IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

MICHAEL JOHNSON AND	:	
KAREN JOHNSON,	:	
Plaintiffs	:	
vs.	:	No. 09-3616
DONEGAL MUTUAL INSURANCE	:	
COMPANY,	:	
Defendant	:	

James J. Conaboy, Esquire — Counsel for Plaintiffs
Jeffrey A. Wothers, Esquire — Counsel for Defendant

Civil Law - Insurance Bad Faith - 42 Pa.C.S.A. § 8371 - Contractual Bad Faith - Implied Covenant of Good Faith and Fair Dealing – Restatement (Second) of Contracts § 205 - Malicious Use of Process - Wrongful Use of Civil Proceedings Act – 42 Pa.C.S.A. §§ 8351-54 – Abuse of Process

1. To establish statutory bad faith under 42 Pa.C.S.A. § 8371, an insured must establish by clear and convincing evidence that the insurer (1) did not have a reasonable basis for its actions and (2) knew of or recklessly disregarded its lack of a reasonable basis. Both elements must be met for bad faith to exist.

2. The first prong of the test for statutory bad faith entails an objective analysis of the insurer's conduct: irregardless of the insurer's actual motive, is there an objectively reasonable basis for the insurer's conduct. If there is a reasonable basis for the insurer's actions, even if it is clear that the insurer did not rely on that reason, there cannot, as a matter of law, be bad faith.

3. The second prong of the test for statutory bad faith is subjective: what is the real reason for the insurer's conduct and does it import a dishonest purpose. Whether the insurer was motivated by self-interest or ill will is probative of this second element.

4. In the absence of evidence of a dishonest purpose or ill will, an insurer does not act in bad faith in taking a stand with a reasonable basis or in aggressively investigating and protecting its interests in the normal course of litigation.

5. In order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that the delay is attributable to the insurer, that the insurer had no reasonable basis for the actions it undertook which resulted in the delay, and that the insurer knew or recklessly disregarded the fact that it had no reasonable basis to delay payment.

6. A low offer by an insurer evidences bad faith when the offer bears no reasonable relationship to the insured's losses.

7. Not every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. However, where a duty of good faith arises, it arises under the law of contracts, not under the law of torts.

8. A duty of good faith will not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties.

9. A cause of action for malicious use of process is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause. A prerequisite to recovery under this cause of action is that the underlying civil proceedings have terminated in favor of the party bringing suit.

10. To establish a claim for abuse of process, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff.

11. Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued.

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MEMORANDUM OPINION

Nanovic, P.J. – January 20, 2015

On June 27, 2007, lightning struck Michael and Karen Johnson's (Plaintiffs) home causing damage to four computers and related equipment ("Computers"), as well as other property in the home. The loss was reported to Plaintiffs' homeowners' insurer, Donegal Mutual Insurance Company ("Defendant"), the following day, and loss payment requested. Believing that their claim was being unreasonably delayed and processed, Plaintiffs commenced suit by writ of summons against Defendant on June 2, 2008.

In their complaint filed on August 20, 2009, Plaintiffs presented two claims: (1) for breach of contract (Count I) and (2) for bad faith pursuant to 42 Pa.C.S.A. § 8371 (Count II). In Count I Plaintiffs averred, *inter alia*, that Defendant had

failed "to investigate, evaluate and negotiate [Plaintiffs'] property damage in good faith and to arrive at a prompt, fair and equitable settlement." This claim was resolved pursuant to the adjustment, appraisal, and settlement process set forth in Plaintiffs' homeowners' policy. As to Count II, before us is Defendant's request for summary judgment not only on this claim, but also on its counterclaims for (1) breach of contract, wherein Defendant contends Plaintiffs violated the covenant of good faith and fair dealing implied by law as part of the homeowners' policy, (2) malicious use of process, and (3) abuse of process, the latter two founded on the alleged lack of merit of Plaintiffs' suit against Defendant and its continued prosecution.

PROCEDURAL AND FACTUAL BACKGROUND

At the time of the lightning strike, Plaintiffs resided at 240 Lamontage Drive, Palmerton, Carbon County, Pennsylvania. There is no dispute that Plaintiffs' home was struck by lightning; that electronic equipment, including Plaintiffs' Computers, was damaged as a result; that Plaintiffs' homeowners' policy with Defendant ("Policy") was in full force and effect at the time; and that the Policy expressly covered property damaged by a lightning strike. The delay in resolving Plaintiffs' claim resulted from checking what use Plaintiffs made of the Computers

and determining their actual cash value: specifically, on whether two of the computers had been used at any time or in any manner for business purposes as Defendant alleged Plaintiffs originally claimed (*See* Defendant's Counterclaim for Declaratory Judgment, ¶15; Defendant's Counterclaim and Plaintiffs' Reply, ¶4), which use, if proven, would limit the amount of coverage available under the Policy, and how to fairly value this loss since the Computers were homemade.

After receiving Plaintiffs' insurance claim, Defendant hired GAB Robins, an independent adjuster, to investigate the claim. GAB Robins inspected the damaged property and reported that the Computers and the other property in Plaintiffs' home for which loss was claimed were damaged by lightning. Based on GAB Robins' investigation, Defendant accepted that Plaintiffs' loss was covered under the Policy, subject, however, to possible coverage limits. To evaluate the extent of the loss, Defendant requested Plaintiffs submit repair or replacement estimates, which the Policy allowed Defendant to request. *See* Policy (Section I – Conditions, ¶2(e)).

Excepting the loss claimed for the Computers, the Plaintiffs and Defendant reached agreement on the loss to Plaintiffs' other property and these amounts were paid. Quantifying the loss to the Computers was more difficult.

Plaintiffs had built the Computers themselves using parts and components from different manufacturers. As a result, the Computers were not able to be valued by reference to other computers of the same make and model. (Motion and Answer, ¶4; Defendant's Counterclaim and Plaintiffs' Reply, ¶8). When Plaintiffs first reported their claim, they placed a value on the Computers at approximately $50,000.00. (N.T. 2/25/14 (Jennifer Tunitis Deposition), pp.29-30, 59; Deposition Exhibit 1, p.36, 6/28/07 entry).

To obtain a more detached and detailed estimate, Plaintiffs employed KeyTech Group, Incorporated ("KeyTech"), a business with expertise in computers. In its estimate, KeyTech considered the value of each of the individualized parts, along with the time and labor expended by Plaintiffs in building the Computers. Including parts and labor, KeyTech estimated the value of the Computers to be $20,537.58.

On September 19, 2007, Plaintiffs sent KeyTech's estimate to Defendant. The adjuster assigned to Plaintiffs' claim, Jennifer Tunitis, an in-house employee of Defendant, had limited knowledge about computers and was uncomfortable evaluating the accuracy of KeyTech's estimate. To get a second opinion, she employed Dial Electronics, Incorporated ("Dial"), an expert in electronics, to inspect the Computers and provide an independent

estimate. (Motion and Answer, ¶4). This was permitted under the Policy. *See* Policy (Section I – Conditions, ¶2(f)(1)).

Beginning in October 2007, Dial attempted to arrange an inspection of the Computers. Initially, Plaintiffs refused. (Defendant's Counterclaim and Plaintiffs' Reply, ¶11). Why is unclear, however, Defendant suspected this may have been related to Plaintiffs' admission when originally reporting their loss that the Computers were used in part for business purposes, a statement Plaintiffs deny having ever made. Under the Policy, the limit of liability for personal property used for business purposes is capped at $2,500.00, not its actual cash value. *See* Policy (Section I – Property Coverages, Coverage C – Personal Property, Special Limits of Liability, ¶8). In any event, soon after Plaintiffs' refusal, on October 16, 2007, Defendant sent Plaintiffs a reservation of rights letter explaining Plaintiffs' obligation to permit the inspection and that a $2,500.00 coverage limit existed under the Policy for property used for business purposes. Ultimately, Defendant – "in an exercise of good faith" - elected to give Plaintiffs the benefit of the doubt on this issue and did not invoke this limitation. (N.T. 2/25/14 (Jennifer Tunitis Deposition), p.45; Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶30).

Shortly after receiving Defendant's reservation of rights letter, Plaintiffs filed a complaint against Defendant with the Pennsylvania Insurance Department. Among other grievances, Plaintiffs complained about Defendant's request to inspect their Computers. In a letter to the Insurance Department dated November 15, 2007, Defendant explained the reasons for its request, stating in part:

> The insureds have presented numerous estimates for damages related to the loss. All of the estimates were paid with the exception of the computer bill the insureds provided to us for damage to four computers totaling $20,351.08. The insureds were unable to provide details on the quality including the make, model, features as the insured built the computers. We requested that Dial Electronics inspect the computers on our behalf to determine cause, reparability, and amount of damages. Upon receipt of the results of the evaluation of the computers, we will be in a position to make payment on the personal property claim.

Following its review, the Pennsylvania Insurance Department found no merit in Plaintiffs' complaint.

During the next seven months, Defendant attempted on multiple occasions to arrange through Dial to inspect the Computers. (Motion and Answer, ¶5; Defendant's Counterclaim and Plaintiffs' Reply, ¶¶13, 14). At first, Dial sought to take the Computers from Plaintiffs' home for its inspection. After it became apparent Plaintiffs would not allow the Computers to be removed, Dial repeatedly attempted to schedule a convenient time

to inspect the Computers at Plaintiffs' home. This proved difficult due to Plaintiffs' work schedule which always appeared to conflict with the times Dial suggested. (Motion, ¶9). Finally, in May 2008, Plaintiffs agreed to allow Dial to inspect the Computers on May 31, 2008, eight months after KeyTech submitted its initial estimate. (Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶28).

After completing its inspection, Dial valued the computer loss at $4,600.00. This valuation was received by Defendant on June 25, 2008. (N.T. 2/24/14 (Jennifer Tunitis Deposition), pp.51-52). On July 8, 2008, Defendant issued a check to Plaintiffs in this amount, together with a copy of Dial's estimate. (Motion and Answer, ¶11). Included with Defendant's check was a letter advising Plaintiffs that if they disagreed with the amount of the loss, they were entitled under the Policy to seek an appraisal. *See* Policy (Section I – Conditions, ¶6).[1]

[1] This provision of the Policy stated the following:

> 6. **Appraisal**. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

This letter also included a copy of the Policy's appraisal provision. (Motion and Answer, ¶12; Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶31; Defendant's Counterclaim and Plaintiffs' Reply, ¶25).

Plaintiffs erroneously interpreted the foregoing letter from Defendant as requesting an appraisal. For the next six months, counsel for both parties exchanged several letters disputing whether Defendant had requested an appraisal. This impasse was finally "resolved" on December 31, 2008, when Defendant advised Plaintiffs in writing that it was construing Plaintiffs' consent to the appraisal process, acknowledged in Plaintiffs' previous letter of December 18, 2008, as an invocation of the Policy's appraisal provision. (*See* Defendant's Motion for Leave to File Counterclaim and Plaintiffs' Answer, ¶9). By letter dated January 9, 2008, Defendant identified Michael Economou of Dial as its appraiser; by letter dated March 26, 2009, Plaintiffs confirmed that they had appointed KeyTech as their appraiser, but did not specifically identify the individual from this firm who would be serving on their behalf. (Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶¶47, 48).

Each party will:
a. Pay its own appraiser; and
b. Bear the other expenses of the appraisal and umpire equally.

The parties next disagreed on who was to act as an umpire for the appraisal. Additionally, Plaintiffs refused to provide the name and contact information of the individual employed at KeyTech who would be serving as their appraiser. (Motion and Answer, ¶14). To resolve this dispute, Defendant filed an Answer to the Complaint and Counterclaim for Declaratory Judgment on December 18, 2009, (Defendant's Counterclaim and Plaintiffs' Reply, ¶48) and later a motion on March 29, 2010, requesting this court to appoint an umpire and to direct Plaintiffs to identify their individual appraiser. By order dated July 1, 2010, we appointed PenTeleData, Incorporated as umpire and directed Plaintiffs, within ten days, to provide the contact information and name of the individual at KeyTech who would be serving as their appraiser, if they had not previously done so.

After examining the Computers and reviewing the estimates of KeyTech and Dial, on October 26, 2011, PenTeleData valued the Computers at $11,449.00. On November 10, 2011, Defendant issued a second check to Plaintiffs in the amount of $6,849.00, the difference between the umpire's estimate of $11,449.00 and Dial's earlier estimate of $4,600.00. Upon learning that Plaintiffs had not cashed its July 8, 2008, check in the amount

of $4,600.00, on November 28, 2011, Defendant reissued a check in this same amount to Plaintiffs. (Motion and Answer, ¶20).

The present suit began on June 2, 2008, when Plaintiffs filed a Writ of Summons in the Lackawanna County Court of Common Pleas.[2] In its complaint filed on August 20, 2009, Plaintiffs brought one count for breach of contract and one count for bad faith under 42 Pa.C.S.A. § 8371.[3] In response to Defendant's challenge to venue, Plaintiffs' suit was transferred to this court by order dated November 5, 2009.

With the completion of the appraisal process under the Policy, both parties agreed that Plaintiffs' breach of contract claim was resolved. (Motion and Answer, ¶21). Notwithstanding this resolution, Plaintiffs decided to pursue their claim for bad faith. In light of this decision, Defendant requested leave of court to file counterclaims for breach of contract, malicious use of legal process, and abuse of process. By order dated November 6, 2012, Defendant's request was granted.

Before discovery was complete, Defendant moved for summary judgment. Based on both parties' agreement that Plaintiffs' claim for breach of contract claim had been resolved through the

[2] This was two days after Dial first inspected the Computers and while Defendant was waiting to receive Dial's estimate. (Motion and Answer, ¶10; Defendant's Counterclaim and Plaintiffs' Reply, ¶15).

[3] Plaintiffs' complaint was filed after the appraisal process in the Policy had been invoked and both parties had selected their respective appraisers. (Motion and Answer, ¶13; Defendant's Counterclaim and Plaintiffs' Reply, ¶43).

Policy's appraisal process, summary judgment was granted on this count. Since discovery was not complete, the remainder of Defendant's motion was denied, without prejudice to Defendant moving for summary motion after discovery was concluded.

Upon the completion of discovery, Defendant filed its Motion for Summary Judgment ("Motion") now before us for disposition. Therein, Defendant requests summary judgment on Plaintiffs' bad faith claim, as well as on its three counterclaims. After receiving briefs, hearing argument, and reviewing the record, we are ready to rule on Defendant's Motion.

DISCUSSION

1. PLAINTIFFS' COMPLAINT: STATUTORY BAD FAITH – 42 Pa.C.S.A. § 8371

We begin with whether Defendant is entitled to summary judgment on Plaintiffs' claim for bad faith pursuant to 42 Pa.C.S.A. § 8371.[4] Historically, in Pennsylvania no cause of

[4] We note the standard for summary judgment. When deciding a motion for summary judgment, we "examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the moving party." LJL Transp., Inc. v. Pilot Air Freight Corp., 962 A.2d 639, 647 (Pa. 2009). We are to enter summary judgment under only two circumstances. First, "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense." Pa.R.Civ.P. No. 1035.2(1). Second, "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense."

action existed at common law in tort for an insurer's bad faith handling of an insured's claim. *See* D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 431 A.2d 966, 969-72 (Pa. 1981). This void was addressed by the Pennsylvania legislature in 1990 with the enactment of Section 8371 of the Judicial Code which states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

Pa.R.Civ.P. No. 1035.2(2). Summary judgment is appropriate only if the issues to be decided are legal.

The initial burden of demonstrating there are no genuine issues of material fact falls on the moving party. Kofando v. Erie Ceramic Arts Co., 764 A.2d 59, 61 (Pa.Super. 2000). Once the moving party has met its burden, the non-moving party must counter with specific facts showing that there is a genuine issue for trial, or challenge the credibility of witnesses testifying in support of the motion. Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1973); Pa.R.C.P. 1035.3. In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 896 (Pa. 2006).

"Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." Babb v. Centre Cmty. Hosp., 47 A.3d 1214, 1223 (Pa.Super. 2012) (citations omitted), *appeal denied*, 65 A.3d 412 (Pa. 2013). Further, "failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." *Id.*

42 Pa.C.S.A. § 8371. *See* Adamski v. Allstate Ins. Co., 738 A.2d 1033, 1036 (Pa.Super. 1999), *appeal denied*, 759 A.2d 381 (Pa. 2000).[5]

Section 8371 does not define the term "bad faith," which has been left to the courts to fathom. Relying on Black's Law Dictionary, bad faith has been held to consist of

> any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (*i.e.*, good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Property and Cas. Ins. Co., 649 A.2d 680, 688 (Pa.Super. 1994), *appeal denied*, 659 A.2d 560 (Pa. 1995). As applied by our courts, this definition forms a two-part conjunctive test; to establish bad faith, an insured must establish by clear and convincing evidence that the insurer (1) did not have a reasonable basis for its actions and (2) knew of or recklessly disregarded its lack of a reasonable basis.

[5] "The purpose of Section 8371 was to provide a statutory remedy to an insured when the insurer denied benefits in bad faith." General Acc. Ins. Co. v. Federal Kemper Ins. Co., 682 A.2d 819, 822 (Pa.Super. 1996). However, "[c]ourts have extended the concept of 'bad faith' beyond an insured's denial of a claim in several limited areas." Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005); *see also* Rowe v. Nationwide Insurance Company, 6 F.Supp.3d 621, 630 (W.D. Pa. 2014) (listing types of conduct where an insurer has been found to have committed bad faith). One of these limited areas is the conduct at issue here: if the insurer acts in bad faith while investigating or processing a claim. *See* O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa.Super. 1999).

Greene v. United Services Auto Ass'n, 936 A.2d 1178, 1189 (Pa.Super. 2007) (citation omitted), *appeal denied*, 954 A.2d 577 (Pa. 2008).

The first prong of this test requires an objective analysis of the insurer's conduct. Williams v. Hartford Cas. Ins. Co., 83 F.Supp.2d 567, 574 (E.D. Pa. 2000), *aff'd*, 261 F.3d 495 (3d Cir. 2001) (Table); *see also* Bodnar v. Amco Ins. Co., 2014 WL 3428877, *3 (M.D. Pa. 2014); *and* Lites v. Trumbull Ins. Co., 2013 WL 5777156, *5 (E.D. Pa. 2013). To determine if this prong has been met, we do not analyze the insurer's actual motive for its conduct but instead determine whether there is an objectively reasonable basis for its conduct. Livornese v. Medical Protective Co., 219 F.Supp.2d 645, 648 (E.D. Pa. 2002), *rev'd on other grounds*, 136 Fed.Appx. 473 (3d Cir. 2005). "As a matter of law, if some reasonable basis did exist, [the] insurer cannot have acted in bad faith under Section 8371." *Id.*

The second prong is subjective and considers the level of culpability that needs to be associated with a finding of bad faith. Employers Mutual Casualty Company v. Loos, 476 F.Supp.2d 478, 491 (W.D.Pa. 2007). "To support a finding of bad faith, the insurer's conduct must be such as to import a dishonest purpose." Brown v. Progressive Insurance Co., 860 A.2d 493, 501 (Pa.Super. 2004), *appeal denied*, 872 A.2d 1197 (Pa. 2005).

Whether the insurer was motivated by self-interest or ill will is probative of this second element. Greene, 936 A.2d at 1190-91.[6]

Both elements of bad faith must be established by clear and convincing evidence. Brown, 860 A.2d at 501. This standard requires "evidence so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendant[] acted in bad faith." Amica Mut. Ins. Co. v. Fogel, 656 F.3d 167, 179 (3d Cir. 2011) (citation and quotation marks omitted). "At the summary judgment stage, the insured's burden in opposing a summary judgment motion brought by the insurer is commensurately high because the court must view the evidence presented in light of the substantive evidentiary burden at trial." Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005) (citation and quotation marks omitted). "In sum, in order to defeat a motion for summary judgment, a plaintiff must show that a jury could find by the stringent level of clear and convincing evidence that the insurer lacked a reasonable basis for its handling of the claim and that it recklessly disregarded its

[6] An insurer's actions in defending itself in litigation alleging its bad faith handling of a claim is not *per se* actionable under Section 8371 "since the statute was designed to provide a remedy for bad faith conduct by an insurer in its capacity as an insurer and not as a legal adversary in a lawsuit filed against it by an insured." O'Donnell, 734 A.2d at 909.

unreasonableness." Williams, 83 F.Supp.2d at 571 (citation and quotation marks omitted).

With this burden in mind, we review Defendant's conduct. Plaintiffs rely on four specific acts which they claim establish bad faith: (1) the investigation into the value of the Computers, (2) the one year delay before any payment was tendered, (3) the low settlement offer, and (4) conduct which Plaintiffs contend evidences Defendant's improper motive. We examine each of these claims in the order stated.

a. Investigation

Section 8371 was passed by the Pennsylvania Legislature with the intent of dissuading insurance providers from "using [their] economic power to coerce and mislead insureds." Jung v. Nationwide Mut. Fire. Ins. Co., 949 F.Supp. 353, 361 (E.D. Pa. 1997). It was not the Legislature's intent to subject an insurer to a finding of bad faith merely because it investigated and litigated legitimate claims. *Id.* As our courts have repeatedly stated, "an aggressive defense of the insurer's interest is not bad faith." *Id.* at 360; O'Donnell, 734 A.2d at 910 (in the absence of evidence of a dishonest purpose or ill-will, it is not bad faith to take a stand with a reasonable basis or to "aggressively investigate and protect its interests" in the normal course of litigation).

In the context of an insurer investigating a claim, our courts have held that an insurer does not act in bad faith if it investigates a claim when there are certain "red flags" that provide a reason to investigate. *See* O'Donnell, 734 A.2d at 905. These deviations from what is normal by their very nature provide a reasonable basis for the insurer to investigate. *Id.* One such signal is when the facts of a case make a determination of the value of the claim difficult to assess. Lublin v. American Financial Group, Inc., 960 F.Supp.2d 534, 541 (E.D. Pa. 2013); Williams, 83 F.Supp.2d at 575.

The "red flag" which provided the Defendant here with a reasonable basis to investigate the value of Plaintiffs' Computers was their uniqueness. Plaintiffs built these Computers themselves using parts and components from various manufacturers so they could be used for creating and playing video games. Because the Computers were built by hand using different parts, they were unique, making it reasonable for Defendant to want to examine and investigate to determine their value. It was likewise reasonable for Defendant to hire an independent qualified expert to examine and appraise the Computers in order to intelligently evaluate the amount of Plaintiffs' loss.

The difficulty in valuing this loss was evident from the information provided by Plaintiffs themselves. Initially, Plaintiffs, who were familiar with computers having built the Computers at issue, valued the Computers at around $50,000.00. They then presented Defendant with an expert estimate that valued the Computers for $30,000.00 less, at $20,537.58. The discrepancy between these two estimates, together with the patchwork nature of the Computers, easily explains the reasonableness of Defendant's decision to investigate.

b. One Year Delay

"Delay is a relevant factor in determining whether bad faith has occurred, but a long period of time between demand and settlement does not, on its own, necessarily constitute bad faith." Rowe v. Nationwide Ins. Co., 6 F.Supp.3d 621, 634 (W.D. Pa. 2014) (citation and quotation marks omitted). "In order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that the delay is attributable to the defendant, that the defendant had no reasonable basis for the actions it undertook which resulted in the delay, and that the defendant knew or recklessly disregarded the fact that it had no reasonable basis to deny payment." Thomer v. Allstate Ins. Co., 790 F.Supp.2d 360, 370 (E.D. Pa. 2011) (citation and quotation marks omitted).

A delay does not constitute bad faith "if [the] delay is attributable to the need to investigate further or even to simple negligence." Rowe, 6 F.Supp.3d at 634. Moreover, a delay attributable to the insured or outside of the control of either party will not establish bad faith. *See* Seto v. State Farms Ins. Co., 855 F.Supp.2d 424, 430 (E.D. Pa. 2012); *see also* Kosierowski v. Allstate Ins. Co., 51 F.Supp.2d 583, 590 (E.D. Pa. 1999) (finding that the "legitimate, if frustrating delays that are an ordinary part of legal and insurance work" do not constitute bad faith), *aff'd*, 234 F.3d 1265 (3d Cir. 2000) (Table).

Dial's investigation into the value of the Computers lasted close to nine months, contributing to the ten month lapse between Defendant's receipt of KeyTech's estimate in September 2007 and its tender of a check to Plaintiffs in July 2008. Although this delay is unfortunate, it does not establish bad faith. The delay began with Defendant wanting additional information relevant to valuing the Computers. As explained earlier, this request was reasonable, likewise allowing for a normal period of delay to investigate to be reasonable.

However, a delay which typically would have lasted only a few weeks or months was extended because of Plaintiffs. Initially Plaintiffs refused to allow Dial to examine the

Computers. Plaintiffs then refused to permit the Computers to be removed from their home for inspection. Once this hurdle was overcome, Plaintiffs' work schedule delayed Dial's inspection of the Computers further. (N.T. 2/25/2014 (Deposition of Michael Johnson), p.80:14-25). These circumstances - a delay attributable to a reasonable investigation and protracted by Plaintiffs' conduct – preclude a finding of bad faith.

c. Low Offer

A low offer evidences bad faith when the offer bears no reasonable relationship to the insured's losses. Brown, 860 A.2d at 501. Conversely, a low offer does not show bad faith when "the insurer makes a low but reasonable estimate of the insured's losses." *Id.* When Dial completed its investigation, it valued the Computers at $4,600.00. This amount was promptly tendered to Plaintiffs.

Although Defendant's offer was less than half what the umpire valued the loss at - $11,449.00, KeyTech's estimate was almost twice the amount determined by the umpire. These variances evidence the difficulty in valuing Plaintiffs' loss on which reasonable minds disagreed. Significantly, Defendant had a reasonable basis for its offer which relied on an estimate prepared by an independent expert in computers. As with the time delay, the circumstances here - a low offer based on an

estimate by a neutral, qualified expert, accompanied by notice to the insureds of their right under the Policy to demand an appraisal if they disagreed with the amount - do not rise to the level of bad faith.

d. Evidence of Improper Motive

Plaintiffs next contend that Jennifer Tunitis, Defendant's inside adjuster, acted with an improper motive, thus establishing that Defendant acted in bad faith. Specifically, Plaintiffs claim Ms. Tunitis did not read, personally respond to, or contact KeyTech about its estimate, did not forward a copy of this estimate to Dial for its review, and her employment of Dial was motivated by a desire to pay as little as possible on Plaintiffs' claim, rather than a fair and reasonable amount. Plaintiffs also claim that Ms. Tunitis misrepresented the facts about Plaintiffs' claim to the Department of Insurance. This conduct, Plaintiffs contend, undermines any pretense that Defendant's conduct was objectively reasonable.

Assuming, *arguendo*, that Ms. Tunitis' conduct implies an improper motive,[7] by itself this does not establish bad faith.

[7] We disagree with Plaintiffs' claim that the evidence to which they point establishes Defendant acted with dishonesty or with an improper motive. When read in the context of the entire record, we do not believe a reasonable jury would find by clear and convincing evidence that Defendant acted with a motive of either self-interest or ill will.

For instance, to the extent Ms. Tunitis did not read KeyTech's estimate, this was because of the small print on the image she received for viewing, which she could not read. (N.T. 2/25/14 (Jennifer Tunitis Deposition),

As previously discussed, the first prong of the test for bad faith, that the insurer have no reasonable basis for its conduct, is an objective test. Williams, 83 F.Supp.2d at 574. As an objective test, "[i]f there is a reasonable basis for [the insurer's actions], even if it is clear that the insurer did not rely on that reason, there cannot, as a matter of law, be bad faith." Serino v. Prudential Ins. Co. of America, 706 F.Supp.2d 584, 592 (M.D. Pa. 2009) (citation and quotation marks omitted).

For the reasons stated, Defendant had an objectively reasonable basis to conduct an investigation into the value of Plaintiffs' Computers and to make an offer based on that investigation. Under the facts in this case, the delay in completing that investigation was not inordinate, nor was the delay attributable primarily to Defendant. Therefore, even if we were to accept that Defendant had an improper motive and acted based on that motive, because the first prong of the test for statutory bad faith requires the absence of an objectively reasonable basis for Defendant's conduct – which prong has not

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p.33). As to not forwarding a copy to Dial for its review, there is nothing inherently suspect in seeking an objective, independent loss estimate from a qualified expert without first presenting that expert with the results of an earlier estimate from another expert. Moreover, these differences were later reconciled in the appraisal process in which all experts participated.

At most, the evidence establishes that Defendant acted imperfectly in its investigation. Even so, an insurer does not act in bad faith by acting negligently or performing an imperfect investigation. *See* Seto v. State Farms Ins. Co., 855 F.Supp.2d 424, 431 (E.D. Pa. 2012).

been met – as a matter of law, Defendant cannot be found to have acted in bad faith.

2. DEFENDANT'S COUNTERCLAIM: CONTRACTUAL BAD FAITH

We consider next Defendant's Motion for Summary Judgment on its counterclaim for what it describes as "reverse bad faith." Unlike Plaintiffs' bad faith claim pursuant to 42 Pa.C.S.A. § 8371, Defendant's reverse bad faith claim is not based on statute or tort, but on breach of contract.[8] Defendant claims Plaintiffs breached the terms of the Policy when they acted in bad faith during the pendency of their claim.

No express provision exists in Defendant's Policy which required either party to act in good faith. Consequently, for Defendant to succeed on this counterclaim, a duty of good faith

[8] Plaintiffs argue that Pennsylvania does not recognize a common law bad faith claim for breach of contract. This is simply not true. While such a claim does not exist at common law in tort, *see* D'Ambrosio v. Pennsylvania Nat. Mut. Cas. Ins. Co., 431 A.2d 966, 969-72 (Pa. 1981), which the Legislature remedied, in part, by its enactment of 42 Pa.C.S.A. § 8371, the implied duty of good faith that is imposed on the parties pursuant to the law of contracts existed at common law prior to the enactment of Section 8371 and was not supplanted by it. Ash v. Continental Insurance Company, 932 A.2d 877, 884 (Pa. 2007). Not only do these two causes of action for bad faith arise from difference sources - "one is imposed by virtue of a contract, and the other is imposed by statute," *Id.* at 883 - compensatory damages are awarded for breach of the contractual duty, whereas breach of the statutory duty created by Section 8371 allows for the award of specified statutory damages generally not available for breach of contract. *Id.* at 884.

The contractual duty to act in good faith is distinct from the common law duties which form the basis for a tort. Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank and Trust Co., 560 A.2d 151, 153 (Pa.Super. 1989) ("Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts."). Further, "[t]his duty arises not so much under the terms of the contract but is said to arise because of the contract and to flow from it." *See* Gray v. Nationwide Mut. Ins. Co., 223 A.2d 8, 12 (Pa. 1966) (citations and quotation marks omitted).

must be implied. The Restatement (Second) of Contracts § 205 states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

In several cases, our Superior Court has stated that Pennsylvania has adopted this Section of the Restatement. *See, e.g.,* Herzog v. Herzog, 887 A.2d 313, 317 (Pa.Super. 2005); Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 722 (Pa.Super. 1996), *appeal denied*, 683 A.2d 883 (Pa. 1996); Baker v. Lafayette College, 504 A.2d 247, 255 (Pa.Super. 1986), aff'd, 532 A.2d 399 (Pa. 1987). In other cases, the Superior Court, as well as the Commonwealth Court and the Third Circuit, have stated that the covenant of good faith and fair dealing is recognized only in limited situations. *See* West Run Student Hous. Assocs., LLC v. Huntington Nat. Bank, 712 F.3d 165, 170 (3d Cir. 2013); Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 867 (Pa.Cmwlth. 2001), *appeal denied*, 796 A.2d 319 (Pa. 2002); Creeger Brick and Bldg. Supply, Inc. v. Mid-State Bank and Trust Co., 560 A.2d 151, 153-54 (Pa.Super. 1989). In a recent decision, the Pennsylvania Supreme Court noted the "considerable disagreement over the applicability of the implied duty of good faith," but, because the issue was not before it,

declined to address it. Ash v. Continental Ins. Co., 932 A.2d 877, 883 n.2 (Pa. 2007).

The duty has been recognized in franchisors' dealings with franchisees, Atlantic Richfield Co. v. Razumic, 390 A.2d 736 (Pa. 1978); in insurers' dealings with insureds, Gray v. Nationwide Mut. Ins. Co., 223 A.2d 8, 11 (Pa. 1966); and in the employer-employee context where the employer does not fulfill some contractual obligation that the employer had assumed beyond the at-will relationship. Donahue v. Federal Express Corporation, 753 A.2d 238, 242 (Pa.Super. 2000) (interpreting Somers v. Somers, 613 A.2d 1211 (Pa.Super. 1992), *appeal denied*, 624 A.2d 111 (Pa. 1993)). In contrast, in Southeastern Pennsylvania Transit Authority v. Holmes, 835 A.2d 851 (Pa.Cmwlth. 2003), *appeal denied*, 848 A.2d 930 (Pa. 2004), the Commonwealth Court noted three circumstances in which no duty of good faith may be implied, where:

> (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties.

Id. at 859 (citation omitted).

In explaining the rationale behind restricting an independent cause of action for breach of the duty of good faith and fair dealing to a limited number of circumstances, the Third Circuit stated:

> Such an approach limits the use of the bad faith cause of action to those instances where it is essential. The covenant of good faith necessarily is vague and amorphous. Without such judicial limitations in its application, every plaintiff would have an incentive to include bad faith allegations in every contract action. If construed too broadly, the doctrine could become an all-embracing statement of the parties' obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements.

Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000). We find this analysis persuasive and apply it here.

As a preliminary matter, the duty of good faith is broadly defined "as honesty in fact in the conduct or transaction concerned." Stamerro v. Stamerro, 889 A.2d 1251, 1259 (Pa.Super. 2005) (citation omitted). "[G]ood faith generally entails 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Curley v. Allstate Ins. Co., 289 F.Supp.2d 614, 617 (E.D. Pa. 2003) (quoting Restatement of Contracts (Second) § 205 cmt. a). "[E]xamples of 'bad faith' conduct include: evasion of the spirit of the bargain, lack of diligence and slacking

off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 887 (Pa.Super. 2000) (citation and quotation marks omitted). While these broad definitions of the duty of good faith are helpful, the extent of the duty and whether the duty was violated requires a case specific and fact intensive inquiry. Haywood v. University of Pittsburgh, 976 F.Supp.2d 608, 627 (W.D. Pa. 2013).

Defendant argues Plaintiffs breached the implied covenant of good faith and fair dealing during the adjustment, appraisal, settlement, and post-settlement phases of Plaintiffs' claim. More precisely, Defendant claims Plaintiffs violated their duty of good faith by (1) delaying for eight months Dial's inspection of the Computers, (2) failing to notify Defendant of their chosen appraiser within twenty days, (3) refusing to provide Defendant with the name and contact information for the individual from KeyTech who was to serve as their appraiser, and (4) filing "vexatious and retributive" litigation against Defendant. (Motion and Answer, ¶51; Defendant's Counterclaim, ¶66).

We begin with whether an independent cause of action exists to redress Plaintiffs' complaints since "a party is not entitled

to maintain an implied duty of good faith claim where the allegations of bad faith are identical to a claim for relief under an established cause of action." Northview Motors, 227 F.3d at 91-92 (citation and quotation marks omitted); *see also* Leder v. Shinfeld, 609 F.Supp.2d 386, 400-01 (E.D. Pa. 2009) (holding that duty of good faith does not apply when party had an adequate remedy based on a negligence claim).

As to Defendant's first three complaints, the express language of the Policy requires Plaintiffs to make the damaged property available for inspection (Policy (Section I - Conditions, ¶2(f)(1))) and to "choose a competent appraiser within 20 days after receiving a written request from the other." (Policy (Section I - Conditions, ¶6)). While not explicit, implicit in this language is the obligation of Plaintiffs to permit an inspection within a reasonable time of request and to provide Defendant with the name and contact information of the appraiser they selected.[9] As for Plaintiffs

[9] The doctrine of necessary implication provides that "[i]n the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose of the contract and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." Agrecycle, Inc. v. City of Pittsburgh, 783 A.2d 863, 868 (Pa.Cmwlth. 2001) (citation and quotation marks omitted). *Cf*. Northview Motors, Inc., 227 F.3d at 91 (noting that "[c]ourts have utilized the good faith duty as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term"); Agrecycle, 783 A.2d at 867 ("The good faith obligation may be implied to

filing what Defendant has characterized as "vexatious and retributive" litigation, the common law causes of action for malicious prosecution and abuse of process are available to vindicate Defendant's rights. *See also* 42 Pa.C.S.A. § 2503 (7), (9) (Right of participants to receive counsel fees).

Though an independent cause of action does not exist to address Plaintiffs delaying the inspection or failing to earlier name the individual they chose to be an appraiser, Defendant has provided us with no law that Plaintiffs owed any fiduciary duty to Defendant. While an insurer owes a fiduciary duty to its insured, thereby being obligated to act in good faith and with due care in representing the interests of the insured, Gray, 223 A.2d at 11, we are unaware of any case holding the reverse to be true. This absence under Holmes precludes a contractual bad faith claim. 835 A.2d at 859.

The uncertain nature of exactly what damages Defendant claims in this count of its counterclaim further precludes the grant of summary judgment. Defendant states only that it has suffered "significant costs due to extensive and unnecessary court intervention in defending against Plaintiffs' baseless claims and in bringing the instant Counterclaim." (Motion, ¶52; Defendant's Brief in Support of its Motion, p.20; Defendant's

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allow enforcement of the contract terms in a manner that is consistent with the parties' reasonable expectations.").

Counterclaim, ¶71). However, to the extent these costs refer to attorney fees, attorney fees are generally not recoverable in a common law action for breach of contract. *See* Trizechahn Gateway LLC v. Titus, 976 A.2d 474, 482-83 (Pa. 2009) ("Under the American Rule, applicable in Pennsylvania, a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.").

3. DEFENDANT'S COUNTERCLAIM: MALICIOUS USE OF PROCESS

Penultimatley, Defendant requests summary judgment in its favor on its claim for malicious use of process. "Malicious use of process is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause." Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa.Super. 1984). These elements are now codified in the Wrongful Use of Civil Proceedings Act, also known as the Dragonetti Act, 42 Pa.C.S.A. §§ 8351-54, which provides:

> **(a) Elements of action.--**A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S.A. § 8351.

"In order to recover under [this] statutory cause of action, three essential elements must be proved: (1) that the underlying proceedings terminated favorably to the plaintiff; (2) that the defendant caused those proceedings to be instituted without probable cause; and (3) malice," that the proceedings were instituted primarily for an improper purpose, "as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid." Shaffer, 473 A.2d at 1020 (citations and quotation marks omitted); Hart v. O'Malley, 647 A.2d 542, 547 (Pa.Super. 1994), *aff'd*, 676 A.2d 222 (Pa. 1996). "As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary [for malicious prosecution] to aver and prove that he has acted not only maliciously, but without reasonable or probable cause." Dumont Television and Radio

Corporation v. Franklin Electric Co. of Phila., 154 A.2d 585, 588 (Pa. 1959) (citations and quotation marks omitted).[10]

A prerequisite of malicious prosecution is that the underlying civil proceedings have terminated in favor of the party bringing suit. *See* Clausi v. Stuck, 74 A.3d 242, 246 (Pa.Super. 2013). The underlying civil proceeding for purposes of this claim is Plaintiffs' current action for bad faith. Although judgment is being granted in Defendant's favor and against Plaintiffs on Plaintiffs' claim for bad faith, a decision favorable to Defendant, the

> entry of summary judgment does not constitute a 'favorable termination' as understood in the context of a wrongful use of civil proceedings suit until the summary judgment is final, meaning that it has been upheld by the highest appellate court having jurisdiction over the case or that the summary judgment has not been appealed.

D'Elia v. Folino, 933 A.2d 117, 122 (Pa.Super. 2007), *appeal denied*, 948 A.2d 804 (Pa. 2008) (citing Ludmer v. Nernberg, 553 A.2d 924, 926 (Pa. 1989)). Because this condition precedent to recovery has not been met, Defendant's Motion for Summary Judgment on this count of its counterclaim will be denied.[11]

4. DEFENDANT'S COUNTERCLAIM: ABUSE OF PROCESS

[10] "The question of want of probable cause is exclusively for the court." Dumont Television and Radio Corporation v. Franklin Electric Co. of Phila., 154 A.2d 585, 588 (Pa. 1959) (citation and quotation marks omitted).

[11] In addition, genuine issues of material fact exist on the other two elements of this cause of action: (1) whether Plaintiffs initiated their claim without probable cause and (2) whether Plaintiffs did so for malicious purposes.

Finally, Defendant seeks judgment in its favor and against Plaintiffs for abuse of process for Plaintiffs' filing and pursuit of what Defendant contends is a frivolous lawsuit. "To establish a claim for abuse of process, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff. The word 'process' as used in the tort of abuse of process has been interpreted broadly and encompasses the entire range of procedures incident to the litigation process." Hart, 647 A.2d at 551 (citations and quotation marks omitted).[12]

[12] At common law, abuse of process and malicious prosecution were two separate and distinct causes of action, part of the difference being the stage of the proceedings at which the abuse or misuse of process occurred. On this point, the Pennsylvania Supreme Court in Dumont stated:

> Decisions in this state and in other jurisdictions have drawn a distinction between actions for abuse of legal process and those for malicious prosecution, which, when founded on civil prosecutions, are usually described as malicious use of civil process. The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it. Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued.

154 A.2d at 587 (citations and quotation marks omitted). In Triester v. 191 Tenants Association, 415 A.2d 698 (Pa.Super. 1979), the Superior Court describes this difference as follows:

> An abuse of process arises when a party employs legal process for some unlawful purpose, not the purpose for which it was intended. The classic example is the initiation of a civil proceeding to coerce the payment of a claim completely unrelated to the cause of action sued upon. The gist of the action is the proper issuance of the original process, but an abuse of that process after it has been issued such that there is a perversion of the process. The action of malicious use of process, on the other hand, is concerned with the wrongful

"Abuse of process is the employment of [process] for an unlawful object, a perversion of it, *e.g.*, to extort money, to compel the surrender of a deed or other thing of value, or the like; and misuse, simply a malicious use of [process] where no objective is contemplated to be gained by it other than its proper effect and execution . . . ." Grohmann v. Kirschman, 168 Pa. 189 (Pa. 1895). Abuse of process "differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial." Lerner v. Lerner, 954 A.2d 1229, 1238 (Pa.Super. 2008) (citation and quotation marks omitted). The gravamen of abuse of process is the perversion of the particular legal process, that it was used primarily for a

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initiation of a meritless suit. It occurs when a party institutes suit with a malicious motive and without probable cause.

Id. at 702-703 (citations omitted).

The elements of a cause of action for abuse of process appear to be subsumed within the statutory elements for a cause of action for the wrongful use of civil proceedings as defined by 42 Pa.C.S.A. § 8351. *See* U.S. Express Lines, Ltd v. Higgins, 281 F.3d 383, 394 (3d Cir. 2002). If so, as a legal matter, Defendant's Motion for Summary Judgment on this count of its counterclaim is premature for the same reasons we have denied Defendant's motion with respect to its claim for malicious prosecution.

However, the appellate courts of this Commonwealth repeatedly – including, since the effective date of the Wrongful Use of Civil Proceedings Act, 42 Pa.C.S.A. §§ 8351-54 - contrast a claim for abuse of process with one for malicious prosecution, noting that the elements of abuse of process do not require a favorable termination of the underlying proceeding or an absence of probable cause preceding the commencement of the underlying suit. *See e.g.*, Clausi v. Stuck, 74 A.3d 242, 248-49 (Pa.Super. 2013); *see also* Rosen v. American Bank of Rolla, 627 A.2d 190, 192 (Pa.Super. 1993) (explaining that the tort of wrongful use of civil proceedings entails the initiation or continuation of an *action*, whereas abuse of process concerns use of *process* which is incident to the litigation). Consequently, we independently evaluate Defendant's motion on this count from that for malicious prosecution.

purpose for which it was not designed, to benefit the defendant in achieving a purpose which was not an authorized goal of the procedure in question. Werner v. Plater-Zyberk, 799 A.2d 776, 785 (Pa.Super. 2002), *appeal denied*, 806 A.2d 862 (Pa. 2002).

"The significance of [the word 'primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant . . . ." Rosen v. American Bank of Rolla, 627 A.2d 190, 192 (Pa.Super. 1993) (quoting Restatement (Second) of Torts, § 682, cmt. b).

> It is not enough that the process employed was used with a collateral purpose in mind.
>
> A cause of action for abuse of process requires [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . [;] there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Hart, 647 A.2d at 552 (citations and quotation marks omitted). "In evaluating the primary purpose prong of the tort, there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action." Clausi, 74 A.3d at 249.

Explaining further, the Superior Court in Rosen stated:

> The gravamen of the misconduct for which the liability stated . . . is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed . . . .

627 A.2d at 192. In other words, abuse of process is, in essence, the "use of the legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." McGee v. Feege, 535 A.2d 1020, 1026 (Pa. 1987).

On this claim, it is unclear what legal process Defendant claims was used improperly[13] and, consequently, just as unclear whether its use was a perversion of that process. While Defendant claims generally the primary purpose of Plaintiffs' suit and its continued pursuit was to harass and intimidate Defendant from investigating Plaintiffs' claim in order to extort a higher settlement payment on their loss, evidence also

[13] Paragraph 78 of Defendant's counterclaim for abuse of process asserts only that Plaintiffs "abused the litigation process by filing a frivolous lawsuit and by using legal process in a manner not intended by the law to effect."

exists to support Plaintiffs' contention that their intent in bringing suit and taking discovery, for instance, were for legitimate purposes. Therefore, summary judgment on this count of Defendant's counterclaim is also being denied.

CONCLUSION

Defendant's Motion for Summary Judgment is granted in part and denied in part. Because there is no clear and convincing evidence by which a reasonable jury could find bad faith, Defendant's Motion as to Plaintiffs' claim for bad faith has been granted. Because genuine issues of material fact exist for each of Defendant's counterclaims, in addition to the legal limitations discussed in the body of this opinion, Defendant's Motion for Summary Judgment on its counterclaim is denied.

BY THE COURT:

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P.J.