IN THE SUPREME COURT OF IOWA

No. 18-1227

SAMUEL DE DIOS,

Plaintiff-Appellant,

vs.

INDEMNITY INSURANCE OF NORTH AMERICA and BROADSPIRE SERVICES, INC.,

Defendants-Appellees.

CERTIFIED QUESTION FROM FEDERAL DISTRICT COURT

Northern Dist. County No. C 18-4015-MWB

APPELLANT'S FINAL BRIEF

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CERTIFIED QUESTION TO THE IOWA SUPREME COURT

I. In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that this Appellant's Proof Brief was served and filed on the 26th day of November 2018, upon the following persons and upon the Clerk of the Supreme Court by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2) to the following:

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STATEMENT OF THE FACTS

I. Nature of the Case

This case involves a certified question from Judge Mark W. Bennett of the Northern District Court of Iowa. Judge Bennet certified a question to this Court before ruling on a Motion to Dismiss filed by one of the two Defendants in a bad faith claim.

Generally, Plaintiff's bad faith claim stems from a work injury where his workers' compensation benefits were denied. Plaintiff alleges that the benefits were denied in bad faith and that both Broadspire Services, Inc. ("Broadspire") and Indemnity Insurance Company of North America ("IICNA") were directly liable for the tort of bad faith. Broadspire filed the Motion to Dismiss claiming that Plaintiff failed to state a claim as Broadspire was merely a third-party administrator.

II. The Work Injury

Plaintiff has plead the following factual allegations regarding the Work Injury:

On April 8, 2016, Samuel Plaintiff ("Plaintiff") was employed by Brand Energy & Infrastructure Services ("Brand"). App. 34-35. Brand assigned Plaintiff to work on a construction site that was located on the private property of CF Industries. App. 34. In order to access the private property, Plaintiff had to drive

past a security gate and security guard to in order to access this private property. App. 34-35.

While on this private property, Jonathan Elizondo crashed his vehicle into the back of Plaintiff's vehicle and caused Plaintiff to sustain injuries, including to his lower back. App. 35.

The security guard, Tina Gregg, witnessed that the car collision. App. 35.

On that same day, Plaintiff reported the work injury to the safety manager of Brand, Ismael Barba. App. 36.

Plaintiff has pled that Brand authorized Plaintiff to choose whatever medical provider he would like to provide care for the work injury. App. 36. Plaintiff went to St. Luke's Hospital, where Dr. Jeffrey O'Tool provided him medical care for his work injury. App. 36.

On April 11, 20016, Plaintiff returned to work with Brand and he began experiencing a worsening of back pain from the work injury. App. 37. On April 14, 20016, the Brand sent Plaintiff home because of the work injury and authorized Plaintiff to choose whatever medical provider he would like to see to care for the work injury. App. 37.

Plaintiff has plead that from April 8, 2016 through May 9, 2016, the Brand refused to provide "light duty" work to Plaintiff. App. 38.

Plaintiff has further pled that from April 15, 2016, Broadspire knew or should have known that that it was required to pay Plaintiff Temporary Total Disability ("TTD") Benefits and/or Healing Period ("HP") Benefits until a determination of maximum medical improvement was made by a qualified, medical expert. App. 38.

III. Insurance Scheme

Plaintiff's Complaint contains the following factual allegations:

Brand had contracted with IICNA to pay benefits pursuant to Iowa Code Chapters 85, 85A, 85B, 86, and 87. App. 32.

IICNA delegated its authority of investigating, handling, managing, administering, and paying benefits under Iowa Workers' Compensation Laws to Broadspire. App. 32. Essentially, Broadspire performed the tasks of a workers' compensation insurance company in Iowa. App. 33.

IICNA lacked the necessary support staff to investigate on-the-job injuries in Iowa, including Plaintiff's on-the-job injury. App. 32.

In addition, IICNA lacked the necessary support staff that had the experience or knowledge to make an informed decision on whether to pay benefits pursuant to Iowa Workers' Compensation Laws. App. 33.

IICNA obligated Broadspire to provide actuarial services for workers' compensation claims, including Plaintiff's workers' compensation claim. App. 33.

IICNA obligated Broadspire to provide underwriting services for workers' compensation claims, including Plaintiff's workers' compensation claim. App. 33.

Plaintiff alleges that in return for performing the services of an insurance company, Broadspire received a percentage of the premiums that the Brand paid to IICNA. App. 33. In addition, Broadspire's compensation package with IICNA was tied to the approval or denial of workers' compensation claims: Broadspire received more of Brand's premium as the payment of workers' compensation benefits decreased. App. 33.

Broadspire had a financial risk of loss for workers' compensation claims it administered on behalf of the IICNA, including Plaintiff's workers' compensation claim. App. 33.

IICNA entered into a reinsurance agreement with Broadspire for payments made on behalf on workers' compensation claims, including Plaintiff's workers' compensation claim. App. 34.

IV. IICNA's Factual Allegations in Pleadings

IICNA alleges that Brand's workers' compensation policy was "subject to a $1,000,000 self-insured retention." App. 52-53.

ICCNA alleges that Broadspire administered workers' compensation claims on behalf of IICNA within the $1,000,000 self-insured retention of Brand's workers' compensation policy. App. 53.

IICNA claims that its "exposure" on Plaintiff's work injury was less than $500,000.00. App. 53-54.

V. Bad Faith Investigation and Evaluation of the Work Injury

Employees of Broadspire made the decision to deny Plaintiff workers' compensation benefits before interviewing: Plaintiff; the security guard, Tina Gregg; and Plaintiff's medical providers, Dr. O'Tool and Dr. Olson. App. 34, 36-38. Broadspire denied benefits in violation of the insurance industry standard of "Three-Point Contact." App. 38-39.

ARGUMENT

Under Iowa law, employers must have a workers' compensation insurance policy. This type of insurance policy is for the benefit of an employee who sustains a work injury. In this case, Brand had a workers' compensation insurance policy, App. 53; however, Defendants[4] claim that Brand's policy was "subject to a $1,000,000.00 self-insured retention rate," App. 52-53. Consequently, Brand was acting as an "insurer" for the first million dollars in the sense that it was paying workers' compensation benefits with its own money – not IICNA's money.

On one hand, Defendants allege that Broadspire administered claims on behalf of IICNA within the first $1,000,000.00. App. 53. On the other hand, Defendants allege that Broadspire did not have an obligation to notify IICNA of any claim with "exposure below $500,000.00" and IICNA did not receive notice of Plaintiff's claim because Defendants determined it to be less than the "reporting threshold." App. 53-54.

Under Iowa law, an "insurer" of workers' compensation benefits has a duty to act in good faith when deciding to pay workers' compensation benefits. So, if an employee is denied benefits in bad faith, then it is only logical that some entity must be held accountable for this conduct. An employer, third-party administrator,

[4] Defendant ICCNA has filed an Answer. Defendant Broadspire has not filed an Answer and instead, filed a Motion to Dismiss. However, both Defendants are represented by the same attorneys.

and insurance company should never be allowed to create a scheme where a claim is arbitrarily denied because none of these entities feel obligated to act in good faith toward an injured worker. This would clearly be against the public policy of Iowa.

Who is the "insurer" or the "substantial equivalent of an insurer" under these circumstances? Defendants do not claim that Brand is "self-insured." Nor do Defendants plead that Brand is in the insurance business. Furthermore, Defendants claim that Broadspire was delegated the authority of investigating and evaluating of Plaintiff's claim. So, who had the duty of good faith when administering workers' compensation benefits to the Plaintiff, whose injury was determined to be less than $500,000.00?

Plaintiff urges the Court to rule that a third-party administrator, like Broadspire in this case, may be held directly liable for its bad faith conduct when it has a special relationship with an injured worker.[5]

[5] Plaintiff has pled that Broadspire and IICNA have should both be held directly liable because of their independent actions and conduct relating to the denial of workers' compensation benefits to Plaintiff. At this stage of litigation when limited discovery had been conducted, Plaintiff has also pled that IICNA should be held vicariously liable for the conduct of its agent, Broadspire. *See Raymie v. Insurance Co. of State of Pennsylvania*, No. 4:09-cv-00222-JAJ, 2009 WL 8621559 (S.D. Iowa 2009) (unreported).

I. The Court should allow a bad faith claim to proceed against Broadspire because Broadspire acted sufficiently like an insurer such that there was a "special relationship" between Broadspire and Plaintiff.

The Court should allow a bad faith claim to proceed against Broadspire because Broadspire acted sufficiently like an insurer such that there was a "special relationship" between Broadspire and Plaintiff.

Plaintiff requests that the Court answer the certified question in the following manner: a third-party claims administrator may be held liable under the tort of bad faith when there exists a special relationship between a third-party administrator and an injured worker. Plaintiff urges the Court to adopt the following factor test to determine whether a third-party has a special relationship with an injured worker: (1) whether a third-party administrator has the power to decide to deny the payment of workers' compensation benefits without the approval of an insurer; (2) whether a third-party administrator has the power to pay workers' compensation benefits without the approval of the an insurer; (3) whether a third-party administrator has the financial motivation to act unscrupulously in the investigation and servicing of the claim; and (4) whether the third-party administrator assumes some of the financial risk of loss from the claim.

Plaintiff submits that this factor test would give guidance to courts to identify what type of situations that would support recovery directly against a third-party administrator. *See Pirkl v. Northwestern Mut. Ins. Ass'n,* 348 N.W.2d 633, 635 (Iowa

1984) (expressing dissatisfaction with approach that merely identifies type of situation which does not permit recovery rather than identifying the type of situations that do).

The first two factors weigh heavily in favor of finding that Broadspire had a special relationship with Plaintiff because Broadspire had complete power over Plaintiff's claim. IICNA gave complete power to Broadspire to determine whether to accept or deny Plaintiff's claim. Broadspire determined that the exposure would be under $500,000.00 and alleges it did not have even have to report the work injury to IICNA under these circumstances. Consequently, IICNA provided no oversight of Broadspire's conduct.

Even more troubling, IICNA lacked the necessary support staff to make a good faith determination on whether to pay benefits to Plaintiff. So, even if Broadspire had reported the work injury to IICNA, IICNA lacked the necessary support staff to fulfill its duty of good faith toward Plaintiff.

The second two factors weigh heavily in favor of finding that Broadspire had a special relationship with Plaintiff because Broadspire had financial motivation to act unscrupulously in the investigation and servicing of the claim and assumed some of the financial risk of loss from the claim.

A. Standard of Review on a Motion to Dismiss and Preservation

The Court accepts as true the facts alleged in the Complaint. *See Dier v. Peters,* 815 N.W.2d 1, 4 (Iowa 2012). A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). A pleading does not require detailed factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

Plaintiff's Amended Complaint contained sufficient factual matter for the Northern District Court to certify the question to the Court.

B. The public policy of Iowa supports holding a corporation liable for its bad faith conduct when that corporation has a "special relationship" with the insured.

This Court adopted the tort of bad faith because it served the public interest of Iowans. *See Dolan v. AID Insurance Company*, 431 N.W.2d 790, 791 (Iowa 1988) ("The bad faith tort is justified because of the nature of the insurance industry, which is imbued with the public interest"). In 1988, the Iowa Supreme Court first recognized that an insurer could be liable for bad faith conduct towards its insured. *Dolan v. AID Insurance Company*, 431 N.W.2d 790 (Iowa). In 1992,

this Court announced that the tort of bad faith applied to workers' compensation cases. *Boylan v. American Motors Insurance Company*, 489 N.W.2d 742 (Iowa). In 1993, this Court held that self-insured employers could be liable for bad faith denial and delay of workers' compensation benefits. *Reedy v. White Consolidated Industries, Inc.*, 503 N.W.2d 601 (Iowa).

This Court has not yet addressed the issue of whether a third-party administrator may be held liable for the bad faith denial and delay of workers' compensation benefits. Plaintiff submits that the public policy of Iowa supports holding a third-party administrator liable for its bad faith conduct when it has a "special relationship" with an injured worker because: (1) an injured worker lacks an adequate remedy against a third-party administrator; (2) otherwise, an employer or insurance company can completely delegate its authority to a third-party administrator and that third-party administrator can arbitrarily deny coverage and delay payment of a claim to an injured worker with minimal consequences; (3) an injured worker needs the extra leverage of the tort of bad faith against the corporation that has the discretionary power to affect the workers' statutory rights; and (4) the third-party administrator should be familiar with the highly regulated insurance industry.

1. **Under the factual allegations pled by parties, the Court should allow Plaintiff to pursue a bad faith claim against Broadspire because Plaintiff may not have an adequate remedy.**

Plaintiff lacks an adequate remedy against Broadspire if the tort of bad faith does not apply to Broadspire.

In 2007, this Court held that the tort of bad faith does not apply to uninsured employers. *Bremer v. Wallace*, 728 N.W.2d 803 (Iowa). The Court reasoned that the tort of bad faith should not be applied to an uninsured employer because an employee could obtain a court judgment against the uninsured employer. In addition, the Court reasoned that the employee had the option of pursing a civil action for damages against the uninsured employer.

Unlike the injured worker in *Bremer*, Plaintiff would not have an option of pursing a civil action for damages against Broadspire outside of the tort of bad faith applies to third-party administrators. Plaintiff does not have any remedy against Broadspire.

An argument might be made that Plaintiff might not have a remedy against Broadspire for its bad faith conduct, but this would not lead to an unjust result because of agency principles. In 2009, the District Court of the Southern District of Iowa specifically addressed the issue of whether bad faith tort liability for refusing to pay workers' compensation benefits can be imposed on a third-party administrator responsible for administering workers' compensation claims. *Raymie*

v. Insurance Co. of State of Pennsylvania, No. 4:09-cv-00222-JAJ, 2009 WL 8621559 (S.D. Iowa 2009) (unreported).

In this unpublished case, the Southern District reasoned that an injured worker could still seek remedies against the insurer even if that injured worker did not have recourse against the third-party administrator. If this is true for Plaintiff's bad faith claim against IICNA, then Plaintiff would at least have an adequate remedy against *someone*. *See Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910, 936-38 (S.D. Iowa 2007) (holding insurer vicariously liable for the conduct of its third-party administrator where third-party and insurer were "the same entity for purposes of the present action").

However, this may not be the situation as IICNA has already alleged in the pleadings that it took no action in regard to Plaintiff's claim. *See Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910, 938-39 (S.D. Iowa 2007) (holding insurer was not liable for punitive damages when insurer gave third-party administrator broad discretionary authority to "follow industry claims adjusting standards")

Moreover, Defendant IICNA has filed an Answer where it has asserted the affirmative defense that Plaintiff has failed "to state claims for which relief can be granted." App. 68.

Under the factual allegations plead by the parties, who is liable for Broadspire's conduct? Defendants do not claim that Brand is "self-insured."

Rather, Defendants allege that Brand had a million dollar self-insured retention and IICNA had no knowledge of Broadspire's denial. Under circumstances like these, it would be unfair and contrary to public policy to allow IICNA to escape liability for Broadspire's conduct because IICNA voluntarily chose to completely remove itself from any of decisions relating to Plaintiff's claim.

2. **Under the factual allegations pled by the parties, the Court should allow Plaintiff to pursue a bad faith claim against Broadspire because otherwise, Broadspire would have minimal consequences for arbitrarily denying benefits.**

Broadspire would have minimal consequences for arbitrarily denying Plaintiff benefits if it does not have duty to act in good faith toward Plaintiff. This would be contrary to the public policy of Iowa. This Court adopted the tort of bad faith in part because without the tort, "an insurance company can arbitrarily deny coverage and delay payment of a claim to its insured with no more penalty than interest on the amount owed." *Dolan v. AID Insurance Company*, 431 N.W.2d 790, 792 (Iowa 1988) (internal quotations omitted). The Court's rationale in *Dolan* would support finding that Broadspire has a duty of good faith to Plaintiff as Broadspire had complete control over Plaintiff's claim.

3. **Under the factual allegations pled by the parties, the Court should allow Plaintiff to pursue a bad faith claim against Broadspire because Plaintiff needs the extra leverage against the corporation that has discretionary power to impact his statutory rights.**

Plaintiff needs extra leverage against the corporation that has the discretionary power to impact his statutory rights. Under the factual allegations of the parties, Broadspire has complete power to impact Plaintiff's statutory rights. "Bad faith claims are applicable to workers' compensation insurers because they hold the discretionary power to affect the statutory rights of workers, which clearly reflects their obligation to act in good faith in the exercise of this authority." *Buhmeyer v. Case New Holland, Inc.*, 446 F. Supp. 2d 1035, 1051 (S.D. Iowa 2006) (quoting *McIlravy v. North River Insurance Company*, 653 N.W.2d 323, 329 (Iowa 2002).

Here, the rationale from *McIlravy* would support holding Broadspire directly liable for bad faith conduct. Broadspire holds complete power of Plaintiff's statutory rights and consequently, Broadspire should *also* have the obligation to act in good faith in the exercise of this power.

Otherwise, IICNA, Broadspire, and Brand have successfully created a created a "loop-hole" where the third-party administrator holds all of discretionary power to affect the statutory rights of workers and yet has no obligation to act in good faith in the exercise of this power. This outcome would be contrary to Iowa's

public policy and would lead to bad outcomes for injured workers caught in this type of insurance scheme.

4. **Under the factual allegations pled by the parties, the Court should allow Plaintiff to pursue a bad faith claim against Broadspire because Broadspire is a part of a highly regulated insurance industry.**

Broadspire is a part of a highly regulated insurance industry. Broadspire holds itself out to be claims professionals and have specialized knowledge.

In *Bremer*, the Court examined the distinction between self-insured employers and uninsured employers. 728 N.W.2d 803 (Iowa). The Court reasoned that self-insured employers have a duty of good faith toward injured workers because "self-insured employers are members of a highly regulated formal insurance association." *Id.* at 805-806. In other words, self-insured employers have technical knowledge and understanding of the insurance industry whereas uninsured employers generally lack this type of knowledge. Like self-insured employers, third-party administrators have this type of technical knowledge and understanding of the insurance industry and know or should know how to act in good faith when administering a claim.

C. Other jurisdictions have held that a third-party administrator can be held accountable under the tort of bad faith if the third-party administrator has a special relationship with the insured.

Other jurisdictions have held that third-party administrators can be held liable under the tort of bad faith. *Arp v. AON/Combined Ins. Co*, 300 F.3d 913 (8th Cir. 2002) (recognizing that material issues of fact existed as to whether workers' compensation insurer and its third-party administrator acted in bad faith, precluding summary judgment for insurer and administrator on insured's bad faith claim under South Dakota law); *Cary v. United of Omaha*, 68 P.3d 462, 469 (Colo. 2003) (When a third-party administrator performs many of the tasks of an insurance company and bears some of the financial risk of loss for the claim, the administrator has a duty of good faith and fair dealing to the insured in the investigation and servicing of the insurance claim); *Wathor v. Mutual Assurance Administrators, Inc.*, 87 P.3d 559, 562 (Okla. 2004) (A duty of good faith and fair dealing may be imposed on an insurance plan administrator where, under the specific facts and circumstances of the case, the plan administrator acts sufficiently like an insurer such that there is a special relationship between the plan administrator and the insured that gives rise to the duty. Judgment for TPA affirmed, absent showing of any motive for bad faith action on the part of the administrator).

The supreme court of Colorado in *Cary* held a "special relationship existed between the administrators and the insured to establish in the administrator a duty to act in good faith":

> …Here, the insurance administrators had primary control over benefit determinations, assumed some of the insurance risk of loss, undertook many of the obligations and risks of an insurer, and had the power, motive, and opportunity to act unscrupulously in the investigation and servicing of the insurance claims. Under such circumstances, we hold that a special relationship existed between the administrators and the insured sufficient to establish in the administrator a duty to act in good faith…

68 P.3d at 463-64.

The Supreme Court of Oklahoma in *Wathor* held a duty of good faith existed for an administrator that acted sufficiently like an insurer such that there was a "special relationship" between the administrator and the insured:

> …In determining whether the plan administrator owed the insured a duty of good faith, the Tenth Circuit refused to decide the issue by simply concluding the plan administrator was a stranger to the insurance contract. Rather, the court emphasized that the analysis should focus on the factual question whether the plan administrator acted sufficiently like an insurer such that there was a "special relationship" between the plan administrator and the insured that would give rise to the duty of good faith. *Id.* at 797. The Tenth Circuit predicted the Oklahoma Supreme Court would impose a duty of good faith on an entity in the position of the plan administrator in *Wolf,* for the same reasons we imposed that duty on "true" insurers in *Christian. Wolf,* 50 F.3d at 798…

87 P.3d at 562-53.

Here, a special relationship existed between Defendant Broadspire and Plaintiff, who needs a remedy against the party primarily responsible for his damages.

The California Court of Appeals reasoned the following:

> …If we were to accept the Group's argument and adhere to the general rule that bad faith liability may be imposed only against a party to an insurance contract, we would not only permit the insurer to insulate itself from liability by the simple technique of forming a management company, but we would also deprive a plaintiff of redress against the party primarily responsible for damages…

Delos v. Farmers Ins. Group., Inc. 93 Cal. App. 3d 642, 654, 155 Cal. Rptr. 843, 849(4th Dist. 1979)

Under the same reasoning provided by other courts, Plaintiff submits that the Court should recognize that in this case, Broadspire can be held directly liable for bad faith denial and delay of workers' compensation benefits.

CONCLUSION

In conclusion, Plaintiff requests that the Court answer the certified question in the following manner: a third-party claims administrator may be held liable under the tort of bad faith when there exists a special relationship between a third-party administrator and an injured worker. Plaintiff urges the Court to adopt the following factor test to determine whether a third-party has a special relationship with an injured worker: (1) whether a third-party administrator has the power to decide to deny the payment of workers' compensation benefits without the approval of an insurer; (2) whether a third-party administrator has the power to pay workers' compensation benefits without the approval of the an insurer; (3) whether a third-party administrator has the financial motivation to act unscrupulously in the investigation and servicing of the claim; and (4) whether the third-party administrator assumes some of the financial risk of loss from the claim.

Respectfully submitted,

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We hereby certify that the costs paid for printing Appellant's Proof Brief for was the sum of $_____.

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