NO. SC 84896

IN THE SUPREME COURT OF MISSOURI

CHARLES I. GREWELL and
LINDA GREWELL,

APPELLANTS,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY and NERESSA L. WILKINS,

RESPONDENTS.

Appeal from the Circuit Court of Jackson County, Missouri

Sixteenth Judicial Circuit

Honorable Jay A. Daugherty, Judge

APPELLANTS' SUBSTITUTE REPLY BRIEF

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STATEMENT

Because the Respondents have raised additional issues not addressed by the Appellants in their brief, the Appellants submit this reply brief pursuant to Missouri Rule of Court 84.04(g). References to Respondents' brief will be abbreviated as "R.Br." and Appellants' opening brief as "App.Br.".

POINTS RELIED ON

POINT ONE

The trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss, ruling that Plaintiffs did not have a right of access to the claims file generated by Defendants, because a special relationship exists between a liability insurer and the insured, which is similar to the attorney-client relationship and which is also characterized as a relationship of identity of interest, and because an insured is entitled to be fully informed as to all matters arising from transactions with the liability insurer as to a claims file in that State Farm is the liability insurer of the Plaintiffs, in that the claims file was generated as a result of a third party claim against Plaintiff Linda Grewell, and in that the coincidence of the liability insurer providing coverage to adverse insureds does not void the special relationship.

Faught v. Washam, 329 S.W.2d 588(Mo. 1959).

Corrigan v. Armstrong, 824 S.W.2d 92(Mo.App. E.D. 1992).

Mitchum v. Hudgens, 533 So.2d 194(Ala.S.Ct. 1988).

POINT TWO

Assuming Plaintiffs have stated a substantive cause of action, then the trial court erred as a matter of law and to the prejudice of Plaintiffs by sustaining that part of Defendants' motion to dismiss as to a declaratory judgment action not being the proper remedy for seeking

access to the claims file because a declaratory judgment action is available upon a showing of (1) existence of a justiciable controversy admitting of specific relief by decree; (2) the presence of a legally protectable interest; (3) the existence of a question ripe for judicial decision; and (4) the absence of an adequate legal remedy in that Plaintiffs have a written contract of insurance with State Farm, in that a liability insurer-insured relationship exists between Plaintiffs and State Farm, in that Plaintiffs have a legal right of access to the claims file which State Farm has denied, in that the respective positions of the parties are polarized and cannot be resolved without judicial resolution, and in that no other adequate legal remedy exists.

Corrigan v. Armstrong, 824 S.W.2d 92(Mo.App. E.D. 1992).

Lake Ozark Construction v. North Port Assoc., 859 S.W.2d 710 (Mo.App. W.D. 1993).

L.B. v. State Committee of Psychologists, 912 S.W.2d 611(Mo.App.W.D. 1995).

POINT THREE

Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss as failing to state a cause of action in Count Two of the petition for attorney fees because attorney fees can be awarded in a declaratory judgment action when there is a

showing of "very unusual circumstances" in that the law regarding the relationship between an insured and a liability insurer and regarding "work product" is well-delineated and well-settled and in that Defendants' refusal, and continuing refusal, to release the requested information was in bad faith, was without just cause or excuse, was intentional, was frivolous, and/or was outrageous because of Defendants' evil motive or reckless indifference to Plaintiffs' rights.

Windsor Ins. Co. v. Lucas, 24 S.W.3d 151(Mo.App. E.D. 2000).

DCW Enterprises, Inc. v. Terre du Lac Ass'n. Inc., 953 S.W.2d 127 (Mo.App. E.D. 1997).

Temple Stephens Co. v. Westenhaver, 776 S.W.2d 438(Mo.App. W.D. 1989).

POINT FOUR

Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss as failing to state a cause of action in Count Three of the petition for nominal and punitive damages because damages can be awarded in a declaratory judgment action and because nominal and punitive damages are available in an action involving a

breach of a fiduciary duty in that when Respondents refused to provide Appellants access to the claims file, Respondents, as liability insurer, breached various fiduciary duties to Appellants, as insureds.

Overcast v. Billings Mutual Insurance Company, 11 S.W.3d 62(Mo.banc 2000).

Zumwalt v. Utilities Insurance Co., 228 S.W.2d 750(Mo. 1950).

MO.REV.STAT. Section 375.420.

ARGUMENT

POINT ONE

The trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss, ruling that Plaintiffs did not have a right of access to the claims file generated by Defendants, because a special relationship exists between a liability insurer and the insured, which is similar to the attorney-client relationship and which is also characterized as a relationship of identity of interest, and because an insured is entitled

to be fully informed as to all matters arising from transactions with the liability insurer as to a claims file in that State Farm is the liability insurer of the Plaintiffs, in that the claims file was generated as a result of a third party claim against Plaintiff Linda Grewell, and in that the coincidence of the liability insurer providing coverage to adverse insureds does not void the special relationship.

In part A of its Point I, Respondents assert that "appellants' declaratory judgment action is based entirely on the faulty premise that an attorney is required to turnover his or her file to the client upon the client's request", relying upon the *Corrigan* case to further assert that in an attorney-client relationship, a client's right to review the file is a "conditional right", which is "limited to the extent [the client] need(s) to know and understand what has been done for him, no more no less" and which the "client can enforce . . . only to the extent the information is needed". (R.Br. 10). Appellants respectfully submit that Respondents have misconstrued Appellants' arguments and the facts and holdings of the *Corrigan* case.

As to the issues presented in the declaratory judgment action, Appellants did not request unlimited access to the claims file. Appellants requested eight (8) specific items of which Wilkins produced information as to three (3) items, but denied the following five (5) items:

> 3. Statement of any witnesses obtained by you and anyone else with State Farm acting on behalf of Charles I. Grewell and Linda Grewell.
>
> 6. Any measurements of the accident scene, particularly as to the point of impact.
>
> 7. Transcript of or any of your notes pertaining to any proceeding or meeting whereby State Farm, acting within the capacity of representing Charles I. Grewell and

> Linda Grewell, and State Farm, acting within the capacity of representing James Kephart, determined or otherwise agreed to the percentage of fault between Linda Grewell and James Kephart, and the names of all parties to this proceeding or meeting and the position of each person with State Farm. Please also provide the date when this proceeding or meeting occurred.
>
> 8. Any other facts upon which you or other representatives of State Farm, acting on behalf of Charles I. Grewell and Linda Grewell, rely in assessing any percentage of fault as to Linda Grewell. (L.F. 8 & 9).

Wilkins' reason for denying such information was that Respondents considered it to be "work product." (L.F. 9). Appellants countered that such information was not work product and that even if any such information could be characterized as "work product", the "good faith or fiduciary obligations imposed upon a liability insurer require the liability insurer to provide access to all information which the insured would need to protect his/her interests". (L.F. 9 & 10).

In addition, Appellants' arguments on appeal do not necessarily involve an unlimited right of access. Paraphrasing the rule in *Conrad*, the insured has a right of access "in respect to any matter being conducted" for the insured by the liability insurer "during the time the relation exists", being "entitled to be fully informed of his rights and interests in the subject-matter of the transaction; and of the nature and effect of the transaction itself, and to be so placed as to be able to deal with the" liability insurer at arm's length. (App.Br. 31 & 32). And, Appellants' assertions are consistent with the holdings of the *Corrigan* case.

As to the *Corrigan* case, the Court should initially note that the plaintiff was not the client, but instead the wife of the deceased client, and that she was also not the personal representative of the

estate. As such, the right of access was significantly altered because "this right would have been a personal right, neither transferable nor assignable, * * * and, therefore, could not have been bequeathed by [the client]", but at "best the right may have been passed to [the client's] personal representative." 824 S.W.2d at 96. The Court should next note that even though the *Corrigan* Court characterized a client's right of access to the file as "conditional", any limitation is more illusory than real. As the *Corrigan* Court recognized:

> To be perfectly frank "and make a full disclosure", however, simply means that [the attorney] had the duty to grant [the client] access to the information in their files which he may have needed to interpret the documents he requested to be prepared or to otherwise provide access to the information in the files in order for him to understand the services they performed. Obviously, [the client] had the correlative right of access to this information if needed to protect his interests.
>
> 824 S.W.2d at 96.

The *Corrigan* Court was also quite clear that an attorney has an obligation to permit the client to have access to the file as to any and all information "needed by the client to protect his interests." Id. at 97 & 98. This Court must also consider rules as set forth in such cases as *Conrad* (App.Br. 30) and *Matter of Cupples*, 952 S.W.2d 226, 234[15](Mo.banc 1997)(Client's files belong to client, not to attorney representing client, and client may direct attorney or firm to transmit file to newly retained counsel).

As these rules would apply herein, Appellants' requests for information are clearly needed to "know and understand" Respondents' *conclusion* that Linda was 50% negligent. If Respondents

cannot produce such information because it does not exist, then Respondents' conclusions are probably baseless. If Respondents can produce this information, Appellants can review this information to determine whether or not Respondents conducted a thorough investigation and whether or not Respondents' conclusions are based upon facts. Armed with such knowledge, Appellants may reluctantly agree with Respondents' conclusions or point out any material errors in Respondents' judgment. At the very least, Appellants will have the opportunity "to be fully informed of their rights and interests in the subject matter" and "to be so placed as to be able to deal with" Respondents at arm's length. Such information will also be potentially useful in dealing with the third party (Prawl/Kephart) in pursuing her claim. In a nutshell, such information is needed to protect the interest of the client/insured.

Before concluding its argument, Respondents generally argued that "clear distinctions" exist "between the standard attorney-client relationship and the insured-insurer relationship even when the liability insurer hires counsel to undertake defense of an insured". (R.Br. 11). As with Respondents, Appellants will also address this issue "in greater detail in this brief", but some rebuttal is appropriate.

While Respondents are correct about a liability insurer's basic contractual rights as to controlling the claim process and litigation, Respondents' conclusions are erroneous because with control, there are responsibilities to protect the interests of the insured. As reflected generally in the *Faught* case (App.Br. 25), the liability insurer has a right to act independently, but it must act in such a manner to protect "the interests of itself *and* its insured" and cannot act in such a manner as to "prejudice the substantial rights of an insured without his knowledge or consent." 329 S.W.2d at 594. A "bad faith claim" or similar action are not the only remedies available to an insured to protect his/her interests and to obtain access to the claims file. Such remedies, while potent, do not provide the insured the opportunity to prevent insurer abuses *before* the damage is done and do not provide the insured

with *prior* knowledge of the liability insurer's disclosures to the third party which may affect the insured's pursuit of a claim against the third party. The liability insurer does not have the right to control the insured's claim against the third party, but the liability insurer's action in defending the third party claim could adversely affect the insured's pursuit of his/her counterclaim. Mutual cooperation and an accessible claims file will actually protect the interests of both the liability insurer and insured because both parties will have the opportunity to know and understand what each may be independently doing to protect each party's own interest as well as joint interests.

In Part B of its brief, Respondents generally assert that the "courts have not recognized any `special relationship' between a liability insurer and the insured, which is similar to the attorney-client relationship, that gives the insured the legal right of access to the insurer's claims file". (R.Br. 12). Respondents then submit that "Appellants' varied contentions in this appeal raise a host of questions", but initially Respondents focus only on the question of "is there a duty implied by law owed by a liability insurer to its insured which creates a `special relationship' that elevates the insured-insurer relationship to that of attorney-client giving the insured, among other legal rights, unfettered access [to] the insurer's claims file?" (R.Br. 12 & 13). In attempting to answer this question, Respondents declare that Appellants are at "a loss for authority" and thus "resort to lobbing out various unfounded theories to support their assertion that the entire claims file must be released to them. (R.Br. 13). While Appellants have acknowledged that this issue has not been definitively answered in Missouri (App.Br. 23) and perhaps not outside of Missouri, Appellants flatly dispute Respondents' assertions.

First, the Court should note that Respondents apparently have been unable to locate any cases which contradict Appellants' proposition. Respondents have also abandoned reliance on the ***Rauch*** and the first ***Keet*** cases. (App. Br. 32 & 33).

Second, when reviewing Respondents' attempts to distinguish various cases relied upon by Appellants (R.Br. 13-19), Appellants are reminded of the old saying that Respondents "cannot see the forest for the trees." Herein, the trees are each case – namely, *Craig*, *Cain*, *J.E. Dunn*, *Brantley*, *Duncan*, the second *Keet* case, and even the *May Department Stores* and *Ganaway* cases – while the forest is the "special relationship". Perhaps a better analogy would involve one tree with each case being a branch and the "special relationship" being the trunk of the tree.

Looking to each case, each court addresses a specific fact-based issue. However, each court clearly recognizes that its particular holding is based upon the relationship arising from the liability insurer's duty to defend and right of control. The duty to defend and right to control are the key components to creating the special relationship, which is nonadversarial, which is fiduciary, and which is akin to the attorney-client relationship. See, *Zumwalt*, 228 S.W.2d at 753[2]; *Cain*, 540 S.W.2d at 55-57; *Craig*, 565 S.W.2d at 723[7]; *J.E. Dunn*, 600 S.W.2d at 710; *Duncan*, 665 S.W.2d at 18[4]; *May Dept. Stores*, 699 S.W.2d at 136[3,4]; *Ganaway*, 795 S.W.2d at 556[1-3]. Access to the claims file is simply another "branch" of this trunk/special relationship. Recognizing this special relationship and the right of access will foster the success of this special relationship between liability insurer and insured, which, as in an attorney-client relationship, is a desirable policy. Cf., *May Department Stores*, 699 S.W.2d at 135 & 136 discussing retaining and strengthening the policy regarding client confidentialities.

In addition, although Respondents' specific arguments, attempting to distinguish the *Craig*, *Cain*, *J.E. Dunn*, *Brantley*, and *Keet* cases, are untenable and should not require a specific reply from Appellants, the following conclusion about the "second" *Keet* case requires additional comment:

> However, it must be noted that the court in *Keet* was careful to point out that its ruling requiring disclosure was based on the fact that the insured requesting the information was a distinct component part of the "tripartition" existing of himself, State Farm and the lawyer hired by State Farm to represent him. Id. It is significant that the court also held that the insured had no right to access any correspondence or memoranda found in State Farm's file that pertained to the other insured. Id. Thus, the court would have refused a request for the entire claims file.
>
> (R.Br. 18 & 19).

Respondents apparently overlook the fact that the insured (Davis) did not have any right to access the claims file of the other insured (Clouse) because Davis did not have any "membership or interest" in the tripartite relationship of the Lowther firm/State Farm/Clouse. 644 S.W.2d at 655. As applicable herein, Appellants would not have a right of access to Kephart's claim file, which is proper in light of *Cain* and its progeny. However, in *Keet*, if State Farm/Clouse had disclosed information from the Clouse claim file to State Farm/Davis, then Davis would have had a right to access such information because it was then a part of the Davis claim file. See, also, App.Br. 40, citing to the *Maher* case, 951 S.W.2d at 674[8]. Thus, the *Keet* Court would have granted Davis access *his* entire claims file. 644 S.W.2d at 655, discussing request for production number 2. Appellants likewise have a right to review any information which has become a part of the Grewell claim file.

Respondents conclude their argument in Part B, appearing to address their first question – namely, "Do liability insurers in Missouri have a fiduciary duty to refrain from engaging in a bad faith willingness to settle?" (R.Br. 12, 19-21). In so doing, Respondents initially assert that Appellants are

"accusing the respondent of being too lenient in its evaluation of the Kephart claim". (R.Br. 19 & 20). Respondents again misconstrue Appellants' arguments.

First, Appellants are not asserting that State Farm is being too lenient as to Kephart, but instead too harsh on Linda. Respondents' evaluation of Kephart's liability will not be binding upon him because of the fact that he is a third party and there is no "privity of contract" or any other type of a mutual relationship. However, Respondents' evaluation of Linda's liability will be binding upon her if she does not adequately dispute the at fault determination, permitting State Farm to publicly report the at-fault determination. In addition, Respondents' agreement with Prawl/Kephart that Linda is 50% at fault will potentially adversely affect her ability to deal with Prawl as to her claim. Obviously, Wilkins and Prawl have engaged in some discussions since Wilkins changed her at-fault determination from 20% to 50% and Prawl has maintained his 50% determination. (L.F. 7, 14). Not being a part of such meeting and not having access to the Grewell claims file potentially puts Appellants' counsel at a disadvantage when dealing with Prawl. To properly dispute the at fault determination and deal with Prawl, Linda should have access to the claims file.

Second, Appellants are not seeking to establish any remedy imposing a duty upon an insurer to refrain from engaging in a bad faith *willingness* to settle. If Respondents desire to settle any monetary claim of Kephart, then Respondents have the independent right to do so up to the policy limits. However, the right to settle the monetary portion of the claim does not give State Farm or any liability insurer the independent right to assess fault. Among other things, State Farm and any other liability insurer may simply desire to settle a third party claim for economic reasons to avoid the expense of the duty to defend. Cf., *Overcast*, 11 S.W.3d at 68 fn 5(For instance, the insurance company could announce that it believed its insured was an arsonist, but was going to pay the claim simply to avoid the

expense of litigation). Mere payment of the claim would not necessarily prejudice the rights of an insured, but the at fault determination would prejudice the rights of the insured if publicly reported.

Appellants instead are seeking access to *their* claims file to have the opportunity to properly dispute or to understand the liability insurer's at-fault determination *before* it is publicly reported as well as to obtain knowledge about any material disclosures to or from the adverse insured/third party. While access to the claims file does not *guarantee* that an insured could change the at-fault determination, access does guarantee the opportunity to understand the at-fault determination and to properly dispute it if the facts so warrant. Access also guarantees the insured the opportunity to know and understand the nature and extent of the negotiations between the liability insurer and the third party. Simply put, access permits the insured the opportunity to protect his/her interests and to put the insured in a position to deal at arm's length with the liability insurer and the third party.

Respondents also cite two cases – *Charter Oak Fire Ins.* and *Reid* – for the proposition that "at least two courts have effectively rejected such a concept." (R.Br. 20). Respondents' reliance is misplaced.

In *Reid*, the issue did not involve the right of access to the claims file arising out of the "duty to defend and right of control", but instead whether or not State Farm/liability insurer had a duty "to take affirmative action to preserve evidence or to conduct investigations concerning any potential claims by Reid [the insured] against third parties." 173 Cal.App. 3d at 573. The *Reid* Court ruled that a "special relationship" did not exist "under the facts of this case". Id. These facts included the absence of forseeability to preserve evidence, the absence of any voluntary assumption by State Farm to protect the claims against codefendants, and the absence by Reid to establish any detrimental reliance upon State Farm. Id. at 573-578.

As applied herein, Appellants are not necessarily claiming that Respondents had any particular duty to preserve evidence or conduct any investigation, although since Respondents are assessing percentages of fault instead of merely paying a third-party claim, it should be required to conduct a reasonable investigation and preserve evidence to support its determinations. See, *Mitchum v. Hudgens*, 533 So.2d 194, 197(Ala.S.Ct. 1988). Herein, the liability insurer has assessed fault to its own insured and potentially disclosed material information to the third party/adverse insured, of which both acts can forseeably prejudice the interests of the insured.

In *Charter Oak*, the issue did not involve access to the claims file, but instead whether a liability insurer had a duty to "handle a claim in a manner that will minimize the business risk, as distinct from the liability risk, to the insured". 45 F.3d at 1172. In rejecting such a duty, the *Charter Oaks* Court was primarily concerned about the possibility of collusion between the insured and the customer. Id. at 1173 & 1174. Other reasons included shifting the "moral hazard" to the insurer, increasing the potential power of the customer to force settlements, and reducing or eliminating the incentive of the insured to cooperate with the insurer after the insured pays damages to the customer. None of these considerations are present herein, and in fact, access to the claims file will effectively prevent collusion between the two liability insurers, particularly when the adverse claimants are insured by the same insurer. Cooperation between the liability insurer and insured may also improve because the parties will share information with each other, work together in a common defense, and deal with each other at arm's length.

In Part C of its argument, Respondents contend that public policy does not require a liability insurer to permit an insured to access the claims file. While Appellants' previous arguments would equally apply herein, Respondents raise two issues which require additional comment.

First, in footnote 3, Respondents state as follows:

> The appellants further contend that insurance companies have access to a service that maintains and reports the insurance claims history of individuals. As was determined by the court of appeals, the argument based on an insured's need to address the public reporting of claims determinations cannot be considered because it was raised for the first time on appeal.

R.Br. at 22.

While the Court of Appeals addressed this issue in its opinion, stating that Appellants failed to plead it, to argue it to the trial court, or to raise it on appeal until raised in the reply brief (Op. at 6), Appellants vigorously disputed this assertion, particularly in their suggestions in support of their motions for rehearing/transfer. Rather than rehash these arguments herein, Appellants would point out that this issue was generally raised in the trial court. (L.F. 38). Upon subsequent research, Appellants' counsel learned of the existence of such entities as Equifax and Choicepoint. Appellants have set forth copies of the relevant portions of the suggestions in the Appendix. See, A-1 to A-4. The Court should also note that Respondents do not deny that such entities exist and do not deny that such claims information is relevant or material to an insurer when assessing the risk of a potential insured, cancelling the coverage of an insured, or raising the rates of an insured.

Second, Respondents cite the *Mitchum* case for the proposition that the insurer's "exclusive right to settle" any third party claim within the policy limits permits the insurer to settle the claim without the consent of the insured. While this proposition may be ultimately correct, depending upon the contractual provisions, see, *Mitchum*, 533 So.2d at 196 & 197, and *Arana v. Koerner*, 735

S.W.2d 729(Mo.App. W.D. 1987), Respondents overlook or ignore Missouri law and misinterpret the holdings of the *Mitchum* case.

As reflected in the *Faught* case, the liability insurer has a right to act independently, but it must act in such a manner to protect "the interests of itself *and* its insured" and cannot act in such a manner as to "prejudice the substantial rights of an insured without his knowledge or consent." 329 S.W.2d at 594. (Emphasis ours). Even in the *Mitchum* case, the citation from Appleman merely recognizes that the insurer "is not bound to consult the interests of the insured *to its own prejudice*." 533 So.2d at 196. (Emphasis ours). However, even more significant is the fact that Respondents overlooked or ignored the *Mitchum* Court's subsequent recognition of a "corresponding duty" of the liability insurer to the insured:

> This is not to say, however, that the insurer is entitled to exercise this right [to settle] arbitrarily. "The right given by contract still requires that the insurer make an investigation, consider the desires or instructions of the insured and that the settlement not be made in bad faith." [Citations omitted]. "[T]he contract of insurance gives the insurer the exclusive right to make a settlement of the claim against [the] insured. That right imposes a corresponding duty raised by law to observe ordinary diligence in performing that power when in exercise of it."
>
> Id. at 197.

In light of Missouri law and the facts herein, the liability insurer must conduct a reasonable investigation, consult with the insured, allow the insured to access the claims file to review all relevant information relating to the liability insurer's conclusions, including fault, and give the insured the

opportunity to dispute such conclusions. The duty upon the insurer to not act arbitrarily and to exercise diligence would also include access to the disclosures between the liability insurer and the adverse insured/third party and representatives thereof because these disclosures are potentially relevant and material as to the at-fault determination and as to whether or not the liability insurer is acting in good faith.

Simply put, while "clear distinctions" may exist as to the liability insurer-insured relationship and the attorney-client relationship, these distinctions do not permit the liability insurer to act independently and to the prejudice of the interests of the insured. Recognizing the insured's right to access the claims file will promote this relationship as it does in the attorney-client relationship. Modifications because of the liability insurer's right to control and duty to indemnify can be readily implemented to protect the interests of both the insured and the liability insurer. As in an attorney-client relationship, mutual cooperation and open communication is fundamental and is a desirable policy which must be retained and strengthened. An insured's access to the claims file will not adversely impact this relationship, but denial will undoubtedly cause distrust and open the path to a destructive, adversarial relationship.

Finally, as a sidenote, the Court may be interested in the fact that Respondents' reliance on the *Mitchum* case is raised for the first time on this appeal to this Court. While Appellants assert that the *Mitchum* case actually supports Appellants' argument, had Respondents argued this issue about the "exclusive right to settle" to the trial court, Appellants may have insisted that the Respondents produce the insurance policy to determine whether or not such right was exclusive. Appellants' counsel has obtained a State Farm automobile insurance policy, which contains the following provision:

> **2. Suit Against Us.**
>
> There is no right of action against us:

a. until all the terms of this policy have been met; and

b. under the liability coverage, until the amount of damages an **insured** is legally liable to pay has been finally determined by:

(1) judgment after actual trial, and appeal if any; or

(2) agreement between the **insured**, the claimant and us.

This provision indicates that an insured does have a contractual right to be a part of the claims process because an agreement is not based upon the unilateral acts of one but the mutual acts of all parties to the agreement. See, *Fish v. Fish*, 307 S.W.2d 46, 50[4] (Mo.App. 1957).

POINT TWO

Assuming Plaintiffs have stated a substantive cause of action, then the trial court erred as a matter of law and to the prejudice of Plaintiffs by sustaining that part of Defendants' motion to dismiss as to a declaratory judgment action not being the proper remedy for seeking access to the claims file because a declaratory judgment action is available upon a showing of (1) existence of a justiciable controversy admitting of specific relief by decree; (2) the presence of a legally protectable interest; (3) the existence of a question ripe for judicial decision; and (4) the absence of an adequate legal remedy in that Plaintiffs have a written contract of insurance with State Farm, in that a liability insurer-insured relationship exists between Plaintiffs and State Farm, in that Plaintiffs have a legal right of access to the claims file which State Farm has denied, in that the respective positions of the parties are polarized and cannot be resolved without judicial resolution, and in that no other adequate legal remedy exists.

Although Respondents' arguments in its second point do not raise any issues which require a reply under Rule 84.04(g), the *Corrigan* case, cited by Respondents in its first point, raises a relevant matter herein because the *Corrigan* Court identified a remedy for the client when seeking judicial intervention:

> What the client needs is information in the files. He should be granted the right to satisfy that need to the extent he justifies it. That justification of need can be manifested in and processed by a request for mandatory injunction. Replevin and its prerequisite of a right to possession is not necessary.
>
> 824 S.W.2d at 98.

While Appellants do not necessarily agree that a client has the burden of "justification", or if a client does, the threshhold should be minimal, the availability of a mandatory injunction as a remedy further supports Appellants' contention that a declaratory judgment action is the proper remedy.

First, a mandatory injunction is an equitable action which "requires a person to affirmatively act". See, *L.B. v. State Committee of Psychologists*, 912 S.W.2d 611, 616[1](Mo.App. W.D. 1995); *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 714[6](Mo.App. St. L. 1977). Because this remedy is equitable, it is not an "adequate remedy at law", but this remedy does appear to be quite similar to a declaratory judgment action. For example, both remedies allow the courts to impose coercive relief, assess actual and punitive damages, assess attorney fees, and to split the hearing into an "injunction phase"/"declaratory phase" and a "damage phase". See, e.g., *Forster v. Boss*. 97 F.3d 1127(8th Cir. 1996); *Siliven v. Cowhick*, 838 S.W.2d 504(Mo.App. E.D. 1992); *Swiss-American Import Co. v. Variety Food Production Co.*, 436 S.W.2d 770, 775(Mo.ap. 1968).

While Appellants' counsel is not well-versed in the differences between these two remedies or as to which remedy may be better suited to declare and enforce the rights of the attorney and client or

insurer and insured, and to assess damages, the purpose of a declaratory judgment action is applicable herein:

> Indeed, as here, the purpose of the Declaratory Judgment Act, Sections 527.010, 527.140 RSMo 1986, is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Washington Univ.*, 801 S.W.2d at 463. It is desirable that the court establish the relationship of the parties because of a continuing relationship and future acts which depend on the outcome. Id. The purpose of a declaratory judgment is to dispel uncertainty before actual loss occurs. *King Louie Bowling Corp. v. Missouri Ins. Guar. Ass'n.*, 735 S.W.2d 35, 38(Mo.App. 1987).
>
> *Lake Ozark*, 859 S.W.2d at 714.

If the Court concludes that a mandatory injunction or other remedy is appropriate, then Appellants would request a remand to provide Appellants the opportunity to amend.

POINT THREE

Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss as failing to state a cause of action in Count Two of the petition for attorney fees because attorney fees can be awarded in a declaratory judgment action when there is a showing of "very unusual circumstances" in that the law regarding the relationship between an insured and a liability insurer and regarding "work product" is well-delineated and well-settled and in that Defendants' refusal, and continuing refusal, to release the requested information was in bad faith, was without just cause or excuse, was intentional, was frivolous, and/or was outrageous because of Defendants' evil motive or reckless indifference to Plaintiffs' rights.

In response to Appellants' third point, Respondents rely on the case of *Windor Ins. Co.*, which identified "limited scenarios" where "special" or "very unusual circumstances" have been shown, including "intentional misconduct by a party; an action brought by an estate beneficiary who successfully brought litigation to the estate as a whole; and an action where the litigant has successfully created, increased or preserved a fund in which non-litigants were entitled to share". (R.Br. 27). Appellants would point out that they are alleging intentional misconduct in their pleadings. (App.Br. 53-55). Appellants would also point out that the *Windsor Ins.* Court cited to the case of *DCW Enterprises Inc. v. Terre du Lac Ass'n*, 953 S.W.2d 127(Mo.App. E.D. 1997), id. at 156, which analyzed another case wherein special circumstances were found – namely, *Temple Stephens Co.*, 776 S.W.2d at 443. In the *DCW* case, the Court of Appeals noted that intentional misconduct existed, but also noted that the "plaintiff property owner challenged a zoning ordinance which affected other property owners". 953 S.W.2d at 132. The *Temple Stevens* Court also recognized that the

"resulting opinion" further clarified notice obligations in the ordinance to the benefit of all property owners. 776 S.W.2d at 443. Similarly herein, Appellants are challenging the practice of a liability insurer to bar an insured access to the claims file, a practice which likely affects insureds other than Appellants. On remand, discovery will potentially reveal the nature and extent of this practice. A favorable "resulting opinion" will also benefit all insureds.

POINT FOUR

Assuming Plaintiffs have stated a substantive and procedural cause of action, the trial court erred as a matter of law and to the prejudice of Plaintiffs when it sustained Defendants' motion to dismiss as failing to state a cause of action in Count Three of the petition for nominal and punitive damages because damages can be awarded in a declaratory judgment

action and because nominal and punitive damages are available in an action involving a breach of a fiduciary duty in that when Respondents refused to provide Appellants access to the claims file, Respondents, as liability insurer, breached various fiduciary duties to Appellants, as insureds.

In response to Appellants' fourth point involving the punitive damages claim, Respondents advance two arguments. One, "if an insurance company breaches a contractual obligation, which is apparently the claim of Appellants in Count I", the Appellants' remedy is limited to MO.REV.STAT. Section 375.420, which does not allow punitive damages. (R.Br. 27 & 28). Two, "the longstanding law in Missouri is that before one is entitled to punitive damages, they must have actual damages", and "appellants have not alleged any actual damages, simply because they obviously have none". (R.Br. 28). Respondents' arguments are untenable.

As to the first argument, Appellants' cause of action is not limited to a breach of contract; it instead involves a breach of fiduciary duties. (App.Br. 56-61). The Court should also note that Section 375.420 is limited to situations involving an insurer's refusal to pay a "*loss under a policy* of automobile, fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance *except automobile liability insurance*". (Emphasis ours). Appellants' cause of action does not involve a "loss under a policy", but instead allegations of bad faith in complying with the (automobile) liability insurer's duty to defend. As with a "bad faith refusal to settle", Appellants' cause of action involves a tort action. See, e.g., *Zumwalt v. Utilities Insurance Co.*, 228 S.W.2d 750, 755 & 756[6](Mo. 1950). And, as also recognized by the *Overcast* Court in discussing *Zumwalt* and limiting the scope of Section 375.420:

In such cases, the insurance company is held to a duty to act in good faith *to protect the interests of its insured, separate from a simple obligation to pay the insured a benefit under the contract*. The insurance company incurs liability exposure in such "bad faith" claims when the company refuses to settle a claim within the policy limits and the insured is subjected to a judgment in excess of the policy limits *as a result of the company's bad faith* in *disregarding the interests of its insured* in hopes of escaping its responsibility under the liability policy. 228 S.W.2d at 754. While an insurance contract is the basis for the relationship between the insurer and its insured, "bad faith" liability in handling third-party claims is premised on tort concepts and the extent of the damages is not confined to the liability amount stated in the policy. Id. * * *

Overcast's tort claim for defamation is not dependent on the elements of the contract claim. Indeed it would be possible for the insurance company to defame Overcast even in a situation where it had decided to pay his claim. Thus, Overcast's defamation claim is not based on the company's refusal to pay and is based on conduct quite distinct from conduct that merely constituted a breach of contract. We cannot infer that the legislature intended, by providing the vexatious refusal to pay remedies in section 375.420, to immunize insurers against all other claims made by an insured for any conduct occurring during a claim determination.

11 S.W.3d at 67 & 68. (Emphasis ours).

Appellants' cause of action also involves an insurer's bad faith in disregarding the interests of its insureds and "is based on conduct quite distinct from conduct that merely constituted a breach of contract." Respondents' reliance on the *Overcast* case (R.Br. 28) is thus also misplaced.

As to the second argument, Respondents rehash their argument to the trial court, relying on the *Adelstein*, *Thornbrugh*, and *Koenig* cases. (R.Br. 28; L.F. 29 & 30). Respondents apparently overlooked or ignored Appellants' response:

> Defendants' reliance on these cases is misplaced because these cases do not address the availability of punitive damages when there is an award of nominal damages. In addition, in *Thornbrugh*, the trial court granted injunctive relief but did not grant "actual" damages because the property did not sustain any damages. 679 S.W.2d at 417 & 418. On appeal, the *Thornbrugh* Court recognized that the plaintiff might be entitled to nominal damages, but declined to so hold because the plaintiff did not raise the issue on appeal, "and the issue was therefore abandoned." Id. 418. And, in both the *Adelstein* and *Koenig* cases, there was a defendant's verdict!
>
> (L.F. 41 & 42).

In addition, as re-argued in Appellants' opening brief, nominal damages suffice to sustain an award of punitive damages. (App.Br. 59; L.F. 42). And, "nominal damages arise from the breach of fiduciary duty, see, e.g., *Clark*, 872 S.W.2d at 527; *Simpkins*, 855 S.W.2d at 422". (App.Br. 61).

Simply put, if there is a violation of fiduciary duties, nominal damages are available. And if there exists "fraud or bad faith" or reckless disregard, punitive damages can be awarded. See, e.g., *Zumwalt*, 228 S.W.2d at 753 & 756; MAI 10.01.

CONCLUSION

For the reasons stated hereinbefore, Appellants respectfully request the Court to reverse the judgment of the trial court, finding that Appellants have stated both a substantive and procedural cause of action, to remand the cause to the trial court, directing the trial court to allow Appellants to proceed with their claims, and for such other relief as this Court deems just. In addition, if the Court concludes that the proper procedural cause is a mandatory injunction or other remedy, Appellants request the Court to remand the cause to the trial court, ordering the trial court to provide Appellants the opportunity to amend their petition.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that one copy of the Appellants' Substitute Reply Brief and one copy of the disk thereof were mailed this ____ day of February, 2003, to:

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I further certify that the brief complies with Rule 84.06(b) by not exceeding 7,750 words and that it contains 7,601 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

_____

BRUCE B. BROWN