IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LARRY and SHARON JENICEK, Husband and wife; and JAMIE and SHERRIE JENICEK, husband and wife, Plaintiffs, vs. STATE FARM FIRE AND CASUALTY COMPANY, a foreign corporation, STATE FARM GENERAL INSURANCE COMPANY, a foreign corporation, and DOES 1 through 5, Defendants.	**CASE NO. CV-01-05652** MEMORANDUM OPINION AND ORDER IN RE: MOTION FOR SUMMARY JUDGMENT

Plaintiffs brought this lawsuit against the parents' insurer after a car drove into the property owned by the parents and resided in by their son and his wife. They alleged several causes of action, including breach of the covenant of good faith and fair dealing and infliction of emotional distress. Defendant moved for Summary Judgment. Motion granted.

Craig K. Vernon, OWENS, JAMES, VERNON & WEEKS, attorneys for Plaintiffs

James D. LaRue and Jeffrey A. Thomson, ELAM & BURKE, attorneys for Defendant

I
FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a dispute between Plaintiffs and Defendant over entitlement to payment from an at-fault driver, Donald Moorman, and his insurer, California Casualty Insurance Company (hereinafter "California Casualty"). Initially, State Farm Fire and Casualty Company was named as a Defendant, but that company has since been dismissed from the lawsuit.

Larry and Sharon Jenicek (hereinafter "Larry") owned a dwelling at 1302 Mullan Avenue in Coeur d'Alene, Idaho. Their son and his wife, Jamie and Sherrie Jenicek (hereinafter "Jamie"), were living there. On February 25, 2000, Donald Moorman lost control of his vehicle and collided with, *i.e.,* drove into, the dwelling. The dwelling and certain of Jamie's personal effects were damaged as a result of the accident.

At the time of the accident, Larry was insured pursuant to a rental dwelling policy. The policy had been issued by State Farm General Insurance Company (hereinafter "State Farm") on May 22, 1989. Larry was the named insured. Jamie did not have any rental insurance.

After the accident, Larry made a claim under the State Farm policy. Larry, along with Jamie, also made a claim against Donald Moorman and his insurer, California Casualty. The California Casualty policy had liability limits of $25,000.00.

In March of 2000, State Farm made certain payments to Larry. Those payments included payment for the dwelling coverage at the policy limits of $26,648.00 and payment for rental loss of approximately $573.62.

The State Farm policy contained a provision for a subrogation right to recover from the at-fault driver to the extent of payments that State Farm had made under the policy. The policy also contained an endorsement, which stated as follows: “Our right to recover our payments applies only after you have been fully compensated for your loss.”

Plaintiffs claim that, shortly after the damage occurred, a builder, Larry Paddock, estimated that it would cost $44,900.00 to rebuild the home. In addition, Jamie sustained losses in excess of $13,000.00 as a result of the accident.

Larry was aware that his insurance wouldn’t compensate him an amount sufficient to re-build the house so he asked State Farm whether he could pursue California Casualty for the portion that State Farm did not pay. According to Larry, State Farm told him “no,” that it was State Farm’s right to pursue the other insurance company and be reimbursed for what it had already paid to Larry.

On March 30, 2000, State Farm sent written notification to California Casualty of its subrogated interest. Larry contended, however, that he had not been fully compensated for his losses by the payment of the policy limits under the State Farm policy. On September 18, 2000, State Farm relinquished its right of subrogation.

Shortly thereafter, Larry settled his property damage claims against Donald Moorman for $10,000.00; Jamie settled his property damage claims against Donald Moorman for $15,000.00. The settlements by Larry and Jamie

exhausted the California Casualty policy limits. Releases were signed on September 25, 2000.

In April of 2001, State Farm paid $1,462.09 for debris removal plus interest of $129.69 to Larry. On August 20, 2001, State Farm paid $1,055.34 for interest that had accrued from the date of the accident in February of 2000 to the date that Larry received the funds from California Casualty in September of 2000.

On August 31, 2001, Larry and Jamie filed their Complaint in the instant lawsuit. After an Answer was filed by State Farm, the matter was set for Jury Trial, which is scheduled to commence on November 3, 2003.

Defendant State Farm filed a Motion for Summary Judgment. Both parties filed affidavits and submitted memorandums in support of their positions on the Motion. On July 15, 2003, the parties provided oral argument at a Hearing on the Motion.

At the conclusion of the Hearing, State Farm's Motion for Summary Judgment was granted for State Farm against Jamie and Sherrie Jenicek on all causes of action alleged against them. The causes of action against Larry and Sharon Janicek were taken under advisement and will be addressed in this Memorandum Opinion.

Plaintiffs Jenicek filed a Motion to Amend the Complaint to assert the following new causes of action: (1) Punitive Damages; (2) Unauthorized Practice of Law; and (3) Wrongful Interference with Economic Relationship. The Plaintiffs' Motion to Amend has been denied.

II

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is granted where there are no genuine issues of material fact and, as a matter of law, the moving party is entitled to judgment. In order to make that determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." ***Rule 56(c), Idaho Rules of Civil Procedure***.

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. Where a jury has been requested, the party opposing the motion is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. ***Roell v. City of Boise***, 130 Idaho 197, 938 P.2d 1237 (1997); ***Bonz v. Sudweeks***, 119 Idaho 539, 808 P.2d 876 (1991).

Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. ***Zehm v. Associated Logging Contractors, Inc.***, 116 Idaho 349, 775 P.2d 1191 (1988). The opposing party cannot rest upon mere allegations or denials, but the party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. A mere scintilla of evidence is not enough to

create a material issue of disputed fact. ***Rule 56(e), Idaho Rules of Civil Procedure; Smith v. Meridian Joint School District No. 2***, 128 Idaho 714, 918 P.2d 583 (1996); ***G & M Farms v. Funk Irrigation Co.***, 119 Idaho 514, 808 P.2d 851 (1991); ***Edwards v. Conchemco, Inc.***, 111 Idaho 851, 727 P.2d 1279 (Ct.App. 1986). Motions for summary judgment must be decided upon facts shown, not upon facts that might have been shown. ***Verbillis v. Dependable Appliance Co.***, 107 Idaho 335, 689 P.2d 227 (Ct.App. 1984).

When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested by testimony in court before the trier of fact. ***Argyle v. Slemaker***, 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 748 P.2d 406 (Ct.App. 1987), ***rev. denied*** (1988).

According to ***Berg v. Fairman***, 107 Idaho 441, 444, 690 P.2d 896 (1984), the "purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain."

III

DISCUSSION

1. Cause of Action for Tortious Interference with Contract

This cause of action was alleged by Jamie and Sherrie Janicek; Larry and Sharon Janicek did not allege such a cause of action. Therefore, Defendant is entitled to Summary Judgment on any cause of action that might be alleged as to Tortious Interference with Contract.

2. Cause of Action for Breach of Contract

Larry contends that State Farm breached its insurance contract after making some payments under the policy by wrongfully pursuing its subrogation interest when Larry had not been fully compensated.

On the other hand, State Farm claims that it has paid Larry all of the amounts to which he was entitled under the policy and, therefore, Larry has not suffered any damages. State Farm made payments of its liability under the policy for the dwelling, plus benefits for rental loss and debris removal. State Farm also paid interest on the funds paid to Larry by California Casualty from the date of the accident to the date that Larry received the funds.

In order to reach a decision here, the case law regarding breach of contract must be examined. It is a fundamental premise of contract law that, although a plaintiff might have been legally wronged, the plaintiff cannot recover damages unless he has been economically "injured." ***Bergkamp v. Martin***, 114 Idaho 650, 759 P.2d 941 (1988).

A plaintiff is entitled to recover damages sustained as a breach of the contract. The damages for a breach of contract are compensatory damages or damages that will fully compensate the non-breaching party for the loss suffered as a result of the breach of contract. The compensatory damages are measured by the amount that would be necessary to put the plaintiff in as good a position as would full performance of the contract. ***Sullivan v. Bullock***, 124 Idaho 738, 864 P.2d 184 (Ct.App. 1993); ***O'Dell v. Basabe***, 119 Idaho 796, 810 P.2d 1082 (1991). The measure of damages may include lost profits. ***Clearwater Minerals Corp. v. Presnell***, 111 Idaho 945, 729 P.2d 420 (Ct.App. 1986).

The law set forth above must now be applied to the facts of this case. In the Complaint, Larry seeks consequential damages from State Farm for the alleged breach of contract. After State Farm relinquished its right to subrogation, California Casualty paid out its policy limits to Larry and Jamie. Larry's claim of a breach of the insurance contract is based upon State Farm's assertion of its right to subrogation. Larry's claim is not based upon State Farm's failure to make all payments due under the rental loss provision of the insurance policy or any other contractual provision. ***See*** Plaintiffs' Complaint for Damages, pp. 6-7. State Farm paid its policy limits for the Janicek claims on the dwelling unit plus an amount for lost rents and debris removal. Furthermore, State Farm paid interest, which was basically a payment to Larry and Sharon for the loss of use of the funds from their eventual settlement with California Casualty. State Farm contends that, by paying the interest, it has fully compensated Larry for any consequential damages that he might have suffered.

In their Memorandum in Opposition to Defendant's Motion for Summary Judgment, Larry argues that State Farm's breach of contract resulted in significant economic injuries. The rental reimbursement covered only a period of one month, from the time of the accident to March 28, 2000. Other than these assertions, however, there is no evidence in the record to show that Larry suffered lost rents for which he was entitled to reimbursement under the policy above the amount already paid.[1]

Larry also incurred attorney fees and suffered emotional distress. There can be no recovery, however, for emotional distress suffered by a plaintiff in a breach of contract action. ***Brown v. Fritz***, 108 Idaho 357, 699 P.2d 1371 (1985). Therefore, the emotional distress is addressed below as a separate cause of action sounding in tort.[2] Attorney fees are not an element of damages; rather, a grant or denial of attorney fees depends upon whether or not a party prevails on a claim and whether or not there is a basis for an award of attorney fees. In their Memorandum, Plaintiffs acknowledge that the attorney fees, lost rents, and emotional distress were not compensable in contract. ***See*** Memorandum, p. 8.

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[1] The State Farm insurance policy provided for loss of rents in the actual amount of loss. It further provided as follows:

> 1. **Fair Rental Value**. If a Loss Insured causes that part of the **residence premises** rented to others or held for rental by you to become uninhabitable, we cover its fair rental value. Payment shall be for the shortest time required to repair or replace the part of the premises rented or held for rental but no exceeding 12 consecutive months from the date of loss. . . . Fair rental value shall not include any expense that does not continue while that part of the **residence premises** rented or held for rental is uninhabitable.

Although it is not entirely clear from the record, it appears that Jeniceks may not intend to repair or rebuild the house.

[2] Mental anguish or emotional distress may, however, be an element of damage with the tort of bad faith in insurance contracts. ***Walston v. Monumental Life Ins. Co.***, 129 Idaho 211, 923 P.2d 456 (1996).

A party opposing summary judgment cannot rest on mere allegations or facts that might be shown. Rather, the party must come forward with specific facts to show that there is a genuine issue of material fact. In this case, Larry has failed to provide evidence that he has suffered damages as a result of State Farm's alleged breach of the insurance contract by asserting a right to subrogation. Therefore, State Farm's Motion for Summary Judgment must be granted as to the cause of action for breach of contract brought by Larry.

3. <u>Cause of Action for Breach of Good Faith and Fair Dealing</u>

Initially, it was unclear as to whether Plaintiffs were alleging a cause of action for the tort of bad faith, a violation of the Unfair Claims Settlement Practices Act, or a breach of the implied covenant of good faith and fair dealing which is found in all contracts. It has become apparent, however, in Plaintiffs' briefing and oral argument, that Larry is asserting a claim for the tort of bad faith.

It is well settled that Idaho recognizes a tort action, distinct from an action on the contract, for an insurer's bad faith in settling the first party claims of its insured. There is a common law duty on the part of insurers to their insureds to settle first party claims in good faith. A breach of that duty will give rise to an action in tort. The imposition of liability in tort for bad faith breach of an insurance contract is based upon the special relationship which exists between the insurer and the insured. ***White v. Unigard Mutual Insurance Co.***, 112 Idaho 94, 730 P.2d 1014 (1986).

According to ***White***, the "duty is beyond that which the policy imposes by itself – the duty to defend, settle, and pay – but it is *a duty imposed by law on an*

insurer to act fairly and in good faith in discharging its contractual responsibilities." ***White v. Unigard Mutual Insurance Co.***, 112 Idaho at 96 (emphasis added). An insurer does not act in bad faith, however, when it challenges the validity of a fairly debatable claim or when a delay results from honest mistakes. ***Id.***

In order to recover on a bad faith claim against an insurer, the insured must show that the insurer intentionally and unreasonably denied or withheld payment, the claim was not fairly debatable, denial or failure to pay was not the result of a good faith mistake, and the resulting harm is not fully compensable by contract damages. ***Robinson v. State Farm Mut. Auto Ins. Co.***, 137 Idaho 173, 45 P.3d 829 (2002); ***McGilvray v. Farmers New World Life Ins. Co.***, 136 Idaho 39, 28 P.3d 380 (2001); ***Anderson v. Farmers Insurance Co. of Idaho***, 130 Idaho 755, 947 P.2d 1003 (1997).

In ***Selkirk Seed Co. v. State Insurance Fund***, 135 Idaho 649, 22 P.3d 1028 (2000), the Idaho Supreme Court noted that the ultimate question to be answered is whether the insurer "intentionally and unreasonably denied or delayed payment" on a claim. The tort of bad faith was recognized by the Idaho Supreme Court to compensate insureds for intentional and unreasonable delays or denials in payment of claims and to provide incentive for insurers to settle valid claims. In ***Selkirk Seed***, the Idaho Supreme Court refused to expand the tort of bad faith to include unreasonable adjustment and overpayment and limited the tort to an insurer intentionally and unreasonably delaying or denying claims.

In ***Simper v. Farm Bureau Mutual Insurance Co.***, 132 Idaho 471, 974 P.2d 1100 (1999), the plaintiff alleged that the insurance company acted in bad faith when it raised her premiums for policy renewal even though it had not yet determined whether it would recover its subrogated interest. The Idaho Supreme Court held that the facts of that case were not sufficient to constitute a cause of action in insurance bad faith because the insurance company had in no way "intentionally and unreasonably denied or withheld payment."

An insurer's subrogation interest was at issue in ***Smith v. USAA Property and Casualty Insurance***, 132 Idaho 466, 974 P.2d 1095 (1999). Smith, who was insured by USAA, was involved in an automobile accident. The driver of the other vehicle was insured by Mutual of Enumclaw. USAA paid Smith's medical expenses and property damage. There was a clause in Smith's contract that gave USAA the right to be subrogated to Smith's right to recover damages from another. USAA informed Smith of that right. Smith negotiated with Mutual regarding her personal injury and property damage claims and received partial payment for her claims. Under the insurance policy, USAA was entitled to a recovery only after the insured had been fully compensated for damages by another party. Eventually, Smith filed an action against USAA seeking a declaration that USAA was not entitled under the insurance policy to recover its subrogated interest from Smith because Smith had not been fully compensated for her damages by Mutual. Smith alleged a cause of action for insurance bad faith.

In ***Smith***, both parties moved for summary judgment. The trial court granted USAA's motion for summary judgment with respect to the bad faith claim and Smith appealed. On appeal, the Idaho Supreme Court affirmed.

Smith claimed that USAA wrongfully asserted its right to subrogation. Smith argued that USAA's course of conduct constituted an intentional and unreasonable delay on payment of the claim. The ***Smith*** court stated as follows:

> This Court has not yet decided a bad faith case involving an insurer asserting a right to subrogation for claims which it has paid in full. As we recently noted, "[w]hile we recognize that there is an implied duty of good faith and fair dealing relating to insurance contracts between insurers and insureds, we have traditionally dealt with the tort of insurance bad faith only as it arose in the context of settling and paying claims." ***Simper v. Farm Bureau Mut. Ins. Co. of Idaho***, ___ Idaho ___, 974 P.2d 1100, 1103 (1999). In this case, USAA fully paid all of Smith's medical payments. USAA sought a subrogation right to those payments only after Smith received her settlement from Mutual. We do not believe that because Smith determined she had not been fully compensated and determined that under the contract she was required to place her money in trust, a cause of action against USAA for bad faith has been alleged. We stress that in this opinion we do not hold that in all cases where an insurer asserts a right to subrogation there is no bad faith. We hold only that the facts of this case do not present a situation where there has been an intentional and unreasonable denial or delay of payment on the claim.

Smith v. USAA Property and Casualty Insurance, 132 Idaho at 469.

An employer's worker's compensation surety sued an injured employee in ***Idaho State Insurance Fund v. Van Tine***, 132 Idaho 902, 980 P.2d 566 (1999). The surety sought a declaration that it had subrogation rights against the employee's tort recovery. The employee counterclaimed that the surety had acted in bad faith. The trial court granted summary judgment to the surety on the employee's bad faith claims. Affirming the trial court's decision, the ***Van Tine***

court held that an insured's claim for bad faith must relate to an insurer intentionally and unreasonably failing to pay a claim or compensate the insured. Furthermore, the ***Van Tine*** court held that a claim against an insurer for breach of the duty of good faith and fair dealing is only available to first-party insureds. Therefore, an employee could not assert a bad faith claim against his employer's worker's compensation surety since the surety's first-party insured was the employer and not the employee.

In this case, State Farm paid its policy limits for the dwelling about a month after the accident occurred. At the same time, State Farm paid for loss of rental. State Farm then asserted its right to subrogation. State Farm's assertion of its right to subrogation was prior to the time that California Casualty made any payment under its policy to the Jeniceks.

The facts must be viewed most favorably to Larry, who is the non-moving party. According to Larry, State Farm told him within a week of the accident that he did not have sufficient insurance to rebuild the house. A building contractor had indicated that the cost to rebuild would be $44,900.00. Larry asked Roy Paynter of State Farm whether he could pursue California Casualty and he was told that he could not because it was State Farm's right to pursue the other insurance company. At his deposition, Dave Allsop, who was Roy Paynter's supervisor, testified that he was aware of the endorsement concerning full compensation before State Farm had a right of subrogation prior to the time that the file was shipped to the subrogation department. In her letter to California Casualty asserting subrogation rights dated March 30, 2000, Pam Byars, Claim

Representative, writes that State Farm would be "helping Mr. Jenicek in his recovery." Larry states that he did not tell Pam Byars to pursue his uninsured losses because, based on what he had previously been told, he was under the impression that he could not pursue the losses. When he found out that he could pursue the uninsured losses, he consulted an attorney.

In letters dated May 22, 2000 and June 16, 2000 to California Casualty, State Farm continued to assert its subrogation rights. At her deposition, Pam Byars testified that everyone's losses – State Farm's, Larry's, and Jamie's - were presented to California Casualty.

Approximately six (6) months after the subrogation right was asserted, State Farm relinquished its right of subrogation. Soon after, Plaintiffs reached a settlement with California Casualty and received the policy limits under that policy.

In a letter to Plaintiffs' counsel dated August 20, 2001, counsel for State Farm stated that the endorsement limiting State Farm's right of subrogation should not have been a part of the Jenicek policy and was inadvertently included with the policy; that explains why the claim representative could not reasonably have been expected to advise the insured of a right to be made whole before State Farm would seek subrogation. In the letter, State Farm claimed that it had made an honest mistake. State Farm paid interest to Larry on the amount of the California Casualty policy from the time of the accident until September of 2000 when California Casualty made payment and offered to reimburse Larry for legal

expense and attorney fees incurred up to the date that State Farm gave up its claim for subrogation. Larry filed this lawsuit on August 31, 2001.

After reviewing the law, it is clear that a tort of bad faith breach of an insurance contract is recognized in Idaho, that such a tort requires that the insurer intentionally and unreasonably denied or withheld payment, and that the tort requires that a denial or failure to pay must not be the result of a good faith mistake. Furthermore, it appears from a close reading of ***Smith v. USAA Property and Casualty Insurance, supra***, that there could be bad faith in a case involving an insurer who asserts a right to subrogation, but only under certain factual circumstances which are not clarified but which did not exist in that case. Finally, according to ***Idaho State Insurance Fund v. Van Tine, supra***, a claim against an insurer for breach of the duty of good faith and fair dealing is available only to first-party insureds.

Even after fully reviewing the record in a light most favorable to Larry, it cannot be found that there is a genuine issue of material fact as to whether State Farm intentionally and unreasonably denied or delayed payment on the claim against it. The undisputed fact is that State Farm made timely payment on the claims under its first-party insurance policy. State Farm did not either deny or delay payment of Larry's claim under its own insurance policy.

Larry does not claim, however, that State Farm denied or delayed payment under the State Farm insurance policy. Rather, Larry contends that State Farm interfered with his claim against third-party insurer California Casualty by asserting a right to subrogation and causing a delay of payment to him by the

third-party insurer. The undisputed facts, however, are that State Farm withdrew any claim to a right of subrogation that it might have asserted, that Larry's claim was fully paid to the limits under the third-party California Casualty policy, and that State Farm paid interest to compensate Larry.

In reaching a decision here, this Court relies upon ***Smith v. USAA Property and Casualty Insurance, supra***, and ***Idaho State Insurance Fund v. Van Tine, supra***. Essentially, the Plaintiffs urge an expansion of the tort of bad faith to include a claim regarding payment from a third-party insurer where the actions of the first-party insurer allegedly intentionally and unreasonably delayed the payment by the third-party insurer. Without appellate instruction, the Plaintiffs' invitation to expand the tort must be declined. State Farm's Motion for Summary Judgment must be granted on the cause of action for breach of good faith and fair dealing.

4. <u>Cause of Action for Intentional Infliction of Emotional Distress</u>

Larry has alleged a cause of action for intentional infliction of emotional distress. The elements for the tort of intentional infliction of emotional distress are: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress was severe. With the tort of intentional infliction of emotional distress, it is not necessary to show that there was a physical manifestation of the distress. ***Payne v. Wallace***, 136 Idaho 303, 32 P.3d 695 (Ct.App. 2001).

The conduct upon which Larry bases his claim for intentional infliction of emotional distress is State Farm's assertion and subsequent relinquishment of the right to subrogation after the payment by State Farm of policy limits. State Farm contends that this conduct is insufficient to support a claim for intentional infliction of emotional distress as a matter of law because such conduct is not "extreme and outrageous."

In ***Brown v. Matthews Mortuary, Inc.***, 118 Idaho 830, 801 P.2d 37 (1990), a widow and her son brought an action against a mortuary and crematorium after the remains of her deceased husband were lost. The trial court granted summary judgment to the defendant. Affirming the trial court's decision on the cause of action for intentional infliction of emotional distress, the Idaho Supreme Court held that the evidence was not sufficient to state a claim. The loss alone did not constitute outrageous and wanton conduct sufficient to allow the widow to recover on a cause of action for intentional infliction of emotional distress where there was no evidence to raise an issue that the defendant's conduct was outrageous, wanton, or malicious.

See also Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980) (action of auctioneer of selling logging equipment at less than minimum specified price and action of auctioneer's attorney of issuing proceeds of sale in a multiple-payee check, which placed seller at cross-purposes with his father, did not rise to the level of outrageousness necessary to maintain an action for intentional infliction of emotional distress).

It is undisputed that State Farm made payment under its policy, that it then asserted a right to subrogation, that it subsequently relinquished its right to subrogation, and that Larry received payment under the California Casualty insurance policy. Viewing the facts most favorably to Larry, he was initially advised by State Farm that he was not entitled to payment from California Casualty. State Farm was aware of the conditions of the policy regarding subrogation. State Farm continued to assert its right to subrogation. Eventually, however, State Farm relinquished its right to subrogation.

Based upon the facts above and even viewing them most favorably to Larry, it cannot be found that State Farm's conduct was outrageous and extreme. There is no genuine issue as to this material fact.

Furthermore, the distress must be severe. Liability for intentional infliction of emotional distress arises only when the emotional reactions are "so severe that no reasonable person could be expected to endure it." ***Payne v. Wallace***, 136 Idaho at 306. The Idaho courts have adopted the following commentary from the RESTATEMENT (SECOND) OF TORTS to describe the severity of the emotional distress that is necessary to support recovery for this tort:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is exstreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

> The intensity and the duration of the distress are factoras to be considered in determining its severity.

Payne v. Wallace, 136 Idaho at 306-307 (quoting from RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).

In ***Davis v. Gage***, 106 Idaho 735, 682 P.2d 1282 (Ct.App. 1984), the Idaho Court of Appeals concluded that there was evidence that the plaintiff was "upset, embarrassed, angered, bothered, and depressed," but that such evidence did not demonstrate a severely disabling emotional condition adequate for intentional infliction of emotional distress.

In this case, State Farm propounded an interrogatory to Plaintiffs asking them to "describe with specificity and particularity the physical manifestations or emotional distress [and] whether any plaintiff sought and/or received medical, psychological, or psychiatric care for said condition. . . ." Plaintiffs responded as follows:

> None of the Plaintiffs have received medical, psychological, or psychiatric care for any condition related to this claim. All Plaintiffs have experienced emotional distress, however, manifested by difficulty sleeping and headaches presumably related to the stress occasioned by State Farm's denial of this claim.

The foregoing Answer to an Interrogatory is the only evidence in the record of the emotional distress suffered by Plaintiffs. It is not specific to Larry and/or to Sharon. This evidence, which is nothing more than a mere scintilla of evidence, does not rise to the level of severe emotional distress. Therefore, Larry is unable to meet the fourth element of severe emotional distress.

Furthermore, Plaintiffs have indicated that their physical manifestations are "presumably" related to the stress occasioned by State Farm's denial of their claim. Larry also fails to meet the third element of a causal connection between the wrongful conduct and the emotional distress.

In conclusion, the Plaintiffs have failed to come forward with evidence to create a genuine issue of material fact on the elements of intentional infliction of emotional distress. State Farm's Motion for Summary Judgment must be granted with regard to Larry's cause of action for intentional infliction of emotional distress.

5. <u>Cause of Action for Negligent Infliction of Emotional Distress</u>

Larry has also alleged a cause of action for negligent infliction of emotional distress. In order to recover damages for negligent infliction of emotional distress, the law requires that emotional distress be accompanied by physical injury or physical manifestations of injury. The physical injury requirement is designed to provide some guarantee of the genuineness of the claim in the fact of the danger that claims of mental harm will be falsified or imagined. ***Brown v. Matthews Mortuary, Inc., supra; Czaplicki v. Gooding School District No. 231***, 116 Idaho 326, 775 P.2d 640 (1989).

In ***Czaplicki v. Gooding School District No. 231, supra***, parents of a child, who died after the principal allegedly failed to call an ambulance and render adequate first aid, sued the principal and school district. The parents described various emotional injuries that were manifested in physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders,

reduced libido, fatigue, stomach pains, and loss of appetite. The trial court granted summary judgment to the defendants on the parents' claim for negligent infliction of emotional distress. On appeal, the Idaho Supreme Court reversed, holding that a genuine issue of material fact existed as to the parents' claims.

There must be evidence, however, that the claimed physical injury was caused by the incident. ***Evans . Twin Falls County***, 118 Idaho 210, 796 P.2d 87 (1990) (judgment debtors brought an action based on the conduct of sheriff's deputies in executing on a writ of execution).

In the instant case, the Plaintiffs do not set forth any particular physical manifestations of the emotional distress in their Complaint. ***See*** Complaint, pp. 10-11. As noted above, all of the Plaintiffs in general claim that they have suffered difficulty in sleeping and headaches. There is no specific evidence as to the physical manifestations suffered by Larry and/or Sharon. Furthermore, the only evidence in the record is that the difficulty in sleeping and the headaches were "presumably" related to the stress, which does not establish that the physical problems were actually caused by State Farm's action.

Larry has failed to come forward with evidence to show a genuine issue of material fact regarding physical manifestations of his emotional distress caused by State Farm's actions. Therefore, State Farm's Motion for Summary Judgment must be granted.

6. Cause of Action for Fraud

Plaintiffs concede that the cause of action for fraud should be dismissed. Therefore, Defendant is entitled to Summary Judgment on the cause of action for fraud.

VI

CONCLUSION AND ORDER

There are no genuine issues of material fact regarding the causes of action alleged by Larry and Sharon Jenicek. Based on the foregoing discussion, it is hereby ORDERED that the Motion for Summary Judgment by Defendant State Farm General Insurance Company shall be and hereby is granted as set forth herein. Counsel for State Farm shall prepare the Summary Judgment.

DATED this _____ day of _____, 2003.

_____
John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER IN RE: MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, sent by interoffice mail, or sent by facsimile transmission on the _____ day of _____, 2003, to the following:

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ALL FIRST DISTRICT COURT JUDGES

The Honorable Don L. Swanstrom
Trial Court Administrator
Interoffice Mail

DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk