IN THE COURT OF APPEALS
STATE OF GEORGIA

COURT OF APPEALS
CASE NO. A15A1806

State Farm Mutual Automobile Insurance Company

Appellant,

v.

Japonica Roberts

Appellee.

BRIEF OF APPELLEE

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PART I

State Farm sales agent, Dennis Akins, sold an automobile insurance coverage [Policy 9811B] to cover Japonica Roberts' car, a 2006 Honda Accord for a bi-annual payment of $621. T. 49-50; R. 559-603. Policy 9811B contains numerous definitions that Akins confirmed were necessary to understand the policy. T. 52; R. 569-71. The policy stated that "*We* define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage." Id. at 4. Policy 9811B contained comprehensive coverage. R. 584-85. The comprehensive insuring agreement stated: "*We* will pay for loss except *loss caused by collision*, to a *covered vehicle*." R. 585, T. 52. Akins confirmed that any limitations on coverage would be described in the policy. T. at 53-54. Comprehensive coverage included towing costs and car rental. R. 587, 589.

Policy 9811B's repair cost limitation stated: "*We* have the right to choose to settle with *you* . . . in one of the following ways: "a. Pay the cost to repair the *covered vehicle* minus any applicable deductible. (1) *We* have the right to choose one of the following to determine the cost to repair the *covered vehicle*: . . . (c) A repair estimate that is written based upon or adjusted to: (i) the prevailing

competitive price; . . . .The prevailing competitive price means prices charged by a majority of the repair market in the area where the *covered vehicle* is to be repaired as **determined by a survey made by *us*** . . . .” [emphasis added]. T. 55-56; R. 587-88. Akins knew nothing about the PCP market survey. T. 56-57. He never provided any survey information to Roberts. Id. Akins agreed that the policy covered repair costs at any repair shop. T. 57. Akin did not know how the prevailing competitive price[PCP] survey limitation “works.” T. at 56.

Roberts car was vandalized and she reported her claim on November 4, 2011. T. at 495. State Farm accepted claim under comprehensive coverage. T. 507. State Farm assigned the claim to their adjuster, Lockett, who was trained Lockett on Policy 9811B. T. 505-06. Lockett issued all checks. T. 101-102. Roberts sought a reputable repair shop known for quality work and she was recommended to Hernandez Collision Center [HCC] and told State Farm of this selection. T. 310-11, 497. She expected State Farm to pay reasonable repair costs, to pay her towing bill and to work with HCC in a timely manner. T. 317.

Lockett worked in the claims adjusting department, separate from the claims estimatics department. T. 97. Lockett could only issue repair costs checks based on State Farm generated estimates. T. 98, 505, 508. Lockett was not involved in

the PCP survey process and he believed that the State Farm estimator applied the PCP survey limitation described in Policy 9811B. T. 508-11. He did not provide any PCP information to Roberts. T. 511.

On November 7th, Lockett sent a standard letter to Roberts stating that State Farm would pay her repair costs based on a State Farm estimate and stating that she would be responsible for any balance. T. 512; R.756-57. Lockett agreed that the letter did not broaden Policy 9811B's defined PCP survey limitation. T. 514-15. Lockett knew that Robert's car had been towed and that a tow bill existed. T. 518. Tow bills are often paid by the repair shop, marked up for payment, and paid by the insurer. T. 518. Lockett had received the HCC estimate and told Roberts to go forward with repairs. T. 519, 521.

Roberts contacted Lockett when she became aware of the difference in State Farm's estimate ($5,045.29) and HCC's estimate ($9,589.60). T. 520-21, 320-23. On November 30th, Lockett told Roberts that State Farm would consider additional items in the HCC estimate. T. 521-23, 529-30. Over the next two weeks, Roberts repeatedly called State Farm asking about the status of State Farm's review. T. 500-01, 530-31. State Farm's estimatics team completed their review on December 13th, but did not include all of the repair procedures, full

towing costs, or full costs of replacement parts, such as comparable tires, that were included in the HCC estimate, leaving a balance of over $4,000. T. 325-26.

On December 13th , Roberts requested that State Farm explain why State Farm was disputing HCC's repair procedures, towing cost and parts cost. T. 522-23. Lockett sent Roberts a letter on December 14th containing a list marking disputed repair procedures and parts as "not competitive" and others as "not necessary." T. 101-02, 523-24; R. 627-30. Lockett was unfamiliar with the PCP survey but knew that the PCP survey did not include repair procedures. T. 524-25. Lockett agreed that policy definitions are important to coverage. T. 528.

State Farm's estimatics team trainer, McNally, reviewed the HCC estimate with the State Farm estimator, Williams. T. 446. Both were trained and supervised by State Farm. T. 406-08, 443-4. McNally reviews State Farm generated estimates for compliance with State Farm estimating policy. T. 461. McNally generated the list describing HCC's costs as "not competitive" or "not necessary." T. 101-02.

McNally never saw Roberts' car, never spoke with Roberts or HCC, never requested HCC's photographs on the Roberts car, never directed William to contact HCC to discuss an agreed price. T. 415, 432, 462-63, 487. The final State Farm estimate was based on McNally's judgment. T. 465. Without any

documentation from any repair shop, McNally opined that Roberts' car could be returned to its pre-damaged condition based on State Farm's estimate. T. 465.

McNally agreed that the PCP survey only addressed seven (7) items, none of them involving repair procedures. T. 469-71. Cal Broom, an estimatics team manager who supervised McNally had conducted the PCP survey and identified document demonstrating the survey's scope. T. 79-80, 82-90. Repair procedure were not a part of the survey. T. 90, 468-71; R. 604-20.

The PCP survey covered three labor unit rates: body($42), refinish($42) and frame ($65) work. Id. These rates are used a multipliers for estimated labor time units in repair procedures. The PCP survey covered three part costs: used part mark-up (25%), domestic part discounts (0%) and foreign part discounts (0%). T. 471. The seventh surveyed item was the paint material labor unit rate ($28). Id. The survey did not address repair shop work quality, technician training, or the quality of a shop's equipment such as paint booths or frame machines. T. 93, 565. The survey consisted of voluntary submissions, some many years old, of shops in Chatham County and two mostly rural counties, Bryan and Effingham. T. 89.

McNally did not rely on the PCP survey in limiting the repair costs on Roberts' car. McNally relied on his judgement on repair procedures that a

majority of the repair shops in State Farm's market area charged for even though repair procedures were not surveyed. T. 90, 472. McNally agreed that Policy 9811B did not include a cost limitation based on his judgement. T. 472. The McNally limitation State Farm applied to Roberts' repair costs had nothing to do with surveyed labor rates, part discounts or the paint material unit rate. The PCP survey was not given to insureds and was kept "confidential." T. 411, 467. Farm did not publish any type of estimating guide for reference by insureds or repair shops. T. 485-86. An insured had no way of knowing what repair procedures State Farm would or would not pay before taking her car to a repair shop. McNally defined "reasonable" and "competitive" based State Farm's estimating policies. T. 473. His definition conflicted with the common definition an insured would rely upon and was absent from Policy 9811B. T. 473.

Walt Green, McNally's boss at time of trial, testified that instead of applying the PCP survey to determine estimates for car repair, State Farm used another term that had the same acronym as PCP, but was broader than Policy 9811B's PCP survey limitation. T. 534, 545. Green described "prevailing competitive practices" as the basis for State Farm's estimates. T. 545. This term is absent from Policy 9811B. T. 558, 562. Green had never seen Roberts' car and

without any documentation from any local repair shops, opined that other shops would have repaired Roberts' car based on the State Farm estimate. T. 550. Green confirmed State Farm's view that any repair procedures charged for that most local repair shops did not, was unreasonable. T. 555-56. State Farm's *per se* rule applied even if the majority of shops were not performing the repairs to industry standards. T. 555-56. Photos of substandard work identified by Eckart on locally repaired cars were shown to Green. T. 552-55.

HCC's repair estimate was based on national repair standards and nationally recognized estimating procedures. T. 420. HCC's production manager, Eckart, described the repair work performed on the Robert's car. T. 102. He had been trained in the national repair standards and guidelines, including the Inter-Industry Conference On Auto Collision Repair [ICAR] and Automotive Service Excellence [ASE]. At time of trial, Eckart was president of the Georgia Chapter of the Automotive Service Association [ASA], a nonprofit industry trade organization. T. 102-06. He identified the ICAR repair procedure guideline that applied to repair of the Roberts' car. T. 107-110; R. 918-79, 985-1035. He identified HCC's 94 photographs taken during the repair of Roberts' car. T. 111, Pl. Ex. 15. Eckart described the repair process and the technician specialities involved. T. 113.

Eckart described the importance of following the paint manufacturer's recommendations on refinishing a car to obtain a manufacturer's warranty. T. 121, 130, 132, 137, 142 Painting a damaged car to replicate the factory finish is challenging due to the less controlled repair shop environment and the circumstances of a car that's been driven for years and accumulated dirt and grime in its many crevices. T. 120-21. HCC used Sherwin Williams paint and Eckart discussed the Sherwin Williams manufacturer's recommendations. T. 124-25. Industry standards apply to refinishing work such as determining the closest paint match, blending new paint into older paint, sanding and polishing. T. 126-27. Eckart explained photos of locally repaired cars not refinished in accord with industry standards and that would not qualify for a paint manufacturer's warranty. T. 116-17, 119-120, 128-132. These photos were later showed to Green. T. 552-53. Eckart explained the rationale for repair procedures on McNally's list. T. 132-168. HCC followed industry standards and warrantied its body and paint work. T. 168-169, 182-83; R. 841. State Farm does not warranty repair work. T 93.

April Hernandez was the HCC estimator manager who priced the cost of repair. T. 186, 204-05; R. 729-71. HCC has been in business for over thirty (30) years and has two repair shops, one in Savannah and another in Hinesville. T. 169,

229. HCC repairs between 50 and 75 cars a month and considers itself competitive in the local collision repair market. T. 229-30.

April Hernandez, a University of Georgia graduate, began estimating in 2005. T. 186-87. She has over 100 hours of training with ASA, is a graduate of the Automotive Management Institute, and has undergone ICAR training. T. 188. She has worked on national ASA committees. T. 188. She was familiar with industry repair standards and the national estimating guides. T. 189-92.

There are three nationally recognized estimating guides and two of them were discussed by April Hernandez: Motor CCC Pathways [Motor] and Mitchell. T. 191-94; R. 846, 884. These national estimating guidelines cite the national repair organizations ICAR, ASE and ASA. T. 194; R. 846. HCC uses Motor and State Farm claims to use Mitchell. T. 191-94. These guides are electronic and populate forms with standardized labor unit times for particular repair procedures.

The estimating guides divide procedures into "included" and "not included." T. 195, 428; R. 848, 885, 887. A repair procedure can include a number of different activities with only one charge allowed by the system for all "included" activities. When "not included" activities are performed, the estimating system requires that it be listed as a separate line item with a separate

allocated labor unit time. T. 473-74. Labor unit times are determined by time studies performed by the national guides. T 194-197; R. 853, 884. The estimating guides include formulas for labor unit times for refinishing activities. T. 198-200.

HCC's first estimate was based on a visual inspection. T. 206. April Hernandez reviewed State Farm's initial estimate and began making calls to locate the parts listed in the State Farm estimate. T. 207. As the car was taken apart, more identified repair issues had to be estimated. T. 205.

Going line by line, April Hernandez explained the charges for both repair procedures and parts on HCC's final estimate. T. 227-249. The balance due for HCC's work totaled $4,297.36. T. 217. No one from State Farm ever called her asking about the HCC estimate or about HCC's supporting photographs. T. 249. Pricing of the labor unit hours could have been worked out with State Farm. T. 256. State Farm only paid half of the Georgia sales tax paid by HCC, demonstrating the 'short pay' on parts. R. 755, 771 ($188.18 vs. $359.43).

April Hernandez followed the national estimating guidelines when generating the HCC estimate. T. 219. There are no local estimating guidelines. State Farm does not publish any estimating guidelines. T. 485. The national estimating guidelines are used by insurance companies and repair shops around

the country and are considered reasonable. T. 420, 473-74, 558-59. McNally that the paint manufacturer's recommendations and industry repair standards should be followed. T. 482–83. Neither State Farm nor local repair shops set collision repair standards. T. 419, 485.

When Roberts came to pick up her car, HCC requested payment of the balance due. T. 325-26. State Farm's refused to pay or negotiate the balance. Roberts was renting a car. State Farm refused to extend the covered rental period. Id. The rental company automatically drafted $1,125 from Robert's checking account. Id. Roberts was a working single parent who needed her car, but she did not have the funds to pay the balance due. Id. Roberts was unsure how long her car repairs were complete before her car was released. T. 335-36. Roberts retained counsel and agreed to pursue State Farm to collect the balance due. T. 326-27, 335-36; R. 469. With this understanding, HCC released Roberts' car and she avoided additional rental car fees. T. 326-27, 336; R. 469.

PART II

1. The Court Correctly Denied State Farm's DV Motion on Contract Breach

Directed verdicts are only appropriate when no conflict exists as to any material issue. OCGA §9-11-50(a); Goody Products, Inc. v Development Author.

of City of Manchester, 320 Ga. App. 530, 533 (2013). Factual issues existed on several material issues: (1) failure to pay towing costs; (2) causing unreasonable delay; and (3) limiting repair costs based on a criteria that differed from Policy 9811B's described repair cost limitation.

First, Policy 9811B stated that State Farm would pay reasonable expenses for towing a car to a repair facility of the insured's choice. R. 587. State Farm paid none of the $417 towing costs. T. 255:5-7. Roberts expected her towing charges to be paid. T. 317:21-24. State Farm knew of the tow charges. T. 518:5-25, 547:22-25. State Farm's adjuster Lockett did not pay the tow charges because the tow charges were not on the State Farm estimate. T. 101, 505. McNally listed the towing costs (estimate line #164) as "not competitive" and so excluded them from the State Farm estimate. R. 630; T. 98, 101-02, 462-63, 505, 508.

State Farm excused this breach, blaming HCC for not sending the towing invoice. However, State Farm saw the towing charge on the HCC estimate. Lockett and McNally knew of the charge and never asked for the invoice. T. 496, R. 753. McNally never contacted HCC for any information. T. 462-63; Pl. Ex. 13. Even when State Farm had the invoices, such as the tire invoices, McNally categorized them as "not competitive," excluding them from State Farm's

estimate. Lockett could not pay for the tow or the tires. T. 101, 486-87, 490, 505.

Secondly, State Farm caused three unreasonable delays. First, the initial delay from Nov. 7th to Nov. 29th was caused by State Farm's estimate of low cost tires. T. 318-19. Tires had to be installed before repair work could begin because the car had to be moved through the repair process. T. 208-209. All four tires had been flattened. T. 156, 206. HCC conducted a national search for these tires in an effort to stay within the State Farm estimate, but the tires specified by State Farm were out of production. T. 208-10. Eventually, HCC found comparable but more expensive tires at Savannah Tire, bought the tires and installed them, saving costs that a "sublet" (ie. having Savannah Tire replace the tires) mark-up would have incurred. T. 209-13, 238-39. The costs were based on the national estimating guides. T. 238. McNally listed these charges as "not competitive." T. 487-89. HCC included a betterment for new tires, reducing the estimate. T. 209-11, 325.

The second delay occurred during the two weeks, from Nov. 30 to Dec. 13, that State Farm took to review the HCC estimate. T. 521-23, 529-30. During this time, Roberts was in her rental car. State Farm never explained this two week delay. Roberts had great difficulty contacting Lockett during this time. T. 320-21. She suspected that Lockett had her phone number identified and was avoiding her

calls, so she called on a different line and he answered. Id.

The third delay occurred when State Farm refused to timely pay Roberts' repair and towing costs. Robert had to reach an agreement with HCC for payment. During these delays, Roberts drove a rental that cost her an additional $1,125, damages that arose from the delay breach. T. 325, 708-09; OCGA §16-6-1, -2, -3.

The third basis for breach of contract is based on State Farm's failure to follow its own Policy 9811B's terms. As a contract of adhesion, the terms must be strictly construed against the carrier. Hurst v Grange Mutual Cas. Co., 266 Ga. 712, 716-17(1996); Jenkins and Miller, Ga. Auto. Ins. Law §2:1 (2010-11 ed.). State Farm's final estimate of repair costs was based on McNally's judgement even though McNally was unfamiliar with Policy 9811B's limitation. T. 465-66; R. 587-88. McNally did not write estimates to repair cars. T. 465. McNally's "competitive" cost was not explained in Policy 9811B. There was no appeal from McNally's judgement, which resided only in McNally's head and was not provided to insureds. T. 485.

To better understand State Farm's definition of "competitive" practices, State Farm's referral contract program must be understood. State Farm's had a contract program with certain shops in its market area. These shops agreed to

limit their repair costs in exchange for placement on a State Farm referral list. T. 76-78. State Farm had financial leverage over these shops and if they charged for repair procedures that State Farm did not think were "competitive," then State Farm could remove them from the referral list. T. 480-81. This leverage can be substantial. See Part 2, sections 4 & 5 below.

State Farm based its "competitive" cost judgement on the repair procedures that a State Farm referral shop would charge. Any charges greater than a referral shop charge was "not competitive" and so, unreasonable. T. 480-81. State Farm applied a "one size fits all" approach to estimating. T. 478-79. If a referral shop charged for the repair procedures that other shops did not charge for, even if the other shops did not perform the procedures, then the repair shop jeopardized its place on the referral list, resulting in a significant revenue loss. T. 92, 481.

The referral shop charges were not based on a free competitive market, but were skewed by contractual pricing agreements and volume referral business that dampened the market. State Farm's "competitive" estimate charges were based on what the referral shops charged. T. 478-79. State Farm's estimating practices dictated repair cost estimates, using the vagaries of Policy 9811B's limitations language in conjunction with volume referred business.

State Farm paid all repair shops on the same basis, regardless of whether the repair shop was enjoying the benefits of State Farm's volume referrals. T. 478-79, 565. At the time of the Roberts' repair, HCC was not in contract with State Farm. T. 299, 304. HCC was an independent repair shop. State Farm's corporate estimating policy, unknown and nondisclosed to Roberts, placed her in an unfair situation because Policy Form 9811B did not describe State Farm's 'one-size-fits-all' estimating practice and left the impression that State Farm would pay reasonable repair costs, rather than a cost unilaterally determined by State Farm's judgement. State Farm did not provide its insured with any information on the repair procedures that State Farm deemed "competitive." T. 485. State Farm applied this estimating policy when the insured chose an independent repair shop.

Policy 9811B did not limit insureds to repair procedures charged for or accepted by State Farm referral shops. Roberts was free to choose the repair shop she thought would do the best job of returning her car to its pre-damaged condition. State Farm did not retain any discretion to dictate repair procedures performed by the chosen repair shop. Reasonable repair procedures are determined by industry standards and reasonable estimating practices are determined by industry estimating guides. Policy 9811B did not state otherwise.

McNally believed Policy 9811B included reasonable costs, but he defined "reasonable" differently than an insured. T. 472. He agreed that the national estimating guides were based on research time studies. T. 483. He agreed that no local estimating guide existed and that State Farm did not publish repair standards. T. 485. He agreed that a car repaired in Savannah should be repaired to the same standard as cars around the country. T. 483. He agreed that the estimating guides contained repair procedure times based on national industry standards. T. 483-84.

The evidence demonstrated that HCC's repair costs were rational and reasonable. State Farm refusal to pay for these costs established a breach.

2. The Court Correctly Denied State Farm's DV Motion on Bad Faith

Insurance bad faith, established when an insurance company has no good cause for resisting or delaying payment, typically requires jury resolution. OCGA §33-4-6; Colony Bank v Hanover Ins. Co., 2011 U.S. Dist. LEXIS 129454, 27 (M.D. Ga. 2011); Balboa Life and Casualty, LLC v Home Builders Finance, Inc., 304 Ga. App. 478, 483 (2010). An insurance company is bound to a policy's plain terms that must precisely define limitations. Hurst, *supra*. 266 Ga. at 716-17; Blue Cross and Blue Shield of Georgia, Inc. v Shirley, 305 Ga. App. 434, 437 (2010); Certain Underwriters v DTI Logistics, Inc., 300 Ga. App. 715, 715, 721 (2009).

Any ambiguity in a limitation must be construed in accord with the insured's reasonable expectations. Fireman's Fund Ins. Co. v University of Ga. Athletic Asso., 288 Ga. App. 355, 356 (2007); Zurich American Ins. Co. of Illinois v Bruce, 193 Ga. App. 804, 806 (1989). State Farm cannot interpret its vague repair cost limitation to its own benefit. Continental Ins. Co. v American Motorist Ins. Co., 247 Ga. App. 331, 334 (2000); Georgia Farm Bureau Mutual Ins. Co. v Huncke, 240 Ga. App. 580, 580 (1999). When an insurance company resolves an ambiguity in its favor, this as evidence of bad faith. Broadman Petroleum v Federated Mut. Ins. Co., 926 F. Supp. 1566, 1577-78 (S.D. Ga. 1995); Trans. Ins. Co. v Piedmont Constr. Group, LLC, 301 Ga. App. 17, 19-23 (2009); Georgia Farm Bureau Mut. Ins. Co. v Meyers, 249 Ga. App. 322, 324 (2001)]Limitations are narrowly construed]. State Farm had the burden to prove a limitations defense. Canal Ins. Co. v. Bryant, 173 Ga. App. 173, 174 (1984).

Roberts expected State Farm to pay reasonable towing costs and repair costs for returning her car to its pre-damaged condition. T. 310, 317-18. Robert's expectation is reasonable considering the State Farm's sales agent Akins' inability to understand the repair cost policy limitation, Lockett's misunderstanding of the repair cost limitation applied by the State Farm estimatics team, and McNally's

reliance on his judgement rather than the PCP limitation survey. T. 55-57, 465, 472, 508-11. Also, Georgia insurance regulations require that an insurance company estimate be "reasonable, and of an amount which will allow for repairs to be made in a workmanlike manner which would restore the damaged vehicle to its preaccident condition relative to quality, safety, function and appearance." Ga. Comp. R. & Regs 120-2-52-.04; R. 912.

In applying a repair cost limitation that differed from the Policy 9811B limitation, State Farm exploited the latitude afforded by Policy 9811B's vague mention of a PCP market survey, the findings of which were absent from Policy 9811B and that State Farm kept "confidential" so that insureds and repair shops were blocked from knowing anything about the survey. The flexibility afforded by this secrecy allowed State Farm to create and apply a repair cost limitation for its own benefit. Legal precedent suggests that State Farm should have apologized for its brazenness. But State Farm doubled down, redefining the PCP limitation with parol evidence in trial testimony that described its corporate estimating policy, incorporating the same acronym, PCP, redefined as "prevailing competitive practices." T. 545, 558.

Policy 9811B did not give State Farm complete discretion over repair costs.

Ironically, State Farm's letter stating that State Farm will only pay costs based on a State Farm estimate better explained the cost limitation that State Farm actually applied. R. 757. However, a letter cannot broaden a written policy limitation. Meyers, *supra*. 249 Ga. App. at 324.

Importantly, State Farm could only establish Policy 9811B's PCP survey limitation with parol evidence because the PCP survey and its findings were missing from Policy 9811B. Parol evidence cannot add to or subtract from a written adhesive contract. OCGA §13-2-2(1). Parol evidence is only admissible to prove ambiguities, but insurance policy ambiguities must be resolved against the insurer. OCGA §13-2-2(5); Meyers, *supra*. 249 Ga. App. at 324. The trial Court denied Roberts' motion for directed verdict on Policy 9811B's ambiguity. T. 604-06. The jury was provided with Policy 9811B and heard parol evidence on State Farm's PCP survey and on State Farm's broadened repair cost limitation. The jury could reject the parol evidence. OCGA §13-2-2(1).

Eckart explained HCC's rationale in detail on each repair procedure performed that State Farm's McNally opined was "not necessary" or "not competitive." T. 137-68. In usual parlance, a business' competitiveness refers to a business' ability to provide products or services at a value attractive to consumers

in a free market such that the business can make a profit and remain in business. HCC had been in business for 33 years, repairing between 100 and 150 vehicles a month. T. 298. Daniel Hernandez testified that HCC's charges were reasonable and competitive in the local market based on the quality provided. T. 298. However, State Farm applied a unique definition of "competitive" that was absent from Policy 9811B. T. 465-67.

April Hernandez explained how she used the national estimating guides to include repair procedures performed on Robert's car in accord with national repair standards. T. 190-93, 194-195. In order to show that HCC's estimating process was unreasonable, State Farm had to show that the national guides were unreasonable. However, State Farm agreed that the estimating guides were nationally recognized and reasonable. T. 420, 420-422; *See* FTC v CCC Holdings, Inc, 605 F. Supp. 2d 26, 31-32 (2009) for a discussion on estimatics. State Farm lacked a good faith basis for 'short paying' Roberts' repair costs that were based on national estimating guidelines and national repair standards. A national standards and guidelines must apply rather than a local judgement, since no local standards or guidelines exist.

In addition to these repair costs, State Farm failed to provide any acceptable

reason for refusing to pay towing costs. While State Farm disputed the sublet mark-up, State Farm did not pay a single penny of the towing cost. Therefore, the mark-up is irrelevant. Additionally, April Hernandez explained the various mark-ups and Lockett agreed that towing costs are often initially paid by the repair shop, were usually marked up by the shops and paid by the insurance company. T. 280, 282, 290-92, 295, 518. Also, State Farm agreed that a repair shop should charge the list price rather than the wholesale price for parts. T. 418-419. HCC paid all vendors for parts and its technicians for work performed. T. 260.

3A. The Court Correctly Instructed On Attorney Fees

A jury charge should be considered as a whole, never in isolation. Hilton v State, 288 Ga. 201, 206 (2010); Salahuddin v State, 277 Ga. 561, 564 (2004). Instructions are harmful when they contradict the law. King v Davis, 287 Ga. App. 715, 715-16 (2007)[Instruction contrary to statute].

The Court instructed the jury to determine "the amount of attorney fees that State Farm should be required to pay to the plaintiff, if any" and instructed on the burden of proof. T. 694. The Court charged the jury to first decide if any attorney fees should be awarded, and then decide the amount. T. 694, 710. The Court accurately charged that the amount shall be based on evidence of reasonable value.

T. 710; OCGA §33-4-6(a); Hendley v American National Fire Ins. Co., 842 F.2d 267, 270 (11th Cir. 1988); Canal Ins. Co., *supra*. 173 Ga. App. at 174. Roberts' counsel presented evidence on reasonable value. T. 338-40.

3B. The Court Correctly Instructed On "Reasonable" Repair Costs

The Court charged that the jury should "award to the plaintiff such sums as you believe are reasonable and just in this case in accordance with the other provisions of this charge, " that State Farm may be obligated "to pay the reasonable value of the repair cost as set forth in the policy," and that the owner of a vehicle may establish repair cost "by showing reasonable value of labor and material used in the repairs." T. 706-07.

Additionally, the jury was correctly charged that they could not apply terms or limitations that were absent from the insurance policy. State Farm urged the jury to rewrite the insurance policy, but this argument is legally indefensible. *E.g.* Hurst, *supra*. 266 Ga. at 716-17(1996); Meyers, *supra*. 249 Ga. App. at 324.

3C. The Court Correctly Instructed On Georgia Insurance Regulations

State Farm misconstrues the jury instruction citing the Georgia Dept. of Insurance regulations and misstates the legal issue. T. 702-703. Roberts never pursued a cause of action based on insurance regulations. If she had, State Farm

would have sought summary judgment. Roberts pursued her claims based on contract law and on the insurance bad faith statute, OCGA §33-4-6.

Regulations are appropriate jury instructions as standards of conduct even when the regulations do not establish a private cause of action. Dayoub v Yates-Astro Termite Pest Co., 239 Ga. App. 578, 581-82 (1999). In Dayoub, the plaintiff did not plead a cause of action based on the defendant's failure to comply with the Georgia Dept. of Agriculture regulations. However, the regulations were admissible on the issue of the pest control company's duty. Id.

Similarly, a plaintiff worker cannot bring an enforcement action against a third party contractor for an OSHA violation. However, OSHA violations are regularly charged as standards for jury consideration. CSX Transp. v Smith, 289 Ga. 903, 906-07 (2011); Baker v Harcon, Inc., 303 Ga. App. 749, 752 (2010)[en banc] [OSHA regulations were admissible]; Cardin v Telfair Acres, 195 Ga. App. 449, 450 (1990). Failure to charge the jury on pertinent OSHA regulation causes reversible error. CSX Transp., *supra.* 289 Ga. at 906-07. Similarly, an injured driver cannot enforce a violation of the Uniform Rules, but can assert that an at-fault driver violated a statutory duty. OCGA §51-1-6.

The insurance regulations expressly applied to first party car repair

insurance claims. Ga. Comp. R. & Regs. 120-2-52-.04; R. 912. The regulations require that a car insurance estimate be reasonable and of an amount that will restore a damaged car to its pre-accident condition relative to quality, safety, function and appearance. Id.; T. 702. This regulation applied to Policy 9811B's repair cost limitation. OCGA §§33-2-9(a)(2), 33-34-8.

The Court took judicial notice of the regulations. T. 305; Dayoub, *supra*. 239 Ga. App. at 581-82. State Farm objected to the regulations being sent out with the jury. T. 305. Therefore, the Court instructed on them. T. 613.

3D. The Unfair Claims Settlement Practices Act Was Correctly Charged

Similarly to the above enumeration, State Farm misconstrued the jury instruction citing four subsections of the Georgia Unfair Claims Settlement Practices Act [UCSPA]. T. 703:14-704:9; OCGA §33-6-34. The UCSPA applies to all Georgia insurance policies. OCGA §§ 33-4-31, -34. These adjusting standards are comparable to the Uniform Rules of the Road that apply to all drivers and on which Courts instruct juries. OCGA §§ 40-6-1 *et. seq*., 51-1-6.

Statutory duties are relevant to a jury's consideration of duties even though a private cause of action cannot be brought to enforce the statute. OCGA §51-1-6. Roberts never plead the UCSPA as the basis for her cause of actions. Yet, UCSPA

cannot be ignored any more than the Uniform Rules or OSHA regulations. OCGA §§33-6-31, 51-1-6; CSX Transp., *supra.* 289 Ga. at 906-07.

Other Courts have instructed juries on applicable portions of their respective Unfair Settlement Practices Acts that did not include a private cause of action. MacFarland v United States Fidelity & Guarantee Co., 818 F. Supp. 108, 110 (E.D. Pa. 1993) *citing* Coyne v Allstate Ins. Co., 771 F. Supp. 673, 678 (E.D. Pa. 1991). During the charge conference in the instant action, the Court considered only those portions of the UCSPA applicable to the factual issues, making changes before finalizing the instructions. T. 598-99; 615, 703-704.

The instructions referred to four subsections: (1) misrepresentation of policy provisions; (2) failure to effectuate a prompt, fair and equitable settlement; (3) requiring an insured to file suit by offering the insured substantially less than the recovered; and (4) refusing to pay without a reasonable investigation. OCGA §33-6-34(1), (4), (5) (6). The UCSPA contains fourteen subsections. Roberts requested instruction on six; the Court charged on four. R.191; T. 589, 703-04.

First, misrepresentation of the policy provisions was supported by evidence that State Farm based Roberts' repair estimate on McNally's judgement rather than on Policy 9811B's PCP survey limitation. T. 472. If State Farm had

applied the PCP surveyed labor unit rates as mulitipliers to the HCC labor unit times based on the estimating guides, the resulting difference would have been $197.40. T. 473, 639. All during the trial, State Farm misrepresented Policy 9811B's limitation. Lockett's Nov. 7th letter to Roberts misrepresented Policy 9811B's limitation, stating that State Farm paid repair costs based only on State Farm's estimate, rather than on 9811B's PCP survey limitation. R. 757.

Secondly, facts supported State Farm's failure in good faith to effectuate a prompt, fair and equitable settlement when liability was clear. See Part 2, §§ 1 and 2 above. Liability (ie. coverage) was established immediately.

Thirdly, Roberts had to file suit because of State Farm's short pay to recover monies due under her policy. Whether State Farm's prior payments were "substantially less" than the amount recovered, presented a jury issue.

Fourthly, State Farm refused to pay Roberts' claim without conducting a reasonable investigation. State Farm's estimator failed to contact HCC for any photographs of the car, to consider submitted invoices or to discuss the repair cost. See Part 2, §§ 1 and 2 at pp. 4, 7, 10, 13, 14 above. Neither McNally or Williams contacted HCC and McNally never saw Roberts car. T. 249, 415, 462.

3E. The Court Correctly Instructed On Unreasonable Delay In Contract

The instruction accurately stated the law. Balboa Life, *supra*. 304 Ga. App. 478, 483 (2010); OCGA §33-6-34(4). Evidence of three unreasonable delays supported the instruction. See Part 2, §1 at pp. 13-14 above.

3F. The Court Correctly Instructed On Policy Limitations

The Court correctly instructed on the law. T. 705:15-12; Broadman Petroleum, 926 F. Supp. at 1577-78; Georgia Farm Bureau, *supra*. 249 Ga. App. at 324; Jenkins and Miller, *supra*. §2.1 at 14. State Farm's defense was based on a PCP limitation that State Farm misconstrued, that was missing from the written policy and that contradicted State Farm's duties under the Georgia insurance regulations. Additionally, this instruction was consistent with State Farm's duty to resolve any ambiguity in Roberts favor. T. 705. State Farm did the opposite.

3G. The Court Correctly Charged Nominal Damages

If the Court had not given this charge, then State Farm would have taken exception. Holmes v Clisby, 121 Ga. 241, 249 (1904)[reversible error for failure to instruct on nominal damages even though not requested]; Brock v King, 279 Ga. App. 335, 340-41 (2006). The Court must charge on principles of law that apply to the case, including pattern charges on contract. R. Carlson, Trial Handbook for Georgia Lawyers §35:11 (2011-12) *citing* Sheftall v Zipperer, 133 Ga. 488

(1909); Burgess v State, 117 Ga. App. 284, 286-87 (1968). State Farm's cited opinion has no application because Roberts relied on relied on OCGA §33-4-6 rather than OCGA §13-6-11 to recover bad faith attorney fees. Howell v Southern Heritage Ins. Co., 214 Ga. App. 536 (1994).

3H. The Court Correctly Charged Preponderance Of Evidence

The charge as given correctly stated that Plaintiff must prove her case with a preponderance, which means "more likely than not" rather than "beyond a reasonable doubt." T. 694-95; Zwiren v Thompson, 276 Ga. 498, 498-500 (2003). The jury was fully instructed on preponderance. OCGA §24-14-3.

4. Court's Discretion Admitted Daniel Hernandez's Testimony

Any evidence having a tendency to make the existence of any consequential fact more or less probable is relevant. OCGA §24-4-401; P. Milich, Ga. Rules of Evid. §6:1 at 99 (2011-12). Daniel Hernandez's testimony was relevant to the reasonable cost issue and to State Farm's defining of HCC's repair costs as "not competitive" and, thus, unreasonable. The Court's discretion balanced probative value. Milich, *supra*. §6:3, 6:4.

State Farm testified that HCC's repair rates were "not competitive" and, thus, unreasonable because HCC charged for repair procedures that other repair

shops in State Farm's market area did not charge for. T. 42-45, 447, 448, 450-51, 453, 454, 456, 457, 458, 459, 484, 535, 536, 541, 544-545, 546, 550. Local repair shops cannot agree on what they are or are not charging for without running afoul of federal anti-trust statutes. Pretermitting the reliability of State Farm's voluntary survey that excluded the quality of the repair services provided and the reliability of State Farm's computations that included submissions from many years past, State Farm equated majority estimating practices, influenced by its market clout, with reasonableness. This corporate policy is questionable since a majority opinion can be exposed as unreasonable when scrutinized. Evidence from persons in repair shops involved in State Farm's direct contract referral program was relevant for exploring the basis of State Farm's contentions.

Daniel Hernandez had this experience. T. 298-99, 301-02. His testimony provided insight into State Farm's business leverage over contract referral shops and showed how State Farm influenced "competitive" repair costs with its "prevailing competitive practices" estimating practice. A practice that was absent from Policy 9811B and was kept from insureds. T. 485. State Farm considered its "competitive" judgement call on costs as the only reasonable repair cost, considering all other repair cost estimates unreasonable. T. 478-81, 485-86.

Testimony established that State Farm "competitive" practices were based on payments that contract referral shops had agreed to accept in exchange for referral business. T. 76-78, 478-81. Broome was a State Farm estimatics team manager in Savannah for 26 years before his 2012 retirement. T. 73, 75. Broome's estimatics department collected the PCP survey information. T. 79, 82-83. Broome met with repair shops on a quarterly basis to discuss their State Farm referred business. T. 75, 76, 77, 79, 91, 302. If the contract shops charged for repair procedures that State Farm thought "not competitive", then that repair shop could be taken off the referral list within two months. T. 92-93.

Broome met with Daniel Hernandez during 1999-2006, when HCC was a contract referral shop. T. 299, 301-02. State Farm took HCC off the program because HCC's repair costs as shown by a severity rating was too high. T. 302, 304. Later, State Farm asked HCC to rejoin the referral program, but HCC declined because State Farm was more interested in repair costs than repair quality. T. 303. The contract referral program was known as Service First and Select Service. T. 303-04. After being taken off the referral list in 2006, the annual number of State Farm insured cars repaired at HCC, from 2005 to 2011, dropped from 380 to 46. T. 301. James Woodcock confirmed this leverage. T. 60-

61, 69-70; *see also* Section 5 below.

Daniel Hernandez's testimony illustrated the economic reality of the referral business and how State Farm's economic leverage over the referral shops discouraged those shops from charging free market repair costs. T. 479-481. Referral shops charging for repair procedures ran the risk of losing a lot of business unless they agreed with State Farm.

Broome refused to acknowledge the financial leverage and would only refer to the contact as a good business relationship. T. 94. McNally recognized State Farm's financial leverage over the contract shops. T. 481. Daniel Hernandez's testimony showed that State Farm's 'competitive" rate was not a fair market rate, but was a volume discount rate.

Roberts contends that her reasonable repair costs should be covered under Policy 9811B. Reasonable repair costs includes repair procedures performed by her chosen repair shop to return her car to its predamaged condition regardless of whether other shops performed work in accord with industry standards or charged for repair procedures. Ga. Comp. R & Regs. §120-2-52-.04.

A repair shop is expected to list all work done on a repair estimate performed by its technicians. Smith v American Family Mutual Ins. Co., 289

S.W.3d 675, 687 (2009); T. 191-95. State Farms claimed that Roberts' repair costs were unreasonable even though HCC charged for work its technicians performed in accord with industry standards and recognized by national estimating guides. Should the insured Roberts have expected State Farm to pay for her repair shop's performed work recognized by national estimating guides?

5. Court's Discretion Admitted James Woodcock's Testimony

The testimony of James Woodcock was relevant for the same reason as Daniel Hernandez's. James Woodcock, subpoenaed to trial, was the body shop manager for Rozier Ford, a State Farm referral shop under contract with State Farm. T. 60. He met with State Farm's estimatics manager on a quarterly basis, just as Danny Hernandez had, discussing State Farm's referred business. T. 64, 65, 66. Eight-five percent (85%) of Rozier Ford's business was based on State Farm referrals. T. 60-61, 63. State Farm referred repair business to Rozier Ford through a direct internet connection. T. 62. Rozier Ford performed repair procedures not charged to State Farm. T. 69. Woodcock refrained from charges that might jeopardize Rozier Ford's relationship with State Farm. T. 69-70. Woodcock's testimony rebutted State Farm's contentions that its "competitive" rate was set by a free market. T. 458-59.

6. <u>Court's Discretion Admitted Industry Standard Documents</u>

Failure to admit industry standards is reversible error. Morrison v Kicklighter, 329 Ga. App. 630, 632 (2014); Dayoub, *supra.* 239 Ga. App. at 581-82. Eckart established the evidentiary foundation of the ICAR industry standards that were followed by HCC. T. 107-110, 132, 168. The estimating guides also consider ICAR repair procedures. T. 192; R. 846. State Farm admitted the ICAR standards applied to the repair of Roberts' car. T. 419. Admissible evidence can go out with the jury. Milich, *supra*. §10:1 at 192 *citing* Moss v State, 274 Ga. 740, 741 (2002), Pickren v State, 269 Ga. 453, 455 (1998), Gabbard v State, 233 Ga. App. 122, 124 (1998).

Similarly, Exhibit 30-A, a 3M Corporation publication, was established as an industry document that included a compilation the estimating guides and paint manufacturer's recommendations for refinishing. T. 124, 137, 190-91. Paint manufacturer's letters to the repair industry were removed, marked individually. T. 347-48. McNally agreed with the paint manufacturers' statements on refinishing procedures. T. 475-76. This evidence rebutted State Farm's "not competitive" and "not necessary" claims. T. 124-125 132, 139-168.

Conclusion

Roberts respectfully requests that the Trial Court's judgement be affirmed.

THIS, the _1st__ day of _July________, 2015.

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CERTIFICATE OF SERVICE

This will certify that the undersigned today served the attached document via electronic service and U. S. Mail on the following:

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THIS, the 1st day of July, 2015.

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