NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3206-10T4

KWABENA WADEER and
OFELIA WADEER,

Plaintiffs-Appellants,

v.

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,

Defendant-respondent.

Argued December 13, 2011 - Decided December 13, 2012

Before Judges Fisher and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2217-09.

E. Drew Britcher and Donald A. Caminiti argued the cause for appellants (Britcher, Leone & Roth, L.L.C., attorneys for Kwabena Wadeer; Breslin & Breslin, P.A., attorneys for Ofelia Wadeer; Mr. Britcher and Mr. Caminiti, of counsel; Kristen B. Miller, on the brief).

Daniel J. Pomeroy argued the cause for respondent (Pomeroy, Heller & Ley, L.L.C., attorneys; Mr. Pomeroy and Karen E. Heller, on the brief).

PER CURIAM

Plaintiffs Kwabena Wadeer and Ofelia Wadeer[1] appeal from an order granting summary judgment to their insurer, defendant New Jersey Manufacturers Insurance Company (NJM), and dismissing their complaint alleging that NJM had acted in bad faith by failing to settle their first-party uninsured motorist (UM) claim.[2] The trial court concluded that because plaintiff had not asserted his bad faith and related claims in an earlier UM personal injury action (the UM action), the doctrines of entire controversy and res judicata barred his bad faith action. After considering plaintiff's arguments in light of the record, we conclude that his bad faith action is barred by the entire controversy doctrine. Accordingly, we affirm.

I.

Plaintiff was injured in a vehicular accident when a "phantom vehicle" swerved into his lane of travel and caused him to lose control of his car, which was struck by two other vehicles, one of which left the scene and was never identified. Plaintiff was insured under a NJM automobile insurance policy that provided up to $100,000 in insurance coverage for injuries sustained by an insured in an accident caused by an uninsured

[1] Ofelia Wadeer's claim is derivative. For that reason, and for ease of reference, we refer to Kwabena Wadeer only as "plaintiff."

motorist. Within three months of the accident, plaintiff notified NJM of his UM claim, provided NJM with copies of his medical records, and demanded that NJM pay its policy limits to settle his claim. NJM made no settlement offer then or thereafter. NJM later rejected two arbitration awards, one within its policy limits and one in excess of its policy limits, and an offer of judgment in the amount of $95,000. Plaintiff alleges that NJM "maintained that since the [first] arbitration award was so close to the policy limits that NJM would just as soon try the case because they felt they would never have anything to lose above and beyond the $100,000 limits since this was a first party UM case."

Four years after plaintiff's accident, the UM action proceeded to trial and the jury awarded plaintiff $255,175. The trial court molded the verdict to NJM's $100,000 policy limits, added attorneys' fees, costs, and interest, and reduced the total amount to a judgment in favor of plaintiff.

Plaintiff and NJM filed cross-appeals. Plaintiff contended the trial court should not have molded the verdict to NJM's policy limits because NJM had acted in bad faith. We rejected that contention:

> We reject plaintiffs' argument that the judge erred in molding the jury verdict of $255,175 to conform to the UM policy limits of $100,000. We follow Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 458 (App.

> Div. 2008), where we recently rejected an attempt to create a new "cause of action providing a remedy in the UM context similar to that provided on third-party claims in Rova Farms Resort, Inc. v. Inv. Ins. Co. of Am., 65 N.J. 474 (1974)." We there implied that such a revision in existing law should be addressed to the Supreme Court or the Legislature, not to an intermediate appellate panel. Taddei, supra, 401 N.J. Super. at 458-58.

Three months after our decision, plaintiff filed the bad faith action that is the subject of this appeal. In his complaint, plaintiff alleged that NJM had violated its duty of good faith and fair dealing as well as the Consumer Fraud Act, N.J.S.A. 56:8-1 to -195, and the Unfair Claims Settlement Practices Act, N.J.S.A. 17:29B-1 to -19. The complaint alleged as a factual basis for those causes of action that NJM had acted in bad faith by: offering nothing to settle plaintiff's claim despite not disputing plaintiff's version of the accident; delaying a prompt and fair settlement of the claim; and delaying the inevitable payment by forcing plaintiff to institute unnecessarily a lawsuit to recover benefits under the NJM policy. After discovery, NJM filed a summary judgment motion. The trial court granted the motion, determining that plaintiff's bad faith claim was barred by the doctrines of entire controversy and res judicata. Plaintiff appeals from that decision.

II.

Plaintiff first contends the trial court erred when it held that the entire controversy doctrine barred his bad faith action. We disagree.

Rule 4:30A, entitled "Entire Controversy Doctrine," provides:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions.)

The two goals of the entire controversy doctrine are "ensuring fairness to parties and achieving economy of judicial resources." Kent Motor Cars, Inc. v. Reynolds & Reynolds, 207 N.J. 428, 443 (2011). Because the "doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court[,] . . . all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989). The entire controversy doctrine applies to first-party UM and bad faith claims. See Taddei, supra, 401 N.J. Super. at 465 (rejecting a "plaintiff's argument that because the jury can not be told about insurance

in the trial of the UM case, . . . the claims can not be brought in the same action.").

Plaintiff argues that his bad faith action did not ripen until the jury returned its verdict. Plaintiff misapprehends the nature of NJM's duties and remedies for breach of those duties.

When negotiating third-party claims, insurers have "a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage." Rova Farms Resort, Inc. supra, 65 N.J. at 496. When an insurer breaches that fiduciary duty, the insurer must "absorb losses which may result from its failure to settle," including a verdict in excess of its coverage limits. Id. at 502. In Taddei, we declined to provide in first-party actions a cause of action "similar to that provided on third-party claims in Rova Farms . . . ." Supra, 401 N.J. Super. at 458.

In a broader context, "it is well-settled that, in New Jersey, 'every insurance contract contains an implied covenant of good faith and fair dealing.'" Wood v. N.J. Mfrs. Ins. Co., 206 N.J. 562, 577-78 (2011) (quoting Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 526 (2005)). That covenant applies to first-party UM claims. We explained in Taddei that

> [w]e can conceive of no reason to limit a UM claimant's remedy, if he or she believes the insurer has acted in bad faith, to the offer

> of judgment rule. The existence of the rule should not bar an aggrieved insured from pursuing a meritorious claim against the insurer for breach of the covenant of good faith and fair dealing, and the ability to recover all consequential damages, and, in an exceptional and particularly egregious case, even be permitted to pursue punitive damages.
>
> [Supra, 401 N.J. Super. at 463.]

In the case before us, it is not entirely clear whether plaintiff is seeking as damages the amount of the excess verdict as a Rova Farms remedy, or consequential damages for NJM's breach of the covenant of good faith and fair dealing. If the former -- a damage claim that usually accrues when a jury returns an excess verdict -- he seeks a remedy to which he is not entitled, an issue we decided in the appeal from the order entering judgment in the UM action. If the latter, his bad faith action is barred by the entire controversy doctrine. Generally the entire controversy doctrine requires a plaintiff who files a UM claim to file in the same action an existing "bad faith" claim. See Taddei, supra, 401 N.J. Super. at 465.[3]

[3] The entire controversy doctrine does not compel a plaintiff to file "premature or unaccrued claims." K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 74 (2002). The question of when a "bad faith" claim arises in the context of insurance coverage is not always readily apparent. See Pickett v. Lloyd's, 131 N.J. 457, 473 (1993) ("if a claim is fairly debatable, no liability in tort will arise.") (internal quotation marks and citations omitted).

Here, plaintiff alleged that NJM had sufficient information to evaluate his claim when he provided NJM with the medical reports three months after the accident. Before plaintiff commenced his UM action, a panel of three arbitrators had assessed the value of his claim as $125,000, but molded the award to $87,500 in consideration of plaintiff's negligence. NJM does not dispute plaintiff's assertion that, following the arbitration, NJM responded that because the award was so close to the policy limits it would just as soon try the case as it would never have to pay more than those limits. Thus, NJM made no offer to settle the case, despite not contesting plaintiff's version of the accident, and despite implicitly acknowledging that plaintiff's claim had significant value, perhaps in the range of its policy limits. Collectively, those circumstances established the basis for a bad faith claim based on breach of the implied covenant of good faith and fair dealing. The cause of action accrued before plaintiff filed his UM action, and long before the UM verdict.

Plaintiff also argues that barring his bad faith action under the entire controversy doctrine is fundamentally unfair. "In considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant has 'had a fair and reasonable opportunity to have fully litigated that claim in the original action.'" Gelber v. Zito P'ship, 147 N.J.

561, 565 (1997) (quoting Cafferata v. Peyser, 251 N.J. Super. 256, 261 (App. Div. 1991)). Here, plaintiff had a fair opportunity to assert and litigate his bad faith action.

Significantly, plaintiff recognized the existence of a bad faith claim before he filed suit.[4] In response to NJM's position that it had nothing to lose by going to trial, plaintiff threatened to pursue a bad faith claim. During the course of the UM action, he deposed a claims adjuster.[5] There is nothing unfair or inequitable about requiring a plaintiff to pursue a bad faith claim in an UM action when the plaintiff has recognized and threatened a bad faith claim before filing the UM action, the carrier has made no settlement offer despite an arbitration panel's evaluation of damages in excess of the policy, and the carrier has represented that it intends to proceed to trial solely because it will not have to pay more

[4] We suggested in Taddei that "the underlying claim could be severed from the bad faith claim, with the latter being held in abeyance until conclusion of the former." Supra, 401 N.J. Super. at 465 (emphasis added). That decision, however, rests within the sound discretion of the trial court. See DiTrolio v. Antiles, 142 N.J. 253, 275 (1995)(emphasizing "that the joinder determination does not repose with the parties," but with the trial court).

[5] NJM asserts that plaintiff had the opportunity to depose the claims adjuster about claims handling. However, during the claims adjuster's deposition, in response to a question by plaintiff's attorney, NJM's attorney emphasized that "this claims case is not about NJM's case handling. There's no bad faith, no lawsuit against NJM for any breach of contract."

than its policy limits. The trial court did not err by dismissing plaintiff's claim under the entire controversy doctrine.

Plaintiff's remaining arguments do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.