SUMMARY
March 30, 2023

2023COA31

No. 21CA2023, *Fear v. Geico* — Insurance — Motor Vehicles — Uninsured/Underinsured; Regulation of Insurance Companies — Improper Denial of Claims

Applying section 10-3-1115, C.R.S. 2022, *Fisher v. State Farm Mutual Auto Ins. Co.*, 2018 CO 39 (*Fisher II*), held that an automobile insurer must promptly pay to a first-party claimant their uninsured or underinsured motorist benefits when the first-party claimant's damages are undisputed. Here, a division of the court of appeals declines to extend *Fisher II*, and holds that an insurer's internal evaluation of a first-party claimant's noneconomic damages does not establish an "undisputed" amount of benefits owed and is therefore not subject to immediate payment.

COLORADO COURT OF APPEALS **2023COA31**

Court of Appeals No. 21CA2023
City and County of Denver District Court No. 20CV32188
Honorable Marie Avery Moses, Judge

Marcus A. Fear,

Plaintiff-Appellee,

v.

GEICO Casualty Company,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE GROVE
Harris and Kuhn, JJ., concur

Announced March 30, 2023

Franklin D. Azar & Associates, P.C., DezaRae D. LaCrue, Timothy L. Foster, Aurora, Colorado, for Plaintiff-Appellee

Deisch, Marion & Klaus, P.C., Gregory K. Falls, Denver, Colorado; Michael S. Simpson, Golden, Colorado, for Defendant-Appellant

Walberg Law, PLLC, Wendelyn K. Walberg, Morrison, Colorado, for Amicus Curiae Colorado Defense Lawyers Association

Dormer Harping, LLC, Timothy M. Garvey, Denver, Colorado; Jordan Herington & Rowley, Michael J. Rosenberg, Greenwood Village, Colorado, for Amicus Curiae Colorado Trial Lawyers Association

¶ 1 In this dispute over underinsured motorist (UIM) coverage, defendant, GEICO Casualty Company, appeals the judgment of the trial court holding it liable for unreasonably delaying payment to plaintiff, Marcus A. Fear. Following a bench trial, and relying on *State Farm Mutual Automobile Insurance Co. v. Fisher*, 2018 CO 39, ¶ 24 (*Fisher II*), *aff'g* 2015 COA 57 (*Fisher I*), the trial court ruled that GEICO violated sections 10-3-1115 and -1116, C.R.S. 2022, by conditioning payment of the ostensibly "undisputed" portion of Fear's noneconomic damages on his release of any remaining claims for UIM benefits.

¶ 2 Because we conclude that the court erroneously relied on GEICO's internal evaluation of the UIM claim to measure Fear's "undisputed" noneconomic damages, we reverse.[1]

I. Legal Background

¶ 3 Section 10-3-1115(1)(a) provides that an insurance company "shall not unreasonably delay or deny payment of a claim for

[1] In addition to ruling that GEICO had violated its statutory duties, the trial court also found that Fear had suffered $9,000 in noneconomic damages. GEICO appeals only the court's ruling on Fear's statutory claim for unreasonable delay; it does not challenge the court's noneconomic damages award.

benefits owed to or on behalf of any first-party claimant." An insurer violates this statutory mandate if it "delay[s] or denie[s] authorizing payment of a covered benefit without a reasonable basis for that action." § 10-3-1115(2). If an insurer unreasonably delays or denies payment of a covered benefit, the claimant "may bring an action . . . to recover reasonable attorney fees and court costs and two times the covered benefit." § 10-3-1116(1).

¶ 4 In *Fisher II*, our supreme court considered whether "auto insurers have a duty to pay undisputed portions of a UIM claim . . . even though other portions of the claim remain disputed." *Fisher II*, ¶ 3. In that case, a motorist who carried $25,000 in liability coverage struck Fisher's vehicle. That amount of coverage was insufficient to cover Fisher's medical bills, which totaled more than $60,000. *Id.* at ¶ 4. Fisher's own State Farm policies, however, included more than $400,000 in UIM coverage. *Id.* at ¶¶ 1, 4.

¶ 5 State Farm conceded that Fisher's medical bills were reasonable, necessary, and causally related to the accident. *Id.* at ¶ 6. But the insurer disputed other claimed losses, including lost wages and noneconomic damages, and it refused to reimburse Fisher for any of his out-of-pocket expenses unless and until the

parties reached a global UIM settlement. *Id.* at ¶ 7. In short, even though State Farm did not dispute Fisher's medical bills, it maintained that it had "no obligation to make piecemeal payments on the undisputed portions of Fisher's claim." *Id.*

¶ 6 The supreme court rejected State Farm's position and held that the plain language of sections 10-3-1115 and -1116 prohibits an insurer from "withholding payment of undisputed covered benefits" owed to an insured "simply because other portions of an insured's UIM claim remain disputed." *Id.* at ¶ 24. State Farm's failure to promptly reimburse Fisher for his medical bills, the court held, violated its statutory "duty not to unreasonably delay or deny payment of covered benefits" because Fisher's medical expenses were "undisputedly covered under the UIM policies." *Id.* at ¶ 27.

II. Factual and Procedural Background

¶ 7 Fear was injured when an underinsured motorist crashed into his car. Fear's economic losses, including medical bills and other out-of-pocket expenses, eventually totaled $21,761, and he settled with the at-fault driver's auto insurer, with GEICO's consent, for the policy limit of $25,000.

¶ 8 Fear then filed a claim with his own insurer, GEICO, which had issued him a policy with $100,000 in UIM coverage. He asserted that he was entitled to UIM benefits because the sum of his economic and noneconomic damages exceeded $25,000, and his settlement with the tortfeasor had thus not made him whole.

¶ 9 In an internal evaluation of Fear's claim, GEICO's adjuster estimated that the claim's total value was somewhere between $27,500 and $34,000. GEICO set aside sufficient reserves to pay its share of the projected amount, and, accounting for a $25,000 offset of Fear's settlement with the at-fault driver's insurer, set an internal "negotiation range" of $2,500 to $9,000 for the UIM claim.

¶ 10 Fear never made a settlement demand, and GEICO began negotiating by offering him $2,500 — a figure that, when added to the $25,000 settlement, placed a value of $7,243 on his noneconomic damages. Later, after Fear submitted documentation showing that he had incurred $1,504 in additional medical expenses, GEICO upped its offer by the same amount, to a total of $4,004.[2] Both offers required Fear to accept the money in full

[2] GEICO's original $2,500 offer, which valued Fear's total claim at $27,500, was based on an incomplete set of medical bills that

satisfaction of his UIM claim, and GEICO did not offer to make partial payment while the claim was still pending.

¶ 11 Fear did not accept the offers or otherwise attempt to negotiate. He also rejected GEICO's request to sit for a recorded interview and did not sign any releases allowing GEICO to speak with his treatment providers. Approximately two weeks after GEICO made its second offer, he filed suit in district court, asserting, as relevant here, a claim for unreasonable delay under section 10-3-1115. As we understand his complaint, Fear alleged that (1) the holding in *Fisher II* compelled GEICO to pay him $4,004 without requiring a release because that amount, which corresponded to the minimum of GEICO's "negotiation range," was "owed under the [UIM] policy"; and (2) GEICO's failure to do so amounted to an unreasonable delay under section 10-3-1115. In addition, as a result of GEICO's allegedly unreasonable delay, Fear asserted that he was entitled to recover from the insurer "an

totaled $20,257. The subsequent offer of $4,004 continued to value Fear's noneconomic damages at $7,243, but was $1,504 higher than the original offer to account for additional medical bills that brought Fear's total medical expenses to $21,761.

additional two times the covered benefits plus reasonable attorney's fees and court costs." *See* § 10-3-1116.

¶ 12 After some procedural maneuvering that has no bearing on our analysis, the parties proceeded to a bench trial. In her opening statement, Fear's attorney asserted that the negotiation range of $2,500 to $9,000 settled on by GEICO's adjuster was an admission that Fear's claim was worth "at least" $9,000, and that under *Fisher II*, GEICO "should have . . . advanced" that amount to Fear without requiring a full settlement of his UIM claim. But the exact "undisputed" figure turned out to be elusive. Fear's expert witness testified at one point that the low end of the adjuster's negotiation range — $2,500 — "represent[ed] the . . . minimum value . . . of the benefits that the insurance company would pay or expect to pay beyond the tortfeasor's limit," and thus he asserted that GEICO unreasonably delayed Fear's UIM benefit by failing to advance that amount to him. Elsewhere in his testimony, however, the same expert testified that GEICO "should have paid [to Fear] the $4,004 estimate . . . that was an offer and it was within their claim evaluation range." And, as we explain further below, the court

eventually found that "it was undisputed that Mr. Fear had at least $3,961 in non-economic damages."

¶ 13 GEICO pointed out these discrepancies and maintained that neither its internal evaluation nor its settlement offers amounted to a concession that any portion of Fear's claim for UIM benefits was "undisputed," and thus subject to a *Fisher* payment. It also objected to the court's consideration of its internal claim evaluation, arguing that it was inextricably intertwined with its settlement offers and thus did not constitute an admission of undisputed amounts owed. *See Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶¶ 25-28. And in its written closing, GEICO asserted that Fear's noneconomic damages were between zero and $9,000 without conceding that any particular amount was undisputed.

¶ 14 The trial court ruled in Fear's favor in a written order issued after trial. It awarded Fear $9,000 in noneconomic damages, and, based on the low end of the adjuster's internal evaluation, concluded that $7,200 of that amount was, and had been,

undisputed since the time that the evaluation was created.[3] After offsetting Fear's $25,000 settlement and accounting for his $21,761 in economic damages, the court found that GEICO had unreasonably delayed paying Fear $3,961 in UIM benefits. The court ruled that Fear was entitled to a penalty of double that amount, along with an award of attorney fees and costs. *See* § 10-3-1116(1). Accordingly, after offsetting the $25,000 settlement, the court awarded Fear a total of $13,683, and later added approximately $46,000 in attorney fees and costs to the judgment.

III. Standard of Review

¶ 15 We review a trial court's judgment entered following a bench trial as a mixed question of fact and law. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12. We review legal conclusions de novo, *id.*, and will disturb factual findings only if they are clearly erroneous and not supported by the record, *Jehly v. Brown*, 2014 COA 39, ¶ 8.

---

[3] It appears that the figure of $7,200 cited by the court was rounded down from the actual numbers in GEICO's internal evaluation, which set the minimum of the estimated range at $7,243.

IV. Admissibility of the Settlement Evaluation

¶ 16 GEICO contends that the trial court erred by relying on its internal settlement evaluation as a basis for concluding that some portion of Fear's claimed noneconomic damages was undisputed. We agree.

¶ 17 When GEICO received Fear's UIM claim, it conducted an internal evaluation and came up with estimates that informed both its "negotiation range" and how much money it should set aside for an eventual payout. *See Sunahara*, ¶ 24 (noting that insurers prepare claim evaluations, in part, "to satisfy statutory obligations and to establish bargaining tactics"). The adjuster estimated that Fear's noneconomic damages ranged between $7,243 and $12,239. Because Fear's settlement with the at-fault driver exceeded his economic damages by several thousand dollars, GEICO offset its estimate by that amount, leaving it with a negotiation range of $2,500 to $9,000. GEICO's two settlement offers — $2,500 and $4,004 — were based on these ranges. Accounting for the offset, both valued Fear's noneconomic damages at $7,243.

¶ 18 The trial court correctly recognized that it could not consider GEICO's settlement offers to be "an admission that the amount of

the offer was the amount of benefits owed to [Fear]." *Fisher I*, ¶ 15 (citing *Sunahara*, ¶ 23). But the court found that it *could* rely on the GEICO adjuster's internal evaluation of the UIM claim — which mirrored the settlement offers — for exactly that purpose. We disagree with that conclusion for two reasons.

¶ 19 First, in contrast to economic damages, which can be calculated with precision, noneconomic damages are inherently subjective and thus "can be difficult to quantify and determine." *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416 (Colo. 2004). That was certainly true for GEICO, which had to evaluate Fear's claim without the benefit of a recorded interview or a release that would allow a full review of his medical records. And even if that information had been made available to GEICO, its internal estimate would not have bound the fact finder at trial. Nor should it have. Internal evaluations like the one that GEICO completed in this case are not intended to confine the fact finder to a particular range of damages, or even to inform its decision-making process. Rather, insurers conduct internal evaluations "for the limited internal purposes of setting reserves and determining settlement authority to comply with insurance regulatory standards and to

estimate [their] potential financial liability." *Sunahara*, ¶ 26; *see also Silva v. Basin W., Inc.*, 47 P.3d 1184, 1191 (Colo. 2002) ("[R]eserves and settlement authority reflect an insurer's basic assessment of the value of a claim taking into consideration the likelihood of an adverse judgment, but do not normally entail a thorough factual and legal evaluation when routinely made as a claim analysis."). And in making its subjective assessment of a plaintiff's damages, the fact finder is free to conclude that they fell below, within, or above the range that the insurer has targeted for settlement.

¶ 20 Second, relying on an insurer's internal assessment of noneconomic damages as a basis for calculating "undisputed" damages would run counter to the limitations of CRE 408, which expressly prohibits admitting into evidence the amount of a settlement offer to prove the "amount of a claim that was disputed." While GEICO's internal evaluation of its potential liability was not itself a "settlement offer," the two were inextricably intertwined, as will be true in virtually every case. Indeed, GEICO's settlement offers matched its internal evaluation precisely. The analysis in *Sunahara* makes the connection clear: "[I]t would be absurd to

protect the end result of the insurance company's initial evaluation process — the reserves and settlement authority — without also protecting the assessments that led to those numbers." *Sunahara*, ¶ 25. Thus, "[t]he spirit of [Federal Rule of Evidence 408, which CRE 408 tracks], as recognized by several circuits and as set forth in the commentary to the Rule, supports the exclusion of certain work product, internal memos, and other materials created specifically for the purpose of conciliation, even if not communicated to the other party." *Equal Emp. Opportunity Comm'n v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009); *see also Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106-07 (5th Cir. 1981) (holding that an internal report made "in the course of an effort to compromise" was properly excluded under Fed. R. Evid. 408).

¶ 21 Nor are we persuaded otherwise by *Sunahara*'s observation, in dicta, that "[i]n bad faith and declaratory judgment actions, evidence of reserves and settlement authority could shed light on whether the insurance company adjusted a claim in good faith, or promptly investigated, assessed, or settled an underlying claim." *Sunahara*, ¶ 29. If, as we have already concluded, an insurer's internal evaluation of noneconomic damages yields no actionable

information about the amount of undisputed benefits owed, then it follows that the same information has no relevance to the question whether the insurer unreasonably delayed making UIM payments under the insured's policy.

¶ 22 In sum, because GEICO's internal evaluation of Fear's economic and noneconomic damages was created for the purpose of facilitating GEICO's effort to settle the UIM claim, and because it sheds no light on the *actual*, subjective, noneconomic damages that Fear suffered, we hold that it was inadmissible as evidence of undisputed "benefits owed" to Fear under *Fisher II*. And because the court's ruling depended heavily on the values assigned in that internal evaluation, we cannot say that the error was harmless.

V. Disposition

¶ 23 We leave undisturbed the award of $9,000 to Fear for his noneconomic damages, the award of costs to Fear as a prevailing party, and the award of pre- and post-judgment interest on the noneconomic damages award. We reverse the award of statutory penalties under section 10-3-1116 and the accompanying award of attorney fees and costs and remand the case so that the court may recalculate the judgment as needed.

JUDGE HARRIS and JUDGE KUHN concur.