determining whether an insurer acted in good faith, "it is necessary to determine whether a claim was properly investigated and whether the results of that investigation were reasonably reviewed and evaluated." *Deese*, 172 Ariz. at 507, 838 P.2d at 1268 (quoting *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 354, 362, 723 P.2d 703, 711 (App. 1985), *rev'd in part*, 150 Ariz. 326, 723

P.2d 675 (1986)). Indeed, the law requires insurers to adequately investigate claims. *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 10, 699 P.2d 376, 385 (App. 1984). In addition, an insurer's "plan and practice" of resisting claims, although it may not be a breach of contract, can be a breach of the duty of good faith and fair dealing because the insurer is gambling on the "fortuity" of whether a jury will find the denial reasonable. *Deese*, 172 Ariz. at 510, 838 P.2d at 1271 (Martone, J., concurring). Thus, an insurer's practice of unreasonably resisting claims, combined with an inadequate investigation of a specific claim, will support the insured's contention that the insurer lacked a reasonable basis for denying or failing to process the claim.

Here, Olson offered evidence that State Farm has a practice of unreasonably resisting and manipulating claims purely for profit. Specifically, Ina DeLong testified that State Farm has "a different agenda, that it's an adversarial relationship," where the "adjusters are frequently not trained" and "[t]he training that they do have is aimed at how to deny a claim." According to DeLong, who worked for State Farm for 24 years, "with the programs in place, policyholders will not be compensated to the amount that they are legitimately entitled to."

Bruce Davis, a former State Farm employee who had become "disenchanted with things [he] had seen over the course of years,"

testified that State Farm routinely offered appearance allowances, improperly incorporated used parts in repairs, and undervalued legitimate claims. According to both Davis and DeLong, State Farm instructs claim adjusters to focus on the elderly, those on fixed income, and to take advantage of the "weakest of the herd." Because of such groups' vulnerability, "State Farm outlined that . . . there was no harm in low-balling such a group" because State Farm "had more money than they did."

In addition, Olson admitted a statement from State Farm's own claims vice-president that the company's goal was to be the "most profitable claim service in the industry." According to DeLong, claims profit is the difference between what State Farm legitimately *should* have paid on a claim and the amount it *actually* paid to the claimant. Manuel Mendoza, a current State Farm employee, apparently disagreed with State Farm's position by stating that "a claim department cannot be a profit center;" rather "claim handlers and claim management should settle claims quickly and fairly . . . ." This testimony demonstrates that State Farm routinely improperly investigated, reviewed, and evaluated claims.

Olson offered evidence at trial that, in this specific case, State Farm failed to adequately investigate Olson's claim. Olson's expert, Gerald DeRungs, testified that an appropriately performed initial investigation would have led to the conclusion that the Cadillac should have been declared a total loss, rather than

repaired. Furthermore, when the time came for State Farm to assert its subrogation claim for the Olson vehicle against Farmers, State Farm took the position with Farmers that the Olson vehicle was a total loss. The jury could reasonably have concluded from this evidence that if State Farm had properly discharged its duty to Olson initially, State Farm would have made a timely investigation of the damage to Olson's vehicle and determined that it should not be repaired. Had State Farm made such an investigation and declared the vehicle a total loss, a provision in Olson's lease would have provided her relief from making any remaining lease payments. In that case, Olson would have been spared the frustration, anxiety, and distress of the GMAC lawsuit.

Not all claims, regardless of the investigative efforts involved, are subject to exact evaluation. Yet that is neither what the law requires nor what was required here. As we have previously recognized, "property damage claims, unlike personal injury claims, may be accurately appraised without great difficulty or difference of opinion." *Voland v. Farmers Ins. Co. of Arizona*, 189 Ariz. 448, 453, 943 P.2d 808, 813 (App. 1997). Thus, State Farm's original estimate of $12,691 was incomprehensibly below the final repair bill of $31,389.78. This original estimate also failed to include necessary parts and essential aspects of the repair process. Therefore, the initial estimate was not only unreasonable, but it demonstrates that State Farm did not do an

adequate investigation and failed to fully communicate, in an ongoing manner, with Olson while handling her claim.

Olson produced evidence of State Farm's practice of unreasonably resisting claims and State Farm's inadequate investigation of Olson's claim. This evidence, taken together, supports the jury's finding that State Farm's rejection of Olson's request to declare the car a total loss lacked a reasonable basis.

Knowledge or Reckless Disregard of Lack of Reasonable Basis

Not only does Olson assert that State Farm's refusal to "total" her car was unreasonable, Olson also claims that State Farm's conduct was evidence that they acted with the requisite knowledge of their unreasonableness. Obviously, the nature of claims handling makes it difficult to prove that State Farm had knowledge that it was acting improperly. However, if State Farm's actions in processing Olson's claim constituted a reckless disregard, we are permitted to impute the requisite knowledge of impropriety. *See Trus Joist Corp. v. Safeco Ins. Co. of America*, 153 Ariz. 95, 104, 735 P.2d 125, 134 (App. 1986).

Here, State Farm resisted Olson's request to declare the Cadillac a total loss, yet considered it as such when dealing with Farmers' subrogation claim. Olson also produced evidence that State Farm intentionally withheld supplemental repair estimates from Olson. Such an action provides a basis for the jury to infer

that State Farm understood that its initial estimate was both unreasonable and inadequately investigated.

Then, when Olson was sued by GMAC, State Farm attempted to intervene in the lawsuit and argue against Olson's interests by promoting a judgment against her in GMAC's favor. This evidence allows us to infer that State Farm either had knowledge of or recklessly disregarded its obligation to treat Olson fairly.

State Farm's failure to adequately investigate, its subsequent failure to disclose information, coupled with its intervention in a suit to argue against its insured's interests, is enough to support a bad faith claim. *See, e.g., Rawlings*, 151 Ariz. at 161, 726 P.2d at 577 (insurer committed bad faith "by deceit, non-disclosure . . . and deliberate attempts to obfuscate").

"An insurer can challenge claims that are 'fairly debatable;' however, it breaches its legal duty when it 'intentionally denies or fails to process or pay a claim without a reasonable basis for such action.'" *Filasky*, 152 Ariz. at 597, 734 P.2d at 82 (citations omitted). State Farm claims that because it had a right under the policy to repair the vehicle rather than totaling it, the claim was "fairly debatable" and thus it was entitled to judgment as a matter of law. We disagree. While an insurer may challenge claims that are fairly debatable, a claim is not debatable if the insurer "fails to undertake an investigation adequate to determine whether its position is tenable." *Id.*

Simply because State Farm and Olson disagreed whether the vehicle was repairable does not make the claim "fairly debatable" so that State Farm may escape liability to Olson under the duty of good faith. Indeed, "[w]hile it is clear that an insurer may defend a fairly debatable claim, all that means is that it may not defend one that is not fairly debatable." *Zilisch*, No. CV-98-0535-PR, slip op. at ¶ 19. The issue is whether State Farm adhered to the duty of good faith and its investigation was adequate to make a reasonable assessment regarding the repairability of Olson's vehicle. Here, substantial evidence exists from which a jury could determine that State Farm failed to make a prompt, reasonable investigation and evaluation of the damages sustained by Olson's vehicle, as well as Olson's interests regarding the claim submitted to State Farm.

Based on these reasons, the trial court properly denied State Farm's motions for judgment as a matter of law.

II.
The Trial Court Did Not Err in Denying State Farm's Motion for New Trial.

State Farm made several assignments of error in its motion for new trial, including attorney misconduct, admission of testimony without scientific value, and improper jury instructions. State Farm also claimed that the verdict was a result of passion and prejudice, as well as contrary to the law and the weight of the evidence. State Farm once again raises these issues on appeal. We

review the trial court's decision to deny this motion for an abuse of discretion, reviewing the evidence in a manner most favorable to upholding the verdict. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶¶ 12-13, 961 P.2d 449, 451 (1998).

Attorney Misconduct

Denial of a new trial motion claiming attorney misconduct is a matter within the trial court's discretion. *See Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 454, 652 P.2d 507, 527 (1982). Reversal is required only when misconduct is present and the misconduct "actually influenced the verdict." *Id.* (quoting *Sanchez v. Stremel*, 95 Ariz. 392, 395, 391 P.2d 557, 559 (1964)).

State Farm contends that Olson's attorney engaged in misconduct during voir dire, jury selection, opening statement, and closing argument. Although some of counsel's conduct may have been improper, misconduct alone will not warrant a new trial. *See Leavy v. Parsell*, 188 Ariz. 69, 73, 932 P.2d 1340, 1344 (1997). We must also determine that the trial court abused its discretion when deciding whether the misconduct "materially affected the rights of the aggrieved party." *Id.* at 72, 932 P.2d at 1343. To find that misconduct so prejudiced the aggrieved party that a new trial is warranted, the trial court must determine that the misconduct is significant, knowing, and deliberate violations of rules or court orders. *See id.* at 72-73, 932 P.2d at 1343-44. Also, the trial court must find the extent of prejudice is impossible to determine

because the record could justify either conclusion. *See id.* at 73, 932 P.2d at 1344. Finally, the misconduct must also be apparently successful in achieving its goals. *See id.*

Here, the trial court did not make such findings. Nor do we find that Olson's attorney made significant, knowing, and deliberate violations of rules or court orders. We also believe the record as a whole cannot support the conclusion that State Farm was prejudiced to such an extent that a new trial should have been granted. Thus, there is no reason for departing from the "usual rule" that, unless the record supports the contrary finding, we must affirm the trial court's order denying a new trial. *Id.* at 72, 932 P.2d at 1343 (quoting *Grant*, 133 Ariz. at 457, 652 P.2d at 530)).

Admission of Scientific Testimony

We will not disturb the trial court's decision regarding admission of expert testimony absent a clear abuse of discretion. *See State v. Mack*, 134 Ariz. 89, 91, 654 P.2d 23, 25 (App. 1982).

State Farm argues that Gerald DeRungs' testimony should have been ruled inadmissible because his statements had "no scientific value" and would not survive analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Although *Daubert* overruled *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), at the federal level, Arizona still follows the *Frye* test. *See State v.*

Tankersley, 191 Ariz. 359, 364, ¶ 13, 956 P.2d 486, 491 (1998). Thus, we need not consider State Farm's argument regarding admission of expert testimony under *Daubert* and *Kumho Tire*.

DeRungs' testimony assisted the jury in determining whether State Farm acted in bad faith. *See* Ariz. R. Evid. 702. In addition, we understand DeRungs' testimony to be both relevant and probative without being unfairly prejudicial. *See* Ariz. R. Evid. 403. Therefore, the trial court did not abuse its discretion in admitting the testimony.

State Farm also asserts that "because the facts upon which [DeRungs'] opinion was based are not 'of a type reasonably relied upon by experts in the particular field,'" the trial court erred by admitting DeRungs' testimony under Rule 703, Arizona Rules of Evidence. In short, State Farm is arguing that DeRungs needed to actually rely upon Henderson's opinion before DeRungs could testify as to his own opinion. This is at best a misunderstanding of the rule and at worst a misstatement of the law. *See* Ariz. R. Evid. 703. The portion of Rule 703 relied upon by State Farm simply means that, when an expert is testifying at trial based upon facts made known to the expert before trial, the facts need not be separately admissible as evidence if the facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Ariz. R. Evid. 703.

The admission of DeRungs' testimony was not an abuse of discretion.

Improper Instructions and Verdict

State Farm claims that errors "in giving or denying certain instructions" and a verdict that both "resulted from passion or prejudice" and "is contrary to the law and against the overwhelming weight of the evidence" necessitate a new trial. Instead of supporting this assertion with an argument and authorities, State Farm attempts to incorporate previous pleadings by "reference" because "[s]pace limitations prevent State Farm from fully addressing all of the errors that occurred at trial." We will not consider State Farm's claims because this tactic can only be interpreted as a circumvention of this Court's page limitation. *See* Ariz. R. Civ. App. P. 14(b).

III.
The Trial Court Did Not Err in Admitting Evidence, and Any Potential Error Was Harmless.

State Farm argues that a new trial is necessary to correct the error created by the trial court's admission of (1) character evidence, (2) information asserted as privileged, and (3) evidence of settlement offers. On review, we will not disturb the trial court's rulings regarding admission of evidence unless a clear abuse of discretion appears and prejudice results. *See Elia v. Pifer*, 194 Ariz. 74, 79, ¶ 22, 977 P.2d 796, 801 (App. 1998), *review denied* (May 25, 1999).

Character Evidence

State Farm argues that the admission of the testimony of Bruce Davis, Manuel Mendoza, and Ina DeLong was in violation of Rule 404(b), Arizona Rules of Evidence. Evidence which is offered to prove conduct in conformity with prior bad acts is inadmissible character evidence. *See* Ariz. R. Evid. 404(b). However, if the evidence is offered for a permissible purpose, the other acts evidence may be admitted. *See id.* Permissible purposes include knowledge, motive, intent, and absence of mistake. *See id.*

The record shows that, while ruling on State Farm's motion to preclude this evidence, the trial court was primarily concerned with relevance. Thus, we are left with the impression that the trial court accepted Olson's explanation that the testimony of Mendoza, Davis, and DeLong, as current and former employees of State Farm or its affiliates, was offered to demonstrate State Farm's improper motive of indiscriminately denying claims to increase profits. We therefore conclude that the other act evidence State Farm cites was properly admitted under Rule 403(b), Arizona Rules of Evidence.

State Farm's additional string of "extraordinarily prejudicial testimony," without citation to any authority, will not be considered. *See Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992). State Farm's reliance on *Elia*, 194 Ariz. 74, 977 P.2d 796, urging this court to set aside the

jury's verdict because the other acts evidence was improperly admitted, is unpersuasive. In *Elia*, the case was reversed because the trial court allowed a dentist's disciplinary proceeding from the Board of Dental Examiners to enter into evidence during a malpractice action against the dentist's domestic relations attorney who settled the dentist's dissolution action. 194 Ariz. at 79, ¶ 23, 977 P.2d at 801. The *Elia* court found that the other act evidence was prejudicial as it shifted the issue from negligence to "whether Elia was a good or bad person." *Id.* We do not come to the same conclusion here. In this case, the other act evidence was admitted to demonstrate a pattern of conduct, support an award of punitive damages, and prove State Farm's intent and knowledge in this specific case.

For these reasons, the trial court did not abuse its discretion in admitting the other acts evidence.

Privileged Information

State Farm asserts that the admission of DeRungs' testimony regarding a conversation with one of State Farm's consulting experts, Gary Henderson, about Olson's Cadillac should have been excluded as privileged work product. Consulting experts' communications with counsel can be protected from discovery. *See* Ariz. R. Civ. P. 26(b)(4)(B). This privilege may also, in certain circumstances, be waived. *See, e.g., Samaritan Health Serv. v. Superior Ct.*, 142 Ariz. 435, 438, 690 P.2d 154, 157 (App. 1984)

(defendant hospital waived attorney-client and work product privileges when it used interview summaries to refresh the recollections of its employees).

However, this case is different from those dealing with pre-trial disclosure in that State Farm was not attempting to protect Henderson's discussions with State Farm from discovery. Instead, State Farm unsuccessfully attempted to protect DeRungs' testimony regarding his conversation with Henderson from being admitted as evidence. We do not understand the asserted privilege to extend to Henderson's voluntary disclosures to DeRungs. Therefore, we conclude that the trial court did not abuse its discretion in admitting the evidence.

"The improper admission of evidence is not reversible error if the jury would have reached the same verdict without the evidence." *Brown v. United States Fidelity and Guar. Co.*, 194 Ariz. 85, 88, ¶ 7, 977 P.2d 807, 810 (App. 1998). We conclude, in light of the other evidence in this case supporting Henderson's purported opinion that the Cadillac should have been "totaled," that the jury would have reached the same verdict without DeRungs' testimony. Thus, even if the admission was error, the error is harmless.

Evidence of Settlement Offers

State Farm asserts that the trial court erred in admitting evidence of settlement offers. Statements made while attempting to

settle a disputed claim are not admissible to prove the declarant's liability for the claim. See Ariz. R. Evid. 408.

Here, State Farm's claims file regarding Olson was admitted into evidence, almost in its entirety. The offers of settlement in the claims file pertained to issues surrounding the damage and repair of Olson's vehicle and predated Olson's claim that State Farm breached the covenant of good faith and fair dealing. Thus, information in the claims file included proposed offers of settlement regarding Olson's *underlying* claims. However, no offer of settlement regarding Olson's present claim of *bad faith* was admitted into evidence. Therefore, the evidence State Farm complains about is not a settlement offer for the present bad faith action.

Assuming the evidence objected to by State Farm actually falls into the category of "settlement offer" for Olson's bad faith claim, it is unclear whether State Farm is objecting to the evidentiary ruling made by the trial court or the testimony elicited from witnesses at trial by Olson's attorneys. Because State Farm failed to object to the testimony and subsequent argument regarding the purported settlement offers that were cited in their brief, the issue is waived. *See Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 214, 693 P.2d 348, 357 (App. 1984).

Even if the statements identified by State Farm are actually settlement offers relating to Olson's bad faith claim and the issue

was not waived, we are unconvinced that the statements were admitted for the purpose of proving State Farm's liability. Therefore, State Farm's claim that this ruling is a violation of Rule 408 is unsupportable.

IV.
Olson's Compensatory and Punitive Damage Awards Are Supported By the Evidence.

Compensatory Damages

State Farm argues that the trial court's remittitur of the jury's compensatory damage award is unsupportable by Olson's claimed damages. The exercise of the power of remittitur rests in the sound discretion of the trial court, see *Spur Feeding Co. v. Fernandez*, 106 Ariz. 143, 149, 472 P.2d 12, 18 (1970), and we will not disturb a remittutur absent an abuse of that discretion. *See Walter v. Simmons*, 169 Ariz. 229, 234, 818 P.2d 214, 219 (App. 1991).

The fact that the trial court remitted the jury verdict from $1,000,000 to $500,000 indicates that the court determined the jury's original verdict to be excessive. *See Mammo v. State*, 138 Ariz. 528, 532, 675 P.2d 1347, 1351 (App. 1983). Such a reduction also indicates, however, "that the court determined that the verdict was *not* a result of passion or prejudice . . . [o]therwise, the court would have set the verdict aside and granted a new trial." *Id.* We rely on *Filasky* in deciding whether the remitted amount is itself excessive. 152 Ariz. at 598, 734 P.2d at 83. In

that case, the Arizona Supreme Court upheld a jury's $100,000 compensatory damage award when the plaintiff incurred economic losses of approximately $4000. *See id.* In addition, the plaintiff also lost the time value of her insurance proceeds and "endured months of overwhelming inconvenience and frustration." *Id.* The court found that the jury's award was not "excessive or grossly disproportionate to the damage incurred." *Id.*

Here, similar to *Filasky*, Olson suffered "pecuniary losses and damages for frustration, inconvenience, and humiliation." *Id.* Olson battled State Farm for over four years. She spent $1,500 on a previous attorney. GMAC's deficiency judgment cost her approximately $16,000. These damages, combined with the lack of any fixed criteria by which the jury or judge could measure the damage to Olson's credit and her emotional well-being, justify the trial court's remitted award.

Accordingly, we conclude that the trial court, whose decision "will nearly always be more soundly based than ours can be," did not abuse its discretion in remitting the jury's $1,000,000 award to $500,000. *Duncan v. State*, 157 Ariz. 56, 63, 754 P.2d 1160, 1167 (App. 1988) (quoting *Creamer v. Troiano*, 108 Ariz. 573, 575, 503 P.2d 794, 796 (1972)).

Punitive Damages

State Farm argues that the issue of punitive damages was improperly submitted to the jury and, even if it was proper,

insufficient evidence was introduced to uphold the jury's punitive damages verdict. State Farm also asserts that the verdict was improper punishment for conduct in other states and, because of its gross excessiveness, is a violation of due process.

Although punitive damages may be awarded in bad faith tort actions, they are not automatically recoverable in every case in which the tort is proven. *See Rawlings*, 151 Ariz. at 161, 726 P.2d at 577. Indeed, punitive damages may not be awarded in bad faith cases unless the evidence produces "something more" than the elements establishing the tort itself. *Bradshaw*, 157 Ariz. at 421, 758 P.2d at 1323. Conduct that is aggravated, outrageous, malicious, or fraudulent will support punitive damages. *See Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. Oppressive conduct, deliberate, overt and dishonest dealings, insult and personal abuse, and fraud will also suffice. *See Farr*, 145 Ariz. at 8-9, 699 P.2d at 383-84. In order to recover punitive damages in this case, Olson must demonstrate that State Farm either intentionally sought to harm Olson, was motivated by spite or ill will, or was aware of and consciously disregarded a substantial risk of significant harm to her. *See Bradshaw*, 157 Ariz. at 422, 758 P.2d at 1324.

Although the award of punitive damages is subject to the more stringent standard of clear and convincing evidence, *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681, a jury's award of punitive damages

should be upheld if there is any reasonable evidence to support it. *See Olson v. Walker*, 162 Ariz. 174, 177, 781 P.2d 1015, 1018 (App. 1989). Support for punitive damages may be inferred from the evidence, including proof that defendant's conduct was outrageous in nature. *See Bradshaw*, 157 Ariz. at 422, 758 P.2d at 1324.

The substantial evidence produced regarding State Farm's questionable claims practices would enable a jury to infer that the practices were the product of an "evil mind." *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. In addition, there was evidence that State Farm intervened in the GMAC lawsuit merely for its own objective - to prove that the decision to repair Olson's car was proper. State Farm's intervention is precisely the type of aggravated and outrageous conduct that supports punitive damages. *See id.* Acting against Olson's interests, with knowledge of both the real and potential harm being done to her, proves that State Farm's conduct meets the "something more" standard set forth in *Bradshaw*. 157 Ariz. at 421, 758 P.2d at 1322. Finally, the cumulative harm suffered by all potential victims of State Farm's conduct is significant. *See id.* at 422, 758 P.2d at 1324. Thus, as in *Bradshaw*, the jury "could have concluded that State Farm knowingly acted improperly to serve its own interests and consciously disregarded a 'substantial risk of significant harm to others.'" 157 Ariz. at 422-23, 758 P.2d at 1324-25 (citation omitted).

We therefore conclude that the issue of punitive damages was properly submitted to the jury and sufficient evidence was introduced to uphold the $5,000,000 verdict.

State Farm also asserts that the punitive damage award was improper punishment for conduct that occurred in other states. State Farm claims that "[the trial court's] reasoning for rejecting *BMW v. Gore*, standing alone, requires reversal in this case." However, the trial court's "rejection" of *BMW* pertained to a ruling regarding jury instructions; the trial court did not address whether the jury's actual award was for punishment outside of Arizona.

Admittedly, we should not punish State Farm for, or deter it from, conduct that lawfully occurs in other states and has no impact on Arizona residents. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996). However, we do not agree with State Farm that the jury's punitive damage award in the present case was such punishment or deterrence. Olson did offer evidence regarding State Farm's conduct in other states. However, it does not necessarily follow that the punishment State Farm actually received was for that conduct. To the contrary, we have already determined that this other act evidence was admitted to demonstrate State Farm's improper motive of indiscriminately manipulating claims to increase profits. In addition, the testimony of Bruce Davis allows us to infer that the type of misconduct State Farm

displayed in Colorado was also occurring in Arizona. In light of this testimony, the present case is pointedly dissimilar to *BMW* as we do not interpret the verdict to be "reflecting a computation of the amount of punitive damages 'based in large part on conduct that happened in other jurisdictions.'" *Id.* at 573 (citation omitted). Instead, we interpret the verdict as being based on State Farm's conduct in relation to Olson and others similarly situated in Arizona. Therefore, the jury did not improperly punish State Farm for conduct that occurred in other states.

Finally, State Farm argues that the punitive damage award is a violation of due process. Due process requires that a defendant be given "fair notice" regarding the conduct that will subject it to punishment and the severity of the penalty that may be imposed. *Id.* at 574. Due process also requires "reasonable constraints on a jury's discretion to award punitive damages, including post-verdict judicial review to ensure that the award is not excessive." *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 133, 907 P.2d 506, 519 (App. 1995).

In order to determine whether State Farm received fair notice in this case, we must analyze the difference between the jury's award and other civil penalties authorized or imposed by comparable cases, the ratio between compensatory and punitive damages awarded to Olson, and the degree of reprehensibility of State Farm's conduct. *See BMW*, 517 U.S. at 575. These factors are sufficiently

similar to the criteria cited in *Hyatt Regency*, 184 Ariz. at 134, 907 P.2d at 520, such that an independent analysis under Arizona law is not necessary. For the following reasons, we determine that the jury's award in this case did not violate due process.

State Farm argues that the civil penalties they would be subject to under A.R.S. section 20-456 (Supp. 1999) - which range from $1000 for a single unfair or deceptive act up to $50,000 for cumulative intentional acts - did not give them adequate notice. Yet the civil sanctions imposed by statute are not the only means by which notice is received. Notice may also be given by "the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 575.

In Arizona, punitive damage awards against insurers in bad faith cases can reach into the millions of dollars. *See, e.g., Bradshaw*, 157 Ariz. at 424, 758 P.2d at 1326 ($1 million); *Hawkins v. Allstate Ins. Co.*, 152 Ariz 490, 505, 733 P.2d 1073, 1088 (1987) ($3.5 million); *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982) ($3 million). Based on the punitive damage awards in other cases, State Farm had fair notice of the sanctions that could be imposed for its misconduct.

State Farm argues that the ratio of actual to punitive damages (which it cites as either 3333:1 or 286:1, depending upon whether the damages from the GMAC lawsuit is taken into consideration) in this case is a violation of due process.

State Farm incorrectly asserts that we only should consider Olson's "alleged hard economic damages" when determining whether an awards' ratio is unreasonable. However, when determining a ratio's appropriateness, due process permits us to compare a plaintiff's actual damages (as determined by the jury in its compensatory award) to the award of punitive damages. *See BMW*, 517 U.S. at 582 (where the Court struck down a punitive damage award because it was "500 times the amount of [plaintiff's] actual harm *as determined by the jury*.") (emphasis added). Because the United States Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . ," we must determine if the ratio is reasonable. *Id.* When determining reasonableness, we both look to the ratio between compensatory and punitive damages in similar cases and take into account that a higher ratio may be supported when "a particularly egregious act has resulted in only small economic damages" and "the injury is hard to detect . . . ." *Id.*

A cursory review of the ratio between compensatory and punitive damage awards in several similar Arizona cases prove that we "need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 582-83 (quoting *Pacific Mut. Ins. Co. v. Haslip*, 499 U. S. 1, 18 (1991)). In *Sparks*, the ratio was less than 3:1. 132 Ariz. at 534, 647 P.2d at

1132 (upholding a jury award of $1,551,000 in compensatory damages and $3,000,000 in punitive damages). In both *Bradshaw*, 157 Ariz. at 416, 758 P.2d 1318, and *Deese*, 172 Ariz. at 506, 838 P.2d at 1267, the ratio was 25:1. Most dramatically, and perhaps factually most similar to the present case, the *Hawkins* court allowed a 233:1 ratio to stand. 152 Ariz. at 505, 733 P.2d at 1088 (jury awarded $15,000 in compensatory and $3,500,000 in punitive damages for insurer's bad faith in handling claim for total loss of automobile).

In the present case, State Farm intervened in the GMAC lawsuit to argue against Olson's interests, harmed Olson economically by refusing to declare the car a total loss, and consistently and intentionally undervalued repair estimates. These are egregious acts that usually result in only minor damages and, because of the nature of the claims process, injuries that are difficult to detect. Because of these factors, the ratio between compensatory and punitive damages (either 10:1 or 5:1, depending upon whether the remitted amount is considered) is within a constitutionally acceptable range.

The degree of reprehensibility of State Farm's conduct also supports the jury's punitive damage award of $5,000,000. "Perhaps the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. "[I]nfliction of economic injury,

especially when done intentionally through affirmative acts of misconduct . . . or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* at 576. We agree with Olson's contention that "[a]ll those factors are present here."

The jury was read a summary of previous testimony by Manuel Mendoza, one of State Farm's own employees, that a substantial penalty was necessary in order for State Farm's "superiors" to be made aware of the award. In the testimony summary, Mendoza stated that he was "not aware of any discussion or intention by anyone from State Farm to modify or change State Farm's claims handling as a result of cases where punitive damages have been assessed . . . ." He later claimed that "if [State Farm] was hit with a punitive damage verdict of a hundred million or something like that, then I would probably tell my boss about it." Thus, the jury could have properly inferred that a significant punitive damage assessment was necessary to punish State Farm's conduct in this case.

Olson also produced evidence that State Farm had a history of misconduct in the claims process. Specifically, DeLong testified that State Farm had a practice of "going back and actually rewriting activity logs . . . going through and taking out documents that were in there that weren't beneficial." Because "the degree of defendant's awareness of the harm . . . and any concealment of it are elements to consider in judging the reprehensibility of the defendant's conduct," *Hawkins*, 152 Ariz.

at 497, 733 P.2d at 1080, the jury was given evidence to support a finding that State Farm's actions were reprehensible.

Most importantly, Olson demonstrated that State Farm rejected her legitimate interests in favor of their own. Additionally, State Farm was made aware of Olson's economic vulnerability and, in spite of her vehicle lease's insurance provision, failed to total the vehicle while still accepting insurance premiums. Even more reprehensible, however, is State Farm's requested intervention in the GMAC lawsuit.

State Farm's conduct in the present case is sufficiently improper to not only give rise to tort liability, but also egregious enough to support the jury's award of significant punitive damages.

V.
The Trial Court's Award of Attorneys' Fees to Olson Was Proper.

We will not substitute our judgment for that of the trial court with respect to awarding attorney fees in the absence of an abuse of discretion. *See Mullins v. Southern Pacific Transp. Co.*, 174 Ariz. 540, 543, 851 P.2d 839, 842 (App. 1992). When an action is based on a breach of the covenant of good faith and fair dealing that is implied in a written contract, the successful party is eligible for an award of attorneys' fees under A.R.S. section 12-341.01(A) (Supp. 1999). *See Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 201, 888 P.2d 1375, 1388 (App. 1994). Because Olson

prevailed on her bad faith claim, the trial court did not abuse its discretion in awarding her attorneys' fees.

Each party requests costs and attorneys' fees on appeal. *See* A. R. S. § 12-341.01. In our discretion, we grant Olson's request for costs and fees incurred on appeal in an amount determined upon compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

CONCLUSION

We affirm the judgment in favor of Olson, the compensatory damage award of $500,000, and the punitive damage award of $5,000,000. In addition, we affirm the trial court's grant of attorneys' fees to Olson, as well as fees and costs incurred on appeal.

Cecil B. Patterson, Jr.
Presiding Judge, Department C

CONCURRING:

Philip E. Toci, Judge

Susan A. Ehrlich, Judge