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S.C. SUPREME COURT

# **Exhibit A**

STATE OF SOUTH CAROLINA COUNTY OF MARION	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT 2025-CP-33-00076
Charles A. Trant, M.D.,  Plaintiff,  vs.  Mag Mutual Insurance Company and McLeod Physician Associates, II,  Defendants.	ORDER

Judge:	Honorable H. Steven DeBerry
Date of Hearing:	March 28, 2025 via WebEx
Appearance for Plaintiff:	Patrick J. McLaughlin & Stephen J. Wukela
Appearance for Defendant Mag Mutual:	John C. Bonnie & Stephen J. Rapp

THIS MATTER comes before the Court on Defendant Mag Mutual Insurance Company's ("Mag Mutual") *Motion to Dismiss or Alternatively to Stay the Case* and *Motion to Seal Certain Paragraphs of the Plaintiff's Complaint*. The parties briefed the matter extensively and the Court heard oral argument, via Web Ex, on March 28, 2025.

After careful consideration of the parties' filings and oral arguments, the Defendant's motions are DENIED.

#### SUMMARY OF CASE:

This present matter arises from Plaintiff's complaint; alleging, among other things, that Mag Mutual, Plaintiff's medical malpractice carrier, refused to settle and mishandled, in bad faith, a malpractice action filed against him; resulting, in the Plaintiff suffering a \$29,870,000.00 Dollar excess judgment, damage to his personal and professional reputation, the impairment of his

financial position, and damage to his emotional well-being to such a degree that he has suffered physical manifestations of his emotional distress.

**LEGAL STANDARD:**

Generally, in considering a Rule 12(b), SCRCPP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

“A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566, 127 S.Ct. 1955, 1965 (2007).

A motion to dismiss pursuant to Rule 12(b) must be based solely on the allegations set forth in the Complaint and must presume all well-pled facts to be true. Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538-39 (2006); Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). “[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts.” Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). “Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” Spence v. Spence, 368 S.C. 106, 116–17, 628 S.E.2d 869, 874 (2006). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf,

the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Rule 8(e)(1), SCRCP states that "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Moreover, all pleadings shall be so construed as to do substantial justice to all parties. Unisun Ins. v. Hawkins, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000).

To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

#### ALLEGATIONS OF THE COMPLAINT:

The Complaint alleges that Defendant, Mag Mutual issued a medical malpractice policy insuring the Plaintiff, Dr. Charles A. Trant a pediatric cardiologist. (Compl. ¶¶7-9).

On July 13, 2022, the Estate of a minor patient, Taylor Price, (hereinafter "Estate"), sued Dr. Trant; alleging wrongful death due to malpractice. (Compl. ¶ 15).

Trant alleges that for over 2 years, notwithstanding the pleas and warnings of their attorney, J. Boone Aiken, and of Dr. Trant's personal counsel, Mag Mutual delayed and refused to negotiate the Price claim; refusing to make any offer, at all, to settle the case. (Compl. ¶¶16-106; 169-172).

In particular, the Plaintiff alleges that Mag Mutual refused offers from the Estate of \$1.2 million (within the policy limit for one occurrence); and refused to participate in mediation where the Estate's opening offer was \$2.4 million (within the policy limit for two occurrences).(Cmpl. ¶71).

The Plaintiff alleges that Mag Mutual's counsel, Mr. Aiken, warned the Defendant about the emotional toll that the litigation was taking on Dr. Trant; that Mr. Aiken repeatedly and urgently pled for the Defendant to protect Dr. Trant from the danger of being "financially crippled from his present status", (Compl. ¶ 62), and that Mr. Aiken urged Mag Mutual that the litigation

was “very worrisome to Dr. Trant as he has been very concerned with his financial security...” (Compl. ¶ 60).

Nevertheless, Trant alleges that the Carrier’s delay and refusal to negotiate continued; and the Price action was called to trial beginning November 4, 2024, in Marion, S.C. (Compl. ¶¶69-70).

The Complaint alleges that, as of the beginning of trial, in spite of more than two years of pleas and warnings from their own counsel, and from Dr. Trant’s personal counsel, Mag Mutual had offered nothing at all to settle the Estate’s case against Dr. Trant. (Compl. ¶71).

Trant alleges that, by the third day of trial, November 6, 2024, Mag Mutual’s Counsel described the trial as “disastrous” (Compl. ¶ 80), and a “trainwreck” (Compl. ¶81), and Mag Mutual, “belatedly”, offered the Estate one occurrence cap of \$1.2 million to settle the case (the same amount the Estate offered to accept two years previous, on November 7, 2022).( Compl. ¶73).

The Complaint alleges that the Estate declined the November 6, 2024 offer; although the Estate’s counsel noted that the Estate would have accepted that offer as recently as the scheduled July 1, 2024 mediation that the carrier refused to attend. (Compl. ¶74).

The Complaint alleges that, in a desperate attempt to avoid financial disaster, Dr. Trant offered \$1.5 million of his own funds to aid in settling the case; which the Price estate declined. (Compl. ¶ 76). The Complaint alleges that Mag Mutual refused to give any consideration to the contribution made by Dr. Trant and offered nothing additional to resolve the case. (Compl. ¶ 77).

The Plaintiff alleges that the Price trial continued and Mag Mutual’s counsel predicted a “nuclear verdict” and urged Mag Mutual to re-engage in negotiations. (Compl. ¶ 88). Trant alleges that Mag Mutual refused. (Compl. ¶94).

The Complaint alleges that, on November 8, 2024, the Jury hearing the Price case returned a verdict of \$30 million, that the presiding Judge denied post-trial motions; and that, after credit for prior settlement with a co-Defendant, the Court entered Judgment against Dr. Trant in the amount of Twenty-Nine Million Eight Hundred Seventy Thousand and 00/100 (\$29,870,000.00) Dollars. (Comp. ¶¶ 95, 106).

The Plaintiff acknowledges that Mag Mutual filed an appeal on March 5, 2025; meanwhile, he points out the judgment accrues interest at the rate of 11.5% compounded annually, i.e. Two Hundred Eighty-Six Thousand Fifty-Four and 00/100 (\$286,254.00) Dollars per month. (Compl. ¶106).

In particular, Trant alleges:

171. That, in addition to proximately causing Dr. Trant's liability for the excess verdict, Mag Mutual's unreasonable delay and refusal to offer any amount to settle the Price action for, at a minimum, two years from November 7, 2022 to November 6, 2024, proximately caused damage to Dr. Trant's personal and professional reputation, impaired his financial position, and severely damaged his emotional well-being to such a degree that he has suffered physical manifestations of his severe emotional distress; moreover, such damages would have resulted from Mag Mutual's unreasonable delay to attempt to effect a settlement for two years, even if the Estate had accepted Mag Mutual's offer on November 6, 2024. (Compl. ¶ 171).

#### ANALYSIS:

##### **I. Mag Mutual's Motion to Dismiss or Alternatively Stay the Case.**

Mag Mutual moves to dismiss or stay the action; arguing that, due to the pendency of the appeal, the bad faith action is not ripe for adjudication.

Mag Mutual argues that the underlying judgment in the Price action is on appeal and that the Plaintiff has not yet paid, and may not ever pay, the excess judgment entered against him.

Thus, Mag Mutual argues, the Plaintiff's complaint is not ripe for adjudication and should be dismissed or stayed pending the appeal.

The Plaintiff argues that our Courts have repeatedly held that bad faith arises from, "not just nonpayment of a legitimate claim but how that claim was processed." Hood v. United Services Auto Assoc., 2025 S.C. LEXIS 1 (Opinion No. 28249, January 8, 2025)(citing Mixon, Inc. v. American, 349 S.C. 394, 400 (Ct. App. 2002)(citing Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504 (1996) and holding "the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also the manner in which it is processed.").

Further, Plaintiff argues that South Carolina case law makes clear that what happens *after* the bad faith suit was filed "is not relevant" to whether or not the insurance company acted in bad faith. *See* Howard v. State Farm Mut. Auto Ins. Co., 316 S.C. 445, 448 (1994) ("Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim or if the insurance company did not specifically deny the claim by the evidence it had before it at the time the suit was filed.").

Thus, the Plaintiff argues, even if the appeal in the Price action were successful, or if Mag Mutual ultimately satisfied the excess judgment, their alleged bad faith would not be absolved, nor would Plaintiff's actions arising from Mag Mutual's handling of the Price claim be extinguished. Id.

The Supreme Court's opinion in Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504 (1996) is controlling.

There, the Supreme Court held that an action for bad faith in the carrier's handling of an insurance claim could continue, even in the absence of any breach of an express contractual provision. *See*, Tadlock, at 504.

In Tadlock, an insured painting company performed an industrial spray-painting job for their client at the client's job site and paint overspray damaged approximately 90 cars. The client brought a claim against the painting company for the resulting damage, and the painting company's insurer delayed paying the claim; disputing with their insured whether one or multiple deductibles applied. Ultimately, the insured personally settled each of the client's claims for amounts within the deductible limits. Because of the delay in cleaning the cars, the client (the insured's primary customer) refused to consider the insured for future jobs. See, Tadlock, at 499.

The insured in Tadlock brought an action against the carrier alleging breach of contract and bad faith. The federal district court granted the carrier's motion for summary judgment on the deductible issue (which the insured did not appeal). See, Tadlock Painting Co. v. Maryland Cas. Co., 1996 U.S. App. LEXIS 24747, fn. 2 (4<sup>th</sup> Cir. 1996). The district court, however, allowed the case to proceed to verdict on the bad faith action, and the jury returned a verdict for compensatory and punitive damages against the carrier. Id.

On appeal, the U.S. Fourth Circuit of Appeals certified to the South Carolina Supreme Court the question: "[m]ay an insured assert a cause of action on an implied covenant of good faith and fair dealing against an insurance company for consequential damages he allegedly suffered because of the insurance company's bad faith handling of third party claims?" Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 499 (1996).

Answering that question, the South Carolina Supreme Court adopted the logic of the Arizona Supreme Court in Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265 (Ariz. 1992). See, Tadlock, 322 S.C. 498, 501.

In Deese, an insured brought an action for breach of contract and bad faith and the jury found for the insurer on the breach of contract action and found for the insured on the bad faith action.

The Arizona Supreme Court upheld the verdict; finding, “[f]ailure to perform the express covenant to pay is not the *sine qua non* for an action for breach of the implied covenant of good faith and fair dealing.” Tadlock, 322 S.C. 498, 501 (quoting Deese).

“The [Deese] Court reasoned that an insured is not only bargaining for security from financial loss, the primary goal motivating the purchase of insurance, when it enters into an insurance contract. Rather, ‘the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith.’” Tadlock, 322 S.C. 498, 501 (quoting Deese).

Adopting Deese, the South Carolina Supreme Court held that the painting company’s bad faith action based upon the carrier’s handling of the claim could proceed, even in the absence of a breach of an express contractual provision to pay the claim. Tadlock, 322 S.C. 498, 503-504 (1996).

We agree with the reasoning of Deese that the benefits due an insured are not limited solely by those expressly set out in the contract. The fact that the claims were ultimately settled for an amount less than the applicable deductible (through the insured’s efforts) is irrelevant to whether the [insurer] [sic] performed its duties in good faith. See Howard v. State Farm Mutual Ins. Co., 316 S.C. 445, 450 S.E. 2d 582 (1994)(whether insurer is liable for bad faith must be determined by the evidence before it at the time it denied the claim; evidence arising after denial irrelevant to propriety of insurer’s conduct at the time of refusal).

Tadlock, 322 S.C. 498, 503.

Applying Tadlock to the arguments before the Court, the fact that the excess judgment could be reversed on appeal does not determine to the question of whether Mag Mutual breached its duties of good faith in handling the Plaintiff’s claim; allegedly causing the entry of the excess judgment in the first place.

A potential reversal of the excess judgment after years on appeal, and following years of litigation below, would not cure the emotional injury, the damage to the insured’s reputation and

financial position, or any other legally cognizable injury from Mag Mutual's alleged bad faith handling of the Plaintiff's claim, and the resulting entry of the judgment against the Plaintiff.

Moreover, as Plaintiff argues, and the case law supports, a potential reversal of the excess judgment would not absolve the carrier from the alleged bad faith that led to the excess verdict to begin with; nor could it insulate Mag Mutual from punitive damages.

The Supreme Court in Tadlock cited, with approval, cases from several jurisdictions in accord with its decision. See, Tadlock, 322 S.C. 498, 504, fn. 4 (1996).

Among them, the Tadlock Court cited the Utah Court of Appeals decision in Campbell v. State Farm Mut. Auto. Ins. Co., 840 P. 2d 130, 140-141 (Utah Ct. App. 1992).

In Campbell, the Utah Court held that a carrier's eventual payment of an excess judgment rendered against its insured in a suit by a third party did not bar the insured's claim that the insurer acted in bad faith by earlier refusing to settle the claim within policy limits. See, Campbell v. State Farm Mut. Auto. Ins. Co., 840 P. 2d 130. The Tadlock Court quoted, with approval, the Campbell Court's conclusion that "an insured may purchase insurance not only to provide funds, but *to provide peace of mind.*" Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, fn. 4 (quoting Campbell)(emphasis added).

Here, Plaintiff argues he purchased the policy to provide funds to satisfy claims against him; funds which, Plaintiff alleges, the carrier refused to tender unreasonably and in bad faith, while mishandling the claim. Plaintiff argued examples of mishandling alleged in the Complaint, such as: failure to properly evaluate (Compl. ¶¶23-24); failure to attend mediation and communicate with Plaintiff regarding that failure to attend (Compl. ¶¶39-42); and, failure to argue essential post-trial motions while instead arguing against Plaintiff's interest (Compl. ¶¶99-101).

Plaintiff argues that he also purchased the policy to provide him peace of mind; and that, because of Mag Mutual's alleged bad faith delay, mishandling of the claim, and refusal to negotiate

the claim against him for years, Plaintiff has suffered the threat of his family's financial ruin during years of unnecessary litigation, a week-long trial, and now the reality of a twenty nine million dollar judgment and additional years of appeal; all of which, he alleges, have devastated his emotional and physical well-being, his reputation, his financial position, and his peace of mind.

Plaintiff argues that Mag Mutual's potential success on appeal could not cure that damage; nor could it absolve Mag Mutual from their alleged bad faith conduct.

To this point, the Campbell Court found:

Eventual payment of the excess judgment does not compensate the insured for emotional injury, damages to the insured's reputation and credit rating, any punitive damages awarded against the insured, or any other legally cognizable injury from the insurer's failure to settle. Nor does it "cure" the insurer's earlier wrongful conduct. . . [A]n insurer's belated payment of a claim after intentionally refusing to pay it does not negate the insurer's liability for bad faith.

\* \* \*

...[I]n accordance with our focus on the insurer's settlement conduct, we think that allowing an insurer to absolve itself of its earlier breach of duty by paying a judgment years later does not adequately encourage an insurer to properly discharge its fiduciary duty. Were we to decide that the insurer's fiduciary obligation would be satisfied by merely paying the excess judgment, we would transform the insurance policy into a mere contract of indemnity. As previously noted the implied duty of good faith and fair dealing demands more than this...

\* \* \*

...[O]ur decision reinforces a policy of giving an insurer every incentive to treat the insured properly in the first instance, rather than encouraging a belated attempt to right a previous wrong by paying an excess judgment which should never have come into existence.

Campbell v. State Farm Mut. Auto. Ins. Co., 840 P. 2d 130, 140-141 (Utah Ct. App. 1992) (cited with approval by the South Carolina Supreme Court in Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, fn. 4 (1996)).

Similarly, the Tadlock Court also quoted, with approval, the decision of the North Carolina Court of Appeals in Robinson v. North Carolina Farm Bureau Ins. Co., 86 N.C. App. 44 (N.C. 1987).

In Robinson, the insured brought a bad faith action against his carrier who, eventually, paid a fire claim after five months delay. The trial court granted summary judgment on the insured's claim, seeking punitive damages.

On appeal, the insured argued "that the defendant had a duty to deal in good faith; and, if it did not do so, it is not absolved from punitive damages because it later performed as it should." Robinson, at 49. The North Carolina Court of Appeals agreed, finding "[w]e do not believe an action for punitive damages from tortious conduct is precluded when the company eventually pays, if bad faith delay and aggravating conduct is present." Robinson, at 50 (cited with approval by the South Carolina Supreme Court in Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, fn. 4 (1996)).

I FIND the South Carolina Supreme Court's decision in Tadlock, and the logic of Deese, Campbell, Robinson, all cited by Tadlock, to support the conclusion that the Plaintiff's bad faith action is ripe, and not contingent upon the judgment being upheld on appeal.

Mag Mutual cites the Federal District Court opinion in Permanent General Assur. Corp. v. Moore, 341 F.Supp.2d 579, 581 (D.S.C. 2004) for the proposition that all appeals in the underlying Price case must be exhausted before a bad faith action is ripe.

However, Moore does not address the question before this Court.

In Moore, after refusing an offer to settle a case within policy limits, a carrier brought a declaratory judgment action prior to the trial of the underlying case; seeking a declaration that it had not engaged in bad faith for failing to settle. The District Court granted the insured's motion to dismiss; finding that the carrier's attempt, prior to trial, to "look into the future and stave off the

threat of potential litigation” was not ripe because judgment had not been entered in the underlying case. See, Moore, at 582.

Here, however, the Price case has been tried and a \$29 Million judgment has been entered against Dr. Trant.

This Court is not convinced that the District Court’s decision in Moore lends persuasive support to Mag Mutual’s motion. Moore recognized that insurers have a duty of good faith and fair dealing and cannot “stave off” the consequences of their bad faith prior to the entry of an excess judgment. Nor, pursuant to Tadlock, can they “absolve” their bad faith on appeal from an excess judgment.

Mag Mutual also relies heavily on another federal district court opinion, Miller v. MagMutal, 2024 U.S. Dist. LEXIS 110655 (D.S.C. 2024), in support of their motion to dismiss.

The District Court in Miller dismissed, as unripe, an insured physician’s action against Mag Mutual; alleging their failure to make any offer to settle a claim against him, also leading to an excess verdict.

The District Court noted “Dr. Miller argues that even if the judgment is reversed on appeal, there has been and will be ‘damage done to him personally and professionally by way of the pendency of the excess judgment.’” Miller v. MagMutal, 2024 U.S. Dist. LEXIS 110655, fn. 4 (D.S.C. 2024).

The District Court did not consider that argument; finding “[h]owever, [the insured] *did not allege any injury in his amended complaint apart from his liability under the excess judgment*. As noted, in a facial attack, such as this one, the Court considers only the allegations in the applicable complaint.” Id. (emphasis added).

I FIND that unlike the plaintiff in Miller, Dr. Trant **did** make specific allegations in his complaint, alleging damages sustained as a result of the carrier's alleged bad faith handling of the claim, in addition to the loss of the policy's contractual benefit.

Specifically, the complaint alleges that "in addition to proximately causing Dr. Trant's liability for the excess verdict, Mag Mutual's unreasonable delay and refusal to offer any amount to settle the Price action . . . proximately caused damage to Dr. Trant's personal and professional reputation, impaired his financial position, and severely damaged his emotional well-being to such a degree that he has suffered physical manifestations of his severe emotional distress..." (Compl. ¶ 171).(emphasis added).

In light of that critical factual distinction, the District Court's decision in Miller does not support Mag Mutual's motion to dismiss.

Mag Mutual argues that Plaintiff's allegations of mishandling the claim are so intertwined with the resulting excess judgment, that the case must be dismissed/stayed pending "finality" of that judgment.

Our Courts have defined a bad faith claim "to include not just nonpayment of a legitimate claim but how that claim was processed." Hood v. United Services Auto Assoc., 2025 S.C. LEXIS 1 (Opinion No. 28249, January 8, 2025)(citing Mixon, Inc. v. American, 349 S.C. 394, 400 (Ct. App. 2002)(citing Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504 (1996) and holding "the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also the manner in which it is processed.").

In Tadlock, our Supreme Court held that an action for bad faith in the carrier's handling of an insurance claim could continue, even in the absence of any breach of an express contractual provision. See, Tadlock, at 504.

Thus, pursuant to Tadlock, if the appeal in the Price action were successful, or even if Mag Mutual ultimately satisfied the excess judgment, Mag Mutual's alleged bad faith would not be absolved; nor would Plaintiff's suit arising from Mag Mutual's handling of the Price claim and the resulting judgment entered against him be extinguished. Id.

I FIND that Plaintiff's alleged damages are not so contingent, abstract, or hypothetical that they are not justiciable. Cases are tried every day in South Carolina where juries are presented with damages and asked to decide whether or not a plaintiff has met their burden of proving damages. That burden is not proof with absolute certainty.

"In order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with *reasonable* certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, *proof with mathematical certainty of the amount of loss or damage is not required.*" Whisenant v. James Island Corp., 277 S.C. 10, 13 (1981) (emphasis added). The evidence must allow the jury "to determine what amount of damages *is fair, just, and reasonable.*" Mills v. S.C. State Ports Auth., 435 S.C. 213, 228-229 (Ct. App. 2021) (emphasis added).

I FIND that delaying the determination of Plaintiff's action would not serve the Court's overriding goal of ensuring fairness and substantial justice. It could take years before appeals of the underlying medical malpractice case are resolved and the "finality" of judgment Mag Mutual argues is required is achieved. Accepting the allegations, and reasonable inferences, of the complaint as true; not only has the Plaintiff been prejudiced by Mag Mutual's conduct, but that harm would continue to impact the Plaintiff exponentially as those appeals make their way through the courts.

Dr. Trant has a right to not only seek justice for the alleged wrongs he has suffered via civil litigation, but to see the actual conclusion of that civil litigation. As controlling case law supports

Plaintiff's causes of action being ripe and justiciable, the Court cannot in good conscience delay the matter just because Mag Mutual wishes the actual damages suffered be established with mathematical certainty.

Based on the above analysis and findings, Mag Mutual's Motion to Dismiss or Alternatively Stay the Case is DENIED.

Mag Mutual also moves that the Plaintiff's third cause of action, alleging improper claims practices in violation of Title 38 of the South Carolina Code, should be dismissed; arguing that the insurance regulatory provisions of Title 38 do not create a private cause of action.<sup>1</sup>

Mag Mutual cites Masterclean, Inc. v. Star Ins. Co., 347 S.C. 405, 415 (2001) for the proposition that the statute does not provide a private right of action. The Supreme Court declined to find that the insurance regulatory provisions of S.C. Code § 38-59-20 create a private cause of action for third parties, in the absence of such a cause of action at common law, holding "[t]hird parties do not have a private right of action under S.C. Code § 38-59-20." Masterclean, at 415.

The Plaintiff here sued his own insurer, Mag Mutual, in a first party bad faith action.

The parties dispute whether the ruling in Masterclean applies to both third party and first party insurance claims.

This Court need not decide whether §39-59-20 creates a private first party cause of action; as it is clear that Mag Mutual owed the Plaintiff duty of good faith and fair dealing at common law. See Nichols v. State Farm, 279 S.C. 336 (1983); and Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286 (1933). The Plaintiff does not rely on S.C. Code § 38-59-20 to create a private cause of action against his insurer; one already exists under Tyger River and Nichols.

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<sup>1</sup> Plaintiff notes that, due to a scrivener's error, Cause of Action III of the Complaint, p. 36-37, cites S.C. Code § 38-~~29~~-20. The applicable statute is, in fact, S.C. Code § 38-59-20. The scrivener's error does not affect the substance of the statutory violations alleged, or the Court's analysis.

While Plaintiff's allegations that Mag Mutual violated the regulatory provisions of S.C. Code § 38-59-20 are not necessary to establish his right to a private action against Mag Mutual; if proven, they are supportive of his common law bad faith action and of his claims for punitive damages. See, Fairchild v. S.C. D.O.T., 385 S.C. 344, 356-357 (Ct. App. 2009)(noting that violation of a statute is sufficient evidence of recklessness to create a jury question as to punitive damages).

Further, the Plaintiff cites the provisions of Title 38 in support of his claim for attorney's fees. Generally, attorney's fees are not recoverable unless authorized by contract or statute. See, Dowaliby v. Chambless, 344 S.C. 558 (Ct. App. 2001). The Plaintiff alleges entitlement to attorney's fees under S.C. Code § 38-59-40. See, Complaint, p. 44, ¶ 168 (a)(ix). It is well established that, in light of S.C. Code § 38-59-40, trial judges presiding in bad faith actions have the authority to award attorney's fees, in addition to the jury verdict. See, e.g., Dorman v. Allstate, 332 S.C. 176, 181 (1998).

If the Court finds that Mag Mutual's alleged delay was "without reasonable cause or in bad faith", Mag Mutual may also be liable for attorney's fees under S.C. Code § 38-59-40. The Plaintiff's allegations regarding the carrier's violation of S.C. Code § 38-59-20, if proved, are relevant to such a finding.

Therefore, the Plaintiff's allegations that Mag Mutual's violated the statutory provisions of Title 38, although not necessary to (and, perhaps not capable of) establishing a private right of action, are relevant, if proven, to the Plaintiff's claims for punitive damages and attorney's fees, under S.C. Code § 38-59-40, and should, therefore, not be dismissed.

## II. Mag Mutual's Motion to Seal Certain Paragraphs of Plaintiff's Complaint.

Mag Mutual moves that the Complaint be sealed on the grounds that it reveals privileged, confidential, and proprietary matters.

The State of South Carolina, and the United States, have a long history of preserving the guarantee of open courts. The United States Supreme Court has interpreted the guarantees of free speech and freedom of the press found in the First Amendment to the United States Constitution to include a federal Constitutional guarantee of open and public courts. See, State v. Williams , Ex Parte Hearst-Argyle Television, Inc., 369 S.C. 69 (2006)(citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980)).

Further, the South Carolina Constitution contains an additional, particular provision, directly mandating “[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.” Id. (quoting S.C. Const. art. I, § 9)(emphasis added).

Rule 41.1 SCRCP prescribes in detail the elements the Court should consider before sealing documents in light of this important Constitutional guarantee:

- (1) the need to ensure a fair trial;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality;
- (4) the public or professional significance of the lawsuit;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

The burden is on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents.

(Rule 41.1.(a)(b), S.C.R.C.P.).

Mag Mutual argues that factors “(3) reliance of the parties upon the expectation of confidentiality” and “(5) perceived harm to the parties from disclosure” are implicated by the contents of the Complaint.

In particular, Mag Mutual argues that the Complaint contains material protected by the attorney-client privilege and work product doctrines, along with proprietary information. Further, they argue that publication of such information would be prejudicial to the Defendant in the event that the judgment in the Price action is overturned, and a new trial granted.

Moreover, Defendant argues their request to seal the complaint is made for Dr. Trant’s benefit, to protect him from violating the “cooperation” with the defense provision of the insurance contract.

The Plaintiff argues that the Defendant’s claims of privilege and confidentiality do not to overcome the Constitutional guarantee of open courts, and the public interest protected therein.

The communications to which the Defendant objects were made in the course of the Price action (some of which originated with the Plaintiff). The Plaintiff was the client in that matter. The law is well established that the client owns and controls the attorney-client privilege. See, e.g., State v. Love, 275 S.C. 55 (1980).

Mag Mutual argues that they share a common interest with the Plaintiff; and therefore, that they benefit from, and control, the privilege as well.

The communications at issue were not, however, prepared for the instant bad faith action between Dr. Trant and Mag Mutual. They were prepared in the underlying malpractice action.

Commentators agree that “[w]hen two or more clients consult or retain an attorney on particular matters of common interest, the communications between each of them and the attorney are privileged against third parties. However, those communications are not privileged in a subsequent controversy between the original parties.” 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence, §503.21 [1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). See also, Restat 3d of the Law Governing Lawyers § 75 (providing “(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication. (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.”)(emphasis added).

The Federal District Court’s opinion in Chitty v. State Farm Mut. Auto Ins. Co., 36 F.R.D. 37 (D.S.C. 1964) is instructive. There, an insured sued his insurance carrier; alleging bad faith failure to settle, resulting in an excess verdict. The carrier withheld from production its claim file; raising the attorney client and work product privileges. The District Court in which the bad faith action was pending ordered the production of the claim file. The Court explained:

It has been held that, where two parties are represented by the same attorneys for their mutual benefit, communications between the parties are not privileged in a later action between such parties or their representatives. (internal citations omitted).

\* \* \*

Whether [the Carrier] Properly investigated the case, whether it sought and followed advice and recommendation of its agents, adjusters, and attorneys are facts which are surly relevant to the issue of its negligence, recklessness, and bad faith in not settling the prior case. Evidence of these matters, if any exists, are in the files of [the Carrier] and may be quite necessary as proof of an unreasonable and arbitrary attitude on the part of [the Carrier] in not settling the cases when advised to do so.

Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37, 40-41 (D.S.C. 1964);  
See also, Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co., 2010 Bankr.  
LEXIS 2440 (Bankr. D.S.C. 2010)(citing Chitty, in accord).

The Plaintiff excerpts the emails and letters in his Complaint (references which the Defendant seeks to seal) which he cites as evidence of Mag Mutual refusing to follow the advice and recommendations of its attorney and of their employing an unreasonable and arbitrary attitude in not settling the Price action.

I FIND that such communications during the Price action are relevant to the bad faith action and not privileged in a subsequent action between the parties.

Factor (4) weighs “the public or professional significance of the lawsuit.” Similarly, factor (7) asks “why the public interest... is best served by sealing the documents.”

Our Courts have noted, consistently, that the business of insurance is a matter of public interest. The bad faith cause of action, itself, is a product of that public interest. See, e.g., Nichols v. State Farm, 279 S.C. 336, 340 (1983)(“The public policy reasons for recognizing this [bad faith] cause of action are plentiful. The insurance business is affected with a public interest”). The determination of matters involving the public interest in a public forum is central to the guarantee of open courts. See, Rule 41.1 S.C.R.C.P.

As to the remaining factors in the Court’s Rule 41.1 analysis, the Defendants have not demonstrated that leaving the Complaint (that has now been public for over a month) unsealed will impair their ability to receive a fair trial, or to ensure witness cooperation (factors 1 and 2).

Finally, Rule 41.1, factor 6, asks “why alternatives other than sealing the documents are not available to protect legitimate private interests. . .”

Were the appellate courts to reverse the judgment and order a new trial in the Price action, the rules of evidence, as applied by presiding trial judge, are designed precisely to protect parties from the admission of privileged or any other improper evidence during trial.

South Carolina law has a long history of preserving the Constitutional guarantee of open courts. Sealing a Complaint is not necessary or appropriate absent compelling justification to overcome the public interest that cannot be met by other means.

I FIND that Mag Mutual has not met that high bar and the motion to seal is DENIED.

**CONCLUSION:**

At this stage of litigation, the Court considers Rule 12(b) motions by presuming well-pled factual allegations of the complaint to be true and viewing those factual allegations and the reasonable inferences to be drawn from them, in the light most favorable to the Plaintiff. Motions to seal are subject to a high bar; requiring strong justification to overcome the Constitutional guarantee of public courts. For the reasons above, Mag Mutual's motions are DENIED.

As the litigation proceeds, the parties may require the Court's consideration of further motions testing the sufficiency of the evidence supporting the Plaintiff's allegations, among others. The parties are welcome to submit such motions at the appropriate time for the Court's consideration. As always, the Court stands ready to assist in resolving those questions as they arise.

IT IS SO ORDERED!

*(e-signature page to follow)*



Marion Common Pleas

**Case Caption:** Charles A Trant M.D VS Mag Mutual Insurance Company ,  
defendant, et al  
**Case Number:** 2025CP3300076  
**Type:** Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771