STATE OF MICHIGAN

IN THE SUPREME COURT

J & J FARMER LEASING, INC.,
FARMER BROTHERS TRUCKING, CO., INC.
CALVIN ORANGE RICKARD, JR., and,
JAMES W. RILEY, as Personal Representative
of the **ESTATE OF SHARYN ANN RILEY**,
Deceased,

Plaintiffs/Appellees,

-vs-

CITIZENS INSURANCE COMPANY,

Defendant/Appellant.

Supreme No.:	125818
COA No.	239069
Lower Court No.	96-3742-NO
Lower Court Judge:	Hon. David S. Swartz

125818

PLAINTIFFS/APPELLEES' RESPONSE TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER-STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND RELIEF SOUGHT

The Defendant/Appellant seeks leave to appeal from the Court of Appeals decision dated February 12, 2004, case no. 239069. Under MCR 7.302(C)(2)(b), the Defendant has 21 days from the date of the Court of Appeals decision to file an application for leave to appeal to the Michigan Supreme Court. The Defendant filed it's application for leave to appeal on March 25, 2004, 42 days after the Court of Appeals decision. The Application was not timely filed. Under MCR 7.302(C)(2)(b), the Defendant failed to file an attorney Affidavit explaining the delay. Therefore, this Court does not have jurisdiction to review this untimely application for leave to appeal since the appellant has provided no explanation for the delay as required by the Court Rule.

COUNTER-STATEMENT OF QUESTION INVOLVED

I.

SHOULD THIS COURT REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF SUMMARY DISPOSITION OF A BAD FAITH INSURANCE LAWSUIT WHERE THE JUDGMENT IN EXCESS OF POLICY LIMITS OCCURRED AS A RESULT OF A CONTESTED JURY VERDICT THAT RESULTED FROM CITIZENS' BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS AND WHERE THE INSURED AND UNDERLYING PLAINTIFF EXECUTED A JOINT AGREEMENT TO COLLECT THE EXCESS JUDGMENT FROM CITIZENS WHILE NOT RELEASING OR SATISFYING THE EXCESS JUDGMENT THAT REMAINS UNCOLLECTED?

Defendant/Appellant Citizens answers:	"Yes."
Plaintiffs/Appellees answer:	"No."
The trial court would answer:	"No."

COUNTER-STATEMENT OF FACTS

A. INTRODUCTION

This lawsuit involves a bad faith insurance action.[1] The claim is brought by Farmer Brothers Trucking Co., J & J Farmer Leasing, Inc., Calvin Rickard and the Estate of Sharyn Riley. Farmer Brothers Trucking Co., J & J Farmer Leasing, Inc., [herein trucking concerns] and Calvin Rickard [truck driver] are the insureds of the Defendant Citizens Insurance Company [herein Citizens]. (See Complaint dated November 1, 1996). Calvin Rickard was a truck driver for the trucking concerns who drove a semi-tractor into the path of Sharyn Riley who was tragically killed on November 15, 1994. The Defendant Citizens was the insurance company for the trucking concerns and truck driver Rickard. See Judy Moskus deposition dated July 22, 1997, Exhibits 3 & 4. The available bodily injury policy limits were $750,000.00. Ibid.

The Estate of Sharyn Riley filed a wrongful death claim against the trucking concerns and Mr. Rickard. See Complaint. The underlying tort case did not settle and a jury verdict was rendered against the trucking concerns and its driver in an amount that equaled a present value in excess of $3 million. (See Complaint, paragraph 20). The Estate of the deceased, Sharyn Riley, along with the trucking concerns and driver jointly filed a bad faith claim against Citizens for failing to settle the underlying tort case. Ibid.

It is undisputed that the Defendant Citizens had an opportunity at the commencement of the truck/automobile negligence lawsuit to settle the case for the $750,000.00 policy limits. Citizens refused to settle for policy limits at the early stages of suit and instead offered

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[1]The most relevant exhibits for purposes of this appeal are found in the Appendix. The critical references are highlighted for the Court's convenience.

$500,000.00. See Moskus deposition Exhibit 6 and deposition transcript at p. 44. Moskus repeatedly over the next year requested Citizens for the authority to offer policy limits on multiple occasions. Ibid, Exhibit 12, 15, 27, 38. Citizens stood firm on their $500,000.00 offer until after mediation. See Moskus deposition at p. 46. The mediation award was $950,000.00. Ibid, deposition exhibit 38. Eleven months after Citizens rejected the policy limit offer of settlement from the Estate of Sharyn Riley, Citizens finally offered to pay its policy limits. Ibid, deposition exhibit 46. The Estate refused the offer due to the substantial delay in making the offer. Ibid.

The Estate made an Offer of Judgment after mediation for $825,000.00 representing policy limits plus interest on the policy limits. (See Moskus deposition Exhibit No. 52). Citizens rejected the offer of judgment. Citizens representatives attended multiple settlement conferences and argued that they were only obligated to pay policy limits not policy limits plus prejudgment interest unless there was a trial and a verdict rendered. Ibid, deposition exhibits 50, 51. Only at the last settlement conference did Citizens offer to pay any prejudgment interest and then only $25,000.00. Moskus deposition exhibit 62. The case proceeded to trial and a jury verdict totaled a net present value of $3.5 million. See Complaint, paragraph 20. Citizens paid its $750,000.00 policy limit, prejudgment interest, mediation sanctions and court costs for a total payment of approximately $1,000,000.00. Ibid. A Partial Satisfaction of Judgment was entered as to those amounts. The trucking concerns and the individual truck driver remained liable for the unsatisfied judgment. Ibid.

The Estate of Sharyn Riley, the trucking concerns and the driver entered into an agreement to jointly pursue a bad faith claim against the Defendant Citizens patterned after

the agreement used in the Supreme Court case of Frankenmuth v Keeley Mutual Insurance Co., 436 Mich 372, 494 N.W. 2d 870 (1992). See **APPENDIX EXHIBIT A**. The Keeley agreement is attached as **APPENDIX EXHIBIT B**. In addition, during the pendency of the bad faith suit, the decedent's Estate had also received an assignment of the bad faith claim from the trucker and trucking concerns. See motion for Summary Disposition hearing held on November 20, 1997 at p. 9, lines 5 to p. 10, line 17, lines 19-25, **APPENDIX EXHIBIT C**, assignment.

The Defendant Citizens filed a motion for Summary Disposition on September 17, 1997 under MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court concluded as a matter of law that Citizens by offering its policy limits [eleven months after the offer to settlement for policy limits was made by the Plaintiff] had barred as a matter of law any bad faith claim. The trial court stated that as long as the insurer offered policy limits during the pendency of the action that there could not be a bad faith claim. [See transcript of motion for Summary Judgment hearing at p. 20, line 16 to p. 21, line 14]. The Plaintiff/Appellee filed an appeal of right from the order granting summary disposition, appeal no. 209236.

This Court issued an opinion on October 22, 1999 which reversed the trial court's granting of summary disposition to the Defendant. The Defendant did not seek leave to appeal to the Michigan Supreme Court. This Court remanded the case for further proceedings. See **APPENDIX EXHIBIT D**, Court of Appeals decision dated October 22, 1999.

After remand, the Defendant Citizens filed a second motion for summary disposition arguing that the Plaintiff sustained no damages as a result of the covenant to forebear execution on the judgment. See Defendant's motion for summary disposition dated June 27, 2001. The trial court denied the Defendant's motion on January 2, 2002. The Court of Appeals

granted leave to appeal on April 1, 2002. The Court of Appeals affirmed the Trial Court's denial of Summary Disposition on February 12, 2004. The Defendant filed an untimely Application for Leave to Appeal on March 25, 2004.

B. SUBSTANTIVE FACTS

The decedent in the auto negligence case was Sharyn Riley. She was driving on a two lane paved roadway east on Ann Arbor-Saline Road toward Ann Arbor. In the opposite direction a gravel truck driven by Calvin Rickard, Jr., driving for Farmers Brothers Trucking Co., and J & J Farmer Leasing, Inc., was traveling too fast to stop for traffic in his lane and as a result swerved his gravel truck into the eastbound lane of traffic that Sharyn Riley was occupying and caused the collision resulting in Sharyn Riley's death. See Complaint dated November 1, 1996. The facts of the accident described in the Complaint were admitted at trial. Citizen's own investigation confirmed these facts. See Moskus deposition Exhibit Nos. 1 and 9. Sharyn Riley was employed as a tax preparer earning approximately $23,000.00 per year and had also started employment as a real estate agent.

Sharyn was survived by her husband James Riley. Ibid. Mr. Riley had been her husband for more than 25 years. Sharyn had two children Robyn Adams and Ricky Riley and four grandchildren as well as a sister who Sharyn had raised from childhood. See Moskus deposition exhibits 3, 4 and 5. The Estate of Sharyn Riley filed the wrongful death action against Farmer Brothers Trucking Co., J & J Farmer Leasing, Inc., and Calvin Rickard on January 11, 1995. The underlying tort feasors were insured with Citizens. Ibid. The available bodily injury limits were $750,000.00 per occurrence. Citizens retained the law firm of Garan, Lucow and attorney Judy Moskus who filed an answer to the Complaint on behalf of the underlying

Defendants on February 24, 1995. Ibid. The case was tried from June 4th to June 6th, 1996 with a jury verdict of economic damages in the amount of $1,000,000.00, noneconomic damages in the amount of $4.1 million, with a total verdict of $5.1 million. After the present value reduction, the total verdict was in excess of $3.5 million.

While the motions were pending in the Trial Court, Citizens paid their policy limits, prejudgment interest on their policy limits, costs and attorney fees. The remaining amount in excess of $2.5 million was unsatisfied by the Judgment. [See Complaint, paragraph 20]. After the Judgment was entered, the Estate of Sharyn Riley made an agreement with the underlying Defendants, the trucking concerns and trucker to pursue a joint bad faith lawsuit against Citizens Insurance Company. The Agreement which was entered was virtually identical to the agreement of the plaintiffs in the Supreme Court case of Frankenmuth v Keeley Mutual Insurance Co., 436 Mich 372, 461 N.W. 2d 666 (1990) (on rehearing).

The Agreements were supplied to the Trial Court in Plaintiffs' original response to Defendant's motion for summary disposition. In addition, an Assignment had been executed by the trucking concerns after Citizens admitted in their pleadings that an Assignment was not objectionable. The assignment was filed with the Trial Court on November 26, 1997.

The Defendant Citizens filed a motion for summary disposition claiming as a matter of law that the instant cause of action is barred by the covenant not to execute against the underlying Defendant trucking concerns and truck driver. This was argument number 4 in the Defendants' first motion for summary disposition dated September 17, 1997. The Defendant Citizens argues that since the Estate has agreed not to execute on the judgment, that the

Estate has fully released the bad faith cause of action.[2]

The Plaintiff retained two economic experts in the bad faith case who established significant damages caused by the Defendant Citizens Insurance Company's failure to settle the underlying case. The experts have calculated the underlying trucking defendants past and future economic collectability. Paulette Miller, CPA testified that the underlying trucking defendants, J & J Farmer Leasing, Inc., Farmer Sand and Gravel, Inc. and Farmer Brothers Trucking Company had an economic collectability of between $1.5 million and $3 million. See Paulette Miller deposition attached hereto as **APPENDIX EXHIBIT E** and deposition exhibit numbers B, M and N. She further testified that the truck driver, Calvin Rickard, Jr. had an economic collectability of $375,312.00, after being reduced to represent value. The plaintiff has also retained Mark Crawford, a business evaluation expert who calculated the collectability of the underlying trucking defendants to be between $3.5 million and $6 million dollars. Mr. Crawford's report and deposition are attached hereto as **APPENDIX EXHIBIT F**.

Robert Pollice also testified that the underlying Defendants in the wrongful death claim incurred attorney fees attached hereto as **APPENDIX EXHIBIT G**. These attorney fees were incurred by the underlying Defendants since the underlying trucking defendants had to retain private counsel to protect their interests as a result of Defendant Citizens Insurance Company's failure to settle the underlying case.

After this court remanded this case to the Washtenaw County Circuit Court. The Defendant filed a second motion for summary disposition. The judge denied the motion and

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[2]There are many situations which allow the Estate to deem the agreement null and void and execute on the excess Judgment.

an order was entered on January 2, 2002. The Court of Appeals affirmed the trial court decision on February 12, 2004. The Defendant seeks to reverse the decision of the trial court and Court of Appeals denying the motion for summary disposition.

STATEMENT REGARDING THE STANDARD OF REVIEW

The Standard of Review stated in the Appellant's Brief is accurate.

Appellate Courts review decisions concerning summary disposition de novo and must review the entire record to determine whether the Defendant is entitled to summary disposition. See Adkins v Thomas Solvent Co., 440 Mich 293, 302 (1992).

When reviewing a motion for summary disposition pursuant to (C)(7), the Court accepts all of the Plaintiff's well-pleaded allegations as true unless specifically contradicted by appropriate documentation submitted by the movant. See Patterson v Kleiman, 447 Mich 429 (1994). The court must consider all affidavits, pleadings, depositions, admissions and documentary evidence submitted by the parties.

ARGUMENT

I.

THIS COURT SHOULD NOT REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF SUMMARY DISPOSITION OF A BAD FAITH INSURANCE LAWSUIT WHERE THE JUDGMENT IN EXCESS OF POLICY LIMITS OCCURRED AS A RESULT OF A CONTESTED JURY VERDICT THAT RESULTED FROM CITIZENS' BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS AND WHERE THE INSURED AND UNDERLYING PLAINTIFF EXECUTED A JOINT AGREEMENT TO COLLECT THE EXCESS JUDGMENT FROM CITIZENS WHILE NOT RELEASING OR SATISFYING THE EXCESS JUDGMENT THAT REMAINS UNCOLLECTED.

A. Michigan Law allows recovery of past and future economic losses suffered by an insured in a bad faith failure to settle claim including an insured's prospects of obtaining future additional assets and earnings from which the judgment could be collected under Keeley.

The damages recoverable in a bad faith case against an insurance company was set forth in the Michigan Supreme Court decision of Frankenmuth Ins. v Keeley, 433 Mich 525, 447 NW2d 691 (1989), reversed on rehearing 436 Mich 372 (1990). Justice Carl Levin's dissent in the original decision became the majority opinion on rehearing. Justice Levin explained what damages are recoverable in a bad faith action as follows:

> "We would accept the judgment rule in so far as it dispenses with the need to establish that Keeley paid any amount on the judgment and would, as did the Court of Appeals, remand to the trial court for a determination of the extent of Keeley's assets not exempt from legal process[27] and, additionally, for a determination of the value of the excess portion of the judgment – now over $600,000 taking into account not only Keeley's assets not exempt from legal process but also his prospects of obtaining in the future additional assets from which the judgment could be collected.[28]
>
> (Emphasis supplied)

* * *

Interpretive footnote 28 confirms that in ascertaining damages in a bad faith claim, the court

must look at the future economic prospects of the insured. The court writes as follows:

> "[28]The court should, in determining Keeley's prospects of attaining in the future additional assets, consider his educational achievement and plans for future education, his skills, present and prospective, and the job opportunities that might be available to him.
>
> I would prefer to direct entry of a judgment declaring that Frankenmuth is *subject to liability* (not that it is liable) for the $600,000.00 excess plus interest as it accrues, but would not require Frankenmuth to pay any amount in respect to that judgment unless and until and then only to the extent Boone can establish that Keeley is collectable.
>
> As and when Keeley acquires assets, greater income, inheritance, whatever, Boone could seek a declaration requiring Frankenmuth to pay an amount equivalent thereto. The judgment against Frankenmuth would substitute for the judgment against Keeley, so that Keeley's credit would no longer be adversely affected. The burden thus imposed on Boone, the injured person, would be no greater than in any case where there is inadequate insurance – he could only recover to the extent he could find attachable or garnishable assets.
>
> Boone would be better off because he need not actually attach or garnish, and there should be a minimum of judicial proceedings. Such a judgment should not be subject to any statute of limitations. There would be no possibility of bankruptcy discharge of Keeley's debt."
>
> (Emphasis supplied)

* * *

Under the Keeley analysis, the past and future economic prospects of the underlying Defendants are collectable damages in a bad faith case. The underlying trucking defendants prospects of obtaining future additional assets and income are allowable damages under the Keeley analysis. The calculations concerning future earnings as set forth by Plaintiff's expert witnesses are recoverable in this case.[3]

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[3] The Estate would also be entitled to recovery of the attorney fees incurred by the underlying trucking defendants in the original wrongful death lawsuit.

The Estate of Sharyn Riley never entered into any type of release with the underlying trucking defendants. Instead, the Estate and the underlying defendants entered into a joint agreement to pursue a bad faith cause of action against Citizens and agreed to an allocation of settlement proceeds in the bad faith case. The underlying trucking defendants and the truck driver have a continuing interest in pursuing and prosecuting the bad faith claim pursuant to the written contract and to recover proceeds for their attorney fees wrongfully incurred in the underlying tort lawsuit as set forth in the agreement. The Defendant's argument that the joint agreement bars the bad faith lawsuit has no merit. The covenant not to execute does not extinguish the Judgment. Footnote seven of the Court of Appeals recognized that the insured may still be liable for the underlying Judgment:

> "Because trial is still pending, the possibility remains that the Farm parties may breach the agreement and thereby forfeit the forbearance from collection to which the Estate has agreed. However, we decline to resolve this appeal on this limited basis because this Court granted leave to address the substantive issues presented."

* * *

As set forth in the joint agreement, the agreement to forbear collection on the Judgment can be declared null and void and the Estate is permitted to take action to collect the unpaid portion of the Judgment. The assertion by the Defendant that this agreement constitutes a release of the instant cause of action is simply incorrect. Under Keeley, it is not necessary for the insured to make payment on the Judgment in order to establish damages.

The Court of Appeals quoted the following quote from Justice Levin's dissent in Keeley in support of it's opinion:

> "A compromise between the prepayment and the judgment rule: that this Court accept the essence of the judgment rule by eliminating the need to show

partial payment, but provide protection for insurers along the lines of the prepayment rule by precluding collection on the judgment from the insurer beyond what is or would actually be collectable from the insured. [*Keeley I, supra*, 433 Mich at 565.]"

* * *

The Court of Appeals found that the joint agreement would not result in forfeiture of a bad faith recovery from Citizens. The entire purpose of the joint agreement between the underlying parties was to collect the excess judgment from Citizens. See paragraph 9 of joint agreement. The purpose of the agreement was not to release Citizens but instead to require Citizens to pay for the excess judgment since the underlying insureds and the Estate of Sharyn Riley were damaged by the actions of Citizens. The Appellees have never executed any documents releasing Citizens from the bad faith cause of action. It was never the intention of the parties to release Citizens from the bad faith cause of action. In order for a release to be valid, it must be intended by the parties. See Trongo v Trongo, 124 Mich App 432, 435; 335 NW2d 60 (1983).

As the Court of Appeals correctly stated:

"We cannot conclude, as Citizens suggests, that the fact that the Farmer parties have entered an agreement to prevent financial ruin they resultantly caused the forfeiture of any recovery from Citizens for its alleged bad faith. Rather, we believe that *Keeley* requires an insurer found liable for bad-faith failure to settle to pay the excess judgment to the extent the insurer would have been able to pay, regardless of the insured's obtainment of a release. To hold otherwise would be to evade the intention of our Supreme Court and cause a windfall for the insurer on the basis of the insured's savvy in saving itself from potential financial ruin, which needed to be done only as a result of the insurer's alleged bad faith in causing an excess judgment against its insured.[11] An insured should not be penalized for devising or taking advantage of a method of avoiding financial loss allegedly flowing from the bad faith of its insurer, nor should an insurer benefit from its insured's maneuverings to protect itself."

* * *

The Court of Appeals decision is also supported by the footnote 27 of the Keeley decision. Justice Keeton contemplated a "workable doctrine" that fully protects the insured from loss, does not result in the elimination of a "penalty" on the insurer and that does not produce "a windfall" for the third party claimant. The Court of Appeals decision satisfied all three aspects of this doctrine. Footnote 27 at pp. 563-564 further reads:

> "The appropriate measure of damages, when an insured is entitled to a recovery that is in excess of the applicable liability insurance policy limits, should be the amount needed to make the insured whole by placing the insured in the same position that would have existed had there been no breach of the duty to settle. Furthermore, this sum should be established after taking into account the amount, if any, that the third party claimant could have realized upon rights against the insured if there had been no cause of action for liability in excess of policy limits - - that is, after taking into account how much could have been recovered above the insurance policy limits against an insured who had some assets, but not enough that the third party could recover more than could have been recovered against the insured. This might be done by permitting a single recovery against the insurer on the excess liability claim, at the instance of either the insured or the third party clamant, in an amount equal to the insure's net assets which are not exempt from legal process, and holding that the claimant's tort judgment against the insured if sully discharged by payment of the sum to the claimant either by the insured or by the insurer on the insured's behalf . Although in some instances this amount may be somewhat more than the net recovery the claimant would otherwise have realized (apart from the excess liability claim) this approach certainly more closely approximates that recovery and it provides full protection of the insured's financial position from the consequences of the insurer's wrong to the insured in failing to settle.
>
> The financial interests of both the insured and the third party claimant are better served by the solution proposed in the preceding paragraph than by leaving them to other legal processes, such as a bankruptcy proceeding, the cost of which would have an adverse impact on the interests of each. This proposal may not be fully within the scope of avoidable consequences rules as thus far developed , because decisions applying this concept have been concerned with mitigating damages in a different sense. However, it is within the scope of the principle underlying the avoidable consequences rule: the principle that even though a person can show that in fact losses have been greater, legal relief is limited to what that person would have been entitled to

receive if reasonable actions had been taken to minimize the harm.

Even though a claimant's tort claim has already been reduced to judgment, the underlying spirit of exemption and bankruptcy laws expresses a public policy that there should be a reasonable limitation on the hardship the claimant is permitted to impose by strict enforcement of the judgment. In this context, the availability of a cause of action against the insurer in excess of its policy limits offers a distinctive opportunity - - not generally existing in other settings involving judgment creditors - - for achieving at least as much as could be attained for the claimant through enforcement of the judgment as far as the exemption and bankruptcy laws would permit, but without incurring the costs of bankruptcy to the claimant himself and not the insured. It seems consistent with the principles underlying both the avoidable consequences doctrine, the exemption rules, specifically, and the bankruptcy laws, generally, to adopt this intermediate measure of damages in excess liability claims.

The application of this measure of damages may present problems of proof not heretofore faced, but they should be manageable. For example, the insurer should have the right to offer satisfactory evidence on these issues if it can, shouldering the burden as one customarily does in advancing an avoidable consequences defense.

The implementation of this approach requires that the insured suffer a loss of privacy because of the necessity for a complete disclosure of the insured's financial situation. This is, however, a consequence to which the insured has contributed by committing a tort against the claimant that caused damages of such severity that the limited amount of liability insurance coverage, chosen by the insured, was inadequate. The loss of privacy in this context is a burden that it seems both reasonable and justifiable for the insured to bear.

The only realistic alternative to such an intermediate solution is to set the measure of damages in these cases at the full amount of the judgment, a solution that would disadvantage the insured an others like the insured by increasing the costs of low-limit liability insurance. [Keeton & Widiss, Insurance Law, §7.8(i)(4), pp 903-905. Emphasis added.]"

* * *

Justice Levin recognized the need for a doctrine that avoided causing the insured to file bankruptcy while preventing the unfairness of the judgment rule which automatically determined the damages to be the full amount of the judgment without <u>any</u> regard to the

collectability of the insured. This doctrine cannot be accomplished if the insured must file bankruptcy or is financially ruined. The Keeley decision calls for "fully" protecting the insured. The Appellant's application of Keeley would financially ruin the insured and provide no mechanism for the tort claimant to recover what would have been collectable from the underlying tortfeasor. The Appellees offer no other practical method to recover damages in the very limited number of cases where this issue arises.

B. The joint agreement to pursue a bad faith lawsuit against Citizens does not constitute a release of the instant bad faith cause of action.

Footnote seven of the Court of Appeals decision recognized that the underlying judgment may still be collected. The pertinent portion of the agreement to pursue a joint bad faith lawsuit states as follows:

> "(e) Farmer Brothers Trucking Company, Inc., J & J Farmer Leasing, Inc. and Calvin Orange Rickard, Jr. and any of their owners, representatives, employees and/or agents shall fully cooperate with the Plaintiff in pursuing the joint lawsuit against Citizens Insurance Company and/or any other culpable parties including taking reasonable steps to prosecute the above lawsuit and resulting litigation. The Defendants will sign waivers of attorney client privilege, insurance privilege and financial privilege and no such privileges will be raised to discovery or the obtaining of information in the contemplated suit.
>
> (f) In the event that any of the Defendants shall fail to: (1) execute pleadings necessary to prosecute the lawsuit; (2) attending meetings with counsel; (3) comply with discovery; or (4) attending evidentiary hearings or trial as needed in the discretion of counsel, the Plaintiff shall notify the offending party in writing of its breach of this agreement, specifying the act or omission which constitutes the alleged breach and the means by which the offending party shall cure the breach. Thereafter, the offending party shall have fifteen (15) days in which to perform the specified corrective action (eg. supply documents, answer interrogatories, or attend a deposition or meeting). If the

> offending party fails to timely cure its breach or its breach is not capable of being cured (i.e. the lawsuit is dismissed as a result of the offending party's conduct), then the Plaintiff may declare this Agreement null and void as to the offending party, only, but not as to any other Defendant, In that event, and that event only, is the Plaintiff permitted to take action to collect the unpaid portion of the Judgment from the offending party."
>
> (Emphasis supplied)

* * *

This agreement is virtually identical to the agreement that was used in the Supreme Court case of Frankenmuth Ins v Keeley, supra. where the underlying plaintiff and defendant filed a joint lawsuit alleging bad faith against the insurance company. As in Keeley, the joint agreement to pursue a bad faith cause of action against the insurance company and the agreement to allocate settlement proceeds does not in any way bar the instant cause of action. The Defendant Citizens argues that since the Estate in the instant case agreed to forever forebear collection of the Judgment and the Keeley plaintiffs agreed to forebear collection of the judgment that this distinction by including the word "forever" turns the instant agreement into a full-blown release. A covenant not to execute is materially different from a release. See Critz v Farmers Insurance Group, 230 Cal. App 2nd 788, 41 Cal Rptr. 401, 410 (3 Dist 1964) where the Court held that a covenant not to execute is not a release and does not release a bad faith claim against the insurance company.

There is not a significant difference in the phrases forever forbear any action and to forbear any action since the terms have essentially the same meaning in the context of the agreements. The Defendant cites the definition of forbear as "the acts of refraining from enforcing a right, obligation or debt." The Defendant also argues that the Keeley defendant

always had the excess Judgment "hanging over their heads." Certainly, the instant agreement which allows the Estate to collect the Judgment under certain circumstances is hanging over the heads of the underlying trucking defendants as much so it was in Keeley.

The Defendant fails to recognize within the instant joint agreement that the Estate under certain circumstances can declare the agreement null and void and that the Plaintiff is permitted to collect the unpaid portion of the judgment. For example, should the Defendants fail to execute pleadings, cooperate, attend meetings with counsel, comply with discovery, attend evidentiary hearings or trial, the agreement can be held null and void.

Michigan Courts have always recognized that there is a significant distinction between a covenant not to sue and a release of liability. See Cook v City Transport Corp., 272 Mich 91, 92-93; 261 NW2d 251 (1935). A covenant not to sue is an agreement where one party pays agreed damages or buys piece of mind against a cause of action asserted by another positively or tentatively. See Industrial Steele v Erie Bank, 167 Mich App 687, 693 (1988). A covenant not to execute is distinguishable from a release in that the covenant not to sue does not extinguish the cause of action. Ibid.

The Defendant argues that it was the intention of the parties to have the joint agreement act as a release by the Estate of any and all claims arising from the Judgment against the underlying trucking defendants. The Defendant cites portions of the depositions of Johnny Farmer and James Riley. However, the Defendant ignores the agreement itself which declares the intent of the parties as follows:

> "9. The Defendants desire to pursue a bad faith claim, intentional infliction claim, and negligence claim against Citizens Insurance Company for the economic burden which has been unreasonably thrust upon them as well as

> other damages directly attributable to Citizens' action. Further, they seek a means to satisfy the outstanding balance of the Judgment which is currently outstanding against them and payable to the Plaintiff plus any other damages recoverable. The Plaintiff seeks to be made whole by obtaining payment of the outstanding Judgment balance plus accrued interest, costs and attorney fees."

* * *

The parties in Keeley and Riley were attempting to accomplish the same goal of having the insurance company bear the financial responsibility of the excess Judgment as a result of the insurance company's bad faith failure to settle the underlying case. There was no intent to discharge the Judgment without a return of consideration which was the transfer of a valid bad faith cause of action to the injured party. The agreement also contains a merger clause which reads:

> "This is the entire agreement between these parties and no other agreement either written or oral exists between these parties for the purpose of resolving these issues of mutual concern. To memorialize our assent to this agreement, the parties have executed and signed below on the date set forth below."

* * *

This written agreement between the parties reflects the intent of the parties and cannot be changed without consent or subsequent agreement. See Westdale Company v Gietzen, 29 Mich App 564, 185 NW2d 596 (1971). The testimony cited by the Defendant is parol evidence which is not admissible since the integration clause in the joint agreement is conclusive unless there is a showing of fraud. See UAW-GM Human Resource Center v KSL Recreation Corp., 228 Mich App 486, 579 NW2d 411 (1998).

The UAW-GM case rejects the Defendant's attempt to re-write the agreement through parol evidence. The UAW-GM court writes as follows:

"The first issue before us is whether parol evidence is admissible with regard to the threshold question of integration even when the written agreement includes an explicit merger or integration clause. In other words, the issue is whether NAG applies to allow parol evidence regarding this threshold question when a contract includes a explicit merger clause. While this issue is one of first impression, it's answer turns on well established principles of contract law."

* * *

"Thus, both Corbin and Williston indicate that an explicit integration clause is conclusive and that parol evidence is not admissible to determine whether a contract is integrated when a written contract contains such a clause. In the context of an explicit integration clause, Corbin recognizes exceptions to the baring of a parol evidence on for fraud, or other grounds sufficient to set aside a contract and for the rare situation when the written document is obviously incomplete on it's face and therefore parol evidence is necessary for the filing of gaps. The conclusion that parol evidence is not admissible itself includes an integration clause is consistent with the general contract principles with the honoring parties agreement expressed and their writing written contracts and not creating ambiguities where one exist."

* * *

"Further and most fundamentally, if parol evidence were admissible with regard to the threshold issue whether the written agreement was integrated despite the existence of an integration clause, there would be little distinction between contracts that included integration clause and those that do not. When the parties choose to include an integration clause, they clearly indicate that the written contract is integrated; accordingly, there is no longer any threshold issue whether the agreement is integrated and correspondingly, no need to resort to parol evidence to resolve this issue. Thus NAG, which allows resort to parol evidence to resolve this threshold issue does not control when a contract includes a valid merger clause. 3 Corbin, contracts § 557, p. 401, states in the pertinent part:

> 'A finding that the parties had assented to a writing of the then complete integration of their then existing agreement is necessarily a finding that there is no simultaneous oral addition. On such a finding of fact, we are no longer required to decide whether proof of simultaneous oral agreement is admissible for we have just found that there was no such oral argument.'

The conclusion that parol evidence is not admissible regarding this 'threshold issue' when there is an explicit integration clause honors the parties' decision

to include such a clause in their written agreement. It gives effect t their decision to establish a written agreement as the exclusive basis for determining their intentions concerning the subject matter of the contract."

* * *

"For these reasons, we hold that when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete on it's face and therefore parol evidence is necessary for the 'filing of gaps.' 3 Corbin, Contracts, §578, p. 411."

(Emphasis supplied)

* * *

Since there is a valid merger clause, this Court should not review parol evidence to re-write the clear and unambiguous contract. The only exceptions involve cases of fraud or where the agreement is obviously incomplete on it's face.

The instant agreement contained a valid merger clause the Defendant's references to parol evidence are improper. The intent of the parties is properly referenced in the joint agreement between the Estate and underlying trucking defendants. Therefore, there was no intent to release Citizens from the bad faith cause of action. For a release to be valid and binding, it must be based on adequate consideration. See Tate v Town & Country Lanes, 79 Mich App 89; 261 NW2d 220 (1979). If the joint agreement released Citizens from the bad faith cause of action, the joint agreement would certainly be voidable for lack of consideration.

C. The Sederholm decision rejected the Defendant's argument.

The Defendant's argument also contradicts the precedent of Sederholm v Michigan Mutual Insurance, 142 Mich App 372 (1985), lv den. 422 Mich 857 (1987). The Defendant attempts to distinguish Sederholm since the bad faith cause of action was characterized as one in tort and not for breach of contract. This distinction is not relevant as to whether or not the bad faith cause of action was extinguished by the execution of the joint agreement to forebear collection of the underlying Judgment. Whether the Judgment sounded in tort or contract is irrelevant to the question of whether or not the Judgment was extinguished by execution of the covenant not to execute between the underlying Plaintiff and Defendants. The Keeley, decision did not upset the Sederholm decision on this issue but rather recognized that a bad faith cause of the action sounds in contract not in tort.

In Sederholm, supra., the parties had also agreed to a covenant not to execute between the underlying plaintiff and defendant. The underlying plaintiff obtained a default against the defendant for failing to appear. Thereafter, the plaintiff and defendants entered into an assignment of claims and covenant not to collect the judgment. The plaintiff specifically agreed not to collect any judgment that they might secure against the defendant and in return, the defendant assigned to the plaintiffs the bad faith claim against Michigan Mutual for the alleged bad faith cancellation of her automobile insurance policy.

The Sederholm plaintiff obtained, in April of 1981, and entered a default judgment against the underlying defendant in the amount of $818,000.00. Six days later on April 27, 1981, the underlying plaintiff and defendant entered into a second assignment of claims and covenant not to collect the judgment wherein the amount of the default judgment was now

secured and the nature of the cause of action against Michigan Mutual was further expanded. Six weeks later on June 5, 1981, the plaintiff commenced a bad faith lawsuit against Michigan Mutual Insurance Company. As in the instant case, the insurance company argued that the covenant not to execute between the underlying plaintiff and defendant barred the bad faith cause of action since the underlying defendant allegedly had sustained no damages. The Sederholm court characterized the issue as follows:

> **"(3) Whether the covenant not to execute between plaintiffs and Lynn Salmi bars recovery?"**
>
> (Sederholm at p. 385 - Emphasis supplied)

* * *

The Sederholm court held that the covenant not to execute did not bar the bad faith cause of action. The Sederholm court held in the pertinent part as follows:

> "Defendant argues that, even if *Stockdale* is extended to the instant case, summary judgment in favor of defendant should have been granted since, in consideration for the assignment from Salmi to plaintiffs dated December 19, 1980, plaintiffs agreed to take no action against Salmi or her assets. Thus, says defendant the covenant not to execute effectively insulated Salmi from execution or bankruptcy, making it impossible for plaintiffs to allege any damage to Salmi because of defendant's refusal to settle. The flaw in defendant's argument is that on December 19, 1980, Salmi's action for failure to defend had not yet accrued, since judgment was not taken against Salmi until April 21, 1981. In short, there was no consideration for the assignment, since no cause of action yet existed.
>
> Further, on April 27, 1981, plaintiffs received a second assignment from Salmi. This assignment covered the same subject matter as the first assignment covered the same subject matter as the first assignment but added as consideration Salmi's cause of action for failure to settle. The second assignment replaced the prior assignment. Thus, between the date of the default judgment and the date of the second assignment, the insured was not insulated from liability after judgment was entered against her. Therefore, the trial court did not err when it refused to grant defendant's motion for summary judgment on count II on grounds that the complaint failed to state a cause of

action on which relief could be granted."

[Sederholm at p. 399 - Emphasis supplied]

* * *

There is not a relevant distinction between the assignment of the cause of action in Sederholm and the agreement to share in the settlement proceeds and eventual assignment in the instant case. The fact that the plaintiff in Sederholm made a covenant not to ever execute did not bar the bad faith cause of action. As in Sederholm, the Estate's agreement not to execute on the judgment in exchange for the right to collect settlement proceeds in the bad faith cause of action would not in any way release and/or bar the instant case. Under the Sederholm analysis, if the joint agreement between the Estate of Riley and the underlying trucking Defendants did not transfer a bad faith cause of action to the Estate, then the agreement would be void for lack of consideration and the later assignment executed on November 26, 1997 would control on this issue and transfer a valid bad faith cause of action to the Estate of Riley.

D. Decisions from other jurisdictions that have addressed this issue support the Appellees' position.

Other courts have recognized that covenants not to execute are different from releases as the legal liability remains in effect against those who have covenants as opposed to a release which represents total freedom from liability. See Critz v Farmers Insurance Group, 230 Cal App 2d 788, 41, Cal Rptr. 401, 404 (1964). In Critz, the court held that the covenant not to execute did not bar a bad faith cause of action. In Ivy v Pacivic Auto Ins. Co., 156 Cal App

2d 652, 320 P2d 140, 147-48 (1 Dist. 1958), the court held that a covenant not to execute does not fully protect the insured and recognized that credit may be impaired and that the insured may not be able to enter certain business transactions as the result of an unsatisfied judgment.

The cases cited by the Defendants address situations where there is collusion between the insured and the assignee. There was no collusion in the instant case but rather a judgment arising from a contested jury trial. In LaRotunda v Royal Globe Ins. Co., 87 Ill App 3d 446, 42 Ill. Dec. 219, 408 NE2d 928 (1980), an agreement not to collect against an insured in consideration for an assignment of rights against an insurer evidenced no collusion and did not bar the bad faith cause of action. See also Metcalf v Hartford Accident and Indemnity Co., 176 Neb. 468, 126 NW2d 471, 475-76 (1961).

In the case of Bishop v Crowther, 101 Ill App 3 2d 933, 57 Ill. Dec. 341, 344, 428 NE2d 1021, 1028 (1981), the Illinois Court of Appeals rejected a similar argument by an insurer where an insured was no longer, "legally obligated to pay judgments against him" and therefore the insurer argued that they were released as well. In that case, the Illinois Court of Appeals held that this argument failed because an agreement limiting execution to specific assets does not negate damages in the bad faith cause of action.

See also State Farm Mutual Auto Ins. Co. v Paynter, 122 Ariz. 198, 593 P.2d 948, 950-51 (Ct. App. 1979), where the court held that an assignment of rights under the policy and $500.00 in exchange for a covenant not to execute future judgments against the insurer was found not to be inherently fraudulent and did not release the bad faith cause of action.

In summary, the courts in other jurisdictions have refused to view a covenant not to execute as a release of the bad faith cause of action so long as there was not collusion between the insured and the underlying defendant in obtaining the excess judgment. The policy rationale behind this is that the insurance company should not be faced with a bad faith liability where there never was a liability to the insured in the first place. The out of state cases relied upon by the Defendant were cases where there was collusion between the parties and there never was any excess liability faced by the insured. In other words, the insured never was exposed to an excess judgment and therefore, there was no consideration for the assignment of the claim. This is a clear distinction between those cases where the parties are simply attempting to invent a bad faith case where the insured really never had an excess liability above the policy limits. Contrary to this, the trucking concerns were harmed by actions of Citizens. A contested jury trial resulted in the excess verdict. As a result of the verdict, the trucking concerns were faced with a judgment well in excess of the policy limits of $750,000.00, which still remains unsatisfied and subject to collection under the terms of the joint agreement.

The Court of Appeals correctly held:

> "With respect to the rule adopted in *Keeley*, we believe that our Supreme Court did not, nor did it intend to, preclude recovery against an insurer for bad faith failure to settle simply because the insured takes steps to protect itself form an excess judgment that it believes resulted from its insurer's bad faith failure to settle. Here, should the trial court determine that Citizens engaged in bad faith failure to settle the claim against the Farmer parties, then it should utilize the guidelines in the *Keeley* decision to determine the amount of damages payable by Citizens, i.e., the trial court shall preclude 'collection on the judgment from [Citizens] beyond what is or would actually be collectable from [the Farmer parties].' *Id.* At 565."

* * *

The Court of Appeals was careful to correctly apply the principles established in Keeley. It would not be appropriate to reverse the Court of Appeals decision since it accurately applied the Keeley precedent to the instant cause of action.

RELIEF REQUESTED

The agreement between the Estate and the trucking company did not extinguish the underlying Judgment and certainly did not extinguish the instant cause of action for bad faith. The joint agreement simply transferred the right to collect settlement proceeds in the bad faith cause of action in exchange for forbearance of pursing the Judgment so long as certain conditions were satisfied by the underlying trucking companies. This joint agreement did not extinguish the Judgment or the responsibilities set forth in the contract to pursue the bad faith cause of action. If the joint agreement did release the bad faith cause of action, then it certainly would be void as a matter of law for lack of consideration. There clearly was no release executed between the parties. The Judgment is still enforceable and has not been extinguished.

If this Honorable Court accepted the Defendant's analysis, then, as a practical matter, a party could never pursue a bad faith insurance claim under Michigan Law. Before the underlying insured would be willing to assign or give up his right to a bad faith cause of action, the insured would want some protection against execution on the Judgment. If this Honorable Court followed the Defendant's argument, then the underlying Plaintiff could never give such protection since he would have waived his bad faith cause of action. Keeley did not intend this result. This would preclude the filing of bad faith cause of actions, which have been recognized as valid claims under existing Michigan Law. Therefore, this Honorable Court should respectfully affirm the decision of the Court of Appeals and deny the Application for Leave to Appeal.

Respectfully submitted:

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