JENNIFER BURDEN and CRAIG BURDEN, her husband, *per quod*, Plaintiffs/Appellants, vs. MICHAEL G. HARRINGTON; JOHN DOE (fictitious name), NANCY E. MARTIN; MARY MOE, (fictitious name), JESSICA M. GONZALEZ; JANE DOE (fictitious name); MANUEL GONZALEZ; RICHARD ROE (fictitious name); FARMERS INSURANCE COMPANY; and MID-CENTURY INSURANCE COMPANY, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-440-24 **Civil Action** ON APPEAL FROM: Law Division Order, dated September 27, 2024, denying reconsideration of the August 2, 2024 Order denying leave to file an Amended Complaint or for leave to file a new Complaint DOCKET NO. BELOW: ESX-L-8074-19 SAT BELOW: Hon. Robert H. Gardner, J.S.C.

PLAINTIFFS/APPELLANTS' BRIEF TO REVERSE DENIAL OF THE SEPTEMBER 27, 2024 ORDER TO RECONSIDER THE COURT'S ORDER DATED AUGUST 2, 2024 FOR LEAVE TO AMEND THE COMPLAINT TO INCLUDE A COUNT FOR VIOLATION OF THE NEW JERSEY INSURANCE FAIR CONDUCT ACT ("IFCA") STATUTE, OR IN THE ALTERNATIVE, TO PERMIT A NEW COMPLAINT TO BE FILED UNDER IFCA

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PRELIMINARY STATEMENT

Plaintiffs seek reversal of the denial of their Notice of Motion seeking leave to file an Amended Complaint to file a claim under the Insurance Fair Conduct Act, N.J.S.A. 17:29BB-1, *et seq*. (hereinafter "IFCA"), or to initiate a new action pursuant to said statute. At the outset, motions to amend are liberally granted. Here, the Trial Court summarily dismissed Plaintiffs' claims with prejudice, not even permitting discovery to be conducted to establish defendant's unreasonable denials and delays throughout the course of litigation and trial.

The Trial Court misconstrued filed Offers of Judgment and defendant's suggestion of a "High-Low" agreement for trial as dispositive evidence of the value of the case and defendant's good faith actions relating to same. The Trial Court further misapplied the accrual date of Plaintiffs' IFCA claim, summarily deciding the cause of action prior to anything even being filed.

Plaintiffs have a right to seek damages under IFCA. Plaintiffs' case is exactly what the applicable statutes and rules were designed for. Respectfully, dismissal with prejudice, without the Complaint being filed or discovery being conducted, and without a trial before the Court or a jury, was reversible error.

STATEMENT OF FACTS

On November 19, 2017, Plaintiff, Jennifer Burden, was a passenger in her sister's motor vehicle, which was violently struck by a car operated by defendant Michael Harrington. Pa1[1]. The claim against defendant Harrington was settled, exhausting his auto insurance liability policy limits, and an Underinsured Motorists ("UIM") claim proceeded to trial against defendant Mid-Century Insurance Company ("MCIC"). See generally ibid. Plaintiffs' Amended Complaint to incorporate the UIM carrier was filed on March 15, 2021, and a Second Amended Complaint was filed on March 24, 2021 upon realizing a clerical error pertaining to the case caption. Ibid. The claims asserted were for Plaintiff's injuries and her husband, Craig's, per quod damages. Ibid. On May 4, 2021, an Order was entered, staying common law bad faith claims against defendant MCIC pending a trial on the merits. Pa9.

Plaintiff's injuries sustained as a result of the underlying crash included, but were not limited to: L3/4, L4/5, L5/S1, C5/6 and C6/7 disc herniations, foot

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[1] Pa – Plaintiff's Appendix;
1T – Trial Transcript of April 23, 2024
2T – Trial Transcript of April 24, 2024
3T – Trial Transcript of April 25, 2024
4T – Transcript of Motion Hearing of August 2, 2024

Note: Trial Exhibits not referenced in brief; therefore, not a part of plaintiff's Appendix.

drop, headaches, etc. Pa11. Notably, Plaintiff's treating spinal surgeon, Dr. Kadimcherla, opined that Plaintiff would require spinal surgeries in the future, estimated to cost $400,000 (valued in 2020). Pa11. Defendant's expert, Dr. Dryer, conceded that one of the spinal surgeries would in fact be necessary. 2T45:14-23; 2T57:22 – 58:5. Dr. Dryer disputed causation, despite admitting that disc herniations may be caused by trauma and that Plaintiff had no prior complaints or treatment for her neck and back ever in her entire life prior to this accident. 2T89:16 – 96:3. He conceded that her complaints were credible and legitimate (2T117:17-21), and that the MRIs demonstrated objective, credible medical evidence of injury. 2T65:19 – 67:3. He further took the position that Plaintiff was asymptomatic before this accident, thereby conceding that this accident was responsible for her current and on-going complaints even if this trauma was super-imposed upon a pre-existing condition. 2T89:16 – 96:3.

On January 18, 2022, IFCA, N.J.S.A. 17:29BB-1, *et seq.*, was enacted, providing that UIM carriers would be liable in damages recited within the statute for the "unreasonable denial" and/or "unreasonable delay" in the payment of a UIM claim.

On April 26, 2023, this matter was arbitrated in the amount $300,000 ($200,000 net). Pa15. That arbitration award was refused by defendant MCIC. Pa16. The following day, on May 9, 2023, Plaintiff served an Offer of Judgment

in the amount of $300,000. Pa17. That offer was refused, and in response, on May 26, 2023, defendant offered $25,000 to resolve the UIM claim. Pa19. On September 14, 2023, defendant MCIC served an Offer of Judgment in the amount of $125,000.00. Pa22.

On the day of trial, a bar panel reviewed the case, finding values of $250,000, $300,000 and in excess of the $400,000 maximum available policy limits. 4T6:11-15.[2] In an *in limine* motion at the beginning of the trial, the Court ruled that future surgery expenses as detailed specifically in Dr. Kadimcherla's report were admissible and recoverable. See 4T10:10-13. Since that amount was $400,000, any verdict in favor of Plaintiffs was nearly certain to exceed the available policy limits.

At trial, defendant MCIC only presented "high-low" trial parameters of $100,000 - $400,000. 4T6:16-19. After returning a verdict of $4,500,000, the award was molded by the Court in the amount of $517,350.44, reflecting the $400,000 available coverage and costs/fees and pre-judgment interest pursuant to the Offer of Judgment and Arbitration De Novo Court Rules. Pa24.

Thereafter, Plaintiffs moved for an Order to lift the stay of the common law bad faith claim, and for leave to file an Amended Complaint to state a claim

[2] Pursuant to Rule 2:6-8, 4T is the transcript of oral argument for the motion to amend the Complaint and lift the stay, and the cross-motion to dismiss, dated August 2, 2024.

under IFCA. Pa26. Defendant crossed-moved for dismissal of the common law bad faith claim, and to deny Plaintiffs' motion to amend. Pa35. Generally, Plaintiffs sought leave to amend or file a Complaint inclusive of IFCA, premised upon lifting the ordered stay to pursue the common law bad faith claim (4T8:8-24) and pursuing an IFCA claim based upon defendant's unreasonable denials and delays (4T10:3-23) that occurred beginning in 2023. Defendant opposed on the basis of Plaintiffs' inability to retroactively apply a 2022 IFCA statute to a lawsuit initiated in 2019, and that evidence of each subsequent instance of defendant's unreasonable denial or delay was a "continuing tort." 4T19:4-24.

By its Order dated August 2, 2024, the Trial Court granted defendant's motion to dismiss the bad faith claims, and dismissed the "statutory bad faith" (i.e., IFCA) count with prejudice. 4T31:23-25; Pa47.

Oral argument was held on August 2, 2024 before Judge Gardner for the aforementioned motions. Judge Gardner noted at the start of the hearing that Plaintiffs filed a $300,000 Offer of Judgment, defendant filed a $125,000 Offer of Judgment, the case was paneled for figures ranging from $250,000 to in excess of the policy limits, and that a $100,000-$400,000 "High-Low" was "offered." 4T6:3-19. Plaintiffs' counsel clarified to the Trial Court that the suggested "High-Low" was not a settlement offer, but a conditional offer on how to try the case, not to settle. 4T7:4 – 8:7.

It was further asserted that since the case was tried, the May 4, 2021 Order staying the bad faith claims needed to be reinstated for discovery, as New Jersey case law and the underlying Order required. 4T8:8-24. It was clarified that Plaintiffs' motion to amend was not a "retroactive application," since the common law bad faith claim was already made and stayed, and that the IFCA claim was for the unreasonable delays and/or denials beginning in May 2023, and the course of conduct impacting same. 4T9:14-10:23. Plaintiffs further argued that defendant's opposing argument as to retroactive application of an IFCA claim essentially "immuniz[es carriers] from all conduct in pending cases" which were "filed before IFCA[.]" 4T29:14-21.

The Trial Court held that the IFCA claim was "a continuing tort" and not "retroactive[.]" 4T30:16-21. The Court further made reference, again, to Plaintiffs' counsel perceiving the value of the case to be $300,000, presumably based upon the filed Offer of Judgment, and gross arbitration award, but without any discovery as to rationale and impact on delay for same. 4T31:1-8.

By its Order dated September 27, 2024, the Trial Court denied Plaintiffs' Notice of Motion for Reconsideration of the August 2, 2024 Order. Pa50. The Trial Court further ordered that Plaintiffs were barred from filing a separate Complaint alleging an IFCA violation.

STANDARD OF REVIEW

When courts refuse leave to amend, they are essentially making a summary judgment determination that "the newly asserted claim is not sustainable as a matter of law." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501-02 (2006) (internal citation omitted). When a party appeals a Trial Court's grant of summary judgment, the Appellate Court is to exercise de novo review as to whether the dispositive decision was proper. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 427 (App. Div. 2004). Thus, this Appellate Court's review of the Trial Court's denial of Plaintiffs' ability to file an IFCA claim is de novo.

LEGAL ARGUMENT

I. The Trial Court Committed Reversable Error When Denying Plaintiffs' Motion to Amend, As Such Motions Are To Be Liberally Granted. (Pa47)

Following the jury verdict, Plaintiffs filed their Notice of Motion to amend the Complaint to plead a violation of IFCA. Rule 4:9-1 has been clearly established to allow for liberality in granting amendments without consideration of the ultimate merits of the case. See Notte, 185 N.J. at 500-01. Such liberality is the guiding principle regardless of the stage of the proceedings. Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010). The only

exception is when it is clear that such an amendment would be futile. Ibid. But such a finding of futility requires it to be clear that the amendment is so meritless that a motion under Rule 4:6-2 would be a "useless endeavor." Notte, 185 N.J. at 501.

Denial of Plaintiffs' Notice of Motion to amend the Complaint to claim damages under IFCA was incorrect. Given the foregoing, the Trial Court erroneously rendered a finding as a matter of law, improperly invading the province of the jury, and doing so without the benefit of pre-trial discovery into the facts and circumstances. This ruling was both presumptuous and unwarranted. While the circumstances of demands, offers and negotiations were known, the underlying analyses (or lack thereof), assessments and actions made by defendant MCIC were not. Given the paucity of information available to the Trial Court, it was inappropriate to rule on this limited factual record that no rational jury could ever find that defendant MCIC engaged in "unreasonable denial" and/or "unreasonable delay" in this matter. The Trial Court made reference to what the case arbitrated for, and for what figures the Offers of Judgment were filed, but there was no analysis as to how same relates to the reasonableness – or lack thereof – of defendant MCIC's denials and delays. 4T31:1-13. To that end, there was no underlying analysis of the denial and delays in relation to admitted evidence of Plaintiff's future medical expenses

($400,000) at the start of trial (4T10:10-13), independent bar panel assessments (4T6:11-15), or defendant's expert's many concessions at trial as to Plaintiff's injuries, need for future procedures, etc. See 2T45:14-23, 57:22 – 58:5, 89:16 – 96:3. All of the foregoing was raised after IFCA was implemented, as were Plaintiffs' $300,000 Offer of Judgment, defendant's $25,000 offer to settle in response to Plaintiffs' Offer of Judgment, and defendant's $125,000 Offer of Judgment.

Furthermore, when the issue in a case is bad faith – although here, under IFCA, it is the lesser standard of "unreasonable denial" or "unreasonable delay," even in the presence of good faith – it is clear that motions with a dispositive impact must be denied until discovery that would adduce facts giving rise to such an inference of bad faith has been permitted. Wilson v. Amerada Hess Corp., 168 N.J. 253-254 (2001). Here, without discovery or guiding reported Appellate Division opinions, the Trial Court essentially dismissed an inchoate claim summarily. 4T30:5 – 31:22. Such a ruling is clear error, as leave to amend should have been liberally permitted.

II. The Trial Court Committed A Reversible Error When Dismissing Plaintiffs' Claim With Prejudice, Despite No Claim Being Filed. (Pa47)

The Trial Court entered an Order dismissing the common law claim of bad faith, as well as the Plaintiffs' Notice of Motion to amend their Complaint to state a claim under IFCA. The statute, N.J.S.A. 17:29 BB-3, states as follows:

> a. . . . [A] claimant, who is unreasonably denied a claim for coverage or payment of benefits, or who experiences an unreasonable delay for coverage or payment of benefits, under an uninsured or underinsured motorist policy by an insurer may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its automobile insurer for:(1) an unreasonable delay or unreasonable denial of a claim for payment of benefits under an insurance policy[.]
> b. In any action filed pursuant to this act, the claimant shall not be required to prove that the insurer's actions were of such a frequency as to indicate a general business practice.
> . . .
> d. Upon establishing that a violation of the provisions of this act has occurred, the plaintiff shall be entitled to: (1) actual damages caused by the violation of this act which shall include, but need not be limited to, actual trial verdicts that shall not exceed three times the applicable coverage amount; and (2) pre- and post-judgment interest, reasonable attorney's fees, and reasonable litigation expenses.

This statute creates a cause of action when there is an "unreasonable delay" or "unreasonable denial" of a claim for payment of benefits pursuant to an underinsured motorist insurance policy. N.J.S.A. 17:29 BB-3(a). The statute itself contains no statute of limitations, no statement as to when a cause of action under it accrues, and no indication as to whether the determination of a violation is by a bench or jury trial. Common sense dictates, however, that such a claim could not possibly accrue until an excess verdict occurs. The Trial Court held

that "issues involving retroactivity" do not "really apply here" and yet, the majority of defendant's argument for dismissal was focused upon the timeline of when such a claim would accrue. 4T31:14-17. To the point, because of the disputes over material facts as to what actions constituted delays or denials, what the rationale was behind each of those points in time, and the reasonableness of same, the matter was not ripe for dismissal – certainly not dismissal with prejudice – and discovery was warranted.

In order to determine whether or not there has been an "unreasonable delay" or "unreasonable denial" of a claim for payment of benefits under an insurance policy in an underinsured motorist coverage setting, there must necessarily be a finding, by either the Court, if sitting alone, or a jury, as to the value of the case. While the Trial Court here, at times, inferred that Plaintiffs' counsel undervalued the case for the Offer of Judgment amount of $300,000 (4T31:1-8), the Court also set forth that "[r]easonable minds can differ with regard to the value of cases" which does not "settle this issue of bad faith." 4T31:9-13. Indeed, the jury here has already decided the value of this case. To that end, Plaintiffs should have been provided the opportunity to conduct discovery and present the rationale behind the value of the case, as determined by the jury, compared to the unreasonable delays and denials throughout the course of litigation, as well as to the admitted evidence as to future medical

expenses and trial testimony from experts as to the extent of Plaintiff's injuries and relating course of treatment.

Until such time, any claim under IFCA would be based on an inchoate right. If a jury verdict results in a no cause for action for a Plaintiff, then there can be no claim that there was an "unreasonable delay" or "unreasonable denial." Conversely, when there is a jury verdict well in excess of the available underinsured motorist policy limits, as in this case, a determination as to an "unreasonable delay" or "unreasonable denial" must be the result of a separate hearing and action under the statute, in which the finder of fact would hear evidence of the course of conduct of the defendant carrier, the offers and demands, the facts of the case on both liability and damages, and the verdict and the results of any post-trial motions as to the trial itself and the verdict.

To summarily decide the cause of action under the statute before it is even filed would vitiate its clear purpose, which is to encourage reasonable conduct by the carrier in the underinsured motorist coverage setting. The salutary purpose of the statute is similar to that in Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474 (1974) – to encourage reasonable and timely conduct by the carrier in light of its fiduciary duty to its policyholders.

In the instant case, there was a verdict that was far in excess of the available policy limits under UIM coverage (greater than tenfold). Despite

numerous independent assessments for much larger amounts, no offer greater than $125,000 was ever made. Pa21. During the trial, a "high-low" proposal was made, but that is a *conditional* offer, subject to the claimant having to proceed to a jury verdict. Indeed, the very proposal of a "high-low" with the upper limit matching the available coverage implies a recognition on the part of the defendant that an excess verdict was both foreseeable and likely.

Plaintiff has a right to seek damages under IFCA, and that right should not be abrogated summarily without a Complaint being filed, going through discovery, and being tried either in front of the Court or in front of a jury. To arbitrarily extinguish a right provided by statute – in the exact kind of case that the statute was designed to provide a remedy for – was error and violates the plain reading of that statute.

It is important to note that an IFCA claim is different than a claim based upon Taddei v. State Farm Indemnity Company, 401 N.J. Super 449 (App. Div. 2008). The latter allowed a common law bad faith claim in a UM or UIM setting, but limited those damages in a bad faith claim to essentially litigation expenses as a result of the carrier's actions (being attorney's fees and prejudgment interest).[3] While IFCA does not specifically preclude or abrogate a separate

[3] Here, Plaintiffs are not appealing the denial of their request to lift the stay to pursue the common law bad faith claim, as Plaintiffs received damages recoverable due to the de novo filing following the arbitration award and the Offer of Judgment Rule.

common law bad faith claim, it does create additional remedies for a Plaintiff when there has been an "unreasonable delay" or "unreasonable denial" – it does not require a finding of "bad faith." N.J.S.A. 17:29 BB-3(a). The Trial Court erroneously precluded Plaintiff from even bringing such an action, for which there is no basis provided either in the statute itself or prior case law.

In addition to being distinguished from a common law bad faith claim, an IFCA claim is readily distinguishable from an ordinary liability claim in which there is an excess verdict after a Rova Farms demand. In that case, the demands and settlement negotiations may be relevant to a determination as to whether or not there was bad faith. While these factors may be relevant to the bad faith common law claim, these factors may have little or no bearing upon a claim for an "unreasonable delay" or "unreasonable denial" of a claim for payment of UIM coverage benefits. Thus, the Trial Court erred in denying Plaintiffs' application for amendment of the Complaint, given the clear language of the statute, which simply requires an "unreasonable delay" – a different standard than "bad faith." N.J.S.A. 17:29 BB-3(a).

Any common law bad faith recovery would be duplicative, but is distinct from an IFCA claim.

A. The Trial Court Erred When Equating Defendant's "High-Low" Trial Parameters To A Settlement Offer. (Pa47; 4T6:16-19)

In addition, a proposal to establish "high-low" parameters for a trial is never an offer of settlement in determining good faith because it requires the case to be tried; the Trial Court erred in equating same. 4T6:16-19, 4T7:5-24. Insurance carriers propose "high-low" agreements to set their maximum exposure at the upper reaches of the policy, at worst, in order to foreclose an excess verdict. Agreeing to try a case with "high-low" parameters in place does not settle the case for anything other than the low end without a verdict, and if accepted, it still requires a verdict to be obtained. If a "high-low" with the policy limits at the maximum fulfilled the carrier's obligations under IFCA, all carriers would always simply suggest a "high-low" of $1.00 on the low, and the policy limits on the high, as a matter of rote. It is an artifice, not a settlement offer. To that end, one cannot send out a Release, or mark the case settled without a trial, and if rejected, it is a nullity.

In the instant case, defendant MCIC never proposed more than $100,000.00 as part of the "high-low," after the proposal of the $125,000 Offer of Judgment, an unreasonable number considering liability and the nature of both the injuries and future treatment. This figure was far lower than that recommended by anyone (4T6:3-15), and was nothing more than a transparent attempt to stave off an excess verdict and the damages under IFCA. Regardless

of whether there was an offer, or whatever the offer was, the question under IFCA is whether or not there was an "unreasonable delay" or "unreasonable denial" in the payment of UIM benefits under the insurance policy. Indeed, the fact that an offer is made does not per se mean that there has not been an "unreasonable delay" or an "unreasonable denial." This issue does not require proof of bad faith, and since there was a verdict in the case, Plaintiffs have a right to file under IFCA for the damages allowable therein.

The practical effect of the Trial Court's Order was to prohibit the Plaintiffs from seeking any recovery under IFCA, with a potential value up to three times the applicable coverage, without any statutory or case law authority. Whether this was the Trial Court's intention or not, Plaintiffs must be permitted to file a Complaint seeking statutory damages under IFCA either by amendment or in a separate action. To allow the preemptive Order to stand is clear error.

III. Discovery Is Required As To Evidence of "Unreasonable Delay" Or "Unreasonable Denial," Under IFCA, And Demands, Offers And Settlement Discussions Are Not Dispositive Evidence of The Absence of Delay/Denial. (Pa47; 4T31:4-25)

As set forth above, IFCA is a statute which creates a cause of action for an "unreasonable delay" or "unreasonable denial" of a claim for benefits under an insurance policy, and provides for a variety of damages, including treble

damages, as to the applicable coverage limits for uninsured or UIM coverage under the policy.

Plaintiffs filed an Offer of Judgment for $300,000.00, which the Trial Court took into consideration, as well as the fact that the Defendant MCIC filed an Offer of Judgment for $125,000.00, and then proposed a "high-low" of $100,000.00 to $400,000.00 during trial, which is simply a mechanism to ensure that the damages are within a range. Regardless, whether or not that "high-low" was suggested is irrelevant to whether or not there was an "unreasonable delay," and since the Offer of Judgment was not accepted, it is of no consequence.

To the extent that the Trial Court's finding of no valid claim under IFCA was based upon the fact that the Plaintiffs would have accepted less in settlement before trial than the $400,000.00 available coverage limits remaining is circumscribed as set forth below. See 4T6:4 – 8:7, 4T31:6-7.

New Jersey Rule of Evidence 408 states in full:

> When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a Mediator present, including offers of compromise or any payment in settlement of a related claim, is not admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim.

Thus, utilizing a demand by a Plaintiff as a basis for concluding that there cannot be a violation of IFCA, because the demand was within the policy limits,

confuses the "bad faith" standard under Rova Farms with IFCA's statutory language. Settlement negotiations are a basis to try to resolve cases, and such negotiations are strongly encouraged. Without settlements, the need to try significantly more cases would result in paralysis of the New Jersey Courts. Indeed, if the determination of the motion was that Plaintiffs' $300,000.00 Offer of Judgment was indicative of the full value of the claim, then every single party who files an Offer of Judgment in every UM/UIM case onward in New Jersey must always demand the policy limits. See generally 4T6:4 – 8:7, 4T31:6-7.

To do otherwise would be to tacitly admit that the full value of the claim does not exceed the available policy limits. Instead of settlement negotiations being encouraged, such a ruling would discourage settlement negotiations. It would not only defeat the statutory intent set forth in IFCA and the plain language of the statute, but more importantly it would render the Offer of Judgment rule under Rule 4:58-1 useless. It would require every plaintiff to always demand the policy limits, prompting insurance carriers to always refuse. The response of every carrier would always be a "high-low" proposal of $1.00 to the available policy limits. Settlement would not be encouraged, but rather discouraged. In point of fact, the intent of the Offer of Judgment rule was to apply pressure on the parties to reasonably negotiate, with looming potential penalties as a deterrent. Wiese v. Dedhia, 188 N.J. 587, 593 (2006) (finding that

the Offer of Judgment rule is "designed particularly as a mechanism to encourage, promote, and stimulate early out-of-court settlement of . . . claims that in justice and reason ought to be settled without trial."). "[T]he rule imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment." Schettino v. Roizman Dev., Inc., 158 N.J. 476, 482 (1999). The unintended consequence of the Trial Court's ruling, denying Plaintiffs' amendment with an IFCA claim, is to essentially re-write both Rule 4:58-1 and N.J.S.A. 17:29 BB-3, neither of which imposed the requirement that the Trial Court imposed on the Plaintiffs in this case.

Moreover, while the amounts demanded and/or offered may be evidence of reasonableness or unreasonableness with regard to a delay or denial of a claim for benefits under IFCA, it is certainly not dispositive. Indeed, Plaintiffs have asserted a number of discrete points in time and actions by the carrier which – at those relevant times – could certainly be found by a rational jury to have been "unreasonable delay" or "unreasonable denial." Further evidence as to same was not permitted to be developed or established since the opportunity to amend with or file such claims were summarily foreclosed to Plaintiffs. For these reasons, Plaintiffs should be permitted to amend the Complaint or to proceed with a separate action under IFCA.

A. The Quantum of The Demand In An Offer of Judgment Is Not Evidential Or Dispositive of The Claim's Value. (Pa47; 4T6:4 – 8:7, 4T31:6-7)

In the Trial Court's ruling on the motion to amend Plaintiffs' Complaint to state a claim pursuant to IFCA, the Court made reference to the Offer of Judgment served by Plaintiffs' counsel in the amount of $300,000. 4T6:4-7, 4T31:6-7. The implication of that reference apparently was that even Plaintiffs' counsel did not believe the full value of the claim exceeded $400,000. Nothing could be further from the truth, and any interpretation in that regard to support such an inference is inappropriate in this context.

Rule 4:58-1, *et seq*. was initially adopted in 1971, and later amended many times, up to the most recent amendment in 2022. See R. 4:58-1. The fundamental purpose of the Rule is to induce settlements. See generally Willner v. Vertical Reality, Inc., 235 N.J. 65 (2018); Serico v. Rothberg, 234 N.J. 168 (2018). Not discussed in the many cases interpreting and applying this Rule is the strategy and nuanced analysis necessary in order to calculate and perfect such an Offer of Judgment.

Clearly, settlement is not induced if the Offer of Judgment is, by rote, the applicable policy limits. While in some cases there may be tactical advantage or leverage gained by doing so, it is generally a useless exercise to do so because the defendant carrier will invariably refuse that offer. In addition, it is the risk

of having to pay costs and fees by an ill-advised denial that gives Rule 4:58-1 its "teeth." In this sense, the greater the amount of the demand, the less likely that the verdict will be 20% more favorable. For these two reasons alone, it is always advantageous to serve an Offer of Judgment that is lesser, as opposed to greater. "In essence, the rule 'imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment.'" Wiese, 188 N.J. at 593 (quoting Schettino v. Roizman Dev., 158 N.J. 476, 482 (1999)). It is designed so that "a party who has rejected a settlement" may not "escape mandatory payment for any portion of the costs incurred as a result of his decision." Ibid.

Of note is the Civil Practice Committee's amendment to the Offer of Judgment Rule, effective September 1, 2016, which clarified the old Rule (requiring a reduction of a monetary jury award artificially to the policy limits) to address that insurance carriers are responsible for awards above the policy limits. R. 4:58-2(b); Pressler & Verneiro, Current N.J. Court Rules, note to 4:58-2 (2025). This amendment was an example of claimants making demands under the Offer of Judgment Rule that was not the value of the case, but done for strategic reasons, and the Committee's amendment recognized and sanctioned same.

Furthermore, an integral consideration to the quantum of the Offer of Judgment is the expense, effort and extent of further discovery necessary to carry one's burden of proof at trial. When factored in, these considerations are moderating in their effects, and encourage smaller Offers of Judgment so as to maximize acceptance. In addition, part of the calculus of any Offer of Judgment is the willingness or resistance of the litigants to proceed to trial. Going to trial for litigants and attorneys calls for a considered, detailed and nuanced balancing of potential benefit, as opposed to risk, not to mention the rigors of trial itself. It is common that litigants will express to counsel privately that they do not wish to go to trial and/or that going to trial seems scary and daunting. This perception of the client invariably informs the quantum of the Offer of Judgment, as it does all settlement discussions including those that occur upon assignment for trial. Again, a Plaintiff may be willing to accept less than the full value of a claim as a set-off to the fear of, and unwillingness to proceed to, a trial.

Finally, the quantum of the Offer of Judgment requires a considerable amount of judgment and discretion by counsel in light of the potential trial evidence adduced in discovery. It involves an assessment of the testimony of the parties, of the experts, of the form of the evidence (video vs. live appearance), the non-testimonial evidence and the perceived relative skills of trial counsel, etc. In short, there are myriad considerations which inform and determine the

quantum of an Offer of Judgment, and frankly, none of them represent the true, full value of the claim.

By referencing Plaintiffs' $300,000 Offer of Judgment when denying Plaintiffs' Notice of Motion to amend Plaintiffs' Complaint to state a claim pursuant to IFCA, the Trial Court implied that counsel did not believe full value of the claim exceeded $400,000. 4T6:4-7, 4T31:6-7. The truth of the matter, however, is that the Offer of Judgment reflected the calculus of all of the foregoing factors enumerated and more, and was strategically calibrated to present a figure high enough to satisfy Plaintiffs while avoiding trial, yet low enough to entice settlement, while also increasing the chances of an award more than 20% greater should trial become necessary. It was not intended – nor should it ever have been interpreted by anyone – as evidence of Plaintiffs' counsel's belief regarding the full value of the claim.

In light of these considerations, so interpreting the Offer of Judgment amount as evidence of Plaintiffs' counsel's perception of full value is the opposite of giving all reasonable inferences to Plaintiffs in their motion to amend. The unintended consequences of same guts the purposes and benefits of the Offer of Judgment Rule, ironically causing an entirely antithetical result to the Rule's concept of encouraging settlement of cases.

IV. Claims Management Is A Dynamic Process, And The Carrier Under IFCA Is Obligated To Act Reasonably And Timely, Should Circumstances Change. (Pa47; 2T30:16-24)

In opposition to Plaintiffs' motion to amend or file a new Complaint, defendant MCIC argued that "continuing conduct" would not be actionable under IFCA. The necessary implication of this argument is that a denial made before the enactment of IFCA somehow confers immunity to the carrier for all subsequent conduct. The logic is inescapable. It is claimed that because defendant MCIC made a determination regarding the claim – any determination would suffice – no subsequent conduct, events, discovery, proofs, rulings, trial circumstances or any other new information could ever render the carrier liable. Once again, such a ruling renders IFCA as a nullity. Recently, the United States District Court in Roach v. Allstate Insurance Company, Civil Action No. 23-02210 (2024) stated:

> The Court does not hold, however, that an insurer can escape liability under IFCA, as a general matter, by denying an insured's claim and maintaining its position in the face of increasingly probative evidence. The Court agrees with Plaintiff's submission that the insurance claims process is a dynamic 'that' requires consideration of any new information presented. When IFCA is applicable . . . it requires insurers to process and resolve claims for insurance benefits in good faith, including by modifying a litigation position where opposition to an insured's claim becomes unreasonable under the circumstances.

Pa56 at 10-11, fn.3.

Here, Plaintiffs have cited numerous events during the litigation timeline that a rational jury could find constituted "unreasonable delay" and/or "unreasonable denial" after the effective date of IFCA. Given the dynamic process at play, and the remedial nature of IFCA, an analysis of the defendant MCIC's conduct in that process at all relevant times after IFCA's enactment is necessary and may establish liability on its part.

Even if the aforementioned post-IFCA delays and denials were put aside, this case was in the pipeline when IFCA was enacted, and as a result, under that basis alone, it should fall under IFCA. In determining whether a statute should be applied to cases in the pipeline, courts consider whether the legislature intended to give the statute retroactive application, and whether the retroactive application of the statute would result in either an unconstitutional interference with vested rights or a manifest injustice. See James v. New Jersey Manufacturers Ins. Co., 216 N.J. 552, 563 (2016). IFCA was/is remedial legislation designed to prevent harm and ensure that people are treated fairly and reasonably, applicable to all cases pending and going forward. See, 4T27:8-25.

For this reason, in addition to the foregoing, it is respectfully asserted that the Trial Court's ruling be reversed and Plaintiffs be permitted to amend their Complaint, or be permitted to file a new Complaint.

V. A "High-Low" Parameter Suggestion Does Not Discharge A Carrier's Duties Under IFCA. (Pa47; 4T6:4 – 8:7, 4T31:6-7)

When denying Plaintiffs' Notice of Motion to amend the Complaint to add an IFCA count, the Trial Court referenced a "high-low" proposal made during trial. 4T6:16-19. Same was not a settlement offer evidencing good faith or reasonable consideration of the UIM claim, since it was conditioned on the occurrence of other future events. Despite this, the Trial Court suggested that such a "high-low" proposal would constitute an offer and, thus, presumably satisfy any obligations under IFCA, although there was no analysis of same in relation to unreasonable delay/denial.

Nothing could be further from the letter or spirit of IFCA. To suggest that a "high-low" – which requires a claimant to proceed to a jury trial and obtain a more favorable verdict than the low figure – could not constitute an "unreasonable delay" and/or "unreasonable denial" in the fair and equitable satisfaction of a claim is illogical. What a "high-low" does is propose the low figure only, and serve to cap the potential damages at the policy limit.

Consider it as follows: if a plaintiff accepts a "high-low," then there is no possibility of an excess verdict. That being so, defendant carriers would claim no violation of IFCA is possible. Conversely, if a "high-low" is made, but refused for entirely rational reasons, the defendant carrier would claim that no violation of IFCA is possible. This, quite obviously, creates a "heads I win –

tails you lose" scenario. The logic of the hypothetical is then this: to entirely avoid the application of IFCA – and all of its remedial and laudable goals – any defendant carrier need only suggest a "high-low" of $1.00 and the policy limit. Under the reasoning employed by the Trial Court, every carrier will now, as a matter of course, always propose such a "high-low," and in doing so, IFCA becomes a nullity with no application in any circumstance.

This could not possibly have been the intent of the Legislature in enacting the statute. That being said, it cannot logically be the case that a proposal of a "high-low", per se, defeats an IFCA claim. If that is so, then there are material issues of fact regarding the claims management process in this case that need to be explored in discovery, so as to determine whether this "high-low" represents a reasonable and timely offer, and whether defendant MCIC's conduct, despite this "high-low," constituted an "unreasonable delay" and/or "unreasonable denial." An offer itself does not automatically mean there has been compliance with IFCA, as same can still constitute unreasonable delay or denial. Discovery would be needed to determine the reasonableness of such an "offer."

For this reason, in addition to the foregoing, it is respectfully asserted that the Trial Court's ruling be reversed and Plaintiffs be permitted to amend their Complaint, or be permitted to file a new Complaint.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Trial Court's Order denying reconsideration of the Order denying Plaintiffs leave to amend the Complaint, or to file a Complaint under IFCA, be reversed.

Respectfully submitted,

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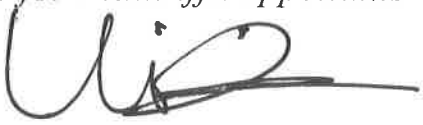
By: 

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Dated: February 25, 2025

In the Superior Court of New Jersey
Appellate Division
DOCKET NO: A-000440-24

Date Filed: May 25, 2025

JENNIFER BURDEN and CRAIG BURDEN, her husband, per quod, *Plaintiffs-Appellants,* *v.* MICHAEL G. HARRINGTON; JOHN DOE (fictitious name), NANCY E. MARTIN; MARY MOE, (fictitious name), JESSICA M. GONZALEZ; JANE DOE (fictitious name); MANUEL GONZALEZ; RICHARD ROE (fictitious name); FARMERS INSURANCE COMPANY; and MIDCENTURY INSURANCE COMPANY, *Defendants-Respondents.*	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO.: ESX-L-8074-19 Sat Below: Hon. Robert H. Gardner, J.S.C.

BRIEF OF RESPONDENT, MID-CENTURY INSURANCE COMPANY

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Preliminary Statement

This appeal stems from the denial of Plaintiff's motion to amend her complaint to assert a claim under the New Jersey Insurance Fair Conduct Act, N.J.S.A. 17:29BB-1 to -3, ("IFCA"). The Plaintiff had filed suit against respondent Mid-Century Insurance Company asserting a claim for common law bad faith and UIM benefits, as the Mid-Century policy had limits of $500,000.00. The bad faith claims were stayed by prior to trial. The matter underwent nonbinding arbitration, and Mid-Century filed an offer of judgment as well as offering a high-low settlement offer, but no settlement resulted.

At the conclusion of trial, which resulted in a verdict in plaintiff's favor exceeding the policy limits, plaintiff moved to reinstate the common law bad faith claim and also to amend the complaint to include a claim under IFCA. Both were denied by the trial court. On appeal, plaintiff has waived consideration of the common law bad faith claim.

Because there was no bad faith in this case, because IFCA became effective well after litigation in this case commenced, and because there is no basis to find that IFCA is to be afforded anything other than prospective application, the trial court did not error when denying leave to amend the complaint for the simple reason that a claim asserting a cause of action under IFCA would be futile and need not be granted by the court. Accordingly, there

was no error in this determination, and respectfully, the affirmation of this decision is necessary and proper.

Statement of Facts and Procedural History[1]

This matter involves a claim for uninsured motorist benefits related to a 2017 automobile accident, with suit commencing in 2019 against the tortfeasor. (See, Pa1-8; 1T-3T[2]) The plaintiff filed an amended complaint in 2021 asserting a direct claim for underinsured motorist benefits against Mid-Century. (Pa1-8) The 2021 amended complaint also included a common law bad faith claim. (Id.) The bad faith claim was stayed pending the trial. (Pa9-10) The Mid-Century policy contained an underinsured motorist limit of $500,000.

The case proceeded to non-binding arbitration in April of 2023, and resulted in a gross award of $300,000, which was reduced by the $100,000 tortfeasor credit, resulting in a net award of $200,000. (Pa15) On May 9, 2023, Plaintiff filed an offer of judgment in the amount of $300,000. (Pa17-

[1] Because the facts and procedural history are so intertwined, to avoid unnecessary repetition, and for this court's convenience, the fact and procedural history sections will be presented together.

[2] 1T= April 23, 2024 Trial Transcript
2T= April 24, 2024 Trial Transcript
3T= April 25, 2024 Trial Transcript
4T= August 2, 2024 Hearing Transcript

18) On September 14, 2023 Mid-Century filed its own offer of judgment in the amount of $125,000. (Pa22-23) The parties did not settle the case.

A bar panel reviewed the case and valued the case at $250,000, $300,000, and $400,000, respectively. (4T6:8-15) At trial, Mid-Century tendered a high-low settlement offer with a low of $100,000 and a high of $400,000, encompassing the bar panel's valuation. (4T6:16-19; 4T7:7)

The matter proceeded to trial in April 2024. (1T-3T) The issue at trial focused on the cause of Plaintiff's neck and back injuries and whether they were causally related to the accident in question. (2T18:2-139:1) At trial, Defendant's expert, Dr. Joseph Dryer, testified consistent with his pre-trial report that Plaintiff's complaints were degenerative and age-related and therefore were not causally related to her accident. (Id.)

At the conclusion of the case, the jury awarded damages well in excess of the Mid-Century policy limit, valuing Plaintiff's total damages at $4,500,000. (3T176:2-179:19; Pa24-25) The trial court properly molded the verdict to conform to the remaining policy limit, less the credit for the tortfeasor's contribution. (Id.) The final order of judgment awarded the plaintiff the remaining UIM limits under the Mid-Century policy, including an award of attorney's fees and costs of litigation, including expert fees. (Id.)

The fees and costs were awarded because the jury verdict was 120 percent greater than the plaintiff's offer of judgment under R. 4:28-2.

After the trial and docketing of the order of judgment, plaintiff filed a motion to lift the stay on the common law bad faith cause of action and to allow the plaintiff to amend the existing complaint to add a second cause of action under IFCA. (Pa26-34) However, IFCA was passed in January of 2022, five years after the accident in question, and three years after the commencement of this litigation. Mid-Century opposed the Plaintiff's motion and filed a cross motion to dismiss the common law claim and to dismiss the IFCA claim. (Pa35-46)

On August 2, 2024, after a hearing on the pending motions, the Hon. Robert H. Gardner, J.S.C., denied Plaintiff's motion to lift the stay of the common law bad faith claim and denied the request to permit the complaint to be amended to add the IFCA claim. (4T4:1-32:21; Pa47-51) The court granted Mid-Century's motion to dismiss and both orders were issued on August 2, 2024. (Id.)

Plaintiff filed a motion for reconsideration, which Judge Gardner denied on September 27, 2024. (Pa50-51) Plaintiff has now appealed the denial of the motion to amend the complaint the IFCA claim, but not the denial of the motion to lift the stay of the common law claim.

Legal Argument

ISSUE I: JUDGE GARDNER DID NOT ERR IN DENYING AMENDMENT TO ADD THE STATUTORY CLAIM AND IN FINDING NO BAD FAITH.

Judge Gardner did not err in determining that the claim under IFCA was barred and denying the motion to amend the complaint.

A) Denial Of The Motion To Amend Was Not Error, Because Amendment Would Have Been Futile.

First, Plaintiff argues that denial of her motion to amend the complaint to add the statutory bad faith claim under IFCA was error. This argument is misguided, because, as the next section of this brief will demonstrate, IFCA does not apply here as a matter of law.

The long-established law in New Jersey holds that motions to amend are to be liberally granted except when doing so would be futile.

Generally, motions for leave to amend pleadings are liberally granted; however, the decision is left to the trial "court's sound discretion." C.V. by & through C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306 (2023) (quoting Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 456-57 (1998)). There was no abuse of discretion in this case because a major exception to the general rule of liberality is present here, when the proposed amendment would be futile:

> [O]ne exception to that rule arises when the amendment would be futile, because the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. ***Courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law.*** [] There is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.
>
> [Rosario v. Marco Const. & Mgmt. Inc., 443 N.J. Super. 345, 352 (App. Div. 2016) (citations omitted, emphasis added)]

See also Robinson v. Zorn, 430 N.J. Super. 312, 316 (App. Div. 2013) (upholding decision to deny amendment of complaint where such amendment would have been futile.) As the Supreme Court has noted, "Granting an amendment would be futile, and leave to amend properly denied, when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." C.V., 255 N.J. at 306 (internal quote and cite omitted.) Moreover, "'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law.'" Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013) (quoting Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006).)

Because the decision to deny the motion to amend the complaint was accurately based on the fact that the IFCA cannot apply retroactively, Judge

Gardner did not abuse his discretion in denying Plaintiff's motion. Defendant asks this Court to affirm that decision.

B) Judge Gardner's Decisions Were Correct As There Was No Bad Faith As A Matter Of Law

Neither Judge Gardner's decision to dismiss the common-law bad faith claim—which Plaintiff does not contest on appeal—nor his denial of the motion to amend to include the statutory bad faith claim under IFCA constitutes error. Judge Gardner appears to have rested his decision on the absence of bad faith of any kind.

First, and importantly, the decision of Judge Gardner was correct and should be affirmed because there was no bad faith under either the common law or statutory formations. While the common law bad faith claim is no longer an issue, as Plaintiff has abandoned it by not raising it on appeal, it is instructive to examine common law bad faith because it illuminates the statutory claim.

In Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591 (2015), the Supreme Court laid out what may best be described as a *prima facie* case for bad faith in the UIM context:

> 1) plaintiff recognized and threatened a bad faith claim before filing the UM action, 2) the carrier made no settlement offer despite an arbitration panel's evaluation of damages in excess of the policy, and 3)

> the carrier represented that it intended to proceed to trial solely because it would not have to pay more.
>
> Wadeer, 220 N.J. at 601 (citing this Court's decision in Wadeer v. New Jersey Mfg. Ins. Co., A-3206-10T4 (App. Div. Dec. 13, 2012).)

The first element is present, as Plaintiff included a count for bad faith when the UIM claim was filed in 2021. (Pa1-8) However, the remaining two factors are conspicuously absent.

The second Wadeer element is absent in this case because there was no arbitration award in excess of the policy limit. Furthermore, Farmers made substantial offers and even filed an offer of judgment in the amount of $125,000, which was just $75,000 lower than the net figure in the arbitration. (Pa22-23) Plaintiff filed their own offer of judgment in the amount of $300,000. (Pa17-18) After the tortfeasor credit, the amount would be reduced to the arbitration award of $200,000. Notably, both offers were substantially less than the $500,000 policy limit and even substantially less than the $400,000 of remaining policy limit. Further, at trial, Farmers offered a hi-low settlement agreement of $100,000 and $400,000. Thus, and fatal to a claim of bad faith, the second Wadeer element is absent.

The final Wadeer element is also absent as there has been no allegation that Farmers ever represented it would not offer more because it would only

have to pay $400,000 of remaining policy limit plus attorney fees and litigation costs should it lose. Such a proposition is defies credulity.

This case is not one where an insurer refused to negotiate because its total exposure was minimal and likely to be cost prohibitive for a plaintiff to continue with litigation. Rather, Farmers had a reasonable and good-faith basis to believe that the injuries to Plaintiff were not causally related to this accident; indeed, the expert opinion of Dr. Dryer formed and illustrates that good-faith belief.

Contrary to the realities of this action, in Plaintiff's brief, she argues that the admission of Dr. Kadimcherla's opinion, that the value of the needed future surgery, meant that there was a certainty that the verdict would exceed the policy limits. (Pb4) This argument is absurd.

As previously noted, Defendant's expert, Dr. Dryer, opined that Plaintiff's neck and back issues were, in the whole, degenerative in nature and that her medical records did not show any traumatic damage. (2T18:2-139:1) Moreover, he attributed ***none*** of her conditions to the accident. (2T24:2-47:5) Further, he disagreed that she would need surgery on her back and neck due to the herniation issues. (2T44:23-46:5) While he conceded that she would need surgery due to the synovial cyst but, again, he did not attribute that condition to the accident taking beyond the scope of the litigation. (2T42:2-14; 133:6-

22) The jury very well could have disbelieved part or all of Dr. Kadimcherla's opinion, even if they found in Plaintiff's favor.

While the jury found otherwise, under the applicable bad-faith "fairly debatable" standard, insurance carriers are not required to predict how a jury is going to resolve a factual issue put to them. Pickett v. Lloyd's, 131 N.J. 457, 473 (1993) ("Under the fairly debatable' standard, a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim."). The given uncertainty of how a jury will ultimately find wholly undermines Plaintiff's argument as to the implication of Dr. Kadimcherla's opinion that was rebutted by Dr. Dryer's testimony.

Furthermore, there was no error in Judge Gardner considering the settlement offers, offers of judgment, and arbitration awards which were before him. New Jersey law recognizes that a trial judge may consider matters outside the complaint, even on a motion to dismiss, if the outside matters are integral to the plaintiff's claim. See, N.J. Citizen Action, Inc. v. Cnty. of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007).

The arbitration award, the offers of judgment, and the defense IME were all properly before Judge Gardner during the motion to dismiss and irrefutably show the existence of a fairly debatable claim. Consequently, when the facts

and evidence in this case are examined, it is clear that the bad faith claims fail on their face as a matter of law:

> A finding of bad faith against an insurer in denying an insurance claim cannot be established through simple negligence. Moreover, mere failure to settle a debatable claim does not constitute bad faith. Rather, to establish a first-party bad faith claim for denial of benefits in New Jersey, a plaintiff must show "that no debatable reasons existed for denial of the benefits."
>
> Badiali v. New Jersey Mfrs. Ins. Grp., 220 N.J. 544, 554 (2015) (citing and quoting Pickett, 131 N.J. at 473, 481.)

Mid-Century submits that the fact that the "fairly debatable" standard could not be met in the common law claim is dispositive on the question of whether the IFCA claim is viable, as well. While the new statute provides for specific, expanded damages in two specific contexts—unreasonable denial and unreasonable delay—there is nothing in the statute indicating that the Legislature intended to change or lessen the existing and well established "fairly debatable" standard for bad faith. Similarly, there is nothing indicating that the Legislature intended that an IFCA claim could be maintained when a common law claim was clearly barred.

Respectfully, there was no error in the denial of the motion to amend the complaint to add the IFCA claim.

C) The IFCA Claim is Barred Because The Statute Postdated The UIM Claim In This Case And The Statute Only Applies Prospectively

However, if this Court were to disagree with the reasoning Judge Gardner employed in resolving this matter, then his order should, nevertheless, still be affirmed because it is well-established New Jersey law that an appeal is taken from the order and not the judge's opinion. Accordingly, this Court can affirm the ruling below for any reason. "[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). See also,: Englewood Hosp. & Med. Ctr. v. State, 478 N.J. Super. 626, 634 fn.1 (App. Div. 2024); Hayes v. Delamotte, 231 N.J. 373, 387 (2018) ("[a] trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.").

In this case, the denial of the motion to amend to add the IFCA count was correct because the IFCA can only be applied prospectively. The accident in this case occurred on November 19, 2017, and the complaint was filed in 2019. IFCA, however, was effective January 18, 2022—five years after the accident, three-and-one-half years after the expiration of insurance contract, and three years after commencement of this litigation. Thus, because IFCA

can only be applied prospectively, it would only apply to accidents occurring after January 18, 2022.

Laws in New Jersey enjoy a long-standing presumption of prospective application. Gibbons v. Gibbons, 86 N.J. 515, 521-22 (1981). The foundation of this long-standing presumption are the fundamental equitable principles and long-held notions of fairness and due process. Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008). That is, the expectation of parties engaged in litigation is based upon the law and rules, as they exist and not as they might be at some future time. Maker v. Ross, 219 N.J. 565, 578 (2014) ("although everyone is presumed to know the law, no one is expected to anticipate a law that has yet to be enacted.").

> It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not been made.
>
> Gibbons, 86 N.J. at 522.

The accepted exceptions to the presumption of prospective application are: (1) when the Legislature has expressed an intent that the statute be applied

retroactively; (2) when the statute is ameliorative or curative; or (3) when the expectations of the parties warrant retroactive application but only in the absence of a clear expression of legislative intent of prospective application. Id., at 522-523. Finally, even if a statute may be subject to retroactive application, prospective application may be in order in a specific case when retroactive application will result in "manifest injustice." Id., at 523.

Whether a statute should be applied prospectively or retroactively is purely a legal question of statutory interpretation. Johnson v. Roselle EZ Quick, LLC, 226 N.J. 370, 386 (2016).

In this case, there is no basis upon which to find anything other than that the presumption of prospective application applies to IFCA. First, nothing in the statute indicates the Legislature's intent for the statute to be applied retroactively. In James v. New Jersey Manufacturers Insurance Company, 216 N.J. 552 (2014), a newly-enacted statute, N.J.S.A. 17:28–1.1(f), altered an insurers' ability to use step-down provisions in commercial auto and business owner policies. Prior to enactment of the statute, a commercial auto policy could limit an employees' eligibility to UM/UIM benefits to the limit chosen on their personal auto policy. The James Court was tasked with determining whether the statute applied retroactively.

The language employed by the Legislature in N.J.S.A. 17:28–1.1(f) was identical to that in this case that the law applied "effective immediately." The James court held this language is not an explicit statement by the legislature to apply the law retroactively:

> As the Olkusz [v. Brown, 401 N.J. Super. 496 (App. Div. 2008)] panel aptly noted, had the Legislature intended an earlier date for the law to take effect, that intention could have been made plain in the very section directing when the law would become effective.
>
> James, 216 N.J. at 568.

Thus, absent an explicit declaration that the law applies retroactively, the court must then assess whether the language in the statute "implies" retroactive application. Here, no interpretation of the statute "implies" the legislature intended retroactive application. The statute's language implies prospective application. For instance, the statute references rate changes by an insurance company and a prohibition on insurers from disseminating "misinformation" about the effect of the law on rates. Obviously, rate changes for personal auto policies do not take place on a retroactive basis. Further, the "disseminating information" language in the statute makes no sense when applied retroactively. Clearly, the statute's prohibition to insurers of disseminating information seeks to regulate a future activity.

Next, the statute is not ameliorative or curative. A statute is ameliorative or curative when a previously enacted law contains a perceived imperfection, inadvertence, or mistake in a previous act, and the new, curative or ameliorative statute does nothing more than correct that imperfection. Id., 216 N.J. at 564. An amendment is curative if it does "not alter the act in any substantial way, but merely clarifie[s] the legislative intent behind the [previous] act." 2nd Roc–Jersey Assocs. v. Town of Morristown, 158 N.J. 581, 605 (1999).

In this case, IFCA is not ameliorative or curative because it is a new law, with no statutory predecessor that contained an imperfection or mistake that IFCA was intended to correct.

Finally, there is nothing in the record in this case demonstrating that the expectation of the parties in this case would favor retroactive application. The party's relationship was governed by contract, specifically the insurance policy, and the laws that existed at the time that contract was made and executed. IFCA became law more than three years after that contract expired. There is nothing in the expectations of the parties which would favor the application of law enacted years after their contract

Moreover, even if this Court could somehow find an intent by the Legislature for retroactive application—which does not exist here—such

retroactivity would constitute a manifest injustice. Changing the substantive rights of the parties at the end of this litigation would clearly result in manifest injustice to Mid-Century, as its actions in this matter were predicated upon the law as it existed at the time the policy was issued, the accident happened, and litigation ensued.

In summary, the legal presumption is that new statutes are to applied on a prospective basis unless explicitly or implicitly stated by the Legislature in the statute. Here, the legislation states that it applies "effective immediately", and not retroactively. Further, the language used in the statute provides no implication that it applies to UM/UIM accidents that took place prior to the law's enactment. The statutory language only supports a prospective application.

Since the accident in this matter took place five years prior to enactment of IFCA, and three years after commencement of litigation, Mid-Century respectfully requests that the court affirm the dismissal of Plaintiff's motion to amend the complaint to add a claim under IFCA.

ISSUE II: THE TEXT OF THE ORDER DENYING PLAINTIFF'S STATUTORY CLAIM DOES NOT CONSTITUTE REVERSIBLE ERROR.

Next, Plaintiff argues that it was error for Judge Gardner to have dismissed Plaintiff's statutory claim under IFCA, "despite no claim being filed" under the statute. (Pb9) There is no merit to this claim.

First, at the time Judge Gardner issued the August 2, 2024 order upon which Plaintiff's appeal is premised, he was considering the pending two motions: (1) Plaintiff's motion to amend the complaint to include the statutory IFCA claim and to lift the stay on the common law bad faith claim[3] as well as (2) Defendant's motion to dismiss the bad faith claim as moot.

Judge Gardner, in deciding the two competing motions, modified and signed the forms of orders supplied by the parties. Out of an abundance of caution, given the uncertainty as to how the cross-motions would be decided and whether Judge Gardner would permit the complaint to be amended to add the IFCA claim before determining whether to dismiss it on the merits, the Defendant's form of order dismissed both the statutory and common-law bad faith claims. If there is any error in Judge Gardner issuing the order in that form, it is mere harmless error.

[3] Plaintiff has chosen not to pursue the common-law portion of the motion in this appeal.

Judge Gardner, in his decision, clearly held that Plaintiff's IFCA claim was barred. Thus, the result would be the same regardless of whether Judge Gardner dismissed the statutory claim or denied the request to include it. As such, there was no reversible error in Judge Gardner's order, for regardless of its form the outcome was the same.

A) Judge Gardner Did Not Err By Recognizing That The High-Low Proposal Was A Settlement Offer.

Second, Plaintiff argues that Judge Gardner erred by recognizing that the hi-low proposal, guaranteeing Plaintiff a measure of recovery, was a settlement offer. Plaintiff, instead, argues that the high-low settlement is not a "settlement" but a "trial parameter." This argument is without foundation and intentionally ignores the monetary offer that the high-low proposal embodies.

It has long been held by the courts of New Jersey that high-low agreements are, in fact, settlements. In Serico v. Rothberg, 234 N.J. 168 (2018), the Supreme Court had to determine whether a successful plaintiff could recover attorneys' fees after a trial, when she entered into a high-low agreement. In resolving the issue, the Court had to first determine whether the high-low agreement was a settlement, and whether normal rules of contract interpretation applicable to settlements, apply. The Court found that it was a settlement.

"A high-low agreement, like the one at issue in this case, is '[a] settlement in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome at trial.'" Serico v. Rothberg, 234 N.J. 168, 177 (2018) (alteration in original) (quoting Black's Law Dictionary 797 (9th ed. 2009)). See also, Serico, 234 N.J. at 171, 177 ("We determine that the high-low agreement is a settlement subject to the rules of contract interpretation"... a high-low agreement "is a settlement contract and subject to the rules of contract interpretation.")

In so holding, the Supreme Court clearly affirmed the holding of this Court in its published decision. See, Serico v. Rothberg, 448 N.J. Super. 604 (App. Div. 2017) ("Serico I"). In reaching its conclusion, this Court defined a high-low agreement thusly: "***A high-low agreement is a settlement agreement*** that guarantees a plaintiff a minimum recovery and limits a defendant's exposure to an agreed upon amount regardless of the jury's award, if any." Serico I, 609 n.3 Emphasis added.)

Subsequent to Serico I, this Court, in Marano v. Schob, 455 N.J. Super. 283 (App. Div. 2018), cited to a previous decision, Pool v. Morristown Mem'l Hosp., 400 N.J. Super. 572 (App. Div. 2008) in which this Court "noted that high/low agreements fundamentally are a type of a settlement, because they

are offered and accepted as a means of resolving the parties' differences." Marano, 455 N.J. Super. at 290 (citing Pool, 400 N.J. Super. at 577). See, also, Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 190 (App. Div. 2008) ("As we recognized in Benz v. Pires, 269 N.J. Super. 574, 578-79, 636 A.2d 101 (App.Div.1994), a high-low agreement is a type of settlement"); Shafer v. Cronk, 220 N.J. Super. 518, 521 (Law. Div. 1987) (a high-low agreement "must and should be considered a settlement.")

Thus, high-low agreements are not "trial parameters" but are settlements. As such, there was no error in Judge Gardner determining that the high-low settlement offer in this case was a settlement offer.

ISSUE III: THE FACT THAT THERE WAS NO DISCOVERY DONE DID NOT PRECLUDE THE DENIAL OF THE MOTION TO AMEND

Third, Plaintiff argues that discovery is needed regarding evidence of "unreasonable delay" or "unreasonable denial" and that, therefore, denial of her motion to amend was improper. This argument is specious ignoring the inherent and incurable legal flaws with Plaintiff's attempted IFCA claim.

As previously detailed, the Plaintiff's claim under IFCA was properly denied because IFCA does not apply retroactively and the statute was enacted after the events giving rise to this claim. There was no need to provide any

discovery because the facts needed to reach that determination—the dates of all these relevant events—were essentially uncontested.

Moreover, Plaintiff's argument concerning the high-low agreement and her argument that it is "of no consequence" to the issue of unreasonable delay is also without merit. Clearly, when entitlement to a claim is reasonably contested, as here, it is unavailing to argue that the carrier is unreasonable in its handling of a claim when that claim is premised on the rejection by the insured of a demonstrably fair settlement offer by the carrier.

Moreover, Plaintiff argues that Judge Gardner erred "to the extent" he considered the settlement offer and Plaintiff's pre-trial demand citing and quoting a portion of N.J.R.E. 408. However, Plaintiff failed to quote the second section of N.J.R.E. 408, which importantly reads that "Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded because it was disclosed during settlement negotiations." N.J.R.E. 408.

"[T]he rule 'permits the use of evidence arising out of settlement negotiations purposes other than proving liability or the amount of damages.'" State v. DeAngelis, 281 N.J. Super. 256, 262-63 (App. Div. 1995) (quoting Biunno, Current N.J. Rules of Evidence, quoting 1991 Supreme Court Committee Comment on N.J.R.E. 408 (1994)); Abbamont v. Piscataway Twp.

Bd. of Educ., 269 N.J. Super. 11, 32 (App. Div. 1993), aff'd, 138 N.J. 405 (1994) ("Since the settlement was offered to prove another material fact [i.e., other than liability or the amount of damages] (that plaintiff reasonably believed that the air quality in his shop was deficient), it was admissible under this rule.")

Plaintiff's N.J.R.E. 408 argument is unavailing because this rule is a rule of evidentiary admissibility and even then, the context of Plaintiff's argument is incorrect. N.J.R.E. 408 formed part of Judge Gardner's analysis; it was not applied in the context of admitting it as evidence. Further, N.J.R.E. 408 was not employed to prove "liability for, or invalidity of, or amount of the disputed claim." N.J.R.E. 408. Rather, it was discussed in the context of pointing out that reasonable minds can disagree as to the value of the claim and that the fact that the matter was resolved by the jury in excess of the numbers discussed for settlement purpose or in an offer of judgment is dispositive of any bad faith issue.

As such, there was no error in the denial of the motion to amend.

ISSUE IV: JUDGE GARDNER DID NOT ERR BASED ON THE NOTION THAT CLAIMS MANAGEMENT IS A "DYNAMIC" PROCESS.

Fourth, Plaintiff argues, citing to a footnote in a federal district court case of Roach v. Allstate Ins. Co., CV 23-02210 (RMB/EAP), 2023 WL

8542463 (D.N.J. Dec. 8, 2023) for the proposition that claims management is a "dynamic" one and that that should somehow translate into liability under IFCA in this case. However, the argument ignores the actual holding of the Court in Roach, which barred the IFCA claim because—as was the case here—the denial occurred prior to the enactment of IFCA. Like here, there was no reason to apply the statute retroactively and because the supposed "post-IFCA allegations of bad faith remain inexplicably linked to her pre-IFCA allegations of bad faith." Roach, at *4 (internal quotes omitted.) Continuation of a pre-IFCA decision concerning coverage cannot constitute "post-IFCA" behavior. Id. To determine otherwise, the Roach court smartly recognized, would destroy any distinction between the retroactive and prospective application of statutory law and destroy the right to repose and finality which that distinction fosters and advances. Id.

Additionally, Plaintiff's argument argues that IFCA should apply to this case because it was in the "pipeline" when the statute came into effect. (Pb25). However, as previously discussed, there is no indication that the Legislature intended retroactive effect. Indeed, the Supreme Court, in a matter concerning the rights regarding whether to retroactively apply a statutory amendment regarding insurance coverage of PIP claims, the Court declined to do so and stated, "[h]ad the Legislature sought to apply the amendment to all pending

claims, it could have adopted the approach taken in other amendments, such as applying it to 'all actions and proceedings that accrue, *are pending* or are filed' at the time of enactment. That it did not do so indicates a lack of intent to depart from the standard practice of prospective application." Johnson, 226 N.J. at 390 (citation omitted, emphasis in original.)

Thus, here, the fact that the Legislature did not include language that it should apply to "all actions and proceedings that... *are pending*... at the time of enactment" indicates that the Legislature did not intend for IFCA to have pipeline retroactivity, as Plaintiff argues. The Legislature could have drafted IFCA to include such language, yet it did not. Respectfully, IFCA must be effectuated as enacted and intended, without retroactive application, in the manner in Judge Gardner properly did.

ISSUE V: THE HIGH-LOW PROPOSAL WAS A SETTLEMENT OFFER AND JUDGE GARDNER DID NOT ERR IN RELYING ON IT AS SUCH.

Fifth and finally, Plaintiff revisits her argument concerning high-low settlements, arguing that such settlement offers do not satisfy any obligations under the IFCA, and if it were, then carriers would make a high-low settlement agreement offers of one dollar and the policy limits to satisfy IFCA.

However, nothing in this case indicates that Judge Gardner held that the mere offering of any high-low settlement-agreement offer constitutes a *per se*

satisfaction of IFCA. Rather, Judge Gardner was discussing the specific high-low settlement proposal in this case, under the specific facts of this case. He was specifically discussing the fact that "[r]easonable minds can differ" as to the value of the claim, and that in the pre-trial period, the plaintiff's counsel valued the claim at $300,000 and the defense counsel valued it at $125,000, which was well in keeping with the high-low settlement offer in this case.

However, Plaintiff's further claim that the analysis does not address the fact that the IFCA references "unreasonable delay or denial" with the suggestion that somehow even a good-faith settlement offer, which is roughly in accord with the aforementioned good-faith estimates, would not meet that standard. That argument also simply ignores the fact that the statute references "unreasonable" delay or denial which, Mid-Century suggests, simply cannot be met when, as in this case, the defense expert concludes that there is no causal connection to the subject accident.

As such, this argument does not provide a basis to find reversible error.

Conclusion

For all the foregoing reasons, this Court is asked to affirm Judge Gardner's decision.

Respectfully Submitted,
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Attorneys for Respondent,
Mid-Century Insurance Company

JENNIFER BURDEN and CRAIG BURDEN, her husband, *per quod*,

Plaintiffs/Appellants,

vs.

MICHAEL G. HARRINGTON; JOHN DOE (fictitious name), NANCY E. MARTIN; MARY MOE, (fictitious name), JESSICA M. GONZALEZ; JANE DOE (fictitious name); MANUEL GONZALEZ; RICHARD ROE (fictitious name); FARMERS INSURANCE COMPANY; and MID-CENTURY INSURANCE COMPANY,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-440-24

Civil Action

ON APPEAL FROM: Law Division Order, dated September 27, 2024, denying reconsideration of the August 2, 2024 Order denying leave to file an Amended Complaint or for leave to file a new Complaint

DOCKET NO. BELOW:
ESX-L-8074-19

SAT BELOW:
Hon. Robert H. Gardner, J.S.C.

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

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PRELIMINARY STATEMENT

Defendant's position in opposition to Plaintiffs' appeal can be distilled down to an assertion that there was no bad faith because of when IFCA became "effective," and that there should be "prospective application" of IFCA, defeating Plaintiffs' application. Such a position, however, not only misapplies IFCA in relation to the conduct at issue, but ignores the broader context of Plaintiffs' appeal, which raises the procedural errors below, i.e., liberality in allowing amended pleadings and permitting discovery to be conducted. Dismissal with prejudice is reversible error on these bases alone.

Furthermore, defendant mischaracterizes the suggestion of a "High-Low" framework, in addition to the Offers of Judgment filed below, as proof-positive of good faith efforts, when same is not evidential of the value of the case or application of IFCA. There was no meeting of the minds to assent to any settlement agreement by way of accepted "high-low" framework, and the assessment of a fair offer, or the reasonableness of the value of same, are fact issues for a jury to decide.

Simply put, dismissal with prejudice, without the Complaint being filed or discovery being conducted, and without a trial before a jury, was reversible error. Defendant's arguments in opposition only further highlight the need for discovery and the need for these issues to be presented to, and determined by, a jury.

LEGAL ARGUMENT

I. Denial Of Plaintiffs' Notice of Motion To Amend Was Reversable Error, As Such An Amendment Would Not Be Futile.

While defendant acknowledges that amendments are liberally granted, it asserts that denial of Plaintiffs' Notice of Motion to amend was justified because the amendment would be "futile." See Db5. Defendant fails to appreciate that Rule 4:9-1 permits liberality in granting amendments without consideration of the ultimate merits of the case. See Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 500-01 (2006). Moreover, defendant generally refers to the proposed amendment as "futile," but does not establish that the amendment would be so meritless so as to be a "useless endeavor," which is what a finding of futility requires under the applicable case law. Id. at 501.

To that end, defendant argues that an amendment would be futile because the Insurance Fair Conduct Act, N.J.S.A. 17:29BB-1, *et seq*. (hereinafter "IFCA"), cannot be applied retroactively, however, as previously asserted, Plaintiffs are not claiming retroactive application, but rather are arguing that IFCA should have been applied to all conduct after the statute passed in 2022. Plaintiffs' motion to amend was not a "retroactive application," since the common law bad faith claim was already made and stayed. The IFCA claim was for the unreasonable delays and/or denials beginning in May 2023, and for the

course of conduct impacting same. Amending the Complaint to incorporate such a claim is not "futile."

Given the paucity of information available to the Trial Court, it was inappropriate to rule on the limited factual record that no rational jury could ever find that defendant engaged in "unreasonable denial" and/or "unreasonable delay" in this matter. This point cannot be overstressed, as the basis of the IFCA claim is entirely unrelated to anything defendant did or did not do before IFCA passed in 2022. Defendant argues that application of IFCA would "substantive[ly] [change the] rights of the parties at the end of this litigation[,]" but that wholly mischaracterizes the underlying basis for the cause of action. Db17. The relevant timeframe is not "at the end of this litigation" – it is focused upon defendant's conduct after IFCA's effective date that unreasonably delayed or denied payment of the UIM claim. Thus, defendant's focus on retroactivity is a red herring – the claimed unreasonable conduct occurred in 2023 and 2024, long after IFCA came into effect.

Furthermore, defendant argues that there is no need for discovery because the dates relevant to IFCA's application are "essentially uncontested." Db21-22. This is incorrect on multiple levels. First, there is clearly a need for discovery to determine facts relevant to the state of mind for good faith and bad faith actions and whether the conduct therein was reasonable or arbitrary. Second, the IFCA

application dates are not uncontested, as is inherently evident by Plaintiffs' recitation of the procedural history and facts, contrasted by defendant's insistence on "retroactive" lookbacks and dates for unrelated conduct. The latter only further underscores why discovery is needed and why the Trial Court's dismissal with prejudice was reversible error. At the very least, the foregoing establishes that Plaintiffs' proposed IFCA amendment was not futile.

II. The Instant Action Is Distinguishable From Finding "Bad Faith" – Instead There Was Unreasonable Delay Or Denial, Which Plaintiffs Were Precluded From Pursuing Due To The Dismissal With Prejudice, Despite No Claim Being Filed.

Defendant argues that the Trial Court's decision was correct because same was based upon "the absence of bad faith of any kind." Db7. As previously asserted, however, the instant action is *not* premised upon bad faith; it was unreasonable delay or denial. The distinction is important, as is the language used under the statute.

The statute, N.J.S.A. 17:29 BB-3, states as follows:

> a. . . . [A] claimant, who is unreasonably denied a claim for coverage or payment of benefits, or who experiences an unreasonable delay for coverage or payment of benefits, under an uninsured or underinsured motorist policy by an insurer may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its automobile insurer for:(1) an unreasonable delay or unreasonable denial of a claim for payment of benefits under an insurance policy[.]
> b. In any action filed pursuant to this act, the claimant shall not be required to prove that the insurer's actions were of such a frequency as to indicate a general business practice.
> . . .

> d. Upon establishing that a violation of the provisions of this act has occurred, the plaintiff shall be entitled to: (1) actual damages caused by the violation of this act which shall include, but need not be limited to, actual trial verdicts that shall not exceed three times the applicable coverage amount; and (2) pre- and post-judgment interest, reasonable attorney's fees, and reasonable litigation expenses.

The statute creates a cause of action when there is an "unreasonable delay" or "unreasonable denial" of a claim for payment of benefits pursuant to an underinsured motorist insurance policy. N.J.S.A. 17:29 BB-3(a). The legislature specifically chose "unreasonable" as the standard – it provides teeth to the statute so as to encourage settlement. It is very precise. Shockingly, defendant argues that "there is nothing in the statute indicating that the Legislature intended to change or lessen the existing and well established 'fairly debatable' standard for bad faith." Db11. This turns a blind eye to the fact that the Legislature used a specific and explicitly different standard – "unreasonable." The statute contains no statement as to when a cause of action under it accrues, and, as conceded by defendant, specifically provides for unreasonable denial and delay – not "fairly debatable" bad faith. Db11. Defendant ignores the applicable standard, which is not premised upon bad faith, but unreasonable delay/denial.

Defendant further cites to the Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591 (2015) decision as a case which outlines brightline UIM "bad faith" elements to be proven when pursuing such claims. Db7-9. The Wadeer case,

however, does not respond to the same circumstances and questions at issue in the case at bar. The factors provided in that case depict what would support a rational jury to find bad faith, but here, again, the language under IFCA is not "bad faith," but unreasonable denial or delay. If anything, the Wadeer case emphasizes why discovery is needed in these types of cases to investigate what efforts were being made, and when, as well as the reasonableness of same. To that end, for example, defendant asserts that "Farmers had a reasonable and good-faith basis to believe that the injuries to Plaintiff were not causally related to this accident; indeed, the expert opinion of Dr. Dryer formed and illustrates that good-faith belief." Db9. This is a fact issue that the denial of the amendment (and inability to obtain discovery) prevented Plaintiffs from establishing.

Defendant also continually points out that Plaintiff "abandoned" her Common Law bad faith, as if to suggest a concession of no bad faith all together. This is incorrect and a red herring. The reasoning for the "abandonment" was not because there was no bad faith. It was that even if there was Common Law bad faith, the potentially recoverable damages, of attorneys' fees and costs, were already recovered by way of Offer of Judgment; Plaintiff could not receive duplicative damages. Thus, the merits of the Common Law bad faith issue were not implicated by "abandonment," but rather the related procedure and

duplicative damages were appreciated and logically followed. None of the foregoing changes the fact that in order to determine if there was unreasonable delay/denial of a claim for payment of UIM benefits, there must be a jury finding as to the value of the case.

III. The Suggested "High-Low" Parameters Were Not Offers To Settle And Do Not Satisfy Obligations Under IFCA.

Defendant argues that a suggested "high-low" is a settlement offer and agreement, but there was no meeting of the minds or accepted framework to enforce. Either way, agreeing to try a case with "high-low" parameters in place does not settle the case for anything other than the low end without a verdict, and if accepted, it still requires a verdict to be obtained. It is an artifice, not a settlement offer. One cannot send out a Release, or mark the case settled without a trial, and if rejected, it is a nullity.

Defendant cites Serico v. Rothberg, 234 N.J. 168 (2018) in support of the position that a "high-low" is a settlement, but the important distinction from the Serico decision is that a "high-low" is a settlement when it is accepted as a framework, but it is not a settlement when the framework is rejected. Db19. Plaintiff does not dispute that when a "high-low" framework is agreed to, it is a settlement agreement, given the meeting of the minds. That is not the case here. There was no meeting of the minds on the "high-low" framework.

If one considers the consequences of such a ruling, it would require every litigant to accept a "high-low," since refusal would be tantamount to rejection of an offer. In a UM/UIM context, it is only for the benefit of the carrier, and has no benefit to plaintiff, except to avoid litigation expenses, ultimately defeating IFCA in every case. A "high-low" suggestion of $1 as the "low," and the policy limits as the "high," could be offered on the day an Answer is filed, and any "delay," no matter how unreasonable in timely paying the claim, could not be actionable. Yet, this scenario is the result when following defendant's position: any "high-low" suggestion would defeat an "unreasonable denial or delay" claim because it would be served pro forma on every case on day one. That is not what IFCA provides for or suggests.

In the instant case, defendant never proposed more than $100,000.00 as part of a "high-low," after the proposal of the $125,000 Offer of Judgment – an unreasonable number considering liability and the nature of both the injuries and future treatment. This figure was far lower than that recommended by anyone (4T6:3-15), and was just an attempt to sidestep IFCA damages and an excess verdict. There was no agreement in place and no "settlement contract" entered into. Db20. Regardless of whether there was an offer, or whatever the offer was, the question under IFCA is whether or not there was an "unreasonable delay" or "unreasonable denial" in the payment of UIM benefits under the

insurance policy. Indeed, the fact that an offer is made does not per se mean that there has not been an "unreasonable delay" or an "unreasonable denial." This issue does not require proof of bad faith, and since there was a verdict in the case, Plaintiffs have a right to file under IFCA for the damages allowable therein. If "reasonable minds can disagree as to the value of the claim," (Db23) as defendant asserts, then that is exactly why a jury must consider these facts and render a determination.

CONCLUSION

For the reasons set forth above, in addition to those set forth in Plaintiffs' initial brief, Plaintiffs respectfully request that the Trial Court's Order denying reconsideration of the Order denying Plaintiffs leave to amend the Complaint, or to file a Complaint under IFCA, be reversed.

Respectfully submitted,

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By: _____
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Dated: June 9, 2025