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

WASHINGTON STREET, LLC	:	
	:	
v.	:	
	:	NO. 2:21-cv-04374
NATIONWIDE PROPERTY & CASUALTY	:	
INSURANCE COMPANY	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF, WASHINGTON STREET, LLC'S OPPOSITION TO DEFENDANT NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The present action seeks recovery of common law and statutory bad faith damages arising from, *inter alia*, the failures of the defendant, Nationwide Property and Casualty Insurance Company ("Nationwide"), to fully, fairly, promptly and properly investigate, evaluate, negotiate, settle and pay the claims of Washington Street arising from a July 14, 2019 fire loss. When the life span of claim, including: (1) the delayed and haphazard handling of the investigation and valuation of the claim; (2) the improper handling of the appraisal process; (3) the initiating of the subrogation action before Washington Street was made whole; (4) and, the eleven month delay in reforming the Policy to include business income coverage; is viewed in its entirety, there is no question that Washington Street has established clear and convincing evidence that Nationwide engaged in bad faith with the handling of the claim. Therefore, it is respectfully requested that the Motion for Summary Judgment be denied.

II. QUESTION PRESENTED

Should this Honorable Court DENY the Motion for Summary Judgment of Nationwide because genuine issues of material fact remain at issue regarding Nationwide's Bad Faith?

Suggested Answer: Yes

III. FACTS

On July 14, 2019, a fire originated in the kitchen of Apartment 39C of the premises, causing severe damage to the property. See Plaintiff's Response to Nationwide's SOF #3. Following the July 14, 2019 fire, Washington Street through its sole member, Ruth Jones, reported the loss to Nationwide. See Plaintiff's Response to Nationwide's SOF #4. Thereafter, Nationwide began to

engage in a systematic course of conduct designed to delay and deny benefits to Washington Street and to attempt to limit its own exposure for the loss by delaying resolution and payment of the claims until such time as Nationwide was positioned to attempt to quickly obtain reimbursement of its payments through subrogation.

In this regard, on September 3, 2019, six (6) weeks following the fire loss, Washington Street was provided a check in the amount of $376,342.95 for the estimated repairs of the premises. See Plaintiff's Response to Nationwide's SOF #10-11. It is undisputed that the estimate and payment of September 3, 2019 was partial and incomplete and did not include payment for electric, plumbing, HVAC, asbestos remediation, masonry or the engineering requirements to restore the property to the pre-loss condition. See Plaintiff's Response to Nationwide's SOF #10-11. Thereafter, however, despite the September 3, 2019 payment constituting only a partial payment of damages, Nationwide refused and/or failed to progress the claims any further, refusing and/or failing to gather any further estimates or items of investigation to complete payment of the claims. While refusing and/or failing to progress the claims of the plaintiff any further, Nationwide placing its own interests well ahead of those of its insured, began to seek repayment of its partial payment from the tortfeasor through subrogation. See Plaintiff's Response to Nationwide's SOF #6, 27, 33-40. During this time, the premises of Washington Street continued to be exposed to the weather and Washington Street was losing monthly rental income in the amount of approximately $4,350.00. See Plaintiff's Response to Nationwide's SOF #8.

As the defendant, Nationwide, had made clear its intention of delaying payment of the claims, Washington Street was forced to obtain its own estimates with respect to the outstanding items. By correspondences dated October 10, 2019 and October 15, 2019, Washington Street provided Nationwide with estimates for the HVAC, electrical repair, mold remediation, roof

repair, masonry, partial demolition work, services to prepare construction permit documents for the repair and reconstruction of the fire damaged building, and the removal of asbestos. See Plaintiff's Response to Nationwide's SOF #13-14. On November 14, 2019, four (4) months after the fire, with no explanation as to the delay, Nationwide advised, for the first time, that it was now engaging a building consultant, Craig McConnell of Reynolds Construction, to purportedly determine the cost of repairs. See Plaintiff's Response to Nationwide's SOF #15-17.

On January 21, 2020, more than six (6) months after the fire loss and two (2) months after engaging the building consultant, Nationwide forwarded an estimate relating to the repairs to the subject premises. See Plaintiff's Response to Nationwide's SOF #17. The untimely estimate received on January 21, 2020 determined the actual cash value to be $585,907.68, which continued to be insufficient and failed to consider the true extent of the damage sustained in the July 14, 2019 loss. See Plaintiff's Response to Nationwide's SOF #17-18. Thereafter, by correspondence dated March 12, 2020, Washington Street made written demand for an appraisal of the loss pursuant to the Policy. See Plaintiff's Response to Nationwide's SOF #18. On April 2, 2020, notwithstanding the requirement of the Policy that the selected appraiser be impartial, the defendant, Nationwide, appointed Craig McConnell of Reynolds Construction, the building consultant who had prepared the estimate of Nationwide, as the designated appraiser. See Plaintiff's Response to Nationwide's SOF #24.

Thereafter, despite having received Washington Street's estimates and demand for appraisal, Nationwide continued to attempt delay the investigation and payment of the claim, advising Washington Street that it purportedly required further clarification with respect to the appraisal demand. In this regard, Nationwide, advised as follows:

> In a letter dated April 1, 2020 from Nationwide Property & Casualty Insurance Company, we responded to an appraisal demand by Washington Street, LLC. We appointed Craig McConnell of Reynolds Construction as its designated appraiser. Before moving forward with the appraisal process, it is imperative that we understand where we disagree as to value of the repairs. We need to have (1) an agreed scope of the appraisal before the process, and (2) that no coverage questions are subjected to the appraisal. Therefore, this is a request that you provide an itemized list of matters you intend to submit to policy appraisal. Nationwide reserves the right, pursuant to the policy language set forth below, to refuse to appraise any item of damage for which there is no coverage under the policy, or that has not been identified prior to the appraisal process.
>
> "2. Appraisal
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim."
>
> Thank you for choosing us for your important insurance protection. If you have any questions or concerns, please contact me . . . .

See Exhibit "AA". Nationwide's letter clearly misstates the Policy when it advised Washington Street that before moving forward with the appraisal process, the parties need to agree on the scope of the appraisal process and that no coverage questions are subject to the appraisal. The Policy, which is quoted in the correspondence, contains no such requirements. *See* Exhibit "AA". The correspondence of Nationwide was a further attempt to delay the payment of benefits that were due and owed under the Policy. On May 20, 2020, a Selection of Umpire was executed, selecting Henry Rodriguez as Umpire. See Plaintiff's Response to Nationwide's SOF #26.

On June 3, 2020, without notice to its insured and despite the pendency of the claims, the ongoing appraisal proceedings and the likelihood of losses in excess of the limits of the applicable Policy, Nationwide, instituted a subrogation action against the tortfeasor, Jose Delvalle, seeking damages through subrogation of its payments to its insured, Washington Street as well as Washington Street's deductible. See Plaintiff's Response to Nationwide's SOF #27.

As the subrogation action continued, unbeknownst to the plaintiff or plaintiff's counsel, Nationwide received a firm proposal for mediation from counsel for Jose Delvalle on or about October 9, 2020 and was advised that the Mr. Delvalle had a policy limit of five hundred thousand dollars ($500,000.00). See Exhibit "B" at NPCIC0013.

On November 3, 2020, more than fifteen (15) months after the date of the fire, an appraisal award for a total of $976,896.48 was entered in this matter which finally recognized the scope and extent of the damages sustained in the July 14, 2019 fire loss. See Plaintiff's Response to Nationwide's SOF #28. The appraisal award of $976,896.48 resulted in an award in excess of the applicable policy limits. The total excess award was $37,196.48. See Plaintiff's Response to Nationwide's SOF #32.

On January 14, 2021, Nationwide advised Washington Street for the first time, that it had already filed a subrogation action. See Plaintiff's Response to Nationwide's SOF #27. During the time that Washington Street was unaware of the ongoing subrogation action, significant discovery was conducted to which Washington Street was unable to participate. Additionally, by including the deductible of the plaintiff in its claim for damages, Nationwide was not only representing its own interest, but those of its insured, the plaintiff, Washington Street. However, in its clear attempt to place its own interests ahead the interests of its insured, by filing and litigating the subrogation action while intentionally delaying resolution of the claims of the plaintiff for a year and a half,

Nationwide, at the expense of Washington Street was able to limit its own exposure until such time as it had the opportunity to position itself for a quick resolution of its subrogation action for reimbursement of payments.

Accordingly, Washington Street joined the subrogation action that was pending in the Court of Common Pleas of Franklin County so as to protect its interests and due to the fact that: (1) the subrogation action had been ongoing for nearly seven months; (2) there were additional claimants that Washington Street was not advised of; (3) Nationwide had already received a firm proposal for mediation; and (4) the inclusion of the deductible in the claim of Nationwide would have barred any further claim by Washington Street against the tortfeasor. See Plaintiff's Response to Nationwide's SOF #27. Thereafter, the subrogation action was resolved with Washington Street receiving $15,000.00 out of the $500,000.00 third party liability policy. See Plaintiff's Response to Nationwide's SOF #38. Nationwide received $420,000.00 of the $500,000.00 liability policy. See Plaintiff's Response to Nationwide's SOF #39. Following receipt of the $15,000.00 from the third party liability policy, Washington Street still had uncompensated losses in the amount of $22,196.48.

IV. STANDARD APPLIED TO SUMMARY JUDGMENT MOTIONS

Granting summary judgment is an extraordinary remedy. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In reaching this decision, the court must determine "whether the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and whether the moving party is therefore entitled to judgment as a matter of law." Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 271 (3d Cir. 2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

A disputed issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could find for the non-moving party. Kaucher v. Cty. Of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A factual dispute is "material" if it might affect the outcome of the suit under governing law. Doe v. Luzerne Cty., 660 F.3d 169, 175 (3d Cir. 2011) (citing Gray v. York Papers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992)). The Court's task is not to resolve disputed issues of fact, but to determine whether there exists any factual issues to be tried. Anderson, 477 U.S. at 247–49.

In deciding a motion for summary judgment, the Court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. Macfarlan, 675 F.3d at 271; Bouriez v. Carnegie Mellon Univ., 585 F.3d 765, 770 (3d Cir. 2009). Whenever a factual issue arises which cannot be resolved without a credibility determination, at this stage the Court must credit the non-moving party's evidence over that presented by the moving party. Anderson, 477 U.S. at 255. Only if there is no factual issue and if only one reasonable conclusion could arise from the record regarding the potential outcome under the governing law, should summary judgment be awarded in favor of the moving party. Id. At 250.

V. Bad Faith

(a) Overview

In this case, Nationwide seeks dismissal of the claims of plaintiff, Washington Street, LLC. In this regard, Nationwide contends that a jury could not conceivably find that it had acted in bad faith. In so arguing, Nationwide: (1) ignores and misrepresents the significant evidence regarding its failure to fully, fairly, promptly and properly handle, investigate, adjust and pay the claims the plaintiff, Washington Street; (2) ignores the different standards to be applied to common law and statutory bad faith actions; and (3) seeks to have the Court usurp the function of the jury by

resolving all factual questions. These actions of Nationwide are improper. Therefore, it is respectfully requested that the Motion for Summary Judgment of Nationwide be denied. An understanding of common law and statutory bad faith concepts is helpful in analyzing the fallacy of Nationwide's position.

(b) Statutory Bad Faith

"The Pennsylvania Supreme Court has long held that an insurer must act with the 'utmost good faith' toward its insured." Romano v. Nationwide Mutual Fire Insurance Company, 432 Pa. Super. 545, 550, (1994) (citing Fedas v. Ins. Co. of Pa., 151 A. 285, 286 (1930)). In 1990, the Pennsylvania Legislature enacted the Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. § 8371.[1] Until recently, there was no definitive pronouncement in Pennsylvania as to the standard to be applied in assessing statutory bad faith claims. That question has now been answered by the Supreme Court in Rancosky v. Washington National, 170 A.3d 364 (Pa. 2017). In that case the Court set forth the standard to be applied in assessing the statutory bad faith claim:

> In summary, we hold that, to prevail in a bad faith insurance claim pursuant to Section 8371, a plaintiff must demonstrate, by clear and convincing evidence, (1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim. We further hold that proof of the insurer's subjective motive of self-interest or ill-will, while perhaps probative of the second prong of the above test, is not a necessary prerequisite to succeeding in a bad faith claim. Rather, proof of

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[1] This statute provides:

> In an action arising under an insurer policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorneys fees against the insurer.

42 Pa.C.S.A. § 8371.

> the insurer's knowledge or reckless disregard for its lack of reasonable basis in denying the claim is sufficient for demonstrating bad faith under the second prong.

Rancosky, 170 A.3d at 377. Justice Wecht states in his concurring opinion as follows:

> Many species of bad faith may flourish notwithstanding the absence of either "self-interest or "ill will. Shoddy claims-handling, lack of diligence, non-responsiveness, haphazard investigation, unreasonable denials, and the like, all may come within the statutory definition of bad faith while nonetheless falling short of the "self-interest"/ "ill will" threshold.

Id. at pg. 379. It is clear that bad faith is not limited to a denial of the claim.

The same standard applied in Rancosky is to be applied to the actions of Nationwide in assessing the statutory bad faith claim. That determination is to be performed by the finder of fact. Moreover, bad faith is not restricted to a denial. If, in fact, the bad faith claims are to be ruled upon at this stage of the proceedings, then Judgment should be entered in favor of Washington Street, LLC, not Nationwide.

(c) Common Law Bad Faith

In Pennsylvania, causes of action for both common law and statutory bad faith exist. In The Birth Center v. The St. Paul Companies, Inc., 787 A.2d 376 (Pa. 2001) the Pennsylvania Supreme Court expressly recognized the existence of a common law bad faith claim. In so holding, the Court stated:

> In St. Paul's third argument, it incorrectly asserts that compensatory damages may not be awarded when an insurer's bad faith conduct causes the insured to incur actual damages, because the damages are not mentioned in *42 Pa. C.S.A. § 8371*. While The Birth Center may not recover compensatory damages based on *Section 8371*, **that Section does not alter The Birth Center's common law contract rights.**

Id. at 386 (Emphasis added). Further, the Court went on to note:

> The [Bad Faith] statute does not prohibit the award of compensatory damages. It merely provides an additional remedy and authorizes the award

> of additional damages. Specifically, the statute authorizes courts, which find that an insurer has acted in bad faith toward its insured, to award punitive damages, attorneys' fees, interest and costs. Id. The statute does not reference the common law, does not explicitly reject it, and the application of the statute is not inconsistent with the common law. **Consequently, the common law remedy survives.**

Id. at 386 (footnote omitted). The Supreme Court then concluded:

> Therefore, contrary to St. Paul's contention, *Section 8371* does not prohibit courts from awarding compensatory damages that are otherwise available. In *Section 8371*, the legislature granted the court additional authority to award punitive damages, interest, costs and attorneys' fees. The fact that the statute authorized courts to award these damages does not prohibit them from granting other remedies that they theretofore had the power to award without the grant of additional authority.

Id. at 387-388 (footnote omitted).

The standard to be applied to claims for Common Law bad faith is negligence, a burden of proof which is markedly different than that required in recovering statutory bad faith damages. In DeWalt v. Ohio Casualty, supra, the Court stated:

> The United States Court of Appeals for the Third Circuit has also described the bad faith standard under Cowden as negligence: 'Pennsylvania law makes clear that an insurer may be liable [for bad faith] . . . if it unreasonably refuses an offer of settlement.' Haugh, 322 F.3d at 237 (internal quotations and citations omitted); see also Schubert, 2003 WL 21466915 at *4 (denying summary judgment on a bad faith contract claim where the evidence permitted a jury to find that the insurance company had acted unreasonably in declining a settlement offer); Clark v. Interstate National Corp., 486 F. Supp. 145, 146-49 (E.D. Pa. 1980) (finding no error in a jury charge permitting the imposition of bad faith liability if the jury found negligence), aff'd without op., 636 F.2d 1207 (3d Cir. 1980). Given the Haugh decision, the Court concludes that the controlling interpretation of Cowden in this circuit ***is that contract claim for bad faith requires evidence that an insurer acted negligently or unreasonably in handling the potential settlement of claims against its insured.***

DeWalt, 513 F. Supp. 2d at 296-297 (emphasis added). Further, in Leproace v. New York Life, 2014 WL 3887726 (E.D. Pa. 2014), Judge Baylson cogently stated:

> The implied covenant of good faith requires an honesty in fact in the conduct or transaction concerned. Bad faith is the opposite of good faith. Bad faith can include evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other parties performance. The plaintiff must show by clear and convincing evidence that defendants breached the covenant of good faith through conduct that was unreasonable or negligent. An insurer's actions is unreasonable or negligent when it is not based on a thorough, honest and objective consideration of all relevant factors.

Id. at *1.

The contention of Nationwide that a common law bad faith claim is inapplicable to claims arising from first party insurance claims is without merit. As noted above, the Pennsylvania Supreme Court has explicitly recognized the validity of a common law bad faith claim. See Birth Center, supra. The language of the Birth Center decision does not distinguish between first and third party insurance claims. Moreover, the Pennsylvania Superior Court has held that the duty of good faith and fair dealing applies ***equally*** in first party insurance claims and third party insurance claims. Condio v. Erie Insurance Co., 899 A.2d 1136 (Pa. Super. 2006), appeal den'd, 912 A.2d 838 (Pa. 2006). In Condio, the Superior Court in addressing the duty of good faith and fair dealing in uninsured and underinsured motorist claims held:

> Pennsylvania law holds insurers to a duty of good faith and fair dealing toward their insureds O'Donnell, 734 A.2d at 905; Bonenberger 791 A.2d 381, ***without distinguishing between first party and third party settings***. As described above, U-claims contain elements of both first party and third party claims. We see no reason, therefore, to impose a different duty on an insurance company in a U-claim setting. While the legal relationship of the parties may change in the context of a U-claim, *i.e.*, become adversarial, the insurer's duty does not change. We hold that, when faced with a U-claim, an insurance company's duty to its insured is one of good faith and fair dealing.

Id 1144-1145 (Emphasis Added). Pennsylvania federal courts have also applied this reasoning. In Smith v. Lincoln Benefit Life Co., 2009 U.S. Dist LEXIS 24941, 2009 WL 789900, Civil Action No.: 08-01324 (W.D. Pa. 2009)(Fischer, J) the court held:

> In Pennsylvania, a duty of good faith and fair dealing is implied in an insurance contract. Condio v. Erie Ins. Exch., 2006 PA Super 92, 899 A.2d 1136, 1144 (Pa. Super. 2006) (citing O'Donnell, 734 A.2d at 905). See also Dercoli v. Pennsylvania Nat. Mut. Ins. Co., 520 Pa. 471, 554 A.2d 906, 909 (Pa. 1989) (quoting Fedas v. Ins. Co. of the State of Pa., 300 Pa. 555, 151 A. 285 (Pa. 1930)). ***As such, under Pennsylvania law, a plaintiff may bring a cause of action for breach of the contractual duty of good faith and fair dealing in the insurance context, permitting an insured to recover compensatory damages for an insurer's failure to act in good faith***. Benevento v. Life USA Holdings, Inc., 61 F.Supp. 2d 407, 425 (E.D. Pa. 1999) (citations omitted); Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8, 11 (Pa. 1966) (holding that a common law breach of contract action will lie for the insurer's failure to comply with its obligation to act in good faith and with due care in representing the interests of the insured in its failure to settle with a third party); Johnson v. Beane, 541 Pa. 449, 664 A.2d 96, 101 (Cappy, J. concurring)(citing Cowden v. Aetna Casualty and Surety Company, 389 Pa. 459, 134 A.2d 223 (1957)). See also Birth Center v. St. Paul Cos., 567 Pa. 386, 787 A.2d 376, 385-86 (Pa. 2001) (holding that, in the context a third party case in which the insurer refused to settle a claim on behalf of the insured, "nothing in *D'Ambrosio* bars a party bringing a bad faith action sounding in contract from recovering damages that are otherwise available to parties in contract actions … .")

Id at * 10 (Emphasis Added). Accordingly, a plaintiff may assert a common law bad faith claim, as well as a statutory bad faith claim, in connection with the handling of first party insurance claims.

(d) Bad Faith of Nationwide

(i) Nationwide's Haphazard Investigation and Shoddy Claim's Handling

From the outset, Nationwide engaged in a systematic course of conduct designed to delay and deny benefits to Washington Street and continuously placed its own interest ahead of Washington Street's. Washington Street reported the loss on July 14, 2019. From July 14, 2019

through August 13, 2019, Nationwide had no contact with Washington Street. See Plaintiff's Response to Nationwide's SOF #7. Rather, during this time frame, Nationwide, solely concerned with protecting its own interest, referred this matter to its subrogation department. See Plaintiff's Response to Nationwide's SOF #6.

Following its initial delay, Nationwide failed and/or refused to perform an adequate investigation into the extent of the damages because doing so would go against its own self-interest. The initial estimate for repairs for the building in the amount of $376,342.95 completed by John D. Matthews, Claims Specialist Nationwide was incomplete, without reasonable basis and was well below the actual costs for repairs to the building. See Exhibit "F". In this regard, it is undisputed that the estimate failed to consider damage to the electric, plumbing, HVAC, asbestos remediation, masonry or the engineering requirements to restore the property to the pre-loss condition. Id.

Thereafter, despite Nationwide acknowledging that the estimate was not complete and the initial payment was a partial payment, Nationwide refused and/or failed to progress the claims of Washington Street. Nationwide failed and refused to attempt to gather the necessary information to complete the claims investigation and estimates, completely disregarding Nationwide's duty to serve its insured. Such shoddy claims handling, lack of diligence, haphazard investigation, and subordinating of Washington Street's interest constitutes bad faith on the part of Nationwide. See Rancosky, 170 A.3d at 379 (Concurring Opinion, Wecht, J.). In fact, in its Motion, Nationwide appears to argue, without any basis in law or in fact, that it is the responsibility of Washington Street to proves the investigation and adjustment of its claims. See Paragraph #23 of Nationwide's Motion for Summary Judgment.

Despite Nationwide's lack of diligence and failure to progress the claim, counsel for Washington Street provided Nationwide with estimates for the HVAC, electrical repair, mold remediation, roof repair, masonry, partial demolition work, permit costs, and asbestos removal. See Plaintiff's Response to Nationwide's SOF #13-14. These estimates were provided in mid-October of 2019. Id. Thereafter, Nationwide continued to delay its investigation of the claims, despite multiple follow-ups from counsel for the plaintiff and Nationwide insurance agent, Gary Shetter. See Plaintiff's Response to Nationwide's SOF #13-14. On November 14, 2019, nearly one month since the estimates were submitted and more than four months since the fire loss, Nationwide advised, for the first time, that it was now engaging a building consultant to purportedly determine the cost of repairs. See Plaintiff's Response to Nationwide's SOF #15. No explanation was provided as to why Nationwide had refused and/or failed to retain such building consultant in the four (4) months since the loss. Id. The hiring of the building consultant was merely a further delay tactic employed by Nationwide. During this time, the property of Washington Street continued to deteriorate and Washington Street continued to suffer the loss of monthly income.

Notwithstanding, Nationwide continued its haphazard investigation and shoddy claims handling throughout December 2019 and January 2020. Counsel for Washington Street continued to follow-up with Nationwide regarding the building consultant, Craig McConnell's, inspection of the premises and estimate. Each time, Nationwide simply passed the buck, placing blame with Mr. McConnell, its own agent, for not getting back to them. See Plaintiff's Response to Nationwide's SOF #17. It wasn't until January 21, 2020, more than six (6) months following the fire loss that Nationwide provided Washington Street with the estimate relating to the repairs to the subject premises. Id. However, the January 21, 2020 estimate was wholly insufficient and

failed to take into consideration numerous items of damage, leaving Washington Street with no alternative but to request an appraisal. See Plaintiff's Response to Nationwide's SOF #18.

It is indisputable, when viewed in the light most favorable to Washington Street, that clear and convincing evidence exists to establish that Nationwide engaged in bad faith in the handling of the plaintiff's claim. To even characterize their investigation and handling of the claim as "haphazard" or "shoddy" would be an understatement. Nationwide's contention that, "the only evidence in support of this claim is that as the investigation of loss continued, the value of the claim increased," completely disregards the totality of the circumstances and fails to consider the complete timeline of events following the loss date. Nationwide delayed its investigation without explanation to Washington Street. Nationwide, despite knowing that its initial estimate and payment was incomplete, failed to take any further action to attempt to complete its investigation and estimate. Nationwide ignored correspondence and phone calls from the plaintiff and plaintiff's counsel seeking status updates. Nationwide placed its own interest ahead of the plaintiff's when Nationwide referred the matter to subrogation. Nationwide waited three months (3) before it hired a building a consultant to assist with the claim, without explanation as to why it waited that long. Nationwide did not provide the estimate prepared by the building inspector to Washington Street until five (5) months after the fire. The conduct of Nationwide, when viewed in its entirety, establishes clear and convincing evidence that Nationwide disregarded the rights and interests of its insured, Washington Street, in the handling of the claim.

(ii) Nationwide's Lack of Due Diligence, Improper Conduct and Misstatements Regarding the Appraisal Process

Additionally, Nationwide misrepresented provisions of the Policy with respect to the appraisal process. In this regard, the Policy of insurance states in pertinent part, as follows:

"2. Appraisal

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim."

See Exhibit "A" at pg. 10. Despite the Policy clearly and unambiguously stating what the parties need to do with regard to the appraisal, Nationwide advised Washington Street as follows:

> .....
> Before moving forward with the appraisal process, it is imperative that we understand where we disagree as to value of the repairs. We need to have (1) an agreed scope of the appraisal before the process, and (2) that no coverage questions are subjected to the appraisal. Therefore, this is a request that you provide an itemized list of matters you intend to submit to policy appraisal.
> .....

Id. It is clear that the Policy contains no such requirements before the appraisal process can begin. Nationwide's actions were imbued with bad faith. Nationwide knowingly misrepresented the Policy and intentionally delayed the resolution of Washington Street's claims. Such a misrepresentation is a violation of the Unfair Insurance Practices Act and is evidence of bad faith. See Gallatin Fuels, Inc. v. West Chester Fire Ins. Co., 244 F. App'x 424, 425 n.5 (3d Cir. 2007) (citing Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228, 1233 (Pa. Super 1994)) (see also Unfair Insurance Practices Act Section 5(10)(i)).

Moreover, in an attempt to continue the policy and practice of delaying payment of the claims and so as to attempt to justify and/or apply excuse or reason to its unreasonable delay in the handling of the claims, Chuck Fitzgerald, one of the three claims associates involved in the

haphazard handling and investigation of the claim, attempted to lay responsibility for the delay on counsel for the plaintiff, Washington Street. See Plaintiff's Response to Nationwide's SOF #25. Moreover, despite being represented by counsel, **Nationwide wrote directly to Washington Street** attempting to lay blame for the delay in the handling of the insured's claim with counsel for Washington Street. Id. Such a practice is clearly improper, unethical and a violation of Nationwide's own policies and procedures. Id.

When viewed in the light most favorable to Washington Street, it is beyond a doubt that there is clear and convincing evidence that Nationwide continued to engage in bad faith after appraisal was requested. Nationwide's Motion for Summary Judgment merely glosses over the appraisal process and fails to discuss or even mention Nationwide's misstatement of the Policy; Nationwide's continued delay in processing the claim; and, Nationwide's improper letter directly to the plaintiff attempting to lay blame for the delay on plaintiff's counsel.

(iii) Nationwide Placed its Own Interests Ahead of Washington Street in its Handling of the Subrogation Action

From the outset of the claim, Nationwide placed its own interests ahead of the plaintiff's, as clearly evidenced by the fact that before the property had even been inspected, the matter was referred to Nationwide's subrogation department. Moreover, Nationwide clearly placed its owned interests of its insured, when instead of conducting/completing the investigation of the claims of its Washington Street, Nationwide began its investigation of its own subrogation action. See Plaintiff's Response to Nationwide's SOF #6. During this time, the premises of Washington Street continued to be exposed to the weather and Washington Street was losing monthly rental income in the amount of approximately $4,350.00. See Plaintiff's Response to Nationwide's SOF #8.

Nationwide's continued conduct of placing its own interests ahead of Washington Street was no more evident than when it instituted its subrogation action, including a claim for the

deductible, against the tortfeasor, Jose Delvalle, without notice and before fully compensating plaintiff for its losses arising out of the July 14, 2019 fire. Nationwide completely disregard Washington Street's request that Nationwide refrain from taking action that would prejudice the plaintiff's ability to recover against the tortfeasor. Rather than comply with Washington Street's request, Nationwide went forward with its subrogation action without providing any updates to Washington Street. It was not until January 14, 2021, more than seven months since the subrogation action was initiated, and following significant discovery, that Washington Street became aware that: a subrogation action was filed; there were additional claimants; and, the tortfeasor had a policy limit of $500,000.00. See Plaintiff's Response to Nationwide's SOF #35-37. Moreover, on or about October 9, 2020, Nationwide received a firm proposal for mediation from counsel for the tortfeasor. See Exhibit "B" at NPCIC0013. This proposal was never communicated to the plaintiff or plaintiff's counsel. Further, Washington Street had to intervene due to the fact that Nationwide included a claim for Washington Street's deductible in its subrogation. See State Farm v. Ware's Van Storage, 953 A.2d 568 (Pa. Super 2008). By including a claim for the deductible, Nationwide essentially precluded Washington Street from asserting a separate cause of action against the tortfeasor. Id. at pg. 574-75. Left with no alternative, Washington Street was forced to file a petition to intervene.

While Washington Street did accept a pro-rata settlement of its underinsured claim against the tortfeasor, the fact remains that Nationwide should have never initiated the subrogation action until the plaintiff was made whole. Nationwide acted in bad faith and in violation of the Made Whole Doctrine when it initiated a subrogation action against the tortfeasor despite knowing there were items of damages that had not been addressed with Washington Street and Washington Street had not been fully compensated for its losses arising from the July 14, 2019 fire.

Further, the institution of the subrogation action by Nationwide is in and of itself, bad faith. In this regard, it is well established that Pennsylvania recognizes the Made Whole Doctrine, which is a common law doctrine providing that an insurer is not entitled to recover from the at-fault party unless and until the insured has been fully compensated or "made whole." Gallop v. Rose, 616 A.2d 1027, 1031 (Pa. Super. 1992); Nationwide Mut. Ins. Co. v. DiTomo, 478 A.2d 1381, 1383 (Pa. Super. 1984). **This "requires that an insured recover the full amount of its losses before an insurer may pursue recovery under its subrogation rights."** Professional Flooring Co. v. Bushar Corp., 152 A.3d 292, 302 (Pa. Super. 2016) (citing Heller v. Pa. League of Cities & Municipalities, 32 A.3d 1213, 1219, n.12 (2012)); Harnick v. State Farm Mut. Ins. Co., 2009 U.S. Dist. WL 579378 (E.D. Pa. 2009). This doctrine is equitable in nature and is intended to "ensure[] that the insured is fully compensated for his or her injury before the insurer recovers . . . and prevent[] the insured from receiving dual recovery for the same loss from both the tortfeasor and the insurer." Jones v. Nationwide Prop. & Cas. Ins. Co., 32 A.3d, 1261 at 1271 (2011) (citing 16 Couch on Insurance § 223:134 (3d ed.)).

In holding that an insurance carrier could not maintain a subrogation action against the tortfeasor where the plaintiff has not yet been made whole, Pennsylvania courts have explained:

> It has been held in this and other jurisdictions that the right of subrogation cannot be enforced until the whole debt is paid, and until the creditor be wholly satisfied, there ought to and can be no interference with the creditor's rights which might prejudice him in the collection of him claim. ***Stated in other words, no right of subrogation arises until the injured party receives full satisfaction and redress for the injuries he has sustained.***

Nationwide Mut. Ins. Co. v. DiTomo, 31 Pa. D. & C.3d 135, 138-39 (Pa. Com. Pl. 1982), aff'd, 478 A.2d 1381 (Pa. Super. 1984) (emphasis added). Thus, under Pennsylvania law, "[i]t is well-established that subrogation is derivative in nature, placing the subrogee 'in the precise position of

the one to whose rights and disabilities he is subrogated.'" Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc., 916 A.2d 686, 694 (Pa. Super. 2007) (quoting Allstate Ins. Co. v. Clarke, 527 A.2d 1021, 1024 (1987)). Indeed, it has been stated that there exists "no equitable right to subrogation until [the insured's] total damages [are] ascertained and recouped." Gallop v. Rose, 616 A.2d 1027, 1031 (Pa. Super. 1992); DiTomo, supra.

To this day, Washington Street has not been made whole by Nationwide, despite the fact that Nationwide recovered $420,000 from the tortfeasor. Under the Made Whole Doctrine, Nationwide had a duty to fully compensate Washington Street for the losses sustained in the July 14, 2019 fire *prior* to seeking subrogation. Rather than satisfy that duty, Nationwide placed its interests ahead of Washington Street's interests when it initiated the subrogation action before fully compensating Washington Street. Such a disregard for the Made Whole Doctrine by Nationwide is clear and convincing evidence that Nationwide engaged in bad faith.

Moreover, Nationwide's violation of the Made Whole Doctrine is also a violation of the Policy. The Made Whole Doctrine is part of the Policy because "the laws that are in force at the time the parties enter into a contract are merged with the other obligations that are specifically set forth in the agreement." Liss & Marion, PC v. Recordex Acquisition Corp., 937 A.2d 503 (Pa. Super. 2007) (quoting Empire Sanitary Landfill, Inc. v. Commonwealth Department of Environmental Resources, 554 Pa. 315,340 (1996)). It is indisputable that at the time the Policy was entered into, the Made Whole Doctrine was in effect. Further, "the general principle that an insurer's right to subrogation does not arise prior to **full** compensation of the insured is not affected absent clear language to the contrary." Watson v. Allstate Ins. Co., 28 F.Supp. 2d at 946. The Policy contains no such language. Therefore, Nationwide's filing of its subrogation action, despite the pendency of the claims of its insured, the ongoing appraisal proceedings and the likelihood of

losses in excess of the limits of the Policy, was in violation of the Policy. In fact, Sara Wells, corporate designee for Nationwide, testified that despite being aware of the Made Whole Doctrine, Nationwide has no policies or procedures in place to ensure compliance with Pennsylvania law. See a true and correct copy of Ms. Wells deposition transcript attached hereto as Exhibit "LL" at pgs. 49:6-7; 51:5-13; 51:19-21; 52:11-16.

Nationwide's entire argument regarding the Made Whole Doctrine is an attempt to distract the Court from its straight forward definition/application. Nationwide claims that the Made Whole Doctrine "exists where there has been a verdict obtained by the insured by the responsible party which quantifies the loss and an insurance carrier attempts to subrogate against that award." However, Nationwide provides no support for such a definition. Interestingly, Nationwide neglects to include the definition of the Made Whole Doctrine which has been relied on by this this Court, the Pennsylvania Superior Court, and the Pennsylvania Supreme Court. A simple reading of the definition and review of the facts readily confirms that Nationwide violated the Made Whole Doctrine when it initiated its subrogation on June 3, 2020, even though Washington Street had yet to be fully compensated for its losses. Nationwide's complete disregard for the Made Whole Doctrine is clear and convincing evidence that Nationwide committed bad faith.

The fact that Washington Street failed to object to the pro-rata distribution and agreed to the settlement is irrelevant. Washington Street had been excluded by Nationwide from the discovery process, investigation and handling of the action against the tortfeasor and was not informed of the proceedings when formal mediation was proposed. How the claims would have been handled differently is entirely speculative. Washington Street was essentially left with no choice other than to proceed with mediation and then institute the present action.

Moreover, although the plaintiff's Amended Complaint does not explicitly us the words "Made Whole Doctrine," the Amended Complaint clearly states at paragraphs 149(w) and 172(w):

> The bad faith conduct of the defendant, Nationwide, consisted of but was not limited to: instituting a subrogation action despite the pendency of a claim, ongoing appraisal proceedings and the likelihood of losses in excess of the limits of the applicable insurance policy.

See Plaintiff's Amended Complaint, ECF #7. Pennsylvania is a fact-based pleading state. Plaintiffs need only plead the material facts the cause of action is based on. The allegations in the Amended Complaint clearly establish that Washington Street intended on pursuing a claim for bad faith related to Nationwide's handling of the subrogation claim. Nonetheless, as Nationwide has consistently done throughout this claim, it attempts to lay blame on its insured for its own failure to act in good faith.

(iv) Nationwide's Delayed and Lackadaisical Handling of the Plaintiff's Policy Reformation

Nationwide's claim that there is no bad faith related to Nationwide's reformation of Washington Street's Policy completely ignores the fact that it took Nationwide nearly eleven (11) months to confirm the Policy reformation, despite Nationwide having all of the information needed. On or about December 17, 2019, Nationwide insurance agent, Gary Shetter, advised Nationwide of the error, failing to include business income loss coverage, and requested the Policy be reformed to include $60,000.00 in coverage for business income with rental value. Approximately three months later, on or about March 12, 2020, the Agency Support department within Nationwide determined that there was an agent error and recommended that business income coverage for the rental value be added to the property. See Exhibit "B" at pgs. NPICI0024-NPCIC0025. Despite this finding, Nationwide failed to provide Washington Street with an update.

On April 22, 2020, Mr. Shetter wrote to Nationwide inquiring as to the status of the business income claim. Mr. Shetter was advised that same day that the underwriting department

was still reviewing the claim to see if they agreed with Agency Support's findings. On August 14, 2020, having received no update, Mr. Shetter again wrote to Agency Support inquiring as to the status of the business income claim. See Plaintiff's Response to Nationwide's SOF #21.

On September 8, 2020, having received no update from Nationwide regarding reformation of the Policy to include business income coverage, Washington Street requested advices as to the status of the income loss claim. Id. On September 9, 2020, despite nearly six (6) months having passed since Nationwide determined that the Policy should be reformed to include business income loss coverage, Nationwide finally began investigation of the claim, requesting the lease agreements pertaining to the Subject Property. Id. By response that same date, Washington Street provided copies of the lease agreements. Id.

On October 7, 2020, counsel for Washington Street wrote to Nationwide, requesting advices as to the status of the income loss claim. Id. On or about November 25, 2020, more than eleven (11) months after Mr. Shetter requested that the Policy be reformed to include business income coverage, Nationwide finally approved the request. See Exhibit "B" at pg. NPCIC0009. Thereafter, despite reformation of the Policy, payment was not issued until December 11, 2020. See Exhibit "B" at pg. NPCIC0007.

This timeline, along with Nationwide's failure to update Washington Street regarding the Policy reformation, establishes clear and convincing evidence that Nationwide's handling of the Policy reformation to include business income coverage constitutes bad faith.

(v) Plaintiff's Consequential Damages

As a result of Nationwide's bad faith, Washington Street incurred significant consequential losses, including: uninsured losses; further damage to the building due to unreasonable delays in

adjusting and paying the loss; threat of fines and legal action from Franklin County; and, an inability to continue to pay the mortgage on the property.

Nationwide's argument blatantly ignores the fact that to this day, Washington Street still has uncompensated losses. Nationwide's filing of its subrogation action, with complete disregard to the plaintiff and the Made Whole Doctrine, resulted in the plaintiff not being fully compensated for the full value of the loss. The plaintiff should have been fully compensated for its losses prior to Nationwide seeking to recover its own losses. Rather, Nationwide disregarded this duty along with its duty to serve its insured, resulting in Nationwide and the plaintiff competing over the funds made available by tortfeasor's insurance carrier. As a result, Nationwide received $420,000.00 and the plaintiff received $15,000.00 Leaving the plaintiff with $22,196.48 in uncompensated losses.

In addition to the uncompensated loss, as a result of Nationwide's bad faith, the building remained exposed to the weather, resulting in increased mold. The plaintiff repeatedly spoke with Nationwide regarding the property's exposure to the elements, and her concerns were downplayed and not given the proper consideration. A true and correct copy of Ruth Jones deposition transcript is attached hereto as "KK" at pg. 56:9-59:17. Ultimately, the mold that formed due to Nationwide's failure to protect the property from the weather, impacted Ms. Jones' decision to sell the property at a loss due to its damaged state, versus, incurring the significant cost of repairing and remediating the property, which far exceeded the policy limits. Id. at pg. 86:6-87:8. Ms. Jones chose the former, resulting in a significant loss, not only on the sale of the property, but from her ability to generate income from the property. Any suggestion that Ms. Jones enjoyed a "windfall" due to her having to sell a property that was in a state of disrepair, due to Nationwide's complete disregard for its duty to its insured, is flat out wrong.

Moreover, as a result of Nationwide's unreasonable delay in adjusting and paying the loss, no rental income was being earned from the property for nearly seventeen months, severely impacting Ms. Jones' financial security during that time. See Exhibit "KK" at pg. 98:2-14. Throughout the lifespan of the claim, Ms. Jones was still having to pay the utilities for the property, despite the fact that the property wasn't generating any income. This resulted in late payments. See Exhibit "KK" at pg. 120 11:17.

Clearly, these are factual issues that Nationwide's Motion for Summary Judgment failed to consider. Therefore, Nationwide's request that summary judgment be entered regarding consequential damages should be denied.

(vi) Nationwide is Not Entitled to Partial Summary Judgment on Plaintiff's Claim for Attorney's Fees

Nationwide's contention that it is entitled to partial summary judgment with regard Plaintiff's alleged failure to comply with the Court's November 19, 2021 Order is meritless. First, by way of correspondence dated December 21, 2021, counsel for Washington Street provided counsel for Nationwide with a written statement of the attorneys' fees and costs incurred up to December 21, 2021, totaling $21,412.69. See Exhibit "II".

Second, shortly thereafter, the handling of the matter was assigned to Vazken A. Zerounian, Esq. Mr. Zerounian was instructed to track his time and provide counsel for Nationwide with a written statement of the attorneys' fees and costs, in accordance with the November 19, 2021 Order. Unfortunately, Mr. Zerounian failed to comply. Moreover, Mr. Zerounian unexpectedly left Haggerty, Goldberg, Schleifer & Kupersmith, P.C. due to a sudden medical emergency in March of 2022.

Third, counsel for the plaintiff, Washington Street, LLC has provided counsel for Nationwide with their attorney's fees and costs to date. See Exhibit "JJ".

Nationwide's contention that they are entitled to summary judgment due to an administrative error is misplaced. Nationwide ignores the fact that totals of $21,412.69 were provided, and counsel for Nationwide failed to ever confer on the issue. Nationwide cites no authority that would support such a conclusion. Further, Nationwide failed to articulate how this administrative error in anyway has resulted in prejudice to Nationwide.

VI. CONCLUSION

In the present matter, Nationwide is seeking summary judgment without any basis in law or in fact. Washington Street has presented clear and convincing evidence that Nationwide engaged in wanton, willful and intentionally deceptive conduct in perpetrating a scheme to delay, limit and deny benefits to the plaintiff, Washington Street, LLC. Therefore, it is respectfully requested that the Motion of Nationwide be denied.

Respectfully,

HAGGERTY, GOLDBERG, SCHLEIFER & KUPERSMITH, P.C.

BY: /s/ Dennis Coyne

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