No. 17-1333

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALEXANDRA SIMS
Appellant-Petitioner,
v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Appellee-Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT-RESPONDENT ALEXANDRA SIMS

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CASE No. 4:13CV-00371-JLH

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Pursuant to Federal Rule of Appellate Procedure 29, *Amicus Curiae* United Policyholders ("UP") respectfully moves for leave of Court to file the attached brief in support of Appellant Alexandra Sims. In support of this motion, UP states:

IDENTITY AND INTEREST OF PROPOSED *AMICUS CURIAE*

1. United Policyholders ("United Policyholders" or "UP") is a non-profit 501(c)(3) organization, founded in 1991, whose mission is to be an information resource and effective voice for consumers of all types of insurance in all 50 states — including the policyholders at issue in this case. UP was founded after the 1991 Oakland-Berkeley Firestorm to assist homeowners with property insurance issues. Over the past 25 years the organization's scope has grown to all lines of insurance, nation wide.

2. UP's work is divided into three program areas: *Roadmap to Recovery* (claim assistance to disaster victims), *Roadmap to Preparedness* (promoting insurance and financial literacy), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators and legislators, and in the media). Donations, grants, and volunteer labor support the organization's work. UP does not sell insurance or accept funding from insurance companies.

3. Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's work. UP has filed *amicus curiae* briefs on behalf of policyholders in

more than 450 cases throughout the United States and in the 8th Circuit in particular. *See, e.g., Amanda Labrier v. State Farm Fire and Cas. Co.*, Case No. 16-3185/16-3562 (2016). UP's brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999). In addition, UP's arguments have been cited with approval by numerous state and federal courts.

4. UP monitors litigation likely to have statewide or national significance to policyholders. UP believes that this case will have such significance for the reasons stated herein.

CONSENT OF THE PARTIES

5. On May 30, 2017, UP sought consent via email of the parties to file a brief of *amicus curiae* in support of Appellant, pursuant to F.R.A.P. 29.

6. On May 31, 2017, counsel for Appellant consented via email.

7. Counsel for Appellee declined to respond to UP's request for consent. A subsequent request was sent on July 6, 2017 which also received no response. Thus, this motion for leave to file a brief of *amicus curiae* is necessary.

REASONS FOR AND RELEVANCE OF UNITED POLICYHOLDERS' AMICUS CURIAE BRIEF

8. Federal Courts have broad discretion to grant amicus status to a party with a valid interest and timely, relevant information. *See, e.g., Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n. 3 (9th Cir. 1987). Courts generally exercise liberality in granting *amicus* status when, as here, the matter is one of

public concern. S. Thomas, *Corpus Juris Secundum*, "Amicus Curiae," §3 (2012); *see also, e.g., Neonatology Associates, P.A. v. Comm'r of Internal Revenue*, 293 F. 3d 128, 133 (3rd Cir. 2002) (opinion by Circuit Judge Samuel Alito: "skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merit stage if leave had been granted.")

9. UP has an interest in the present case because its outcome will have a large impact on policyholders in Arkansas and across 8th Circuit jurisdictions; thus it seeks to fulfill its role as an effective voice for insurance consumers.

10. The underlying issue in this case addresses an insurance company's obligation to act in good faith when settling claims with its policyholders, specifically regarding the important obligation to pay underinsured motorist benefits under an automobile insurance policy when the amount of insurance available from a tortfeasor is insufficient to compensate them for their injuries.

11. This case addresses at least three important issues: (1) the legal standard for tortious breach of the duty of good faith and fair dealing which includes an insurer's non-delegable duty to conduct a reasonable investigation and settle claims fairly and in good faith; (2) the appropriate use of summary judgment in resolving these types of cases; and (3) what type of evidence is relevant to these type of cases.

12. The proposed brief will aid the Court by reviewing legal standards relevant to a policyholder's ability to hold an insurance company accountable for failure to perform under an insurance contract and secure redress.

13. The proposed brief provides additional analysis demonstrating that the District Court abused its discretion when it excluded certain evidence proffered by the plaintiff and granted a motion for summary judgment in favor of the insurance company and usurped the jury's function of resolving factual questions.

14. In the process, the District Court held that an insurance company's failure to conduct a reasonable investigation and failure to follow its own internal procedures is not a breach of the covenant of good faith and fair dealing, when it should have allowed all relevant evidence to be submitted to the jury.

15. In this proposed brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., *Supreme Court Practice* 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)). UP's 25 years of experience advocating for the interests of insurance policyholders

and its extensive knowledge of insurance law makes it well suited to aid this Court in this case.

16. A 25-year history of advocating for the interests of insurance consumers in disaster areas, legislative and regulatory forums and as *amicus curiae* allows UP to have a "unique perspective or specific information that can assist the court beyond what the parties can provide." *See Voices for Choices v. Illinois Bell Telephone Co*. 339 F.3d 542 (11th Cir. 2003) (citing *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). UP's broad experience working with individual consumers should prove helpful to the Court in understanding the equities involved in the instant case and others like it.

17. Accordingly, for the reasons set forth above, UP respectfully requests that the Court grant UP's Motion for Leave to File a Brief of *amicus curiae*.

18. UP's proposed brief is submitted as an attachment to this Motion.

Respectfully submitted this 12th day of July 2017.

/s/ Amy R. Bach

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 1,256 words.

The motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

/s/ Amy R. Bach

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CERTIFICATE OF VIRUS CHECK

The undersigned certifies under Eighth Circuit Rule 28A(h)(2) that the foregoing has been scanned for computer viruses and that the brief is virus free.

/s/ Amy R. Bach

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2017, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Counsel for Amicus Curiae United Policyholders

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly traded corporation owns 10% or more of the stock of United Policyholders.

/s/ Amy R. Bach

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

United Policyholders ("UP") is a non-profit 501(c)(3) organization, founded in 1991, whose mission is to be an information resource and effective voice for consumers of all types of insurance, including commercial and residential policyholders, in all 50 states—including the policyholders at issue in this case.

UP's work is divided into three program areas: *Roadmap to Recovery* (claim assistance for disaster victims), *Roadmap to Preparedness* (promoting insurance and financial literacy), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators and legislators, and in the media). Donations, grants, and volunteer labor support the organization's work. UP does not sell insurance or accept funding from insurance companies.

Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's work. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 450 cases throughout the United States and in the 8th Circuit in particular. *See, e.g., Amanda Labrier v. State Farm Fire and Cas. Co.*, Case No. 16-3185/16-3562 (2016). United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the *amicus curiae* or its counsel, contributed money intended to fund the preparation or submission of this brief.

299 (1999). In addition, UP's arguments have been cited with approval by numerous state and federal courts. UP monitors litigation of concern to insurance consumers and identifies cases that will have statewide or national significance. UP believes that this case will have such significance.

In this proposed brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[2] UP's 25 years of experience advocating for the interests of insurance policyholders and its deep and broad knowledge of insurance law, makes it well suited to aid this Court in this case.

UP seeks to appear as *amicus curiae* in the instant case in order to more fully explore the public policy concerns surrounding an insurance company's duty to act in good faith toward its policyholders. This brief will address, *inter alia*, (1) whether an insurance company's failure to conduct a reasonable investigation of a claim by its insured constitutes bad faith; (2) whether summary judgment is appropriate in these types of cases; (3) what type of evidence is relevant.

[2] Robert L. Stern et al., *Supreme Court Practice 570-71* (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

INTRODUCTION AND SUMMARY OF ARGUMENT

Insurance "products" (policy contracts) are subject to a special body of law because they promise a unique service and are uniquely important in commerce and society.[3] Their delivery of peace of mind and risk transfer make them unique. The fact that they spread risk and provide financial security, making it possible for people and businesses to thrive, make them uniquely important.

Insurance protection and coverage after an adverse event makes the difference between recovery and ruin. Because insurance is so important, it is a carefully regulated industry that has long been deemed to be imbued with the public interest.[4] Oversight agencies in every state have the authority to regulate the

[3] "…Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to "cover" if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance." *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447 (Del. 1996).

[4] *See, e.g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S.. 440, 447 (1946); *United States. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251,

financial affairs of insurance companies, the rates they charge, and the way they sell their products and process claims made by policyholders. Legislatures have enacted statutes and courts have rendered decisions that define the standards that companies must adhere to when dealing with their insureds. In the end, however, it is up to private litigants and courts of law to enforce those standards.

In this case, Appellant Alexandra Sims (hereinafter "Sims") appeals the District Court's grant of partial summary judgment in favor of State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"). In granting summary judgment, UP maintains that the Court erred in summarily dismissing Sims' claim by (1) misapplying relevant Arkansas bad faith law, (2) abusing its discretion to weigh questions of fact properly reserved for a jury; and (3) excluding relevant material evidence supporting her bad faith claim against State Farm.

In granting summary judgment, the District Court effectively invented a new rule that does not follow the current legal standard in the State of Arkansas. The Court's purported rule that only malicious conduct can constitute bad faith is heavily slanted in favor of insurance companies and against consumers. It improperly heightens the state of mind requirement for bad faith under Arkansas law and tacitly permits insurance companies to mishandle claims without fear of being held accountable. If allowed to stand, this "new rule" will virtually

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257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

encourage insurers to put their own profit motives ahead of their obligations to their policyholders.[5] Yet the Arkansas Supreme Court has clearly stated why the law needs to prevent that from happening:

> [B]ecause of the great disparity of financial resources which generally exists between insurer and insured and the fact that insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest, [the Court] recognizes the wisdom of a rule which would deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith.

Findley v. Time Ins. Co., 264 Ark. 647, 651-52, 573 S.W.2d 908, 910 (1978).

The District Court's opinion would grant courts broad discretion to exclude material evidence relevant to policyholders' bad faith claims, and in doing so deny insurance consumers their constitutional right to have a jury consider all relevant evidence in deciding whether an insurance company has acted in bad faith. This Court should not condone the District Court's infringement on the jury's duty to try material facts.

Thus, this Court should reverse summary judgment and remand this case to the District Court for a new trial because there remain genuine disputes and questions of material fact for a jury to decide as to Appellant's bad faith claim.

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[5] …[An insurance company has a financial incentive to deny a claim…] *Cf. Weese v. Nationwide Ins. Co*., 879 F.2d 115, 118 (4th Cir. 1989) ("Nationwide fails to recognize that all first party claims are adversarial. The insurer wishes to minimize payment and the insured wishes to maximize it.") (Opinion and Order of Judge Leon Holmes, Eastern District of Arkansas, *Alexandra Sims v. State Farm Mutual Automobile Insurance* Company) 4:13CV00371 JLH, Doc. 31, April 30, 2014

STATEMENT OF FACTS

UP adopts the Statement of Facts set forth in Appellant Sims' brief.

STANDARD OF REVIEW

Summary judgment is proper only if there are no genuine issues of material fact and the moving party, here Appellee State Farm, is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (West). *Medical Liability Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 471 (8th Cir. 2008). The court should state on the record the reasons for granting the motion. Fed. R. Civ. P. 56(a) (West). This appellate court reviews the district court's determinations of law de novo. *Id.*

ARGUMENT

I. The District Court Improperly Narrowed Arkansas Bad Faith Law by Requiring an Insurance Company's Affirmative Conduct to be Malicious

The District Court properly noted that Arkansas courts recognize bad faith as an actionable tort and correctly set forth the elements prescribed by the Arkansas Supreme Court, which the model jury instruction echoes. To establish a claim for bad faith, the plaintiff has the burden of proving: (1) he or she sustained damages; (2) the insurance company acted in bad faith in an attempt to avoid liability under its policy; and (3) that such conduct proximately caused damage to the plaintiff. *Aetna Cas. and Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128 at 133, 664 S.W.2d 463, 465 (1984) ("*Broadway Arms*"); AMI Civ. 2304 (West 2017).

The Arkansas Supreme Court and AMI 2304 require the tort of bad faith to include **affirmative misconduct by the insurance company**, without a good faith defense, and that the misconduct be **dishonest, malicious, or oppressive** in an attempt to avoid its liability under an insurance policy. *Broadway Arms, supra* at 281 Ark 134, 664 S.W.2d at 465 (emphasis added). The Arkansas Supreme Court has held that actual malice may be inferred from conduct and surrounding circumstances and is characterized as that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge. *Id*. at 465.

Because affirmative bad faith misconduct may be characterized as either dishonest, malicious, **or** oppressive in attempting to avoid liability and the Federal Fed. R. Civ. P. 56(a) requires the court to state on the record the reasons for granting a motion for summary judgment, the District Court made reversible error by only analyzing whether Sims could establish that State Farm had committed any **malicious act**, ignoring that **dishonest *and* oppressive** acts also may constitute bad faith. *Ibid.* However, the District Court's Opinion and Order states only that "Sims has not identified a **malicious act** independent of the actual decision to deny her claim." The Court incorrectly characterized Sims' argument and reasoned that Sims could not establish State Farm's failure to review or credit information from its claims file amounted to bad faith because the malicious act found in *Cincinnati Life Ins. Co. v. Mickels*, 85 Ark. App. 188, 148 S.W.3d 768 (2004), was not

"turning a blind eye to clear evidence," but was committed by the insurance company's agents in the application process and the claims handling process. The District Court only examined whether there was malicious conduct and failed to analyze whether, as here, the insurer failed to honestly review a claim and follow internal procedures before making an undue settlement offer, and thus oppressively forcing Sims to litigate to obtain benefits in bad faith. However, Arkansas law does not require malice, rather, it requires only that State Farm made an affirmative act of dishonesty, malice, *or* oppression in an attempt to avoid its liability under Sims' insurance policy. *Broadway Arms*, *supra* 281 Ark. at 134, 664 S.W.2d at 465.

In the instant case, State Farm's affirmative conduct, namely its refusal to order an independent medical exam, in clear violation of its own internal protocols and proceed to offer an arbitrary settlement, which forced Sims to litigate, could be characterized as **dishonest** or **oppressive** under *Broadway Arms*. Thus, the District Court's refusal to follow Arkansas law by limiting its analysis to **malicious** conduct only is reversible error. Upholding this ruling would establish new precedent narrowing the state of mind requirement in clear contravention of *Broadway Arms*. Respectfully, this Court should remand this case.

II. Summarily Dismissing Appellant's Claim When Triable Issues of Material Fact Remained Improperly Conflated the Role of Judge and Jury.

A Federal Court "…review[s] a grant of summary judgment de novo, applying the same standard as the District Court." *Naucke v. City of Park Hills*,

284 F.3d 923, 927 (8th Cir. 2002). The federal courts require the evidence in a motion for summary judgment to be such that a reasonable jury could find in favor of the party with the burden of persuasion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). The mere existence of a scintilla of evidence in support of the nonmoving party is insufficient to defeat a motion for summary judgment. *Id.* The *Anderson* Court held:

> "The judge's inquiry, therefore, unavoidably asks whether *reasonable jurors* could find by a preponderance of the evidence that the plaintiff is entitled to a verdict –
>
> 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"

Improvement Co. v. Munson, 14 Wall. 442, 81 U. S. 448 (1872) (emphasis added).

A District Court commits reversible error if it substitutes its view of the evidence for that of the jury's. *Baylis v. Travellers' Ins. Co.*, 113 U.S. 316, 321, 5 S. Ct. 494, 497, 28 L. Ed. 989, 990 (1885); *Bowman v. Atchison, T. & S. F. R. Co.*, 184 F. 697, 699-700 (8th Cir. 1910). When a court does so, it unconstitutionally infringes on a litigant's Seventh Amendment right to a jury trial.[6] In the instant

[6] In *Kampouris v. St. Louis Symphony Soc.*, 210 F.3d 845, 850 (2000), a disability and age discrimination case, the Chief Judge Mark W. Bennett's Dissent cited *Jacob v. City of New York*, 315 U.S. 752, 753, for the proposition that "The federal courts' daily ritual of trial court grants and appellate court affirmances of summary judgment was increasingly troubling and cause for worry, such that the expanding use of summary judgment, in federal employment discrimination and the broader law, raises the ominous specter of serious erosion of the "fundamental and sacred"

case, the District Court improperly tried relevant evidence in summary judgment that should have been presented to a jury during trial.

The District Court here declined to find bad faith when State Farm refused to independently investigate Sims' claim after she provided State Farm with objective analysis supported by Ph.D experts and then subsequently offered Sims an arbitrary settlement that forced her to litigate to rightfully recover her policy limit. Reasonable minds could disagree whether State Farm's evaluation, failure to investigate, and settlement offer were made in good faith rather than to avoid liability under Sims' policy. That is a question for the jury, not the court.

III. An Insurance Company's Failure to Conduct a Reasonable Investigation of its Policyholders Claims Can Be Evidence of Bad Faith

Under Arkansas law, insurance companies must abide by the provisions of the insurance contract in good faith. *Selmon v. Metropolitan Life Ins. Co.*, 372 Ark. 420, 426-27, 277 S.W.3d 196, 202 (2008). When they fail to do so, the law allows for remedies, including punitive damages. *Id.* As discussed above, the tort of bad faith requires affirmative misconduct that is dishonest, malicious, or oppressive in an attempt to avoid its liability. *Broadway Arms, supra* at 281 Ark 134, 664

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right of trial by jury. (The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob*, 315 U.S. at 752-753, 62 S.Ct. 854.

S.W.2d at 465. Actual malice may be inferred from conduct and surrounding circumstances, but determination of whether there was an affirmative act of misconduct is a question of fact reserved for the jury. *Id.* at 465-66.

Although mere inaction, or nonfeasance, does not itself constitute bad faith; misfeasance, on the other hand, will support an action in tort. *Findley v. Time Ins. Co.*, 264 Ark. 647, 653, 573 S.W.2d 908, 911 (1978); *See also Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 148-50, 852 S.W.2d 799, 801-02 (1993). The Arkansas Supreme Court has extended tort liability for misfeasance whenever the misconduct involves a foreseeable unreasonable risk of harm to the plaintiff's interests. *Farm Bureau Ins. Co. of Arkansas v. Running M Farms, Inc.*, 366 Ark. 480, 491, 237 S.W.3d 32, 40 (2006) (Held: a tenant could maintain a negligence action against the landlord for a breach of contractual duty to maintain the sprinkler system which the landlord had failed to do because the misfeasance caused harm that was both foreseeable and unreasonable).

An insurance company acts in bad faith when it fails to investigate and settle a claim. In *Edgin v. Central United Life Ins. Co.*, an Arkansas Court of Appeal found that an insurance company's practice of knowingly using an unreasonable interpretation of a contractual term to withhold payment, or underpay, policy benefits without investigating legal grounds could be evidence of bad faith. 2013 Ark. App. 233, 3, 2013 WL 1456687 (Ark.App.), 2, 4. Importantly, the *Edgin* court

found the insurance company's actions so unreasonable as to be **dishonest** and concluded that whether something is reasonable is, under long-established precedent, a question of fact only for the jury to decide. *Id.* at 4-5.

The Arkansas Supreme Court has similarly held that whether an insurance company conducts proper investigation of claims made by or against its policyholders is a question of fact. *S. Farm Bureau Cas. Ins. Co. v. Hardin*, 233 Ark. 1011, 1016, 351 S.W.2d 153, 156 (1961). Thus, a bad faith claim may arise when, as here, the insurance company refuses to pay benefits to a policyholder even though it determined that the policyholder's claim was valid or it refused to undertake any investigation at all in an effort to avoid liability under its policy.

Given that Arkansas courts recognize that a bad faith claim can arise from an insurance company's unreasonable failure to investigate and refusal to pay, the duty to investigate in third party liability cases can be imputed to first party failure to pay cases. In a bad faith settlement of a liability policy case, for example, this Court approved of the rule set forth by the Minnesota Supreme Court:

> We have kept in mind the rule, and given due recognition to it, that it is the duty of the insurance company to exercise good faith toward the insured, ***both in the investigation under a liability policy*** and in the defense of the lawsuit ***and in the payment of its obligations under the insurance contract.***

(emphasis added). *S. Farm Bureau Cas. Ins. Co. v. Mitchell*, 312 F.2d 485, 493 (8th Cir. 1963) (citing *Larson v. Anchor Casualty Company*, 249 Minn. 339, 350 82 N.W.2d 376, 383 (1957). Other jurisdictions in the Eight Circuit, such as South

Dakota, also recognize a cause of action for bad faith based on failure to conduct a reasonable investigation. *Arp v. AON/Combined Ins. Co.*, 300 F.3d 913, 916 (8th Cir. 2002) (Plaintiff must prove that an insurance claim was denied or benefits withheld **without a reasonable basis**; and (2) the knowledge or reckless disregard of the **lack of a reasonable basis** for the denial) (emphasis added).[7]

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[7] *See also Radio Taxi Service, Inc. v. Lincoln Mut. Ins. Co.*, 31 N.J. 299, 304-05, 157 A.2d 319, 322-23 (1960) (insurers are obligated to exercise good faith in dealing with offers of compromise, and a reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to settlement can be formulated since the decision not to settle must be honest and intelligent) *Beeman v. Blue Cross/Blue Shield*, No. 59, 1988 WL 102757 at 2, 3-4 (Tenn.) (insurance company that consciously placed an incorrect diagnosis, which had no basis in fact, as was the arbitrary settlement offer made by State Farm here, on a medical form and used the result to deny the claim without ever making any additional effort to investigate the true facts and compounded the problem by failing to investigate for more than five months, even when faced with overwhelming proof that its initial decision was wrong was held liable for bad faith, despite precedent holding that an insurance company is entitled to rely upon available defenses and refuse payment if substantial legal grounds exist indicating that the policy does not afford coverage, the appellate court upheld the finding of the trial judge that the insurance carrier had acted in bad faith and conscious indifference because even the simplest of inquiries would have determined the essential facts, demonstrating there was no legal defense); *Standard Plan, Inc. v. Tucker*, 582 So.2d 1024, 1027 (Ala. 1991) (actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal) (citing *Chavers v. National Security Fire & Cas. Co.*, 405 So.2d 1, 7) (Ala. 1981) (The trier of fact upon a finding of an intentional failure to determine whether there was any lawful basis for refusal may use that fact as an element of proof that no lawful basis for refusal ever existed, the relevant question being whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review) (*Id.*, citing *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916 (Ala. 1981) (Knowledge or reckless disregard of the lack of legitimate or reasonable basis may

IV. The Court Erred In Excluding Evidence of Appellee Disregarding Its Own Policies In A Bad Faith Effort To Avoid Liability.

In light of the legal standard for summary judgment, UP respectfully requests that this Court reverse the District Court's unprecedented limitations on a jury's discretion to draw its own inferences from all the admissible evidence in determining an insurance company's intent and state of mind. Relevant to this determination is whether State Farm's failure to follow its own internal procedures is evidence of bad faith, a question which was never allowed to be presented to the trier of fact, the only entity which could properly make such a determination.

In some regard, this is a question of first impression. Arkansas has never held that failure to follow internal company procedures is evidence of bad faith, though it has held that a purported lack of proper internal procedures cannot be characterized as affirmative misconduct. *Watkins v. S. Farm Bureau Cas. Ins. Co.*, 2009 Ark. App. 693, 15, 370 S.W.3d 848, 857 (2009). Other jurisdictions, however have found that expert testimony revealing the insurance carrier's investigation was conducted in violation of its own procedures was sufficient to support a bad faith claim. *Powers v. United Servs. Auto. Ass'n,* 114 Nev. 690, 703, 962 P.2d 596, 604 (1998), *opn. modified on denial of reh'g,* 115 Nev. 38, 979 P.2d 1286 (1999).

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be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured. (*Id.,* citing *Gulf Atlantic Life Ins. Co. v. Barnes,* 405 So.2d 916 (Ala. 1981)).

Indeed, at least one other 8th Circuit Court held that an insurance company had acted in bad faith and violated its fiduciary relationship to its policyholder when documents written for its internal use indicated the company itself had evaluated the case to be worth $60,000 to $80,000, but offered to settle for a mere $50,000, in spite of its own contrary internal investigation and evaluation. *Helmbolt v. LeMars Mut. Ins. Co.*, 404 N.W.2d 55, 58–59 (S.D. 1987). In a failure to pay policy limits case, Judge Kermit E. Bye's dissent agreed with the policyholder that a reasonable jury could find that a claim handling manual that directs its adjusters to evaluate claims and create the necessary leverage for a positive settlement result was evidence of bad faith. *Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991, 1001 (8th Cir. 2007).

Other Federal Courts have found that failure to follow internal company procedures constitutes bad faith. For example, the Ninth Circuit, interpreting Alaska law, found evidence of bad faith, in part due to the denial of a claim when the insurance company's policy explicitly instructs claim analysts to consider subjective complaints as well as objective evidence, yet it had failed to do so. *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1245 (9th Cir. 1998), *as amended on reh'g* (Mar. 12, 1998) (citing *Hillman v. Nationwide Mut. Fire Ins. Co*., 855 P.2d 1321, 1324 (Alaska 1993) (quoting *Anderson v. Continental Ins. Co*., 85 Wis.2d 675, 271 N.W.2d 368, 376-77 (1978)). A Tenth Circuit Court also held that a defendant's

overt failure to follow the terms of its own policy regarding the appraisal process provides substantial evidence that the defendant acted in bad faith. *Massey v. Farmers Ins. Grp.*, 986 F.2d 1428 (10th Cir. 1993). The Third Circuit has held that an insurer's violation of its own policy entitles the jury to find evidence of bad faith. See *W.V. Realty, Inc. v. Northern Ins. Co.* 334 F.3d 306, 317-18 (3d Cir. 2003) (holding that an insurer's claims manual that prescribed making advances on undisputed portions of claims while the insurer failure to do so was sufficient for a jury to find bad faith)[8] And of note, the Kentucky Supreme Court has held that policy manuals are discoverable because they are relevant to bad faith claims. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 813 (Ky. 2004).

Thus, it is not unreasonable, nor unprecedented to conclude in the context of a bad faith claim that an insurance company's failure to follow its own internal procedures is relevant evidence to establish that its actions were motivated to avoid liability. In the instant case, the senior adjuster on Sims' claim testified that according to State Farm's claims manual, he must conduct a diligent investigation, reasonably evaluate, and provide prompt explanation regarding the payment of policyholders' claims. *See* Appellants Brief at pp. 46. In addition, State Farm's

[8] *See also Bonenberger v. Nationwide Mut. Ins. Co.*, 971 A.2d 378, 381-82 (Pa. Super. Ct. 2002) (holding a claims practice manual used by an insurer's employees as the primary guid for evaluating, valuing and negotiating claims was relevant evidence and offers support for the ultimate finding of bad faith); see also *Zappile v. Amex Assur. Co.*, 928 A.2d 251, 258 (Pa. Super. Ct. 2007) (holding a trial court may consider the insurer's claims manual when considering bad faith.

internal procedures allowed for the use of utilization reviews and independent medical reviews, which never occurred. *Id.* Evidence that State Farm knowingly violated its own claims manual and internal procedures applicable to uninsured motorist claims would clearly be relevant to Sims' bad faith lawsuit. By excluding this evidence and granting summary judgment in favor of State Farm, the District Court deprived Appellant of her rightful day in court.

CONCLUSION

Accordingly, for the reasons set forth here, *amicus curiae* UP respectfully request that this Court reverse the decision of the District Court and remand for a new trial, so that Appellant may be allowed to present all relevant evidence in support of her claim and have it judged under the appropriate legal standards.

Respectfully submitted this 12th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this motion contains 4,688 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

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CERTIFICATE OF VIRUS CHECK

The undersigned certifies under Eighth Circuit Rule 28A(h)(2) that the brief has been scanned for computer viruses and that the brief is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2017, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE*** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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