COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT

CASE NO. 2014-SC-00758

SAMANTHA G. HOLLAWAY — APPELLANT

v.

DIRECT GENERAL INSURANCE COMPANY
OF MISSISSIPPI, INC. — APPELLEE

AMICUS CURIAE BRIEF OF INSURANCE INSTITUTE OF KENTUCKY

ON REVIEW FROM THE KENTUCKY COURT OF
APPEALS CASE NO. 2012-CA-000354,

ON APPEAL FROM THE FAYETTE CIRCUIT COURT
ACTION NO. 08-CI-002603

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class mail on the 22nd day of October, 2015: Matthew D. Ellison, Fowler Bell PLLC, 300 W. Vine Street, Suite 600, Lexington, KY 40507-1660; Perry Adanick, 9300 Shelbyville Road, Suite 400, Louisville, KY 40222; Samuels Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and the Hon. Thomas Clark, Fayette Circuit Court, 120 N. Limestone Street, Lexington, KY 40507

BY: 
RONALD L. GREEN

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE

The within brief is respectfully submitted on behalf of the Insurance Institute of Kentucky in support of the judgment of the trial Court and opinion of the Court of Appeals. At the heart of this case is the need to clarify the impact this Court's 4-3 opinion in *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000) is to have on claims brought by third party claimants under KRS 304.12-230 [KUCSPA]. The purpose of this brief is to illustrate the problems created by the interpretation given to Farmland by some, advocate for reaffirmation of the original standard for extracontractual cases, as well as the use of traditional methods for distinguishing between speculation and proper inferences in these cases.

ARGUMENT

I. HISTORY OF CAUSE OF ACTION

Until relatively recently, Kentucky law was clear that the remedy for the failure to pay under a contract to pay money, such as a policy of insurance, is the money owed plus interest. The only extracontractual action originally recognized was not based on the duty to pay money, but instead arose from the independent duty to defend and right to control settlement found in a liability policy. *See Georgia Cas. Co. v. Martin*, 46 S.W.2d 777, 779-80 (Ky. 1932) as clarified in *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 498 (1975).

In 1984, the General Assembly amended subtitle 12 of the Insurance Code so as to add a section based on the model drafted by the National Association of Insurance Commissioners [NAIC], which is now known as the KUCSPA. In 1982, there was an effort to enact this same model statute but with the addition of provisions 1) extending

the model statute's terms to third party claimants, 2) creating a private cause of action for both first and third party claimants, 3) requiring the conduct to be willful or a business practice to be actionable, and 4) making any other "unfair or deceptive act" a violation. 82 BR 403. This bill did not make it to the Senate floor. Legislative Record at 111-12. In the 1984 enactment, these provisions creating a private cause of action and extending the KUCSPA to third party claimants were omitted. The statutory remedy for a violation of the KUCSPA is set forth in KRS 304.12-120, which holds that an order from the Commissioner enforcing the KUCSPA does not relieve the insurer of liability ***other*** than for the violation of the KUCSPA.

In *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988), a majority of the Court decided that a private cause of action was created by KUCSPA without mentioning the legislative history, even though it was fully set out in the brief filed by the Commissioner of Insurance. The Court held that a cause of action could be premised on KRS 446.070, and then extended the cause of action to non-insureds such as third party plaintiffs. The statute was clearly not intended to protect this class of persons, and it is fundamental that a violation of statute only extends to persons the statute is intended to protect. At this time, Kentucky is the only state to permit a third party claim absent legislation authorizing such a cause of action and making other changes to the statute to accommodate it. As a result, courts have experienced difficulty in trying to apply a first party statute to third party facts, and part of the solution is to recognize the serious difference in these two distinct types of cases.

II. REQUISITE CONDUCT TO PROVE BAD FAITH

The *Reeder* Court addressed a third party property damage claim where the insurer offered to pay the amount of the repair estimate it had obtained. The insured had obtained a higher estimate, and the jury basically split the difference. In *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. App. 1993), this Court clarified that an action based on the KUCSPA required more than a mere violation of the statute. The *Wittmer* Court first quoted the three prong test used in first party bad faith claims as set forth in the dissent in *Federal Kemper Insurance Co. v. Hornback*, Ky., 711 S.W.2d 844, 846 (Ky. 1989)(Leibson, J., dissenting) and adopted in *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176 (Ky. 1989), as follows:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.... ***[A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.***

864 S.W.2d at 890 (emphasis added). But then the Court added:

> Before the cause of action exists in the first place, there must be evidence sufficient to warrant punitive damages:
>
> > "The essence of the question as to whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages depends first on whether there is proof of bad faith and next whether the proof is sufficient for the jury to conclude that there was 'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.' Restatement (Second) Torts, Sec. 909(2) (1979), as quoted and applied in Horton v. Union Light, Heat and Power Co., Ky., 690 S.W.2d 382, 388–90 (1985)." Federal Kemper, supra, 711 S.W.2d at 848.

Id. A number of courts have held that this threshold test must be met before reaching the three prong test.[1] This threshold is critical because without it, the Court is allowing the recovery of punitive damages for a breach of contract in violation of KRS 411.184(4). *See also Guaranty Nat. Ins. Co. v. George*, 953 S.W.2d 946, 949 (Ky. 1997).

It should be noted that the cause of action had accrued before the effective date of KRS 411.184 and .186, and for that reason the statutory standard would not have applied. In dicta, the Court suggested that the application of KRS 411.184 and .186 would violate the jural rights doctrine. This observation, however, is inconsistent with the longstanding principal that the jural rights doctrine does not apply to causes of action that did not exist in 1892. *William v. Wilson*, 972 S.W.2d 260 (Ky. 1998). In *Wilson* the Court wrote:

> ***The doctrine of jural rights has also been examined and found to be inapplicable where the statute did not eliminate or restrict claims recognized at common law.*** Kirschner v. Louisville Gas & Electric Co., Ky., 743 S.W.2d 840 (1988).

Id. at 266 (emphasis added). While *Wilson* invalidated the statutory standard for punitive damages in common law negligence cases, its holding cannot be extended to a statutory cause of action created by the same legislature that defined the punitive damages standard. In the 1988 enactment, the legislature specifically provided that KRS 411.184 and .186 are applicable to all cases where punitive damages are sought. The Court should take this opportunity to make it clear that a claim for "bad faith" based on the KUCSPA requires proof to justify punitive damages and that the applicable standard for punitive damages is set forth in KRS 411.184 & .186.

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[1] *E.g. USAA v. Bult*, 183 S.W.3d 181 (Ky.App. 2006); *Phelps v. State Farm Mut. Auto. Ins. Co.*, 736 F.3d 697, 707 (6th Cir. 2012)(C.J. Batchelder dissenting); *Price v. AgriLogic Ins. Services, LLC*, 37 F.Supp.3d 885, 899 (E.D.Ky. 2014); *Scott v. Deerbrook Ins. Co.*, 714 F.Supp.2d 670, 676 (E.D.Ky. 2010); *Shaheen v. Progressive Casualty Insurance Company*, --- F.Supp.3d ---- (W.D.Ky. 2015) (at pages 2-3 of slip opinion).

This Court reinforced the requirement that actual subjective bad faith was required and came close to acknowledging the applicability of the statutory standard for punitive damages in *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997). In addressing the KUCSPA claim by the non-insured claimant, the *Glass* Court made it clear that a showing of bad faith cannot be made by simply disagreeing with or second guessing the insurer's evaluation of the claim. The Court wrote:

> Even if Depp made an incorrect evaluation, or no evaluation at all, such would not constitute conduct that was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Wittmer, supra, at 890. The UCSPA does not require that a claim be evaluated, or that it be evaluated correctly. It only requires that payment of a claim not be refused without conducting a reasonable investigation based on all available information, KRS 304.12–230(4), and that a good faith attempt be made to effectuate a prompt, fair and equitable settlement, KRS 304.12.230(6).

Id. at 454. By the same token, it is not bad faith to offer less than limits. *Id.* at 453. The Court also reinforced the "fairly debatable" principle in the context of an underinsured motorist claim. The insurers claimed a defense of settlement based on the testimony of a structured settlement agent who conducted negotiations. While it was found that no settlement had occurred, the Court held that since there was a jury issue created there could not be bad faith. *Id.* at 454.

> In view of Hackney's deposition testimony and existing law as expressed in Barr v. Gilmour, supra, that defense not only was fairly debatable, it had substantial merit. The Glasses' contention that Farm Bureau's payment of its policy limits after rendition of the partial summary judgment was a "judicial admission" that the settlement defense was not fairly debatable is preposterous. If Farm Bureau had not offered its policy limits after losing on the settlement issue, the Glasses would now be claiming that it was bad faith for Farm Bureau to withhold its policy limits after it had been judicially determined that it had no valid defense.

Id. at 454. The *Glass* Court reaffirmed the principle in established *Wittmer* (third party) and *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176 (Ky. 1989) (first party) that "an insurer is entitled to challenge a claim and litigate it if the claim is ***debatable on the law or the facts***." 996 S.W.2d at 452 (emphasis added).

III. THE *FARMLAND MUTUAL* CASE

The *Farmland* Court considered a first party bad faith case in which the jury awarded $2 million in punitive damages. The judgment was affirmed in a 4-3 opinion. The insured sustained a fire loss to a commercial building. The claim was actually handled by a third party administrator, Shields.[2] Shields offered $168,993.18, which was the cost of repair less depreciation. The insured took the position that the repairs suggested by Shields would not leave the premises structurally sound, and sought replacement cost of $304,444.00. The insured offered to settle all claims for $260,000.00, but Shields stood pat on his offer. The jury awarded $213,810.00, $46,190.00 less than the insured's demand and $44,816.82 more than the only offer made by Shields. The insured stipulated that the amount of the loss was fairly debatable. The majority summed up the holding with the ambiguous but now famous quote as follows:

> Farmland's position thus reflects an erroneous interpretation of the "fairly debatable" language. Although matters regarding investigation and payment of a claim may be "fairly debatable," an insurer is not thereby relieved from its duty to comply with the mandates of the KUCSPA. Although there may be differing opinions as to the value of the loss and as to the merits of replacing or repairing the damaged structure, an insurance company still is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner. In other words, although elements of a claim may be "fairly debatable," an insurer must debate the matter fairly.

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[2] It is odd that a separate verdict was allowed against the third party administrator and the insurer even though both were responsible for the same conduct. This likely led to a double recovery but apparently this issue was not raised by the parties, or if it was, it was not addressed by the Court.

Id. at 376. Most confusing is the portion of the quotation that suggests that there is a duty to settle even though the offer made has a reasonable basis. Also confusing is language that can be read as overruling the *Curry* dissent, *Wittmer* and *Glass* in that it suggests that the fairly debatable proposition is limited to legal issues of first impression. The case could also be read as overruling *Glass* to the extent that *Glass* held that the creation of a jury issue precluded a finding of bad faith. Yet the opinion makes no suggestion that the Court intended to overrule anything.

While the opinion contains some loose and ambiguous language, the core principle set out by the case can be gleaned without damaging the long standing precedent concerning bad faith claims. The true holding of the case is that the position taken by the insurer was not fairly debatable, the stipulation of the parties notwithstanding. First, the position taken by the insurer was based on a standard that was different from the policy itself.[3] Second, the opinion says that Shields admitted that he based his offer on a repair estimate that he knew was too low. Finally, in response to the insureds' demand that a structural engineer be retained, Shields hired one. However, the engineering report obtained by Shields reflected that the scope of work was limited, and presumably this limited its value in determining the loss. Shields nonetheless relied upon the report in standing pat on his offer. Shields was then told by the insured that the insured's engineer had confirmed that the repair cost would exceed replacement, and made an offer. Without examining the report (assuming the report was available) Shields

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[3] This was treated by the Court as a misrepresentation of the terms of the policy in violation of section (1) of the KUCSPA. Even if Shields told the insured the policy contained a different measure of recovery than was provided by the policy, and did it with a bad faith scienter, there is nothing in the opinion to suggest that the insured relied upon on or that it caused damage. Instead, the damage, if any, was caused by Shield's reliance on the incorrect measure of recovery, which relates to the basis for the offer.

stood by his offer based on an incorrect standard. Everyone can agree that the facts as related by the majority display an example of claim handling that no company would expect of its employees, but poor claim handling is not the same thing as bad faith. The majority in *Farmland* did not address how the proof supported the characterization of bad faith as opposed to negligence or incompetence, or whether the conduct of the adjustor actually caused any harm. Perhaps these issues were not addressed by the parties. In any event, this case has led to considerable confusion among the courts handling these cases as to just what standard is applicable to extracontractual claims in Kentucky.

IV. THE CONFUSION

In a number of cases the federal court has struggled with the apparent deviation of the language in *Farmland* from the principles set out in the *Curry* dissent, *Wittmer* and *Glass*. A bad faith verdict was reversed in *United Services Auto. Ass'n v. Bult*, 183 S.W.3d 181 (Ky. App. 2003) by applying the *Glass* standard requiring outrageous conduct without a mention of *Farmland*. In *Naugle v. Allstate Ins. Co.*, 2003 WL 21774012 (6th Cir. 2003), the Court suggested that the more relaxed standard (akin to negligence) suggested by *Farmland* applied to first party claims while third party claims are to be governed by the more rigorous standard established by Justice Liebson in *Wittmer*. Subsequently, this Court evaluated a third party case using the *Glass* standard without a mention of *Farmland*. *Coomer v. Phelps*, 172 S.W.3d 389 (Ky. 2005). In *Powell v. Cherokee Ins. Co.*, 2011 WL 2160856 (W.D.Ky. 2011), the District Court observed the prior holdings of this Court that Kentucky law adheres to a single test applicable to all bad faith actions, whether brought by a first-party claimant or a third-party claimant, and whether premised upon common law or a statutory violation. In

Rybinski v. State Farm Fire and Cas. Co., 2012 WL 289913 (W.D.Ky. 2012), the District Court applied the traditional *Curry*, *Wittmer* and *Glass* standard for bad faith, even though it was a first party claim. While there are significant differences between valuing first party claims and third party personal injury claims[4], this hardly seems a significant distinction in terms of the very meaning of the concept of bad faith.

More recently, another panel of the Sixth Circuit made an intense effort to reconcile the *Curry*, *Wittmer* and *Glass* holdings with the *Farmland* holding in *Phelps v. State Farm Mut. Auto. Ins. Co.*, 736 F.3d 697 (6th Cir. 2012), concluding:

> Finally, we note that our dissenting colleague's disagreement with the reversal of summary judgment in this case is primarily based on the "intentional misconduct or reckless disregard" standard for bad faith set forth in Wittmer, 864 S.W.2d at 890. We acknowledge that the Kentucky cases still recognize Wittmer 's punitive-damages standard despite the Kentucky Supreme Court's later pronouncement that "the appropriate inquiry is whether ... the insurer acted unreasonably," Farmland Mut., 36 S.W.3d at 375 (internal quotation marks omitted). See, e.g., Wiles, 2011 WL 2420011, at *7–9. This strikes us as confusing because a claim will obviously meet Farmland's lower standard of "unreasonableness" if it has first met Wittmer's higher standard of "reckless disregard." Wittmer's threshold inquiry thus appears to render superfluous the merits inquiry into an insurance company's alleged bad faith. In any event, this seems to be the current state of Kentucky law.

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[4] Take section (6) of the KUCSPA for example. In a first party case, a loss is either covered or it is not. Once it is reasonably clear that a loss is covered, the insurer is required to ***attempt*** to settle the claim in ***good faith***. But in the third party context, in addition to coverage, the insurer must try to predict what a jury will do on the issue of liability of the insured, any possible apportionment, as well as the range of possibilities from which a jury might value damages. Any injury claim has an infinite number of values, and unless a case is decided by the jury, the value is actually determined in what amounts to an auction between the plaintiff and defendant lawyer, and their clients/insurers. Change any factor and the value changes. Further, the value that a jury might ascribe to the damages is not the only criterion a party might consider in determining a valuation. For example, a party may take into account the cost of defense, the expense of prosecuting the case, or even the emotional requirements of a party. Insurers are constantly being told by lawyers that only a fool would pretend to be able to predict what a jury will do, but somehow the claims adjustor is required to accomplish this with mathematical precision.

Id. at 704-05. That Court proceeded to analyze the case as though negligence was the standard, relying heavily on "experts" that did little more than second guess the actions of the claims adjustor. In *Lee v. Medical Protective Co.*, 904 F.Supp.2d 648 (E.D. Ky. 2012), the court opined that there were two distinct lines of cases in Kentucky law, and suggested that the relaxed *Farmland* standard was applicable only where liability was reasonably clear and the only issue was the amount of loss. That Court observed:

> It is true, as argued by the plaintiffs, that Farmland stated: "Although there may be differing opinions as to the value of the loss ..., an insurance company still is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner." Farmland, 36 S.W.3d at 375. Taken in context, however, this language was clearly limited to cases where liability was a certainty.

Id. at 655. In *Gale v. Liberty Bell Agency, Inc.*, 911 F.Supp.2d 488 (W.D.Ky. 2012), Judge Russell discussed the *Phelps* decision (rewriting the opinion slightly) as follows:

> The Sixth Circuit found it confusing that the Kentucky Supreme Court in Farmland spoke of a "lower standard of 'unreasonableness' " that will obviously be met if a plaintiff "has first met Wittmer's higher standard of 'reckless disregard.' " Id. at 733. But ultimately, the Sixth Circuit concluded that under Kentucky law a plaintiff still "has to meet Wittmer's higher threshold standard." Id.
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> Gale argues that Farmland "provided additional detail into what was required as proof at the threshold summary judgment stage," and that Farmland "described the threshold standard as 'unreasonableness.' " (Docket No. 31, at 3, 5.) Based on its analysis of Farmland and Phelps above, the Court disagrees with Gale's contention here. This conclusion is supported by a number of Kentucky decisions since Farmland. See, e.g., Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, 293 (Ky.Ct.App.2007) (citing Wittmer to conclude that "A cause of action for violation of the UCSPA may be maintained only where there is proof of bad faith of an outrageous nature"); Bult, 183 S.W.3d at 186 (citing Wittmer as establishing the need for proof that "there was conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others" (internal quotation marks omitted) (emphasis in original)); Ison v. GEICO Gen. Ins. Co., 2006 WL 2382721, at *3–4 (Ky.Ct.App. Aug. 18, 2006) (citing Wittmer as requiring "sufficient evidence to warrant punitive damages" and "of outrageous

> behavior" as a threshold for asserting a statutory bad-faith claim). The Court's conclusion on this point is also supported by a very recent decision, albeit unpublished, by the Sixth Circuit since Phelps. See Nat'l Surety Corp. v. Hartford Cas. Ins. Co., 2012 WL 4839767, at *3–4 (6th Cir. Oct. 9, 2012)

In the most diplomatic of language, Judge Russell refuted the *Phelps* finding that *Farmland* had changed the standard for bad faith. By the time of the decision in *Powell v. Cherokee Ins. Co.*, 919 F.Supp.2d 873 (W.D.Ky. 2013), the *Phelps* decision was being cited as consistent with the *Curry*, *Wittmer* and *Glass* formulation and the idea that *Farmland* did not modify the standard had become mainstream. *Id.* at 877. In *Gale v. Liberty Bell Agency*, 2013 WL 5942131 (6th Cir. 2013) the Sixth Circuit affirmed Judge Russell's reformulation of the *Phelps* decision.

V. THE NEED FOR CLARIFICATION

In practice, the confusion created by *Farmland* has led to a cottage industry of attorneys who, instead of practicing the cases entrusted to them, find it easier to spend their time trying to set up a bad faith claim and extort additional funds from the insurer. This is occurring in both first and third party cases. When the Court decided in *Reeder* to convert the KUCSPA into a private cause of action, whether it was intended or not, the Court took on the role of a super regulator of the insurance industry. The primary problem for the industry is that the "regulations" are developed on a case by case basis after the fact. The standard to be applied as well as the conduct which may be found to violate the KUCSPA varies from county to county and even among panels of the Court of Appeals. If the goal of this cause of action is to improve the handling of claims, the industry must know in advance what conduct can subject it to sanctions. For example, if an offer is made for less than the settlement value estimated by the adjustor, the bad faith

attorney will claim the insurer low-balled (even though the demand was more than the claim was worth as well). But if instead the adjustor put forth in the first offer the entire value he or she estimated, the bad faith attorney would claim that the failure to make further offers was a failure to attempt to settle. This is one of many lose-lose situations that have been created by the bad faith attorneys under the sanction of a loose reading of *Farmland* and all too often these are sanctioned by the trial court, largely because the trial judges are bereft of a standard for determining whether there is bad faith. They also lack the tools necessary to cull specious claims given the lack of an effective summary judgment procedure. This case offers the Court an opportunity to begin the process of establishing clear lines of demarcation between claims that actually involve subjective bad faith as opposed to mere difference of opinion as to liability, value or claim handling procedures. While the idea of regulating the insurance industry is an awesome undertaking better left to the legislatively appointed regulators, once undertaken it is crucial that some certainty find its way into this area of law.

VI. CIRCUMSTANTIAL PROOF

This case presents a fine example of how cases based on sheer speculation can be allowed to go forward. The insurer had limits of $25,000.00. This was a low impact soft tissue claim, and the insurer offered $5,000.00 in addition to the medical expenses already paid by no-fault benefits. Ultimately, the insurer paid $22,000.00. Holloway claims this demonstrates bad faith, but what is the proof of that? There is no direct evidence of any improper motive. The claim is based on nothing more than the assertion of counsel, or maybe the assertion of an expert. The Court needs to make it clear that the trial judges must examine such assertions to determine whether counsel is advocating a

proper inference or is just speculating. The principles for conducting such an analysis are already established.

In *Bryan v. Gilpin*, 282 S.W.2d 133 (Ky. 1955) this Court observed:

> [W]e are of the opinion that to entitle a plaintiff to go to the jury on circumstantial evidence the essential proven facts upon which liability can be based must do more than suggest a possibility that the defendant was at fault. While we do not at this time go so far as to declare that circumstantial evidence must exclude all other inferences of non-liability, we believe the evidence must furnish some basis for the jury to decide that the probability of fault preponderates over the probability of innocence.

Id. at 134-35. Likewise, in *Lesage v. Pitts*, 223 S.W.2d 347 (Ky. 1949) this Court held:

> An inference may be drawn from a clearly established fact, but, if the conclusion is drawn upon a fact dependent for proof of its existence upon a prior inference, the evidentiary fact is too remote to support the conclusion. Where, as here, the ultimate inference is based upon an inference which in turn is based upon a prior inference, depending upon an even more remote inference, the conclusion does not rise above the dignity of mere speculation, because a pyramiding of inferences never has been regarded as sound reasoning and always has been held not to be a permissible predicate for a conclusion.

Id. at 163. Likewise, speculation by an expert is not evidence. *Mondie v. Comm.*, 158 S.W.3d 203, 212-13 (Ky. 2005). A court should ask in each case whether the facts proven justify a conclusion that improper motive or bad faith is the more likely explanation for those facts. First of all, placing a value of $5,000.00 on a case of this type is inherently reasonable.[5] A jury may have awarded nothing since there were two distinct versions of the liability.[6] A jury may have not believed the plaintiff's complaints. The jury may have apportioned most of the fault on Holloway. Or the jury may have

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[5] See 19 Ky.Trial.Ct.Rev. 9 at page 3 (Marion County) and page 9 (Kenton County) for just two of many examples in one month's summary.

[6] The third party claimant suggests that liability is reasonably clear because the insurer "accepted liability". This is disingenuous at best. One would think that an insurer would be rewarded for accepting liability when it was not required to do so rather than being tarred with the bad faith moniker.

awarded Holloway her entire demand of $125,000.00. All of these juries would have been reasonable, or so this Court would have held if the verdict was challenged. For example, one might consider the case of *Adams v. Combs*, 465 S.W.2d 288 (Ky. 1971) in which the same case was tried twice to different juries. This Court held that an award of $500 was not inadequate while an award for the same injuries of $6000 was not excessive. How can such a range of reasonableness be permitted for a jury and denied to an adjuster who is, after all, trying to predict what a jury might do.

This is the fundamental flaw in the idea that a third party injury claim has a discrete value that must be paid. A liability policy is not a contract to pay money to a plaintiff, and in fact prior to judgment the plaintiff is not even a beneficiary to the policy. Instead it is an agreement to pay a judgment entered against the insured up to policy limits. While the policy gives the insurer the right to control settlement as part of the defense, the insurer has not agreed to actually settle anything. Any obligation in this regard arises from the fiduciary duties owed the insured or is imposed by the Court's interpretation of the KUCSPA, which was not written for third party claims.

So, again reviewing the facts of the case before the Court herein, each position taken by the adjustor can be explained as a good faith belief at the time the position was taken. There is nothing that makes this explanation less likely than a bad faith motivation, which means that to draw either conclusion is speculation. Perhaps Holloway would argue that there was nothing stopping the insurer from offering the amount ultimately paid sooner and that this demonstrates bad faith. An adjustor, just like an attorney, is entitled to change his or her view of a case as things develop, and there is no proof that the adjustor paid the ultimate amount because he thought that was the fair

value. In fact, Holloway suggests that the change followed a threat of a bad faith action. In addition to demonstrating the abuse of this tort by the bad faith lawyers, this actually provides an additional reason to change the offer which disproves bad faith. As things stand now in practice, the KUCSPA is in effect the thumb of the judicial system on the scales of justice tipping the balance in favor of plaintiffs. If the purpose of the KUCSPA is to provide a windfall to plaintiffs then *Farmland* as construed by some to have changed the standard is the way to go. But if the tort system is to return to a fault based system built on the idea that advocacy is the best way to determine truth and justice, and that all parties are the same in the eyes of the law, then this is an opportunity to make it clear that the *Curry*, *Wittmer* and *Glass* standard is the applicable standard, as was held by the Court of Appeals in this case.

CONCLUSION

For the reasons set forth hereinabove it is respectfully submitted that the opinion of the Court of Appeals should be affirmed and that the Court reaffirm the threshold requirement of actual subjective bad faith to claims for extracontractual damages in Kentucky.

Respectfully submitted,

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