NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WILLIAM MICHAEL LANIGAN, AN INDIVIDUAL, Appellant v. T.H.E. INSURANCE COMPANY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 646 WDA 2013

Appeal from the Order Dated March 28, 2013
In the Court of Common Pleas of Lawrence County
Civil Division at No(s): 11250-10

BEFORE: BOWES, WECHT, and STABILE, JJ.

MEMORANDUM BY BOWES, J.: **FILED MARCH 14, 2014**

William Michael Lanigan ("Mr. Lanigan") filed the within declaratory judgment and bad faith action against T.H.E. Insurance Company ("Insurer") seeking a declaration that the Insurer breached its duty to defend him under a commercial liability policy and acted in bad faith. Insurer filed a motion for summary judgment as to both claims; Mr. Lanigan filed a cross-motion for summary judgment solely on the duty to defend issue. The trial court granted summary judgment in favor of Insurer as to both counts contained in the complaint, and Mr. Lanigan appealed. After thorough review, we vacate the order granting summary judgment in favor of Insurer. We remand for the entry of summary judgment in favor of Mr. Lanigan on the

breach of duty to defend claim and for further proceedings on the bad faith claim.

On March 31, 2007, Mr. Lanigan was driving his car in a race at the Mercer Raceway Park in Mercer, Pennsylvania. The throttle stuck unexpectedly, Mr. Lanigan lost control on a turn, and he struck the catch-fence. Steven Guthrie, Jr. and Samuel Ketcham were standing behind the fence in the pit area when the impact occurred. Mr. Guthrie died as a result of his injuries, and Mr. Ketcham was seriously injured.

The personal representative of Mr. Guthrie's estate commenced a wrongful death and survival action alleging negligence against the raceway, the race operator, and the fence suppliers and manufacturers. Mr. Ketcham filed a similar action, and subsequently, the cases were consolidated. Mr. Lanigan was joined as an additional defendant. On December 3, 2009, Mr. Lanigan tendered his defense in the underlying litigation to Insurer, which verbally denied him a defense on December 7, 2009. Mr. Lanigan formally requested a written explanation of the reasons for the denial. Insurer responded five months later, on May 17, 2010, that the denial was based upon Exclusion 8 of the policy endorsement which excluded coverage for "Bodily injury . . . to any participant against another participant while practicing for or participating in a racing program, which is sponsored by the Insured." Commercial General Liability Policy, Racing, Participant, Sponsors Liability Coverage Form, PAR111 (12/95) (hereinafter "The Policy"), at 2.

Mr. Lanigan retained his own counsel to defend him in the underlying litigation. Prior to the filing of the within declaratory judgment action on August 18, 2010, he was dismissed from that litigation. Hence, in contrast to the majority of declaratory judgment actions seeking a declaration as to coverage and the duty to defend, the instant action involves no claim for indemnity under the policy; the relief requested is limited to attorneys' fees and costs incurred in defending the underlying action, prosecuting the instant case, and compensatory and punitive damages for bad faith.

Insurer filed a motion for judgment on the pleadings, which was denied. It subsequently filed the within motion for summary judgment seeking judgment on both claims. Mr. Lanigan filed a cross-motion for summary judgment on the duty to defend. Following the submission of briefs and oral argument, the trial court denied Mr. Lanigan's motion for summary judgment and granted the Insurer's motion on March 28, 2013. Mr. Lanigan timely appealed and complied with the trial court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal.

Mr. Lanigan presents two issues for our review:

> I. Whether the trial court erred in granting T.H.E. Insurance Company's motion for summary judgment and in denying Mr. Lanigan's motion for summary judgment, pertaining to Mr. Lanigan's claims for a defense in the underlying litigation, where the complaints in the underlying litigation did not allege or establish that Mr. Guthrie, Jr. or Mr. Ketcham were "participants" in the race as required to deny a defense to Mr. Lanigan pursuant to the express terms of the insurance policy at issue?

> II. Whether the trial court erred in granting T.H.E. Insurance Company's motion for summary judgment, pertaining to Mr. Lanigan's claims of bad faith denial on the part of T.H.E. Insurance Company, where Mr. Lanigan presented clear and convincing evidence of bad faith, and discovery on the issue of bad faith remained in process?

Appellant's brief at 2.

In reviewing the trial court's grant or denial of summary judgment, our scope of review is plenary and our standard of review is well established:

> We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered."

QBE Ins. Corp. v. M & S Landis Corp., 915 A.2d 1222, 1225 (Pa.Super. 2007).

"Our standard of review in a declaratory judgment action is narrow. We review the decision of the trial court as we would a decree in equity and set aside factual conclusions only where they are not supported by adequate evidence. We give plenary review, however, to the trial court's legal conclusions." ***Swarner v. Mutual Benefit Group***, 72 A.3d 641 (Pa.Super. 2013). We must determine whether the trial court clearly abused its discretion or committed an error of law. ***Id***.

At issue herein is an insurance company's duty to defend its insured. The courts of this Commonwealth have long held that

> The duty to defend is a distinct obligation, separate and apart from the insurer's duty to provide coverage. Moreover,

> the insurer agrees to defend the insured against any suit arising under the policy even if such suit is groundless, false, or fraudulent. Since the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.

American and Foreign Ins. Co. v. Jerry's Sport Center, Inc. (***Jerry's Sport Center I***), 948 A.2d 834, 845-846 (Pa.Super. 2008) (quoting ***Wilcha v. Nationwide Mut. Fire Ins. Co.***, 887 A.2d 1254, 1258 (Pa.Super. 2005)). ***See also Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc. (Jerry's Sport Center II)***, 2 A.3d 526, 540 (Pa. 2010) ("Indeed, the duty to defend is not limited to meritorious actions; it even extends to actions that are 'groundless, false, or fraudulent' as long as there exists the possibility that the allegations implicate coverage.").

Thus, an insurer's "duty to defend is broader than the duty to indemnify." ***Penn-America Ins. Co. v. Peccadillos, Inc.***, 27 A.3d 259, 265 (Pa.Super. 2011) (*en banc*).[1] In making a determination whether there is a duty to defend, a court must compare the four corners of the insurance contract to the four corners of the complaint. ***See Donegal Mut. Ins. Co.***

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[1] In ***Babcock & Wilcox Co. v. Am. Nuclear Insurers & Mut. Atomic Energy Liab. Underwriters***, 76 A.3d 1, 12 (Pa.Super. 2013), this Court noted that "Pennsylvania counterbalances the insurer's broad obligation to defend even claims as to which coverage may not apply by providing the insurer the option of defending subject to a reservation of its right later or simultaneously to contest coverage." Herein, Insurer did not avail itself of this option.

v. Baumhammers, 938 A.2d 286, 290 (Pa. 2007) ("The language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation."). An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy. ***Jerry's Sport Center II***, ***supra*** at 541. In making this determination, the "factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured." ***Id***. "As long as the complaint 'might or might not' fall within the policy's coverage, the insurance company is obliged to defend." ***Id***. That duty continues until the claim is confined to a recovery that the policy does not cover. ***Id***.

Mr. Lanigan contends that he is an insured under the commercial general liability policy at issue and that neither the factual allegations of the underlying complaints nor the complaints joining him as an additional defendant support Insurer's denial of a defense. He continues that the complaints asserted negligence claims against him that potentially fell within the coverage and the "participant" exclusion relied upon by Insurer is to be strictly construed against it. ***State Farm Fire & Casualty Company v. PECO***, 54 A.3d 921, 935 (Pa.Super. 2012).

The policy endorsement at issue is one between Insurer and Mercer Raceway Park and covers liability arising from automobile racing activities. The endorsement amends the policy's definition of an insured:

> I. PERSONS INSURED: Form CG0001, Section II WHO IS AN INSURED is amended to include as an insured, any automobile owner, sponsor, or participant(s) while participating in a Covered Program, however, no owner, sponsor, or participant is insured for bodily injury to another owner, sponsor, or participant or property damage to the property of another owner, sponsor, or participant.

The Policy, at 2. Thus, Mr. Lanigan was an insured for purposes of the policy. "Participant" is defined as:

> IV. ADDITIONAL DEFINITIONS
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> For purposes of this endorsement, "participant" shall be defined as individuals who have registered to and actually do engage in the racing activity provided under the INSURED'S PROGRAM – including drivers, mechanics, pitmen, race officials, flagmen, announcers, ambulance crews, newsmen, photographers, gate workers, and all other persons bearing duly and officially assigned credentials and/or guest pit passes for the program.
>
> For purposes of this endorsement, "Pit" or "Pit Area" means the area used to prepare the automobiles for racing."

Id.

Insurer did not rely upon the "Persons Insured" language as the basis for denying Mr. Lanigan a defense and indemnity under the policy. Rather, Insurer relied upon an exclusion, which provided that:

> This insurance does not apply to any loss on any premises owned by, rented to, or controlled by any insured for any of the following:
>
> . . . .

> (8) bodily injury or property damage to any participant against another participant while practicing for or participating in a racing program, which is sponsored by the Insured.

The Policy, at 2. Thus, while Mr. Lanigan was an insured, the exclusion prevented coverage if the injured party was also a participant. Insurer took the position that there was no coverage for claims made by Mr. Guthrie and Mr. Ketcham against Mr. Lanigan because they were claims for bodily injury of other "participants" in the sponsored racing program. Insurer continues that the complaints contained allegations that both victims were standing in the pit area when the Lanigan car lost control and struck the guardrail and, thus, were participants. ***See*** Ketcham Third Amended Complaint, ¶¶18, 19; Guthrie Third Amended Complaint, ¶25. Additionally, Insurer maintains that, immediately after the accident, it commenced an investigation, which "established that both accident victims were members of the Guthrie Motor Sports pit crew, had executed the Agreements granting them the right to be present in the restricted pit area, that both had been issued armbands allowing such access and that both were present in the pit area when the accident happened." Appellee's brief at 7. Based on its findings, Insurer concluded that they were participants as defined in the policy and that it had no duty to defend Mr. Lanigan in the underlying litigation. Insurer directs our attention to what it characterizes as an analogous decision by a federal district court applying Georgia law in ***T.H.E. Ins. Co. v. Cochran Motor Speedway***, 2010 WL 5351183 (M.D. Ga. 2010), involving an identical

racing endorsement. The issue in the declaratory judgment action was whether the insurer was obligated to defend or indemnify the speedway, its owners, operators, and the racecar driver against claims asserted by a minor who fell off a racecar on the track while posing for post-race pictures. The question was whether exclusion 8, providing that the policy did not apply to any loss for "bodily injury or property damage to any participant against another participant while practicing for or participating in a racing program, which is sponsored by the Insured[,]" governed. The question of coverage turned on whether the minor was a "participant" and was "participating in a racing program."

The district court found that the minor was issued a pit pass, entered the pit area, and later rode on the driver's car as he drove it onto the track for post-race pictures. Such actions, according to the court, brought the minor "squarely within both the functional definition of a participant, as an individual who 'registered to and actually . . . engaged in the racing activity' and the illustrative list of participants, as an individual bearing a guest pit pass." ***Id***. at *5. The court also found that the minor was injured while "participating in a racing program" because a post-race awards ceremony fell within "the usual and customary number of racing events" surrounding a "feature race." ***Id***.

We do not find the aforementioned case persuasive. First, the issue therein was a duty to indemnify as well as a duty to defend. The court

focused simply on whether the damages sustained were covered under the contract. Consequently, the court did not limit its inquiry to whether the allegations in the complaint, taken as true, might potentially be covered under the policy, which is the proper inquiry under Pennsylvania law when determining whether an insurer has a duty to defend. In fact, the court did not recite the allegations in the complaint, and thus, we have no basis for determining whether they were potentially covered.

In the instant case, the trial court defined the issue before it as, whether "Mr. Guthrie and Mr. Ketcham were 'participants' at the time of the accident." Trial Court Opinion, 3/28/13, at 3. In making that determination, it expressly considered facts obtained during the discovery process in the underlying litigation. This review constituted error. The issue, properly framed, is whether, examining only the underlying complaints and the insurance policy, the claims of negligence against Mr. Lanigan were potentially covered under the policy, giving rise to a duty to defend. In making that determination, the trial court was limited to the four corners of the complaints and the insurance contract. Thus, it erred in considering the Insurer's investigation and discovery in the underlying case in ascertaining whether there was a duty to defend.

In order to determine whether the claim could potentially come within the coverage of the policy, we solely analyze the allegations in the complaint.

> 17. On or about March 31, 2007, [Mr. Ketcham] attended a motor sports racing event at Mercer Raceway Park with his friend, Steven W. Guthrie, Jr. Steven W. Guthrie's father, Steven W. Guthrie, Sr. was participating in the event, driving a racecar that he owned.
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> 18. At or about the same time when the Guthrie racecar was participating, [Mr. Ketcham] and Steven R. Guthrie, Jr. were standing in an area known as the "pit area." Their attention was focused on the Guthrie racecar.
>
> 19. At or about the same time when [Mr. Ketcham] and Steven W. Guthrie, Jr. were standing in the pit area, the racecar, driven by Defendant William Michael Lanigan, on the track lost control and struck the guardrail and fence behind which [Mr. Ketcham] and Steven W. Guthrie, Jr. were standing.

Third Amended Complaint, ¶¶ 17-19.

The allegations in the underlying complaints against Mr. Lanigan sound in negligence. It is alleged that he and his wife "negligently built, designed, installed, modified, operated, and manufactured the racecar." Third Amended Complaint, ¶67. The injuries to Mr. Ketcham and the death of Mr. Guthrie were "the direct and proximate result of the negligent manner" in which the racecar was operated and modified, and in failing to keep alert, travel at a safe speed, maintain control over the racecar, in failing to ensure that the racecar was in proper working order. ***Id***. at ¶68. Additionally, the complaint contained an allegation that the victims sustained their injuries while they were in the pit area. The complaint, however, contains no averments that they were registered to engage in racing activities or that they were actually engaged in such activities. It thus did not indicate that they were participants as defined in the policy.

The preliminary question is whether the allegation that Mr. Ketcham and Mr. Guthrie were present in the pit area, without more, made them "participants" within the meaning of the exclusion for bodily injury claims made by participants against participants. We cannot so conclude. Based upon the underlying complaint and the policy endorsement, that allegation alone does not establish that the underlying plaintiffs were participants. We agree with Mr. Lanigan that there are no averments that would give rise to an inference that these individuals were "registered" and were "actually engag[ed] in the racing activity." Rather, according to the complaint, they were merely spectators watching Mr. Guthrie's father, who was a participant. Insurer would have us ignore this threshold language in the definition of a "participant" and focus instead on the specific examples of participants. Since the list includes "persons bearing duly and officially assigned credentials and/or guest passes for the program," Insurer urges us to construe the allegation that the victims were in the pit area in its favor and infer that they must have had pit passes.[2] In the absence of an allegation in the underlying complaint that the victims possessed pit passes, we decline to

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[2] Insurer also equates "registration" with the execution of a release and the purchase of a pit pass. We find no support for this interpretation. Furthermore, there is no averment in the complaint that Mr. Guthrie and Mr. Ketcham purchased such a pass or signed a release, but only that they were located in the pit area. Mr. Lanigan points out that there was a "Registration Form," as distinguished from the Release, and that he executed one the day of the race.

find the existence of such a fact. Indeed, our standard of review demands that we make inferences in favor of the insured. Thus, on the facts pled in the complaints, we find it far from certain that Mr. Ketcham and Mr. Guthrie fell within the definition of "participants."

In deciding that Insurer did not owe a duty to defend, the trial court applied the wrong legal standard. It looked beyond the policy and the allegations of the complaint to discovery and investigative reports. It ruled that, since "Mr. Guthrie and Mr. Ketcham purchased a pit pass, signed a release form, and wore an arm band designating their right to access the pit area[,]" "a strict interpretation of the insurance policy . . . characterizes [them] as 'participants' at the time of the accident." Trial Court Opinion, 3/28/13, at 8. However, the facts that indicate that plaintiffs purchased a pit pass, signed a release form, and wore an armband, are not present in the complaint.

In essence, the court concluded that the policy exclusion applied to negate coverage, and absent coverage, there was no duty to defend. In so holding, the trial court was complicit in Insurer's attempt to define its duty to defend based on the outcome of the coverage determination, an approach our Supreme Court rejected in another context in ***Jerry's Sport Center II***. In that case, the Court held that an insurer was not entitled to reimbursement for costs expended in defending potentially covered claim prior to a court determination of coverage. Such an approach, according to

the Court, "would amount to a retroactive erosion of the broad duty to defend in Pennsylvania by making the right and duty to defend contingent upon a court's determination that a complaint alleged covered claims." ***Id***. at 544.

We find that the allegations of the underlying consolidated complaints could possibly have resulted in coverage under the endorsement. Since any doubt regarding the insurer's duty to defend must be resolved in favor of the insured, Insurer was not relieved of its right and duty to tender a defense under the policy and the trial court erred in so finding. We conclude that, based on the allegations in the complaints and the policy, Insurer was obligated to defend Mr. Lanigan in the underlying action until it was conclusively determined that the claims asserted were not covered. Hence, summary judgment on the duty to defend issue should have been entered in favor of Mr. Lanigan rather than Insurer.

Next, Mr. Lanigan asserts that the trial court erred in entering summary judgment in favor of Insurer on his bad faith claim premised on Insurer's denial of a defense, its investigation of the claim, and its delay in issuing a written denial. Mr. Lanigan alleges that he presented sufficient evidence of bad faith to present a genuine issue of material fact. He alleged that Insurer "knowingly and recklessly" disregarded the underlying complaints and Pennsylvania law when it denied him a defense under the policy. Furthermore, while acknowledging that he could not maintain a

direct action under the Unfair Insurance Practices Act ("UIPA"), Mr. Lanigan maintained that evidence that Insurer engaged in conduct that was violative of UIPA was admissible to show bad faith. ***See Berg v. Nationwide Mut. Ins. Co.***, 44 A.3d 1164, 1174 (Pa.Super. 2012) (holding that evidence of bad faith conduct as defined in the UIPA can provide a basis for recovery under 42 Pa.C.S. § 8371).

Finally, Mr. Lanigan claims that summary judgment was premature since depositions of Insurer's employees were necessary but the Insurer did not make those employees available as ordered. Mr. Lanigan notes that not only was discovery still in process, due dates for expert reports had not been established. He asks that the order granting summary judgment in favor of Insurer on the bad faith claim be reversed and that the matter be remanded for further discovery proceedings, the filing of expert reports, and a trial on the merits.

Insurer responds that even based upon the pleadings in the underlying actions alone, no coverage was owed, an argument that we have already rejected. Furthermore, it maintains that it only owed a defense until the claim is confined to one for which no recovery is possible under the policy, and within weeks of the accident, "there was undisputed evidence establishing that no recovery could be obtained under the Policy, as all of the involved parties were 'participants.'" Appellee's brief at 28. When Mr. Lanigan requested a defense two years later on December 7, 2009,

Insurer maintains that it promptly denied coverage and timely communicated the explanation for the denial to counsel for Mr. Lanigan. Furthermore, Insurer contends that Mr. Lanigan's alleged violations of the UIPA are merely a thinly–veiled attempt to assert a private action under UIPA where none exists. Moreover, even assuming that a violation of UIPA could demonstrate bad faith, Mr. Lanigan has failed to show that Insurer violated that Act. As Mr. Lanigan's own complaint acknowledges, Insurer contacted his counsel just four days after the request for a defense was made and advised him that there was no coverage based upon the accident victims' being "participants for purposes of endorsement PAR 111 (12/95)." Third Amended Complaint, ¶16. This, according to Insurer satisfied any obligation under the UIPA or applicable regulations.

Additionally, Insurer points out that a bad faith claim can only be asserted by an insured. While Mr. Lanigan was arguably an insured because he was a participant engaging in a "Covered Program," the definition further provides that no participant is insured for bodily injury to another participant. Thus, Insurer contends that on the facts herein, Mr. Lanigan is not an insured and cannot maintain a bad faith action.

Finally, Insurer places the blame for failure to complete discovery of its employees at Mr. Lanigan's door. According to Insurer, the motion for summary judgment was filed four months after Mr. Lanigan's counsel failed

to respond to correspondence inviting him to suggest scheduling if he was still interested in moving forward with the depositions.

The trial court found that Insurer's post-accident investigation was appropriate and satisfied its obligations. It further concluded that, based upon the evidence available to it immediately following the accident, Insurer "made a reasonable determination that [Mr. Lanigan] was not entitled to a defense or coverage under the existing policy issued to Mercer Roadway." Trial Court Opinion, 3/29/13, at 8. In light of our finding that the trial court applied the wrong legal standard in determining whether Insurer owed Mr. Lanigan a duty to defend, and that Insurer did owe such a duty, its subsequent conclusion that the denial of a defense was "reasonable" is untenable.

Title 42 Pa.C.S. § 8371 applies in any action in which an insurer is called upon "to perform its contractual obligations of defense and indemnification or payment of a loss that failed to satisfy the duty of good faith and fair dealing implied in the parties' insurance contract." ***Berg v. Nationwide Mut. Ins. Co.***, 44 A.3d 1164, 1172 (Pa.Super. 2012) (quoting ***Toy v. Metropolitan Life Ins. Co.***, 928 A.2d 186, 199 (Pa. 2007). Our courts recognize that a bad faith claim under 42 Pa.C.S. § 8371 is separate from the basic claim for coverage, and the success of the bad faith claim is not dependent upon the success of the underlying claim. ***Nealy v. State Farm Mut. Auto. Ins. Co.***, 695 A.2d 790 (Pa.Super. 1997). Furthermore,

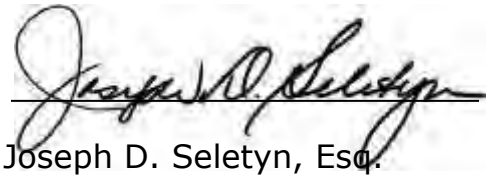
the common law provides a remedy for bad faith breach of a duty to defend in addition to 42 Pa.C.S. § 8371. ***See Kelmo Enterprises, Inc. v. Commercial Union Ins.***, 426 A.2d 680 (Pa.Super. 1981). Since we have concluded that Insurer should have provided Mr. Lanigan with a defense in the underlying action, there is a material issue whether Insurer's refusal to do so was made in bad faith.

In order to constitute bad faith, it is not necessary that the refusal to defend be fraudulent. However, mere negligence or bad judgment is not enough. Mr. Lanigan acknowledges that in order to prove bad faith, he must show by clear and convincing evidence that Insurer "(1) did not have a reasonable basis for denying benefits under the policy, and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim." ***Terletsky v. Prudential Property and Casualty Insurance Company***, 649 A.2d, 680, 688 (Pa.Super. 1999). Bad faith claims are fact specific and depend on the conduct of the insurer vis 'a vis the insured. ***Williams v. Nationwide Mutual Ins. Co.***, 750 A.2d 881, 887 (Pa.Super. 2000). ***Condio v. Erie Ins. Exch.***, 899 A.2d 1136, 1143 (Pa.Super. 2006). The fact finder is charged with deciding whether the insurer recklessly disregarded its duty to defend against the claim, and if this disregard rose to the level of improper purpose and beyond gross negligence, which proves bad faith.

Unfortunately, there is a dearth of evidence of establishing the factual and legal basis for Insurer's determination that Mr. Lanigan was not entitled to a defense. Glaringly absent in the instant case is key discovery from Insurer's personnel who handled the claim and who determined that the exclusion applied. While each party blames the other for the failure to schedule and take those vital depositions, we find that without this discovery, summary judgment on the bad faith claim was premature.

Order granting summary judgment vacated. Case remanded for entry of summary judgment in favor of Mr. Lanigan on the duty to defend issue and for further proceedings in the bad faith action. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/14/2014