Circuit Court for Prince George's County
Case No. CAL-19-33650

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1318

September Term, 2021

DAVID GRANT ORNDORFF

v.

ERIE INSURANCE EXCHANGE

Shaw,
Albright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: November 21, 2022

In 2016, Appellant David Grant Orndorff ("Mr. Orndorff") was seriously injured when the motorcycle he was riding struck another vehicle attempting to make a left turn. The driver was insured by Appellee Erie Insurance Exchange ("Erie") under a policy with a liability coverage limit of $30,000. Five months after the accident, Mr. Orndorff rejected Erie's offer of its insured's policy limits in full settlement of his claims against the insured. Two years later, when Mr. Orndorff sued Erie for bad faith in failing to settle sooner, the Circuit Court for Prince George's County granted summary judgment to Erie.

Here, Mr. Orndorff presents two questions for review.[1] We have rephrased and consolidated them into one:

1. Whether the circuit court erred in granting summary judgment to Erie?

For the reasons that follow, we answer "no" and affirm the judgment of the circuit court.

[1] In Mr. Orndorff's brief, the Questions Presented are phrased as:

1. Did the circuit court err in granting summary judgment in favor of Appellee based upon a legal "safe harbor" that establishes that where the insurance policy was offered before Judgment was entered against the insured, it accomplishes a retroactive cure of bad faith (thereby establishing that carriers cannot commit bad faith pre-suit, as there is no remedy/punishment for same).

2. Did the circuit court err in disposing of the case via summary judgment, in this tort action, where the finding of good or bad faith conduct is an issue of motive and intent, to be based upon *inferences* from case specific fact; said inferences to be held *against the moving party* incident to a motion for summary judgment.

BACKGROUND[2]

On October 15, 2016, Mr. Orndorff was on his motorcycle traveling southbound along Route 1 in Laurel, Maryland, when he collided with a car attempting to turn left from the northbound lanes at the Manheim Avenue intersection. The other driver was insured by Erie under an automobile policy that provided $30,000 of coverage for bodily injury claims per person per occurrence. After the accident, Mr. Orndorff was taken to the hospital where doctors amputated his left leg below the knee. At the time, Erie was unaware of Mr. Orndorff's injury or how serious it was.

Two days after the accident, on October 17, 2016, the driver of the other vehicle (Erie's insured) reported the accident to Erie. Erie then assigned a claims adjuster who began investigating the claim the next day. The claims adjuster requested the accident report from the Maryland State Police; attempted to locate any citations possibly issued either to its insured or Mr. Orndorff; called its insured but was not able to speak with her; and called Mr. Orndorff but could not get in contact with him either. The adjuster followed up the phone calls with letters to Mr. Orndorff and its insured, asking them to contact her to discuss the claim. The adjuster also sent a separate letter to Mr. Orndorff, informing him that Erie would need additional information to help settle the claim, such as records and bills from medical care he received, if any, related to the accident. Erie enclosed a medical authorization form with the letter.

[2] These facts are drawn largely from the Statement of Material Facts Not In Dispute (and appended exhibits) in Erie's summary judgment motion. Mr. Orndorff did not dispute these facts.

> "In order for us to give your claim prompt attention, please sign, date, and return the enclosed authorization(s) by November 18, 2016.
>
> Also, please send copies of any medical bills and the names of the treating physicians as soon as possible."

One week into the investigation, on October 25, 2016, the claims adjuster received a message from Mr. Orndorff's retained counsel requesting that all correspondence go to her. Erie informed counsel it would comply with her request and forwarded her all the earlier communications sent to Mr. Orndorff. On November 3, 2016, the claims adjuster reviewed the accident report. The report indicated that Erie's insured was cited for "failing to yield right of way" and that Mr. Orndorff had "exceeded the speed limit" and thereby contributed to the accident.

That day, the adjuster also informed Mr. Orndorff's counsel that it was conducting an investigation to determine liability for Mr. Orndorff's losses. The adjuster added

> Erie has received the police report which indicates your client contributed to the accident by speeding. I would suggest he have his own insurance company handle, if he has not done so already. I am trying to reach the witness to confirm our final liability decision but as MD is a contributory negligence state, your client may be barred from recovery against our insured.

On November 8, 2016, thirty-four days after the accident, Mr. Orndorff demanded that Erie settle his claim " . . . for the full insurance policy, or any and all insurance policy or policies covering your insured for this accident." Mr. Orndorff did not supply any of the requested documents or description of his injuries that Erie said were necessary to determine liability and settle the claim. Mr. Orndorff indicated he would

release Erie's insured from liability if Erie delivered a check no later than 5 p.m. EST on December 8, 2016.

On November 21, 2016, Erie denied Mr. Orndorff's claim because its investigation showed that Mr. Orndorff was speeding and contributed to the accident. The adjuster said

> We have reviewed the facts of this accident . . . [O]ur obligation as an insurer is to reimburse your client only when our insured is legally responsible for the damage. We must be guided by all information available to us, including the report of our insured.
>
> We wish to be fair in handling our client's claim, but the facts indicate that our insured is not liable for your client's damage. For this reason, we must respectfully decline payment of their claim.
>
> Our decision on this case was based upon the following: My investigation indicates your client was speeding and therefore contributed to the accident.

Erie also informed its insured of the denial and that the claim "may proceed to litigation in the future."

On November 30, 2016, Mr. Orndorff's counsel asked Erie if it would be willing to disclose the insured's policy limits and whether Erie intended to make any offer to settle the claim, policy limit or otherwise. Erie disclosed the policy limits, adding that it did not intend to make any offers to settle because the accident happened in Maryland and Erie believed Mr. Orndorff was contributorily negligent for exceeding the speed limit.

> I do not intend on making any offers as this is [an] MD claim

> with contributory negligence. Our policy limits are $30,000/$60,000."

Mr. Orndorff's motor tort complaint

On January 9, 2017, Mr. Orndorff filed a motor tort suit against Erie's insured in the Circuit Court for Prince George's County and later served Erie's insured. The complaint described Mr. Orndorff's injuries: "A below the knee amputation was performed on [Mr. Orndorff] at the hospital immediately after the accident." On January 30, 2017, Mr. Orndorff's counsel emailed the claims adjuster that all prior settlement offers were withdrawn and that its insured had been served.

On March 17, 2017, Erie, through the attorney assigned to represent its insured in the motor tort suit, offered to settle Mr. Orndorff's claim for the full limit of the insured's policy.

> To follow up a voice mail I left for you earlier today, I am authorized to offer my client's $30k policy limits to your client to resolve this case.
>
> Please advise of your response at your convenience.

On April 26, 2017, having not heard from Mr. Orndorff, Erie reiterated its policy limits offer to Mr. Orndorff.

> This letter is to follow up regarding our offer of policy limits. As you are aware, our Policyholder carries Liability limits of $30,000.00. We had previously extended those policy limits to settle your client's case. I understand that you have not accepted this offer and I wish to advise you that the offer does remain on the table. I would request that you please let me know once you are in the position to accept this policy limits offer.

On July 13, 2017, Erie again reiterated its policy limit offer to Mr. Orndorff. This offer was in response to Mr. Orndorff's June 15, 2017 request that Erie and its insured execute a Joint Stipulation and Agreement, which included an entry of a $10,000,000 final judgment against the insured. Mr. Orndorff also wanted Erie's insured to assign to him any claims she might have against Erie for breach of contract or bad faith. Erie declined this offer.

> In [your June 15, 2017] correspondence, you requeste[ed] that Erie Insurance, along with our insured . . . execute a Joint Stipulation and Agreement which would include entry of a final settlement of $10,000,000 against our insured. Please be advised that ERIE will not agree to your demand and will not execute this Joint Stipulation and Agreement.
>
> ERIE restates our policy limit offer of $30,000 to your client. Should your client wish to accept this offer, kindly contact us and we will conclude the settlement of this claim in exchange for a Release and dismissal.

On September 21, 2017, with Mr. Orndorff's motor tort suit having been bifurcated between liability and damages, a jury found Erie's insured liable for Mr. Orndorff's injuries. Specifically, the jury found that Erie's insured was negligent and that Mr. Orndorff was not contributorily negligent. A damages-only trial was then scheduled for May 15, 2018.

The liability-only trial aftermath

On October 27, 2017, Erie again offered its insured's policy limits to settle Mr. Orndorff's claim against Erie's insured. Mr. Orndorff did not accept this offer.

On May 15, 2018, the parties appeared for the first day of the damages trial. They notified the circuit court that they had settled Mr. Orndorff's claim with the entry of consent judgment against Erie's insured for $2,870,000; an assignment of the insured's claims against Erie (if any) to Mr. Orndorff; and Mr. Orndorff's promises (1) to forbear on collection efforts while the assigned claims against Erie were pending, and (2) to file an Order of Satisfaction once litigation of the assigned claims (including appeals) was over. As to the kinds of claims assigned to Mr. Orndorff, the parties agreed

> [The insured] assigns to [Mr. Orndorff] any and all actions, causes of action, claims or rights against any person or entity, including, but not limited to, Erie Insurance Exchange, for bad faith, failure to settle, or any other claims of any kind or character arising from the subject occurrence giving rise to the instant action, her liability therefor, or the failure to provide and/or obtain sufficient coverage applicable to the subject occurrence.

Orndorff v. Erie Insurance Exchange (This Case)

On October 15, 2019, Mr. Orndorff filed a four-count complaint against Erie the gist of which was that Erie had acted in bad faith in refusing Mr. Orndorff's November 2016 demand. Specifically, in Count I, Mr. Orndorff alleged "wrongful failure to pay the policy limit demand and refusal to negotiate the claim in any manner (Adjuster's Bad Faith);" in Count II, "[a]fter the commission of the egregious bad faith refusal to settle for 30k, Erie had a duty to attempt to resolve the case at a number higher than 30k, but failed and refused to offer anything other than the 30k;" in Count III, "[w]hen Erie finally sent

the check for the policy limits of 30k, Erie tied payment of same to an additional element, which Mr. Orndorff will not agree to;" and in Count IV, "Punitive Damages."[3]

Erie's Motion for Summary Judgment and Mr. Orndorff's Opposition

On March 29, 2021, Erie filed a motion for summary judgment arguing that it had acted in good faith (not bad) in attempting to negotiate a settlement of Mr. Orndorff's claim within its insured's policy limits. With its motion, Erie included a statement of undisputed material facts establishing that it denied Mr. Orndorff's November 2016 demand because Erie's investigation showed that Mr. Orndorff " . . . was speeding and therefore contributed to the accident." Erie also appended evidence of its March 17, 2017 offer to settle for its insured's policy limits, as well as its April 26, 2017, July 13, 2017, and October 27, 2017 correspondence reiterating the offer. Erie also pointed out that no Maryland case had recognized liability on the part of an insurance company for wrongful failure to settle where the insurer offered to settle for its insured's policy limits before its insured faced the possibility of an excess verdict.

To Erie's summary judgment motion, Mr. Orndorff filed two oppositions but neither identified evidence to controvert Erie's statement of undisputed material facts.[4]

[3] On September 28, 2021, Mr. Orndorff filed an amended complaint but withdrew it on October 7, 2021.

[4] Filed May 3, 2021, Mr. Orndorff's first opposition argued that he could not respond to Erie's summary judgment motion because he had been unable to depose Erie's adjuster. Erie's adjuster then sat for deposition by Mr. Orndorff on July 27, 2021.

Mr. Orndorff's second opposition was filed on October 7, 2021. Though his counsel had twice filed papers styled "Plaintiff's Notice of Filing," and therein

Instead, Mr. Orndorff outlined the steps he thought Erie should have taken as an alternative to declining his November 2016 demand. Thus, Mr. Orndorff argued that Erie should have asked for an extension of the deadline on his demand or interviewed the police officer that investigated the accident or the fact witness that saw the accident. Mr. Orndorff argued that Erie's failure to accept his November 2016 demand constituted an improper rejection of "an opportunity to settle." Mr. Orndorff called Erie's subsequent offer of its insured's policy limits a "retroactive cure" of Erie's prior bad faith that, if permitted, would overrule 50-60 years of case law in Maryland.

The motions hearing

At the hearing on Erie's summary judgment motion,[5] in answer to the motion court's questions, Mr. Orndorff continued not to identify facts that would suggest that

(collectively) listed 21 items filed in "Opposition to Defendant's Motion for Summary Judgment, and in Support of Plaintiff's Motion for Summary Judgment[,]" none of these items were referenced in Mr. Orndorff's second opposition. Thus, by failing to identify the portions of the 21 items on which he relied in order to controvert Erie's Statement of Material Facts Not in Dispute, Mr. Orndorff failed to "demonstrate[a] dispute." Md. Rule 2-501(b).

[5] At the same hearing, the motions court heard argument on Mr. Orndorff's cross motion for summary judgment and denied it. Mr. Orndorff does not challenge that decision here. In his second question, Mr. Orndorff asks whether "the circuit court err[ed] in *disposing of the case* via summary judgment[]. . ." (emphasis added). The motion that prompted the disposition of the case was Erie's (judgment granted for Defendant), not Mr. Orndorff's (judgment denied for Plaintiff). Put another way, had Erie not filed a summary judgment motion, the motions court's denial of Mr. Orndorff's motion would not have disposed of the case. Accordingly, because Mr. Orndorff does not challenge the motion court's denial of his cross motion, we do not address that ruling. Md. Rule 8-504(a)(3) and (c).

Erie had acted in bad faith. Instead, Mr. Orndorff argued that summary judgment was inappropriate where motive or intent is at issue since inferences must be resolved against the moving party. Ultimately, the motions court found no evidence of bad faith or liability on Erie's part, and granted Erie's motion.

> The Court cannot find on this record that there has been any bad faith negotiation on the part of Erie based upon the information that it had. Even assuming some bad faith did occur, there is not liability. The policy limits - - first of all, I find that between - - a demand was made back in late October or in November. That by March 17th, the insurance company had come around and seen - - gathered more information and determined that its insured was liable for the collision and offered policy limits. And the Plaintiff, having received that, declined to accept it and pursued its - - his claim against [Erie's insured], whether rightly or wrongly.
>
> But I find at that point the insurance company has met its obligation and duty to [Erie's insured] to resolve the case within the policy limits before such time as a judgment had been entered against her before the case event went to trial.
>
> What Plaintiff is asking the Court to do is allow plaintiffs to control bad faith in the sense that a plaintiff could go to the end with an insurance company and do discovery. An insurance company could offer policy limits on the eve of trial and the - - in cases where they offered it at eve of trial, the plaintiff, under the circumstances, could reject it and go forward, get an excess judgment, and then come back, presumably on behalf of the insured, and say, hey, they didn't offer the policy limits before we got this judgment. So we now we want to help you get out from under by seeking the excess from the insurance company. And that is not what the case law says.
>
> So the Court does not find bad faith. And, therefore, the other counts - - Count 2 of the Plaintiff's claim fails. There is no breach of contract by the insurance company to its insured . . . . It offered its policy limits . . . . It offered its policy limits

> well before any judgment was entered against [Erie's insured], well before any trial occurred. So this matter could have been resolved at an earlier time by the Plaintiff. The Plaintiff elected not to accept the offer of the policy limits and chose to pursue its claim against [Erie's insured].
>
> The insurance company should not be at the mercy of what the Plaintiff wants to do. The Court doesn't find that by not immediately accepting a demand - - accepting to a demand for policy limits places the insurance company in a bad faith posture.

This timely appeal followed.

Standard of Review

"We review the [circuit court's] decision to grant or deny a motion for [summary] judgment in a civil case without deference." *Webb v. Giant of Maryland, LLC*, 477 Md. 121, 348 (2021) (citations omitted). "Because that decision is purely legal," an appellate court reviews the decision de novo to determine for itself "whether the record on summary judgment presented a genuine dispute of material fact, and if not, whether the moving party was entitled to summary judgment as a matter of law." *Dett v. State*, 161 Md. App. 429, 441 (2005) (citations omitted).

DISCUSSION

Mr. Orndorff's Contentions[6]

Mr. Orndorff contends the circuit court erred in granting Erie's motion for summary judgment *first*, because the grant of summary judgment in favor of Erie was

[6] Mr. Orndorff's contentions are directed to the granting of summary judgment on his complaint as a whole, not to each individual count. We address his arguments in this fashion as well.

based on the circuit court's improper failure to draw an inference of Erie's bad faith in favor of Mr. Orndorff, the non-moving party; *second*, because Erie's May 17, 2017 offer of its insured's policy limits amounts to an improper "retroactive cure" of Erie's prior bad faith; *third*, because the motions court applied the wrong measure of damages in concluding that summary judgment was appropriate; *fourth*, because Erie acted in bad faith by not offering the policy limits when Mr. Orndorff's counsel made a policy limits demand in November 2016; and *fifth*, because the evaluation of bad faith requires drawing inferences from "the totality of circumstances."[7] We disagree.

[7] In his appellate brief, Mr. Orndorff makes a number of other factual assertions or legal arguments. These were that Erie's bad faith was evidenced by its failure to inform its insured of Mr. Orndorff's compromise offer, instead sending her "an excess letter;" that Erie denies 1% of the claims against it; that Erie supports this fraud; that Erie "is no stranger to bad faith cases;" that Erie does not train its adjusters; that the Erie adjuster that handled Mr. Orndorff's claim had favorable performance reviews; that the Maryland State Police Accident Report's listing of Mr. Orndorff's "excessive speed" was an "irrational excuse" for Erie to deny Mr. Orndorff's November 2016 demand; that Erie has no remorse for its conduct; that Erie's conduct violated Section 27-303 of Maryland's Insurance Article and to hold otherwise would create an impermissible 'safe harbor' for Erie; that the independent witness said Mr. Orndorff was not speeding; and that Erie improperly denied its insured's towing claim.

To the extent that these assertions are of fact, we do not address them because Mr. Orndorff did not include or verify them as genuinely disputed material facts in his opposition to Erie's summary judgment motion. See Md. Rule 2-501(b). To the extent that these assertions are legal arguments, we do not address them because Mr. Orndorff did not raise them below in opposition to Erie's summary judgment motion. See Md. Rule 8-131(a).

Maryland Rule 2-501(f) entitles a movant to summary judgment if " . . . there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). A non-movant wishing to controvert an assertion of genuinely undisputed material facts must do so "with particularity" and " . . . as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute." Md. Rule 2-501(b). "In other words, '[o]nce the movant makes [a sufficient] showing, *the burden shifts to the nonmoving party* to identify with particularity the material facts that are disputed.' . . . The nonmoving party must proffer facts that would be admissible in evidence to show that there is a genuine dispute as to a material fact." *Thomas v. Shear*, 247 Md. App. 430, 447 (2020) (cleaned up).

Genuine disputes can arise from "predicate" facts or from the inferences that may reasonably be drawn from those predicate facts. *Cador v. Yes Organic Market Hyattsville Inc.*, 253 Md. App. 628, 635 (2022) ("The notion of a 'dispute' is not limited to a testimonial dispute about the very physical existence of a predicate fact in order to launch a possible inference. It may also be a 'dispute' about the inferential process itself."). Although the non-movant is entitled to have inferences drawn in his favor, the inferences must be reasonable, based on "particular facts," and not merely general allegations or second guesses about hypothetical alternative scenarios that may have been available.

Rite Aid Corp. v. Hagley, 374 Md. 665, 688-89 (2003).[8]

With these precepts in mind, we turn to the undisputed facts identified by the motions court. It found that Mr. Orndorff made a demand on Erie to settle for its insured's policy limits in late October or November 2016, [9] a demand that Erie denied. This denial was not in bad faith because it was based on the information Erie had at the time. By March 17, 2017, Erie had gathered more information and "had come around" to the determination that its insured was liable. Erie offered its insured's policy limits in full

[8] In *Rite Aid Corp.*, Rite Aid and its employee claimed statutory good faith immunity to a customer's suit filed after the employee reported to police what appeared to be (but were determined not to be) inappropriate images in the customer's photograph order. On appeal from the trial court's grant of summary judgment to Rite Aid and the employee, the customer pointed to a number of alternative steps the employee could have taken, and argued that the employee's failure to take those steps entitled the customer to an inference of bad faith. The Court of Appeals disagreed, explaining that "general allegations" or the "availability of other alternatives" for handling the situation " . . . [did] not equate to bad faith or a lack of good faith." *Id.* at 687. Instead,

> [f]or the [customer] to oppose the summary judgment motion successfully, [he] must have made a showing, supported by particular facts sufficient to allow a fact finder to conclude that [the employee] lacked good faith in making the report of suspected child abuse. [The customer] might have done so by producing specific facts showing that [the employee] knew, or had reason to know, that the photographs did not depict a form of child abuse and, in total disregard of that knowledge, filed a report anyway. What the [the customer] ha[s] produced are general allegations, that simply show that all of [the employee's] actions in making the report can be second guessed.

Rite Aid Corp. v. Hagley, 374 Md. at 688.

[9] We recognize that Mr. Orndorff appears to have made his demand in November 2016, not late October 2016. This variance in the motion court's recitation of the undisputed facts is immaterial to our conclusion here.

settlement, but Mr. Orndorff did not accept the offer. Erie made its offer well before the liability trial against its insured and well before a judgment against its insured.

We agree that these facts are undisputed. But we do not add to this list any inference of bad faith based on what Erie could have done but did not do. Specifically, Mr. Orndorff contends that Erie could have (but did not) ask for an extension of Mr. Orndorff's 30-day time limit on his November 2016 demand, and could have (but did not) interview the investigating police officer and the fact witness before denying his demand. These assertions are merely hypotheticals or second guesses about what Erie could have done and do not support reasonable inferences of bad faith by Erie. *Rite Aid Corp v. Hagley*, 374 Md. at 688.

With the above undisputed facts in mind, we turn to Maryland's law on the tort of wrongful failure to settle an insurance claim. In Maryland, an insurance company that " . . . undertakes to defend its insured . . . may be liable for the 'wrongful failure to settle a claim against its insured within policy limits.'" *Johnson v. Pennsylvania National Mutual Casualty Insurance Company*, 447 F. Supp. 3d 372, 379 (D. Md. 2020) (quoting *Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. 241, 259 (1999)). Such a claim recognizes the conflict of interest that can occur between an insurer and its insured, at least to the extent of an excess verdict, and the insurer's fiduciary duty that arises as a result:

> When a claim exceeds the amount of applicable insurance, the potential for a conflict of interest may exist, particularly when there is an opportunity to settle the claim within policy limits, . . . and where liability is not an issue. The insured, wishing to avoid the risk of a judgment in excess of policy limits, will desire to settle the claim as early as possible. The

> insurer, who risks nothing beyond the limits of the policy, may wish to delay settlement based upon a judgment that a more favorable settlement may be made at a later time. But their interests are in no way adverse to the extent that exists where coverage is an issue.

Allstate Ins. Co. v. Campbell, 334 Md. 381, 395–96 (1994). *See also Sweeten, Adm'r v. Nat'l. Mutual*, 233 Md. 52, 55 (1963) (" . . . because the insurer has the exclusive control, under the standard policy, of investigation, settlement and defense of any claim or suit against the insured, . . . there is a potential, if not actual, conflict of interest giving rise to a fiduciary duty."). Once an insurer undertakes to defend its insured on a claim, the insurer's wrongful failure to settle the claim is a claim in tort, not contract. *Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. at 257.

The possibility of liability in tort does not mean that an insurer must settle all claims against its insured. Indeed, "[a]n insurer does not have an absolute duty to settle a claim within policy limits, although it may not refuse to do so in bad faith. . . . But, while an insurer has a duty to enter into good faith negotiations 'where reasonable and feasible' to settle a claim within policy limits . . . [,] there is no requirement that it 'rush to the settlement of a claim' against the insured to avoid an excess judgment. . . ." *Allstate*, 334 Md. 381, 396 (1994) (citations omitted). An insurer's decision to reject a settlement will be in "good faith" if the decision " . . . consist[s] of an informed judgment based on honesty and diligence. Furthermore, the insurer's negligence, if any there be, is relevant to determining whether or not it acted in good faith." *State Farm Mut. Ins. Co. v. White*, 248 Md. 324, 333 (1967).

We have identified certain "acts or circumstances," the presence of one or more of which, "may affect the 'good faith' posture of the insurer.'" *State Farm Mut. Ins. Co. v. White*, 248 Md. at 332. These are " . . . the severity of the plaintiff's injuries giving rise to the likelihood of a verdict greatly in excess of the policy limits; lack of proper and adequate investigation of the circumstances surrounding the accident; lack of skillful evaluation of plaintiff's disability; failure of the insurer to inform the insured of a compromise offer within or near the policy limits; pressure by the insurer on the insured to make a contribution towards a compromise settlement within the policy limits, as an inducement to settlement by the insurer; and actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament." *Id.* (citing cases).

Notwithstanding our identification of these "acts and circumstances," we are aware of no case, and Mr. Orndorff cites none, in which a jury was permitted to determine an insurer's good (or bad) faith in settling (or not settling) a claim where, as here, the insurer offered its insured's policy limits in full settlement prior to its insured being at risk of an excess judgment. *Hughes v. Progressive Direct Ins. Co.*, No. CIV. CCB-12-1555, 2012 WL 4480726, at *3 (D. Md. Sept. 27, 2012) (**"**No Maryland case has been cited to this court in which the Court of Appeals held that an insurer that offered its policy limits in settlement of a claim prior to trial could be held liable in tort for bad faith."). *See, e.g., Allstate Ins. Co. v. Campbell*, 334 Md. 381 (1994); *American Mut. Ins.*

Co. of Boston v. *Bittle*, 26 Md. App. 434 (1975); *Sobus v. Lumbermens Mut. Cas. Co*., 393 F. Supp. 661 (D. Md. 1975).

Here, there was no dispute that Erie offered its insured's policy limit in full settlement of Mr. Orndorff's claims well before the liability trial began, i.e., well before its insured faced exposure for an excess verdict. Nor was there any dispute that Erie made this offer multiple times. Accordingly, as above, the issue of Erie's having acted in good faith (or bad) in its attempts to settle its insured's liability was no longer a question for a jury. Even if Erie could be said to have acted in bad faith by denying Mr. Orndorff's November 2016 demand, Erie's subsequent offer of policy limits before its insured faced the risk of an excess verdict meant that Erie did not act in bad faith in attempting to settle Mr. Orndorff's claim against Erie's insured.

Preferred Risk Mut. Ins. Co. v. Gaskill, 371 F.2d 792 (4th Cir. 1967) and *Kremen v. Maryland Auto Ins. Fund*, 363 Md. 663 (2001), the cases on which Mr. Orndorff relies, are both distinguishable. In *Preferred Risk*, the insurer wanted to " . . . 'try to save something'" of the policy limit, even as it became apparent that the injured plaintiffs' trial evidence was stronger than the insurer anticipated. In *Kremen*, while there was some dispute about why an insurer failed to settle a claim against its insured for policy limits, it was held that the insurer's failure to fully investigate the third-party claimant's injuries was sufficient evidence for the jury to have found bad faith. In neither case, however, did the insurer make a policy limits offer before its insured was at risk of an excess verdict.

Nor are we persuaded by Mr. Orndorff's contention that the motion court's

analysis of damages should have included other damages to Mr. Orndorff. The law is well-settled that damages for an insurer's wrongful failure to settle a third-party claim are limited to the difference between the insured's policy limits and the excess verdict, "a mathematical computation." *State Farm v. Schlossberg*, 82 Md. App. 45, 63, *cert. denied*, 320 Md. 222 (1990). Here, however, the motions court found no basis for liability on Erie's part because Erie offered its insured's policy limits in full settlement before its insured faced an excess verdict. Accordingly, the motions court had no occasion to consider damages.

Mr. Orndorff's reliance on cases involving claims of bad faith by an insured against his or her insurer for failure to pay the insured's claims is similarly unavailing. Citing *Jerry v. Allstate Ins. Co*., 553 F. Supp. 3d 287 (D. Md. 2021), *Barry v. Nationwide Mutual Ins. Co.*, 298 F. Supp. 3d 826 (D. Md. 2018), *Mt. Hawley v. Adell*, Civil No. JKB-17-252 (D. Md. Dec. 3, 2018), and *Schwaber v. Hartford*, 636 F. Supp. 2d 481 (D. Md. 2009), Mr. Orndorff argues that these cases establish a "totality of the circumstances" standard for the assessment of an insurer's good (or bad) faith, a standard that (presumably) should have been applied here. These cases are based on Section 3-1701 of the Courts and Judicial Proceedings Article,[10] a statute that applies only to "first party"

[10] This statute, entitled "Actions against insurance providers to determine coverage," applies to claims that an insurance provider failed to act in good faith in determining coverage or "the extent to which the insured is entitled to receive payment from the insurer for a covered loss." Md. Code (2007, 2013 Repl. Vol. & 2015 Supp.), Cts. & Jud. Proc. § 3-1701.

claims between an insured and his or her property, casualty, or individual disability insurer.[11] Mr. Orndorff's claims against Erie are plainly not first party claims. Accordingly, these cases are not persuasive here.

We also decline to accept Mr. Orndorff's suggestion that the motions court's decision works as an improper "retroactive cure" of Erie's bad faith failure to accept Mr. Orndorff's November 2016 demand. To start, as above, Mr. Orndorff provided no evidence of bad faith for Erie to "cure." Moreover, he supplies no authority for the proposition that paying a claim after receiving more information about it is itself evidence that an earlier denial was in bad faith. Quite the opposite is true, as Maryland insurers have a " . . .continuing duty to negotiate in good faith to settle the claim within policy limits." *Allstate*, 334 Md. at 659. Here, there is no evidence that Erie failed in this continuing duty.

Ultimately, we hold that the circuit court did not err in granting summary judgment in favor of Erie. In response to Erie's summary judgment motion, Mr. Orndorff supplied no verified facts to dispute Erie's explanation for why it denied Mr. Orndorff's November 2016 policy limits demand, and no facts, either predicate or reasonably inferred, that Erie's denial was in bad faith. Erie's subsequent offer of its insured's policy limits, an offer made well before its insured faced the risk of an excess verdict, foreclosed any claim by Mr. Orndorff, the insured's assignee, that Erie had acted in bad faith.

[11] See Md. Cts. & Jud. Proc. § 3-1701(b) ("This subtitle applies only to first-party claims under property and casualty insurance policies or individual disability insurance policies issued, sold, or delivered in the State.").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.