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2024 CO 77

No. 23SC333, *Fear v. GEICO Casualty Company*—Insurance—Non-Economic Damages—Underinsured Motorist Coverage.

Petitioner principally asks the supreme court to determine whether it is reasonable as a matter of law for an underinsured motorist ("UIM") insurer to refuse to pay non-economic damages to an insured on the ground that such damages are "inherently subjective" and, thus, are always reasonably disputed until resolution of the remainder of the insured's claims. The court also granted certiorari to decide whether an insurer's internal settlement evaluation is admissible as evidence of undisputed "benefits owed" under *State Farm Mutual Automobile Insurance Co. v. Fisher*, 2018 CO 39, 418 P.3d 501.

The court first concludes that CRE 408 bars the admission of the kind of claim evaluation at issue here to show an amount of undisputed benefits owed, although the evaluation may be admissible for other purposes, including, for example, to establish an insurer's good or bad faith.

Next, the court concludes that the court of appeals division below erred in determining that it is reasonable as a matter of law for an insurer to refuse to pay non-economic damages (or any portion of alleged non-economic damages) before resolving the rest of an insured's claim because such damages are inherently subjective and therefore are always subject to reasonable dispute under *Fisher*. In the court's view, it is conceivable that non-economic damages (or some portion of alleged non-economic damages) could be undisputed (or not subject to reasonable dispute) in a particular case, and in such a case, under *Fisher*, an insurer would be required to pay those damages without obtaining a release of an insured's entire claim. Here, however, the sole evidence advanced by petitioner to demonstrate that a portion of his non-economic damages was undisputed (or not reasonably disputed) amounted to nothing more than an assertion that the claim evaluation proves the amount of the allegedly undisputed non-economic damages, which the court concludes is inappropriate under CRE 408.

Accordingly, the court affirms the judgment of the division below, albeit in part on different grounds.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 77

Supreme Court Case No. 23SC333
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 21CA2023

Petitioner:

Marcus A. Fear,

v.

Respondent:

GEICO Casualty Company.

Judgment Affirmed
en banc
December 23, 2024

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 Petitioner Marcus A. Fear principally asks us to determine whether it is reasonable as a matter of law for an underinsured motorist ("UIM") insurer to refuse to pay non-economic damages to an insured on the ground that such damages are "inherently subjective" and, thus, are always reasonably disputed until resolution of the remainder of the insured's claims. In Fear's view, under *State Farm Mutual Automobile Insurance Co. v. Fisher*, 2018 CO 39, ¶ 3, 418 P.3d 501, 502, respondent GEICO Casualty Company violated section 10-3-1115, C.R.S. (2024), which prohibits an insurer from unreasonably delaying or denying payment of a covered benefit, by failing to pay undisputed non-economic damages before final settlement. We also granted certiorari to decide whether an insurer's internal settlement evaluation is admissible as evidence of undisputed "benefits owed" under *Fisher*.[1]

[1] Specifically, we granted certiorari to review the following issues:

1. Whether it is reasonable as a matter of law for an uninsured/underinsured motorist ("UIM") insurance carrier to refuse to pay non-economic damages because such damages are "inherently subjective" and because the insurer attempted to negotiate a full and final settlement of the insured's claim.
2. Whether an insurer's internal settlement evaluation is admissible as evidence of undisputed "benefits owed" under *State Farm Mutual Auto Ins. Co. v. Fisher*, 2018 CO 39, 418 P.3d 501.

¶2 Because our analysis of the second issue informs our consideration of the first, we begin with the second issue and conclude that CRE 408 bars the admission of the kind of claim evaluation at issue here to show an amount of undisputed benefits owed. We further conclude, however, that the evaluation may be admissible for other purposes, including, for example, to establish an insurer's good or bad faith.

¶3 Turning then to the first issue, we conclude that the court of appeals division below erred in determining that it is reasonable as a matter of law for an insurer to refuse to pay non-economic damages (or any portion of alleged non-economic damages) before resolving the rest of an insured's claim because such damages are inherently subjective and therefore are always subject to reasonable dispute under *Fisher*. In our view, it is conceivable that non-economic damages (or some portion of alleged non-economic damages) could be undisputed (or not subject to reasonable dispute) in a particular case, and in such a case, under *Fisher*, an insurer would be required to pay those damages without obtaining a release of an insured's entire claim. Here, however, the sole evidence advanced by Fear to demonstrate that a portion of his non-economic damages was undisputed (or not reasonably disputed) consisted of the claim evaluation itself, his expert's views thereon, and his expert's interpretation of the claim adjuster's not having expressly noted in the claim file that she disputed any particular amount of Fear's claimed

non-economic damages. This evidence, however, amounts to nothing more than an assertion that the claim evaluation proves the amount of the allegedly undisputed non-economic damages, which we have concluded is inappropriate under CRE 408.

¶4 Accordingly, we affirm the judgment of the division below, albeit in part on different grounds.

I. Facts and Procedural History

¶5 In 2018, Fear was involved in a rear-end collision for which he was not at fault. As a result of the accident, he suffered injuries and received medical treatment. At the time, Fear held a UIM policy issued by GEICO. With GEICO's permission, he settled with the tortfeasor's insurer for the tortfeasor's policy limit of $25,000. He thereafter sought compensation for additional damages through his UIM policy with GEICO.

¶6 In April 2020, GEICO offered to settle Fear's UIM claim for $2,500, in exchange for a release of any claims relating to the accident. In June 2020, after Fear submitted documentation of additional medical bills, GEICO extended a new settlement offer of $4,004 to reflect the amount of those bills. GEICO again requested a release in exchange for any settlement. Fear did not accept either of these offers or communicate a demand for any particular amount, and GEICO ultimately did not make any partial payments to Fear. Fear then filed suit against

GEICO alleging, as pertinent here, statutory bad faith under section 10-3-1115 in the handling of his UIM claim.

¶7 The case proceeded to a bench trial during which experts retained by each party disagreed about whether GEICO had acted reasonably in its handling of Fear's claim. The adjuster who had handled Fear's claim did not testify at trial, and the district court declined to admit her deposition testimony for purposes of proving the truth of any matters asserted therein. The court allowed the parties' experts, however, to rely on the adjuster's testimony as a basis for their opinions. The court also admitted, pursuant to the parties' stipulation of admissibility, GEICO's claim file, which included a claim evaluation summary prepared by GEICO in its handling of Fear's claim. This evaluation designated $6,500 as a "reserve"; $2,500 as "evaluated" general damages (which both experts referred to as non-economic damages); and $7,243–$12,239 as a "negotiation range" for those general damages, which, when combined with Fear's medical expenses and then offset by the $25,000 that Fear had collected from the tortfeasor's insurer, resulted in a final "negotiation range" of $2,500–$9,000.

¶8 At trial, Fear's expert opined that GEICO did not dispute the amount of $2,500 in April 2020 and the amount of $4,004 in June 2020. Accordingly, in his view, GEICO had acted unreasonably in not paying at least those amounts. In support of this opinion, Fear's expert testified that in his experience, the $2,500 (or

later $4,004) amount in the evaluation represented the minimum amount that GEICO would pay or expect to pay because, in his view, that was the amount that GEICO believed the claim to be worth. On this point, he observed that he had seen evaluations that calculate damages as a negative number, and, in his view, the inclusion of a particular amount in the evaluation suggested, at a minimum, that GEICO did not dispute that number. In addition, he noted that when an insurance adjuster disputes a particular amount, the adjuster ordinarily documents in the claim file notes why the adjuster did so, and Fear's expert found no such note in Fear's claim file. Finally, Fear's expert asserted that although the adjuster's framing of her initial offer as an offer of compromise could potentially signal that she disputed the amount of non-economic damages, her deposition testimony suggested that she perceived no such dispute. Specifically, Fear's expert noted that the adjuster testified in her deposition that the lower end of the range in the evaluation represented the amount that GEICO would consider due, thus indicating that the adjuster did not dispute that amount.

¶9 GEICO's expert did not agree that either $2,500 or $4,004 represented an undisputed amount of non-economic damages. In his view, non-economic damages are inherently disputed, and neither the *Fisher* court nor any other court had required that an insurer make partial payments of any alleged non-economic damages. The expert further opined that an insurer's evaluation as to

non-economic damages does not constitute an admission as to the amount of those damages because it is a settlement evaluation, not an objective evaluation of a claim. An objective evaluation of a claim occurs, the expert asserted, only when the parties agree to a value or a court or arbitrator determines that value. And in the expert's experience, the range for non-economic damages in an evaluation is often based on settlement amounts in other cases, as opposed to a mathematically precise calculation in the present case.

¶10 At the conclusion of the bench trial, the district court concluded that *Fisher*'s holding extends to undisputed non-economic damages. The court then found that $3,961 of Fear's non-economic damages was undisputed (the court arrived at this number by subtracting the $25,000 paid by the tortfeasor's insurer from the $28,961 that the court determined to be the undisputed total of Fear's economic and non-economic damages). The court stated that in reaching this conclusion, it had disregarded GEICO's settlement offers and "settlement range," which the court deemed to be distinct from the "evaluation range" that the court found to be probative of GEICO's understanding of the actual value of Fear's claim. The court thus determined that GEICO had violated section 10-3-1115.

¶11 GEICO appealed, and in a unanimous, published decision, a division of the court of appeals reversed. *Fear v. GEICO Cas. Co.*, 2023 COA 31, ¶¶ 2, 23, 532 P.3d 382, 383, 387. The division concluded that, for two reasons, the district court had

erred in relying on GEICO's claim evaluation as evidence of an amount of undisputed benefits owed. *Id.* at ¶ 18, 532 P.3d at 386. First, in the division's view, non-economic damages are "inherently subjective," and insurers estimate them in internal evaluations for the limited purpose of determining reserves and settlement authority, not to confine the factfinder to a particular damages range. *Id.* at ¶ 19, 532 P.3d at 386. Second, the division opined that admitting the claim evaluation as evidence of an amount of undisputed damages would violate CRE 408 because, although the evaluation itself was not a settlement offer, it was "inextricably intertwined" with such an offer, thus explaining why the settlement offer matched the internal evaluation range exactly. *Id.* at ¶ 20, 532 P.3d at 386. On this point, the division noted that it would be absurd to protect the end result of the insurer's initial evaluation process (i.e., a settlement offer) without also protecting the assessments that gave rise to that offer. *Id.*

¶12 In reaching its conclusion, the division was unpersuaded by dicta in *Sunahara v. State Farm Mutual Automobile Insurance Co.*, 2012 CO 30M, ¶ 29, 280 P.3d 649, 657, that stated that the kind of evaluation at issue could be relevant in a bad faith action to indicate whether the insurer had adjusted a claim in good faith. *Fear*, ¶ 21, 532 P.3d at 387. In the division's view, because the evaluation could not show an amount of undisputed benefits owed, it could have no relevance to whether the insurer unreasonably delayed payment of a covered

benefit. *Id.* And because the district court's ruling depended heavily on the claim evaluation, the error in admitting that evaluation was not harmless. *Id.* at ¶ 22, 532 P.3d at 387.

¶13 Fear then petitioned this court for a writ of certiorari, and we granted his petition.

II. Analysis

¶14 We begin by setting forth the applicable standard of review. Because our analysis of the second issue on which we granted certiorari informs our consideration of the first, we then address the second issue before proceeding to the first.

A. Standard of Review

¶15 We review a trial court's factual findings for clear error and its legal conclusions de novo. *Martinez v. People*, 2024 CO 6M, ¶ 24, 542 P.3d 675, 681. The reasonableness of an insurer's conduct must be determined objectively, based on industry standards. *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 415 (Colo. 2004). What constitutes reasonableness under the circumstances of a given case is generally a factual question for the jury. *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 497 (Colo. App. 2011). When, however, no genuine issue of material fact exists, the question of reasonableness may be decided as a matter of law. *Id.*

B. Admissibility of the Claim Evaluation

¶16 Fear contends that the division erred in concluding that CRE 408 precludes admission of the claim evaluation here to show both undisputed benefits owed and good or bad faith. We agree with the division that CRE 408 bars the admission of the claim evaluation to show undisputed benefits owed, but we do not agree with the division's further conclusion that, as a matter of law, CRE 408 also bars the admission of the claim evaluation to show an insurer's good or bad faith.

¶17 CRE 408 provides, in pertinent part:

> (a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount . . . :
>
> (1) furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim . . . .
>
> (b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; *negating a contention of undue delay*; and proving an effort to obstruct a criminal investigation or prosecution.

(Emphasis added.)

¶18 We have previously analyzed whether reserves, settlement authority, and internal evaluations like the claim evaluation at issue here are discoverable, and

we believe that the reasoning of those decisions sheds light on the admissibility question now before us.

¶19 In *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1193 (Colo. 2002), we concluded that in a first-party claim between an insured and their insurer, the establishment of reserves and settlement authority could be relevant and discoverable as to whether an insurer adjusted a claim in good faith or properly investigated, assessed, or settled a claim. We noted, however, that reserves and settlement authority are less likely to be discoverable in third-party actions. *Id.* In reaching this conclusion, we observed that reserves, which we defined as funds an insurer sets aside to cover future expenses, losses, claims, or liabilities, should not be equated with an admission or valuation by the insurer. *Id.* at 1189. This is because insurers are statutorily required to maintain reserves to assure the insurer's ability to satisfy its possible obligations under its policies. *Id.* Specifically, insurers are required to make a reasonable estimate of the amount necessary to pay losses and claims for which the insurer may be liable. *Id.* Reserves must also account for any claim expenses, including attorney fees and court costs. *Id.*

¶20 Turning then to the question of an insurer's settlement authority, we concluded that such authority, like reserves, also cannot be equated with the value of a claim because settlement authority generally refers to an agent's ability to accept a settlement offer that binds the insurer up to and including a particular

amount. *Id.* In light of the foregoing, we concluded, "Neither reserves nor settlement authority reflect an admission by the insurance company that a claim is worth a particular amount of money." *Id.* at 1190. Rather, "[s]tatutory requirements, limitations in the evaluation, and bargaining tactics limit the usefulness of reserves and settlement authority as valuations of a claim." *Id.*

¶21 Subsequently, in *Sunahara*, ¶ 25, 280 P.3d at 657, we extended our reasoning in *Silva* to cover liability assessments and "similar cursory fault evaluations" used by insurers to develop reserves and settlement authority. There, we agreed with the trial court that insurance companies must be free to make internal assessments that bear on the insurer's reserve decisions. *Id.* We further agreed with the trial court that "it would be absurd to protect the end result of the insurance company's initial evaluation process—the reserves and settlement authority—without also protecting the assessments that led to those numbers." *Id.* Accordingly, we concluded that these evaluations, like the reserves and settlement authority that they underlie, were not discoverable. *Id.* We again added, however, that reserves and settlement authority might be discoverable when a first-party plaintiff sues an insurance company for bad faith or declaratory relief. *Id.* at ¶ 29, 280 P.3d at 657.

¶22 In our view, the same reasoning that protected the claim evaluations from discovery in *Silva* and *Sunahara* applies to the admissibility of those evaluations. As noted above, CRE 408(a) bars the admission of settlement offers as proof of the

amount of a disputed claim. Although the rule does not refer to the evaluations underlying a party's settlement offers, for the reasons set forth in *Silva* and *Sunahara*, because these evaluations often underlie the determination of a party's settlement offers, allowing their admission would circumvent the rule's bar on the admission of settlement offers to prove the amount of a disputed claim, thus undermining the rule in many insurance cases. Stated otherwise, in the same way that it would be absurd to bar the discovery of reserves and settlement authority but not the evaluations that led to them, *Sunahara*, ¶ 25, 280 P.3d at 657, it would be absurd to bar the admission of settlement offers proffered to establish the amount of a disputed claim but not the evaluations from which those settlement offers were developed.

¶23 Accordingly, we agree with the conclusion of the division below that an insurer's internal settlement evaluation is inadmissible as evidence of undisputed benefits owed. Consistent with our reasoning in both *Silva* and *Sunahara*, however, and contrary to the division's determination below, *Fear*, ¶ 21, 532 P.3d at 387, we further conclude that CRE 408 does not prohibit the use of documents like the claim evaluation at issue here for purposes not prohibited by CRE 408(a). Indeed, CRE 408(b) expressly includes as an example of a permitted use of such evidence "negating a contention of undue delay," which is an essential issue in a statutory bad faith claim.

¶24 Because the district court admitted the claim evaluation for a prohibited purpose, we agree with the division below that that decision must be reversed.

C. Non-Economic Damages Under *Fisher*

¶25 Having thus concluded that the district court erred in admitting the claim evaluation, we proceed to consider Fear's assertion that the division erred in concluding, as a matter of law, that a UIM carrier acts reasonably in not advancing non-economic damages because such damages are inherently subjective. According to Fear, *Fisher* requires that insurers pay undisputed damages and not condition that payment on a release covering the claim in its entirety. Fear further asserts that although non-economic damages may be more difficult to quantify than economic damages, some amount of non-economic damages may be undisputed in a given case.

¶26 We agree with Fear that the division below erred in determining that it is reasonable as a matter of law for an insurer to refuse to pay non-economic damages (or any portion of alleged non-economic damages) before resolving the rest of an insured's claim because such damages are inherently subjective and therefore are always subject to reasonable dispute under *Fisher*. We nonetheless conclude that the division reached the correct result on the facts of this case.

¶27 Section 10-3-1115(1)(a) provides, "A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits

owed to or on behalf of any first-party claimant." Section 10-3-1115(2) adds that "an insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." And section 10-3-1116(1), C.R.S. (2024), in turn, authorizes first-party claimants who have had their insurers unreasonably delay or deny payment of benefits to bring an action to recover reasonable attorney fees, court costs, and two times the covered benefit.

¶28 We recently construed these provisions in *Fisher*. There, the insurer conceded that the claimant's medical bills were reasonable, necessary, and causally related to the accident at issue but refused to pay those medical bills while the parties disputed the remainder of Fisher's claim. *Fisher*, ¶¶ 6–7, 418 P.3d at 503. Because section 10-3-1115 refers to the unreasonable delay or denial of payment of a "covered benefit," as opposed to an entire claim, we concluded that the statute required the insurer to pay the covered benefit (there, the undisputed medical expenses), even while other portions of the insured's claim remained reasonably in dispute. *Id.* at ¶¶ 3, 15–22, 418 P.3d at 502, 504–05.

¶29 To decide the issue now before us, we must first determine whether *Fisher*, which, as noted, involved undisputed medical expenses, applies as well to undisputed non-economic damages. Contrary to the reasoning of the division below, *see Fear*, ¶¶ 18–22, 532 P.3d at 386–87, we conclude that it does, although

we recognize that the difficulties and subjectivity involved in calculating non-economic damages may impact whether the non-economic damages in a given case are undisputed or reasonably disputable. We reach this conclusion for two reasons.

¶30 First, *Fisher*'s reasoning extends beyond only medical expenses. Specifically, section 10-3-1115 applies to any "covered benefit," which, as we reasoned in *Fisher*, ¶¶ 16–22, 418 P.3d at 504–05, can be a component of an insurance bad faith claim, as opposed to the entire claim itself. Moreover, many insurance policies, including the UIM policy at issue here, cover non-economic damages. In such cases, non-economic damages constitute a covered benefit, and, thus, *Fisher*'s reasoning applies to such damages.

¶31 Second, *Fisher*'s reasoning extends beyond those expenses that an insurer *explicitly* concedes as undisputed. As noted above, section 10-3-1115 prohibits an insurer from delaying or denying payment of a covered benefit "without a reasonable basis." In determining whether an insurer acted reasonably, then, courts must consider, among other things, whether a reasonable person would find that the insurer's justification for delaying or denying payment was "fairly debatable." *Schultz v. GEICO Cas. Co.*, 2018 CO 87, ¶ 20, 429 P.3d 844, 848 (clarifying, however, that fair debatability is neither an outcome-determinative threshold inquiry nor the beginning and end of the analysis in a bad faith case).

Furthermore, although a genuine difference of opinion regarding the value of an insurance claim may weigh against a finding of bad faith, a valuation dispute alone does not render a claim fairly debatable because virtually every lawsuit involving insurance coverage constitutes a valuation dispute, at least to the extent that the parties disagree about how much should be paid under a policy. *Vaccaro v. Am. Fam. Ins. Grp.*, 2012 COA 9M, ¶ 47, 275 P.3d 750, 760. Accordingly, insurers may not shield themselves from liability simply by disputing the value of a particular benefit; the dispute must have a reasonable basis.

¶32 Applying these principles to the question before us, we conclude that circumstances may exist in which section 10-3-1115 requires an insurer to pay some or all of an insured's alleged non-economic damages prior to final resolution of a claim. Although, as GEICO argues, non-economic damages tend to involve greater subjectivity than other types of damages like medical expenses and, as a result, it may well be a rare case in which non-economic damages are not reasonably disputable, we decline to conclude, as a matter of law, that such damages (or a portion thereof) can *never* be undisputed or free from reasonable dispute such that *Fisher* would require an insurer to pay them.

¶33 The question thus becomes whether Fear has proffered any admissible evidence to support his claim that some portion of his claimed non-economic

damages were either undisputed or not subject to reasonable dispute in this case. We conclude that he has not done so.

¶34 As noted above, the sole evidence advanced by Fear to demonstrate that his claim for non-economic damages (or a portion of that claim) was either undisputed or not subject to reasonable dispute consisted of the claim evaluation itself, his expert's opinion as to what the numbers in that evaluation meant (relying, in part, on the adjuster's deposition testimony as to her understanding of the evaluation), and the expert's interpretation of the adjuster's not having expressly noted in the claim file that she disputed any particular amount of Fear's claimed non-economic damages. In our view, however, this evidence amounts to nothing more than an assertion that the claim evaluation proves the amount of the allegedly undisputed non-economic damages, which is precisely what we have determined is inappropriate under CRE 408.

¶35 Accordingly, we conclude that although the division below erred in determining that it is reasonable as a matter of law for an insurer to refuse to pay non-economic damages (or any portion of alleged non-economic damages) under *Fisher*, it nonetheless reached the correct result because Fear has not carried his burden of establishing, through admissible evidence, that any portion of his alleged non-economic damages was either undisputed or not subject to reasonable dispute.

III. Conclusion

¶36 For these reasons, we conclude that CRE 408 bars the admission of the kind of claim evaluation at issue here as evidence of the amount of undisputed benefits owed, but such a claim evaluation may be admissible for other purposes, including to seek to establish an insurer's good or bad faith. We further conclude that *Fisher* and section 10-3-1115 require an insurer to pay non-economic damages (or a portion thereof) prior to resolving the rest of an insured's claim when such damages are undisputed or not subject to reasonable dispute. Here, however, Fear has not carried his burden of establishing, through admissible evidence, that any portion of his claimed non-economic damages was either undisputed or not subject to reasonable dispute.

¶37 Accordingly, we affirm the judgment of the division below, albeit in part on different grounds.