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I. ISSUES PRESENTED FOR REVIEW

A. Were the following findings of the trial court clearly erroneous and without support in the record:

1. That the following language:

“A FINAL NOTE: As with hip fractures, treatment of a vertebral body compression fracture is most successful with immediate intervention. Please refer potential patients for an evaluation as quickly as possible.”

in a brochure about the medical procedure called kyphoplasty, given by the office of plaintiff Marlene Barnes’ treating orthopedic physician, Dr. Robert Benz, to Laura Cuddihy, the Corvel Corporation nurse-case manager, “was not expressly called to Cuddihy’s attention.” (R.Vol. I at 0073)

2. That past MRI’s and X-rays had not shown the new fractures at T9 and T12 to exist before before October 18, 2002. (Vol. I at 0073)

3. That “it never was adequately and clearly conveyed to CorVel or Shelter that there was a, possibly closing, window of opportunity, regarding kyphoplasty, so that, if they chose to investigate, fairness and equity would demand they expedite their investigation and decide before the window closed.” (R.Vol. I at 0076)

4. That the amount of time taken by Shelter to investigate the matter of whether it would authorize the second kyphoplasty recommended by Dr. Benz was reasonable. (R.Vol. I at 0077)

5. That Dr. Benz' statement that a positive outcome could have been obtained if the second kyphoplasty had been done in the fall implied that immediate approval by Shelter was necessary. (R.Vol. I at 0077)

6. That there was considerable dispute as to whether the accident caused the new fractures. (R.Vol. I at 0077)

7. That Shelter's delay in investigating the matter of authorization of the second kyphoplasty was not unreasonable and did not constitute bad faith. (R.Vol. I at 0077)

B. Did the trial court err in concluding as a matter of law that Shelter's conduct in investigating the matter of authorization of the second kyphoplasty did not constitute bad faith.

II. STATEMENT OF THE CASE

A. Nature of the Case.

Appellant Marlene Barnes (hereinafter, "Barnes") alleges in this action that, on February 26, 2002 when she was injured in a motor vehicle accident, she was an insured under a No Fault automobile insurance policy issued by Defendant Shelter

Mutual Insurance Company (hereinafter, "Shelter") and that, after her treating physician recommended a medical procedure called kyphoplasty to treat compression fractures in her spine, Shelter failed to provide approval of said procedure within a reasonable time period and that such conduct of Shelter was a breach of the implied covenant of good faith and fair dealing owed to Barnes and constituted the tort of insurance bad faith entitling her to an award of compensatory damages. Barnes further alleged that the conduct of Shelter was willful and wanton entitling her to exemplary damages.

B. The Course of the Proceedings.

Barnes and her husband, Douglas Barnes, through their counsel of record, filed their complaint on July 9, 2003. The original complaint included claims for declaratory relief and breach of contract with respect to the Barnes' uninsured motorist claim but these were settled and dismissed and Douglas Barnes was dismissed as a party plaintiff. Trial to the court occurred January 25 and 26, 2005. The court took the case under advisement and entered its order that judgment be entered in favor of the defendant on August 15, 2005. The trial court made no findings with respect to compensatory damages or punitive damages.

C. Disposition in the Court Below.

The trial court entered its order on August 15, 2005 that judgment be entered for defendant and that defendant be awarded costs.

D. Statement of the Facts.

The parties stipulated at trial that trial Exhibit 5, consisting of two volumes which, in the record of this Court are Volumes IX and X, constitutes the Bates number-stamped file of defendant Shelter Mutual Insurance Company in the PIP claim of plaintiff Marlene Barnes. (R.Vol. II at 170:15 to 171:4). The parties further stipulated that trial Exhibit 6 which, in the record of this Court is Volume XI, is the case management file of Corvel Corporation in the claim of Marlene Barnes. (R.Vol. II at 61:25 to 62:4)

On February 26, 2002, Barnes as the driver of her 1999 Chevrolet Lumina, was involved in a motor vehicle accident in Fort Collins

Barnes was taken to Poudre Valley Hospital in Fort Collins from the scene of the accident where she was seen in the emergency department. Her primary complaints in the emergency room were of pain in the sternum and pain in the low back but the examiner also noted that she “has a frontal headache and is generally starting to feel achy and hurting all over.” She was examined and x-rays of the pelvis, lumbosacral spine and chest were done which were read as negative for acute findings. The impression on discharge was “[m]otor vehicle accident with

sternal contusion, lumbosacral back pain, skin tear right hand, contusion left hand.” On release, she was given Percocet for pain and was to apply heat to her back and ice to her sternum. (R.Vol. IX at SHEL 137-147).

Among the symptoms that Barnes experienced following the accident was severe disabling pain in her thoracic spine. Both Dr. Andrew Hughes, her primary care provider, in a letter dated June 28, 2002, and Dr. Robert Benz of the Orthopaedic Center of the Rockies (hereinafter, “OCR”), her treating orthopedist, in a treatment note and letter dated June 27, 2002, determined that the pain was caused by compression fractures in her thoracic spine at T6 and T7 which, in their unqualified opinions, were the result of the subject motor vehicle accident (R.Vol. IX at SHEL 0081, 0096, and 0097). Dr. Hughes, in his June 28, 2002 letter, wrote:

“She is in exquisite discomfort, and because of her multiple drug allergies we have been unable to find any oral medications to adequately treat her discomfort.” (R.Vol. IX at SHEL 0081).

Dr. Benz advised Barnes that one option to deal with the symptoms of the compression fractures was to give it additional time and that a second option was a surgical procedure called kyphoplasty at the T-6 and T-7 levels. Kyphoplasty, as described by Dr. Benz, is a procedure in which the physician tries to reduce the fracture or get it closer to its normal height and then stabilize it by placing fast drying bone cement into the vertebra. (R.Vol. V at 18:13-17). Barnes chose the

option of kyphoplasty as her pain had been progressively worsening. (R.Vol.IX at SHEL 0096).

Barnes' PIP benefits coverage with Shelter included a PPO provision. (R.Vol. II at 195:13 to 196:8).

Laura Cuddihy (hereinafter, "Cuddihy") was a nurse-case manager employed by Corvel Corporation (hereinafter "Corvel") who was assigned to perform case management on behalf of Shelter in Barnes' PIP benefits claim beginning in June, 2002. (R.Vol. II at 61:9-18). Cuddihy is registered nurse with a bachelor's degree in nursing and a masters degree in nursing. (R.Vol. II at 60:9-12) (R.Vol. 60:18-19). She's been a registered nurse since 1979 and her experience includes "typical bedside nursing," acting as a head nurse, teaching nursing, clinical work and case management. She has 13 years experience in case management. (R.Vol. II at 60:13-19)

Cuddihy received a phone call from OCR on July 2, 2002 requesting authorization to do the kyphoplasty at T6 and T7 and, during the phone call, she requested a copy of the thoracic spine MRI and Dr. Benz' notes. (R.Vol. II at 68:21 to 69:4) She received the MRI and Dr. Benz' notes on July 3, 2002 which included his note of June 27, 2002 in which he stated (1) that he wanted to proceed with the kyphoplasty, (2) his opinion that the fractures were the result of the car

accident, and (3) that Marlene Barnes continued to feel exquisite tenderness in her mid to upper thoracic spine” which Cuddihy interpreted to mean that Barnes was in pain which was “intense or hurt quite a bit.” (R.Vol. II, 69:19 to 70:23)

Cuddihy, at this time, knew nothing about kyphoplasty. (R.Vol. II at 69:5-7). On July 5, 2002, Barnes’ attorney FAX’d her an article about kyphoplasty (and a similar procedure called vertebroplasty) which described the kyphoplasty procedure as a minimally invasive procedure that can alleviate up to 90 percent of the pain caused by compression fractures and which stated, “As yet, the FDA has not given approval to medical companys (sic) to promote vertebroplasty and kyphoplasty. Both techniques remain ‘off-label’ uses. However, many physicians believe the techniques to be efficient and safe and are using them in their practices. Research continues to done to study the outcomes of these procedures and the initial findings are encouraging.” The article included a notation that, “Controversy often exists in medicine. This area is no exception.” R.Vol. II at 70:24-25 and 72:18-25. Vol. XI at 72-175).

On July 10, 2002, OCR, FAX’d to Ms. Cuddihy a brochure (R.Vol. XI at 170-171) describing kyphoplasty and stating that the procedure provides immediate pain reduction in over 90% of patients and that the pain relief is “significant.” The brochure included the following note:

“A FINAL NOTE: As with hip fractures, treatment of a vertebral body compression fracture is most successful with immediate intervention. Please refer potential patients for an evaluation as quickly as possible.”

Cuddihy read the brochure thoroughly when she received it because, until the Barnes case, she knew nothing about kyphoplasty and she was to advise Shelter whether or not to approve the procedure. (R.Vol.II at 73:11 to 74:8). Cuddihy testified that she specifically read the “FINAL NOTE” quoted above at the time she received the brochure in July 2002. (R.Vol. II at 77:20 to 78:8). She further testified that she learned from the brochure that spinal deformity caused by compression fractures in the spine “jeopardizes a patient’s mobility, lung function and overall quality of life, and can lead to earlier mortality.” (R.Vol. II at 76:5-10). She testified that she also learned from the brochure that there is immediate pain reduction in over 90 percent of patients, that patients can have an immediate return to activities of daily living and that there was a low overall complication rate. (R.Vol. II at 77:7-19)

Cuddihy was called by OCR four times and received one FAX following up on the request to authorize the kyphoplasty between June 28, 2002 and July 12, 2002 (R.Vol. II at 78:12 to 80:8) but she didn’t interpret the multiple contacts from OCR to convey a sense of urgency to get the authorization. (R.Vol. II at 80:12-21)

Shelter authorized the kyphoplasty at T6 and T7 and it was performed by Dr. Benz on July 27, 2002. (R.Vol. II at 83:18 to 84:4).

On August 8, 2002, Barnes was seen by Dr. Benz and, on this date, Dr. Benz, in commenting upon x-rays of the thoracic spine taken that date, “[t]here appears to be a mild compression deformity at T9 which from my reading does not appear to be significantly changed from previous films. The treatment note concerning this visit is contained in the Shelter file, indicating an “Entry Date” of 08/14/2002 and that it was sent to Corvel 8/15/2002. (R.Vol. X at SHEL 0845).

In September 2002, Dr. Benz responded to a written inquiry from Cuddihy about the status of Barnes’ recovery, stating that her prognosis was good and that she was “fully recovered.” (R.Vol. XI at 94)

Barnes visited Dr. Benz on October 18 (12 weeks status post T6 and T7 kyphoplasty) and reported increased pain in her back just below the area of the previous surgery. X-rays of the thoracic spine on this date showed compression deformities at T9 and T12 and Dr. Benz commented in his treatment note, “Although there was some deformity at these levels previously, it does appear that these may have worsened, especially at the T9 level.” He suggested a repeat MRI scan. (R.Vol. IX at SHEL 250-251).

On October 21, 2002, Cuddihy received a call from Dr. Benz' office requesting authorization to do another MRI of the thoracic spine. On October 22, 2002 Cuddihy received a phone message from Dr. Benz' office which Cuddihy returned on October 23 and, in that conversation, a Kim from Dr. Benz' office told Cuddihy that, although Barnes had been released from care, she began having further complications which consisted of an increase in back pain and that x-rays showed additional fractures at T9 and T12. In these calls, Cuddihy explained that the case management file was closed and they should contact the Shelter adjuster. (R.Vol. II at 87:19 to 88:20. and Vol. XI at 42).

MRI on October 30, 2002 shows acute compression fractures at T9 and T12 (R.Vol. IX at SHEL 306-307).

Barnes visited Dr. Benz on October 30, 2002, after the MRI earlier in the day. He noted again her increasing pain. Examination showed tenderness to palpation just below previous levels of kyphoplasty and he recommended kyphoplasty at T9 and T12 (R.Vol. IX at SHEL 287-288).

On October 30, 2003, Kate at OCR called Cuddihy regarding the scheduling of a kyphoplasty at T9 and T12. Cuddihy did not suggest or request that OCR send medical records to her or Shelter at this time. (R.Vol. II at 90:19 to 91:2)

On October 31, 2002, Cuddihy called the Shelter adjuster and left a voice mail message giving information that there were new fractures and that Dr. Benz' office was requesting authorization for another kyphoplasty. (R.Vol. II at 93:9-13).

On November 1, 2002, Cuddihy received a voice mail message from the Shelter adjuster asking her to call. (R.Vol. II at 93:14-19). On November 4, 2002, Cuddihy spoke again with Kate at Dr. Benz' office and told her that she should call the adjuster. (R.Vol. II at 93:20-25). On November 4, 2002, Cuddihy spoke to the Shelter adjuster, Pamela Carbocci who said that Ms. Barnes' attorney had contacted her about Ms. Barnes' medical issues and that she was going to research the file because she was a new adjuster on the file. (R.Vol. II, at 94:7-19).

During the November 4, 2002 conversation between Cuddihy and the Shelter adjuster, Cuddihy testified, when asked if she told the adjuster what she had learned about kyphoplasty, "I imagine I did." But that she didn't remember what she specifically said about kyphoplasty and that the adjuster did not suggest that medical records be obtained, and; the adjuster did not give her authority to re-open the case management file. (R.Vol. II at 95:19 to 98:10).

On November 4, 2002, OCR FAX'd to Shelter Dr. Benz' October 30, 2002 treatment note in which he discussed in detail his findings concerning the

compression fractures at T-9 and T-12 and his recommendation for kyphoplasty at those levels. (R.Vol. IX at SHEL 287-288)

On November 4, 2002, Cuddihy knew that Barnes was probably in pain as a result of the new fractures at T9 and T12. (R.Vol. II at 100:14-21)

On November 4, 2002, Cuddihy knew that the kyphoplasty performed on July 27, 2002 had resolved Barnes' pain symptoms caused by the fractures at T6 and T7. (R.Vol. II at 100:22 to 101:1).

On November 11, 2002, Kate at Dr. Benz' office called Cuddihy about the status of the scheduling the second kyphoplasty. Cuddihy explained the case was still not yet in case management but "the adjuster would be contacted in an effort to expedite the surgery, if surgery is considered appropriate and related to the MVA." (R.Vol. II at 101:21 to 102:8).

On November 12, the Shelter adjuster gave approval to Cuddihy to reopen the case management file (R.Vol. II at 104:13-16) and Cuddihy asked OCR to provide medical records. (R.Vol. II at 104:17-20).

Cuddihy initially testified she received Dr. Benz' records concerning his recommendation for the second kyphoplasty at T9 and T12 on November 19, 2002 (R.Vol. II at 104:17-24 but later testified she received them November 17, 2002. (R.Vol. II at 142:22-25).

Among the records in Cuddihy's file was a letter from Dr. Benz dated November 12, 2002 in which he stated:

"Ms. Barnes underwent kyphoplasty at T6 and T7 on July 27, 2002. She has had good results from this; however, she has developed increased pain just below the site of her previous fractures. She underwent a repeat MRI examination, which showed evidence of fractures at T9 and T12. I feel these fractures are related to her initial accident. Her spine became more kyphotic as a result of the fractures, and thus this is likely causing increased stress on the remaining levels of her back. She has not had any additional inciting incidents since the initial accident. Therefore, I feel strongly that her additional fractures are related to her initial accident in that her spine is more kyphotic and thus creating increased loads on the anterior column." (R.Vol. XI at 98).

Dr. Hughes saw Barnes on November 7, 2002 and he noted in his treatment for that date, "She's had two more compression fractures at T9 and T12 and it is felt these are also secondary to her MVA." (R.Vol. IX at SHEL 0308).

On November 22, 2002, Cuddihy discussed the medical records and the file and the possibility of either a peer review or a PPO examination with the Shelter adjuster. (R.Vol. II at 105:23 to 107:5).

On November 25, 2002, the Shelter adjuster advised Cuddihy by telephone that a PPO examination was to be arranged. Cuddihy telephoned OCR and informed them that a PPO examination was to be done. (R.Vol. XI at 44).

Cuddihy testified that, over the period of time from November 25, 2002 to December 31, 2002, she was attempting to find a physician who was familiar with

kyphoplasty and who was in the geographic area where Barnes lived to perform the PPO examination of Barnes. (R.Vol. II at 109:15 to 111:25). She testified that her attempts to find the PPO doctor consisted of making phone calls and waiting for call-backs (R.Vol. II at 110:20 to 111:2) but her report to Shelter dated January 6, 2003 in which she described her activities in the Barnes case covering the time period, October 21, 2002 to January 6, 2003, there is no description of any activity on her part between November 25, 2002 and December 31, 2002 except to write a letter to Barnes' attorney on December 3, 2002. (R.Vol. XI at 42-45). Further, the Corvel billing records for the same time period, show no billing for any activity on Cuddihy's part in the Barnes case between November 25, 2002 and December 31, 2002 except, again the letter to Barnes' attorney on December 3, 2002. (R.Vol. IX at SHEL 0365). When asked why her report showed no activity on her part during the five plus weeks between November 25, 2002 and December 31, 2002, she said the phone calls were "not billable time" (R.Vol. II at 110:15-19) but all of her reports (R.Vol. XII, Exh. H at 1-47) and the Corvel billing records for the entire time she worked on the Barnes case (R.Vol. X at 0800 and 0889; Vol. IX at SHEL 0252, 0289, 0365, 0417, 0461, 0487, 0499 and 0505) regularly noted many telephone calls she made, many of those billed for 0.10 hours and six of such calls (on June 6 and 7, 2002 and on November 1, 4, 11 and 12, 2002) noted and

described in the billing as 0.00 hours and not billed. (R.Vol. X at SHEL 0800; Vol. IX at SHEL 0365).

The Shelter adjuster, Pamela Carbocci, testified that, as is reflected in the Shelter file, she had no communications with Cuddihy and did nothing otherwise with respect to the Barnes claim during the time period, November 25, 2002 to January 15, 2003. (R.Vol. II at 185:16 to 186:19)

On January 3, 2003, Cuddihy FAX'd a memo and updated medical records to Corvel PPO Dept. "for use in PPO examination."

Cuddihy, when asked if, during the time period, November 25, 2002 to December 31, 2002, she knew that Barnes was probably in pain, she responded, "I imagine she was in pain, yes." (R.Vol. II at 112:5-7).

On January 8, 2002, Cuddihy got a call from the Corvel PPO office indicating that she had sent the PPO examination to the wrong office. (R.Vol. II at 112:18-113:7). Cuddihy, on January 9, 2003, e-mailed a Kerri Birkland who worked in the Corvel office in Colorado Springs stating that she was sending the PPO exam referral for Barnes by overnight mail and that "...because I accidentally sent this to Denver PPO, it really is a priority as her attorney wants to know why this hasn't been done yet." (R.Vol. II at 113:8-25).

On January 9, 2003, plaintiff's attorney called Laura Cuddihy inquiring as to an update on the status of the PPO examination and expressing concerns about plaintiff having to travel a long distance for the examination because of her pain. (R.Vol. XI at 47)

On January 10, 2003, Dr. Benz wrote a letter to "Medical Director" at Shelter/Corvel at Shelter's correct address, 1817 W. Broadway, Columbia, MO 65218-000, saying:

"I am encouraging you to approve Ms. Marlene Barnes' kyphoplasty. She continues to struggle with her back pain. Unfortunately, she has become more nonfunctional. She is unable to any type of housework. She is having to rely on her husband for nearly all of her activities. Her pain is not improving whatsoever. She is still requiring a Duragesic patch. I believe that surgery would significantly improve her pain level and improve her quality of life." (the Shelter file shows this letter stamped with an "entry date" of January 28, 2003)(R.Vol. IX at SHEL 0393)

On January 14, 2003, Corvel PPO Dept. in Colorado Springs scheduled the PPO examination with Dr. Alan Villavicencio in Boulder on February 3, 2003. (R.Vol. II at 114:8-16)

On February 3, 2003, Marlene Barnes underwent examination with Dr. Villavicencio. In his report of that same date, he states his opinion that, while the subject motor vehicle accident was not the direct cause of the compression fractures at T9 and T12, the combination of the "significant amount" of

kyphoscoliosis caused by the T6 and T7 fractures, combined with the pre-existing osteoporosis, were a cause of the fractures at T9 and T12. He stated that it was difficult if not impossible to place a percentage between the effect of the kyphoscoliosis and the underlying osteoporosis but, "if I had to," 50% to each. He concluded:

"My current diagnosis then is new T9 and T12 compression fractures as a result of underlying osteoporosis combined with increased kyphoscoliosis as a result of previous mid/upper thoracic spine compression fractures that resulted from the accident."

Dr. Villavicencio stated that Marlene Barnes would be a candidate for kyphoplasty at T9 and T12 but recommended another MRI of the thoracic spine to determine whether the fractures had already healed because, if they had healed, kyphoplasty could not be done. (R.Vol. XI at 66-70).

Cuddihy's records indicate she received Dr. Villavicencio's report on February 13, 2003. On February 18, 2003, Cuddihy wrote a letter to Dr. Benz outlining treatment that would be certified per the report of PPO examiner. On February 19, 2003, Laura Cuddihy wrote a certification letter for the MRI suggested by Dr. Villavicencio and that payment would be apportioned 50%. (R.Vol. XI at 31)

MRI of thoracic spine was done on February 27, 2003. It shows fractures as healed so kyphoplasty cannot be done. (R.Vol. IX at SHEL 0448). Dr. Benz stated in a letter dated March 7, 2003 to Shelter:

“I have recently re-evaluated Ms. Marlene Barnes. As you know, she recently underwent a repeat MRI examination which failed to show any signs of ongoing healing in her thoracic compression fractures. Unfortunately, she has healed in significant kyphosis from T9 and T12. She continues to have significant pain that is made worse with any type of flexion activity. Because of this she remains significantly disabled. She states that she has difficulty bending forward to put on her socks and cannot do any type of housework secondary to her pain. Because of this her husband has had to be her primary caregiver. Although there is no way to say for sure it does appear that if we would have done additional levels of kyphoplasty last fall that she may have gotten some relief. Unfortunately, she now remains in a significant amount of pain and is disabled. I do not feel that she can return to any type of productive work with her current pain level. In addition, her husband has become her primary caregiver and it is difficult for him to do any additional work outside the home. At this point, there is nothing further that we can do from a surgical standpoint to alleviate her pain and her problem will need to be managed by one of the pain management physicians.” (R.Vol. IX at SHEL 0455)

Dr. Benz testified that it is his opinion to a reasonable degree of medical probability that, had he been able to do the kyphoplasty at T9 and T12 in the fall of 2002 after he recommended it on October 30, 2002, there would have been improvement in plaintiff's condition. (R.Vol. V at 37:21 to 38:5).

Dr. Benz further testified:

Q You'd indicated, Dr. Benz, that since this was a broken bone, essentially, the – the compression fractures that you were seeking approval

for the surgery on T9 and T12, that normally you expect approval within a relatively short period of time from an insurance company?

A Yes. We – I mean, routinely, most insurance companies have a 72-hour window where they will approve or deny a procedure.

Q Okay.

A That's my understanding.

Q Yeah.

A I mean, I don't take care of this on a daily basis.

Q And with respect to broken bones, this is something that you normally expect that kind of a turnaround?

A That's what I would expect. I mean, we talk about a fracture in her spine. Granted, it's not an unstable fracture that she's – that's she's hospitalized for. But still, I would expect a relatively quick answer from someone. P. 93, ll. 4-15.

Bradley Levin, Barnes' expert in the field of insurance law, testified that, in the context of a PIP claim, an insurance company has a duty to "timely process the claim, to investigate it, to gather the information that they need in order to decide whether or not they're going to pay a claim; ultimately, to make a decision on the claim (R.Vol. III at 14:18-23; that Shelter failed to meet its obligations to Barnes: "the obligations of good faith and fair dealing, the requirement that they have to timely process the claim, make a determination, and to communicate that determination to the people who need to know" (R.Vol. at 15:2-12); that Shelter

took too long, “and did so in a manner which was in reckless disregard of their insured’s interests,” to determine whether or not they would approve the second kyphoplasty “such that they tremendously prejudiced their insured” (R.Vol. III at 15: 15-24); that the fact Marlene Barnes was in pain during the time Shelter was investigating approval of the second kyphoplasty elevated the duty of Shelter to make a prompt determination (R.Vol. III at 16:6-18); that the brochure (R.Vol. XI at 170-171) told Shelter that something needed to be done rapidly (R.Vol. III at 16:19 to 17:12); that Shelter and anyone working on behalf of Shelter is bound by information contained in the insurance company file (R.Vol. III at 17:13 to 18: 12), and; that the fact that there was a five month period between the accident and the first kyphoplasty does not justify Cuddihy’s assumption that she could take several months to investigate the request to authorize the second kyphoplasty because she didn’t call a doctor to discuss that and because there was no medical evidence in the file to justify the assumption (R.Vol. III at 18:13 to 20:21).

Shelter’s insurance expert, Garth Allen, testified to his opinions that Shelter’s delay in investigating the authorization of the second kyphoplasty was reasonable and did not constitute bad faith. (R.Vol. III at 81-122).

III. SUMMARY OF ARGUMENT

The trial court based its order granting judgment to defendant upon the following findings that are clearly erroneous and are not supported in the record:

1. That the language:

“A FINAL NOTE: As with hip fractures, treatment of a vertebral body compression fracture is most successful with immediate intervention. Please refer potential patients for an evaluation as quickly as possible.”

In the kyphoplasty brochure “was not expressly called to Cuddihy’s attention.”

2. That past MRI’s and X-rays had not shown the new fractures at T9 and T12 to exist before October 18, 2002.

3. That “it never was adequately and clearly conveyed to CorVel or Shelter hat there was a, possibly closing, window of opportunity, regarding kyphoplasty, so that, if they chose to investigate, fairness and equity would demand they expedite their investigation and decide before the window closed.”

4. That the amount of time taken by Shelter to investigate the matter of whether it would authorize the second kyphoplasty recommended by Dr. Benz was reasonable.

5. That Dr. Benz’ statement that a positive outcome could have been obtained if the second kyphoplasty had been done in the fall implies that immediate approval by Shelter was necessary.

6. That there was considerable dispute as to whether the accident caused the new fractures.

7. That Shelter's delay in investigating the matter of authorization of the second kyphoplasty was not unreasonable and did not constitute bad faith.

That, upon the evidence in the record, Shelter failed to provide approval of the second kyphoplasty at T9 and T12 within a reasonable time period and that such conduct of Shelter was a breach of the implied covenant of good faith and fair dealing owed to Barnes and constituted the tort of insurance bad faith entitling her to an award of compensatory damages.

IV. ARGUMENT

A. THE TRIAL COURT'S FINDING THAT THE "FINAL NOTE" IN THE KYPHOPLASTY BROCHURE WAS NOT EXPRESSLY CALLED TO CUDDIHY'S ATTENTION IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

Findings of the trial court sitting without a jury are not to be disturbed upon appeal unless they are clearly erroneous and not supported in the record. *Gebhardt v. Gebhardt*, 595 P.2d 1048, 1050 (Colo. 1979). The trial court, in its finding that the "FINAL NOTE" in the kyphoplasty brochure (R.Vol.XI at 170-171) was not expressly called to Cuddihy's attention implies a finding that she did not read it when she received the brochure and, therefore, couldn't be charged with notice of the content of the FINAL NOTE. Ms. Cuddihy's testimony, however, specifically

indicates to the contrary. She testified that she read the entire brochure at the time she received it in July 2002 and testified specifically that she read the “FINAL NOTE” at such time. (R.Vol.II at 73:11 to 74:8 and Vol. II at 77:20 to 78:8). For the purposes, therefore, of her management of the case when Dr. Benz requested authorization for the second kyphoplasty, the content of the FINAL NOTE was within her knowledge.

B. THE TRIAL COURT’S FINDING THAT THE PAST MRI’S AND X-RAYS HAD NOT SHOWN THE NEW FRACTURES AT T9 AND T12 TO EXIST BEFORE OCTOBER 18, 2002 IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

The trial court’s finding that past MRI’s and X-rays had not shown the new fractures at T9 and T12 to exist before October 18, 2002 is clearly erroneous and unsupported in the record. On August 8, 2002, Barnes was seen by Dr. Benz and, on this date, Dr. Benz, in commenting upon x-rays of the thoracic spine taken that date, “[t]here appears to be a mild compression deformity at T9 which from my reading does not appear to be significantly changed from previous films. The treatment note concerning this visit is contained in the Shelter file, indicating an “Entry Date” of 08/14/2002 and that it was sent to Corvel 8/15/2002. (R.Vol. X at SHEL 0845). When Barnes visited Dr. Benz on October 18 , 2002 and new X-rays of the thoracic spine were taken, they showed the compression deformities at T9

and T12 but Dr. Benz commented in his treatment note, “Although there was some deformity at these levels previously, it does appear that these may have worsened, especially at the T9 level.” (R.Vol. IX at SHEL 250-251).

C. THE TRIAL COURT’S FINDING THAT A WINDOW OF OPPORTUNITY FOR THE SUCCESS OF THE SECOND KYPOPLASTY WAS NEVER CONVEYED TO CORVEL OR SHELTER IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

The content of the FINAL NOTE in the kyphoplasty brochure informed Shelter and Corvel that, “As with hip fractures, treatment of a vertebral body compression fracture is most successful with immediate intervention.” (R.Vol.XI at 170-171). This language went beyond giving an actual time frame window for a successful outcome – it clearly told Shelter/Corvel that, the sooner the procedure is performed, the more successful it will be. “Immediate” is a word about which there could not have been any misunderstanding on the part of Cuddihy, a highly educated person. It is defined in Webster’s New Universal Unabridged Dictionary, copyright 1994, as “occurring or accomplished without delay; instant.” p. 712. Utilization of the word, “immediate” and further stating, [p]lease refer potential patients for an evaluation as quickly as possible” conveyed unmistakable urgency and that there was a window of opportunity that could be lost if the procedure was not performed soon enough.

D. THE TRIAL COURT'S FINDING THAT THE AMOUNT OF TIME TAKEN BY SHELTER TO INVESTIGATE WHETHER TO AUTHORIZE THE SECOND KYPHOPLASTY WAS REASONABLE IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

Particularly in light of the fact that Shelter/Corvel had knowledge from the kyphoplasty brochure that immediate action was recommended for the most successful outcome, their delay in the process of investigating the approval of the second kyphoplasty was not reasonable. With the sense of urgency that was conveyed by the "FINAL NOTE" and the knowledge on the part of Shelter that its insured, during the time of its investigation was in pain, (R.Vol. II at 100:14-21) the various factors contributing to the delay that the trial court cited as "reasonable and normal," e.g., desire to find a doctor close to Barnes' residence, that the procedure, i.e., kyphoplasty, was new and not well know, that the file was initially closed and had to be re-opened, that information had to be gathered to bring the new adjuster current, etc. (R.Vol. I at 0077) were nothing more than excuses and did not justify a delay of more than the seven week period in which Dr. Benz felt the procedure could have been performed successfully, i.e., if the procedure had been performed "in the fall." . While Cuddihy claimed that, during the five weeks from November 25, 2002 to December 31, 2002, she was making phone calls to find the doctor to perform the PPO examination, her reports and her billing records

demonstrate she wasn't doing that. (R.Vol. XII, Exh. H at 1-47 and Vol. X at 0800 and 0889; Vol. IX at SHEL 0252, 0289, 0365, 0417, 0461, 0487, 0499 and 0505)

E. THE TRIAL COURT'S FINDING THAT DR. BENZ' STATEMENT THAT A POSITIVE OUTCOME COULD HAVE BEEN OBTAINED IF THE SECOND KYPHOPLASTY HAD BEEN DONE IN THE FALL IMPLIES THAT IMMEDIATE APPROVAL BY SHELTER WAS NECESSARY IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

Dr. Benz's office first conveyed to Cuddihy a request to approve the kyphoplasty at T9 and T12 on October 30, 2002. (R.Vol. II at 90:19 to 91:2). From October 30, Shelter had seven weeks through the end of fall, 2002 in which to investigate the request for authorization which, if Shelter had expedited the process as it should have, was more than sufficient time and would not have required immediate approval.

F. THE TRIAL COURT'S FINDING THAT "THERE WAS CONSIDERABLE DISPUTE AS TO WHETHER THE ACCIDENT CAUSED THE NEW FRACTURES" IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

During the time that Shelter was investigating whether to authorize the second kyphoplasty, there was no dispute in any medical record as to this causation issue. Dr. Benz, in his November 12, 2002 letter to Shelter gave his unequivocal opinion on the causation issue with clearly stated rationale for that opinion.

(R.Vol. XI at 98). The only other medical notation about causation during the relevant time period was Dr. Hughes' November 7, 2002 treatment note when he saw Barnes and said, "She's had two more compression fractures at T9 and T12 and it is felt these are also secondary to her MVA." (R.Vol. IX at SHEL 0308). The opinions of Dr. Maruyama and of Dr. Villaviciencio could not have had any impact on Shelter's investigation because they were after the fact. Dr. Villaviciencio was the PPO examiner and Dr. Maruyama was Shelter's medical expert retained for the litigation of this case.

G. THE TRIAL COURT'S FINDING THAT SHELTER'S DELAY IN INVESTIGATION THE MATTER OF AUTHORIZATION OF THE SECOND KYPHOPLASTY WAS NOT UNREASONABLE AND DID NOT CONSTITUTE BAD FAITH IS CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

That the trial court had insufficient basis in the evidence for its finding that Shelter's delay in investigating the authorization of the second kyphoplasty was not unreasonable is addressed above in section D. The trial court's finding that Shelter's delay did not constitute bad faith is addressed below in section H.

H. UPON THE EVIDENCE IN THE RECORD, SHELTER FAILED TO PROVIDE APPROVAL OF THE SECOND KYPHOPLASTY AT T9 AND T12 WITHIN A REASONABLE TIME PERIOD AND SUCH CONDUCT OF SHELTER WAS A BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING OWED TO BARNES AND CONSTITUTED THE TORT OF INSURANCE BAD FAITH ENTITLING HER TO AN AWARD OF COMPENSATORY DAMAGES.

Colorado first recognized the tort of bad faith in the first party context in *Rederscheid v. Comprecare, Inc.*, 667 P.2d 766 (Colo. App. 1983). In that case, the Colorado Court of Appeals stated, “the vendor of a policy has a duty imposed by law to deal fairly and in good faith with the purchaser of the policy, and when it refuses to do so without proper cause, it is liable for damages naturally flowing therefrom.

Two years later, in *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985), the Colorado Supreme Court articulated the standards for first party bad faith claims. The *Savio* court established a twofold test: there must be (1) an absence of a reasonable basis for denial of policy benefits and (2) knowledge or reckless disregard of a reasonable basis for a denial. *Id.* At 1275. The Court’s rationale for extending the tort of bad faith to the first party context was that when an insured, who is covered under a private insurance contract, has been injured, he is particularly vulnerable because of that injury. Although the *Savio* court recognized the right of an insurer to reject invalid claims, it also clearly acknowledged that an insurer has the duty to investigate and pay valid claims. *Savio*, 706 P.2d at 1275. “The second element of the test reflects a reasonable balance between the right of an insurance carrier to reject a non-compensable claim submitted by its insured and the obligation of such carrier to investigate and

ultimately approve a valid claim of its insured.” *Id.* The *Savio* court also held that “[T]he knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is reckless disregard of a lack of a reasonable basis for denial or *a reckless indifference to facts or to proofs submitted by the insured.*” *Id.* Quoting from *Anderson v. Continental Insurance Co.*, 271 N.W. 2d 368, 377 (Wis. 1978) (emphasis added).

The public policy against unreasonable delay in paying legitimate claims has been expressed legislatively through the enactment of the Unfair Competition and Deceptive Practices Act, C.R.S. § 10-3-1101-1104 (also known as the Unfair Claim Settlement Practices Act).

Since issuing the *Savio* decision, the Colorado appellate courts have steadfastly and consistently imposed a duty of good faith and fair dealing on insurers in their dealings with their insureds. *See, e.g., Farmers Group, Inc. v. Williams*, 805 P.2d 419 (Colo. 1991)(holding that an insurer can be liable for damages for the tort of bad faith even though it is also exposed to statutory liability for treble damages under the Colorado No-Fault Act, C.R.S. § 10-4-708); *Dale v. Guaranty National Insurance Co.*, 948 P.2d 545 (Colo. 1997).

For reasons discussed above in section D, the delay of Shelter in its investigation of the matter of the authorization of the second kyphoplasty was

unreasonable. Information that it didn't have a reasonable basis for its delay was clearly in its possession. Shelter had knowledge from the kyphoplasty brochure that promptness was important to the success of the procedure and ignored it. Shelter had knowledge that, throughout the three and a half months it took to make its determination, Marlene Barnes was in pain and it ignored that.

V. CONCLUSION

The trial court's findings upon which it bases its judgment in favor of the defendant are clearly erroneous and without basis in the record and it's judgment should be reversed and the case remanded to the trial court with instructions to enter new findings consistent with the evidence that Shelter's conduct was unreasonable and constituted bad faith and for further findings with respect to the issues of compensatory and punitive damages. .


WHEREFORE, based on the arguments and authorities in this brief, plaintiff respectfully requests that this Court enter an order reversing the judgment of the trial court and remanding this matter to the trial court for entry of findings consistent with the evidence that Shelter's conduct was unreasonable and constituted bad faith and for further findings with respect to the issues of compensatory and punitive damages. .

DATED this 18th day of May, 2006.

Respectfully submitted,

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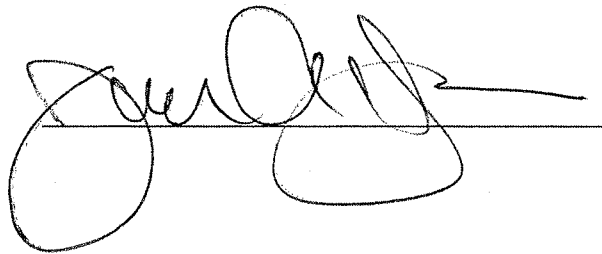
CERTIFICATE OF MAILING

I certify that on the 18th day of May, 2006, service of a true and complete copy of the foregoing pleading or paper, **OPENING BRIEF**, was made by depositing the same in the United States Mail with proper first class postage affixed, addressed to:

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Original and five copies hand delivered to:

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2 East 14th Avenue, #300
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A handwritten signature in black ink, appearing to be "Steven J. Dawes", written over a horizontal line.

