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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

Jeffrey Golden, Chapter 7 Trustee, on behalf of the **Bankruptcy Estate of Nurse Tung Nguyen-Phuc**,

Plaintiffs,

v.

MedPro Group, Inc., d/b/a **Medical Protective Corporation of California**, a Corporation; **Margaret M. Holm**, Attorney at Law; **Does 1–100**,

Defendants.

Case No.: 30-2018-01035776-CU-CO-CJC

Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant MedPro Group, Inc.'s Motion for Summary Judgment and/or Adjudication

Date:	December 18, 2020
Time:	10:00 a.m.
Dept.:	CX105
Judge:	Hon. Randall J. Sherman
Complaint Filed:	November 30, 2018
Trial Date:	n/a

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INTRODUCTION

This insurance-bad-faith case arose when Medical Protective Group, Inc. ("MedPro") failed to settle a medical-malpractice lawsuit against its insured, Tung Nguyen-Phuc ("Nguyen"), within her $1 million policy limits, ultimately resulting in a **$6 million** judgment against her.

The underlying medical-malpractice case was brought against Nguyen, a vocational nurse, by Emma Borges, then a two-year-old child who was dependent on a breathing tube. Emma suffered a severe brain injury when her breathing tube dislodged while under Nguyen's supervision and Nguyen failed to timely reinsert it. Emma kept an offer to settle for Nguyen's $1 million insurance policy on the table for *seven months*. (PAMF #42.) But MedPro rejected that offer, forcing the case to arbitration, which resulted in a $6,069,139.72 judgment against Nguyen and forced Nguyen into bankruptcy.

The bankruptcy court appointed Jeffrey Golden as trustee. Golden then brought this lawsuit to hold MedPro accountable for its unreasonable refusal to settle for the $1 million limits of Nguyen's malpractice policy. MedPro now seeks summary judgment on the theory that, as a matter of law, it reasonably refused to settle Emma's claim for Nguyen's $1 million policy limits.

But under California law, whether an insurer acted unreasonably in refusing a settlement within policy limits is a question of fact for the jury. And here, a jury could easily find that MedPro acted unreasonably.

For one, the evidence shows that MedPro knew or should have known that *any* judgment against Nguyen would exceed her policy limits by **100%** to **300%**. Moreover, in June 2017, an attorney MedPro hired to defend Nguyen told MedPro "that the current *settlement value* of the case … is in the **$1,000,000 to $1,250,000 range**." And the insurer for Nguyen's employer (a co-defendant in Emma's lawsuit) offered *its* $1 million policy limits the first time Emma demanded them.

The evidence shows that MedPro rejected Emma's offer to settle for Nguyen's policy limits because MedPro unreasonably (1) assumed it had a 60% chance to defend the malpractice case against Nguyen, and (2) failed to include factor Emma's claims for future wage loss and noneconomic damages into its case assessments.

Ultimately, a reasonable jury could easily find that MedPro's refusal to accept Emma's policy-limits demand was classic bad faith. Accordingly, this Court should deny MedPro's motion.

BACKGROUND

1. The underlying malpractice

Emma was born prematurely. (PCOE 031.)[1] As a result, she was initially dependent on a breathing tube for the first 18 months of her life. (PCOE 033.) Nguyen was the home-health nurse responsible for managing Emma's breathing tube. (PAMF #1.)

Before October 6, 2015, Emma was a "very happy," "fun little girl," who "smiled" when she saw "familiar faces." (PAMF #5.) Despite her breathing tube, Emma could crawl and "walk by holding onto furniture or people," and was even capable of "sign language." (PAMF #5.)

On October 6, 2015, while under Nguyen's care, Emma's breathing tube fell out. (PAMF #2.) Nguyen panicked and could not successfully reinsert the breathing tube. (PAMF #3, 7.) Emma's eyes rolled back in her head, she became unresponsive, and she lost her pulse. (PCOE 032.) Someone called 911. When paramedics finally arrived, the breathing tube still had not been reinserted. (PAMF #3.) Paramedics intubated Emma and transported her to the hospital where doctors were able to stabilize her airway. (PCOE 033.)

When MedPro's retained medical expert (Dr. Mary Dyes) examined Emma in February 2017, she confirmed that Emma suffered a "severe hypoxic [brain] injury" in the incident. (PAMF #4.) Indeed, Dr. Dyes commented that Emma's brain injury was "among the worst [she] had ever seen," that Emma was now "very floppy, worse than a ragdoll," that she was "in a persistent vegetative state," and was "one step above being brain dead." (PAMF #4; PCOE 104.) As a result, keeping Emma alive now requires extensive life-supporting care (PCOE 268–271), including chronic mechanical ventilation. (PCOE 035.)

2. The medical-malpractice lawsuit

In January 2016, Emma filed a lawsuit against Nguyen (and her employer) alleging medical negligence. (PCOE 009.) It is undisputed that Nguyen tendered the claim to MedPro, which had issued Nguyen a malpractice policy with $1 million policy limits.

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[1] Citations to pages in Plaintiff's consecutively paginated "Compendium of Evidence" appear as **(PCOE XXX)**. Citations to Plaintiff's "Additional Material Facts" in their separate statement appear as **(PAMF #X)**. Citations to MedPro's memorandum brief appear as **(Def. Memo. at p. X)**. Citations to MedPro's appendix of exhibits appear as **(Def. Appx., Ex. X)**.

From the outset, it was apparent to MedPro the case posed significant risk to Nguyen.

Indeed, when MedPro's "large case committee" reviewed the case in December 2016, the "consensus" was "that this case may be difficult to defend." (PAMF #9; PCOE 304.) And the nursing expert MedPro initially retained to defend the case (Karen Geneau, R.N.) indicated she "does not feel she can defend it on the standard of care issues." (PAMF #8.) The persistent consensus was that it appeared Nguyen "panicked" and was "shaky during her efforts to resuscitate the child." (PAMF #4.) MedPro's Senior Vice-President of Claims acknowledged that this "hampered the ability to defend the care." (PAMF #9; PCOE 303.)

Making matters worse, the damages were significant: MedPro estimated that Emma's "[m]edical expenses and costs of nursing care" were "between a low of **$300,000** per year and **$550,000** per year." (PAMF #14.) And MedPro anticipated that Emma "will have an expert who will argue ... life expectancy ... up to 5 years," and that "[t]his will increase her projected lifetime medical expenses up to approximately **$2,500,000**." (PAMF #18.) MedPro also knew that "[Emma] is going to claim lost earnings" (PAMF #20), which MedPro estimated would add another **$432,254** to **$795,915**. (PAMF #21.) Thus, even with Emma's noneconomic damages capped at $250,000, a judgment against Nguyen would likely range from **$1,731,305** to **$4,045,915**. (PAMF #24.)

Between December 2016 and June 15, 2017, there was a standing offer from Emma to settle the case for the $1 million limits of Nguyen's policy with MedPro. (PAMF #42.) MedPro's decision to reject that settlement offer for the fourth and final time on June 15, 2017, was the product of at least two indefensible errors.

First, despite ample reason to believe "this case may be difficult to defend" (PAMF #9), MedPro analyzed settlement value based on the unrealistic assumption it had a 60% chance to win the case. (PCOE 219.)

Second, even though it knew "[Emma] is going to claim lost earnings" (PAMF #20), MedPro *never* took future loss of earnings into account. (PAMF #29.) Moreover, it appears that in assessing Emma's policy-limits offer, MedPro did not factor in $250,000 for Emma's noneconomic damages. (PAMF #30.)

Ultimately, despite a verdict range of **$1,730,334** to **$4,044,944**, MedPro responded to Emma's policy-limits demand in June 2017 with a mere $500,000 counter-offer. (PAMF #12.) Even worse, that $500,000 was contingent on Emma's parents waiving any future wrongful-death claims against Nguyen. (PAMF #12.) Because "[a] claim for wrongful death would encompass another $250,000" on top of Emma's individual claim (PCOE 224), MedPro's $500,000 offer was really an offer of just $250,000 to Emma. Not surprisingly, Emma rejected it.

On September 19, 2017—a mere four days before arbitration—MedPro finally got around to deposing Emma's retained medical expert, Dr. Goldie. During that deposition, Dr. Goldie testified that, with proper care, Emma could live 35 years. The next day, MedPro scrambled to offer $1 million to settle. But once again, that offer included a wrongful-death waiver, and was thus not a full $1 million to Emma. (PAMF #39.) Again, Emma rejected it, although she would have accepted the offer without a wrongful-death waiver. (PAMF #40.)

The case proceeded to arbitration before a panel of three arbitrators. Nguyen was found liable by all three, including the arbitrator MedPro selected. (See Def. Appx., Ex. 51.) A judgment against Nguyen was entered in the amount of **$6,069,139.72**. (PCOE 279.)

3. This bad-faith action

The massive excess judgment against Nguyen forced her into bankruptcy. The bankruptcy court appointed Jeffrey Golden as the trustee of Nguyen's bankruptcy estate. In that capacity, Golden brought this action against MedPro to hold it accountable subjecting Nguyen to a massive excess verdict.

MedPro now seeks summary judgment based on an absurd conspiracy theory that MedPro was the victim of "an insurance bad faith set up, orchestrated against ... MedPro by [Emma]'s personal injury lawyer." (Def. Memo. at p. 6.)

But as discussed below—and as set forth in the declaration of Timothy Walker, a veteran insurance-defense lawyer and consultant to insurance companies for over 35 years—MedPro committed classic bad faith when it rejected Emma's $1 million policy-limits demand even though it knew or should have known that any judgment against Nguyen would exceed her policy limits by 100% to 300%.

STANDARD OF REVIEW

The party seeking summary judgment has the burden of persuasion and production, and must make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) It is not enough to simply point out "an absence of evidence to support" an element of the plaintiffs' cause of action. (*Id*. at p. 854, n.23.) The moving party must initially "present facts to establish a defense." (*Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 462.) Only if the defendant succeeds in doing so does the burden shift to "demonstrate the existence of a triable, material issue of fact" as to that defense. (*Ibid*.) A court reviewing a motion for summary judgment must strictly scrutinize the moving party's evidence. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.)

Summary judgment should be "used with caution" so it does not become a substitute for trial. (*Molko v. Holy Spirit Ass'n.* (1988) 46 Cal.3d 1092, 1107.) "In ruling on the motion the court must consider all of the evidence and all of the inferences reasonably drawn therefrom and must view such evidence in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at p. 843, internal citations omitted.) This Court's role is to determine whether such issues of fact exist, "not to decide the merits of the issue themselves." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441). All doubts as to whether there are any triable issues of fact must be resolved in favor of the party opposing summary judgment. (*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1259.)

Finally, a party seeking summary judgment may not rely on new facts or evidence in its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

POINTS & AUTHORITIES

1. MedPro committed bad faith when it rejected Emma's policy-limits offer in June 2017.

1.1 The policy-limits offer was reasonable.

"In each policy of liability insurance, California law implies a covenant of good faith and fair dealing." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312.) "This implied covenant obligates the insurance company, among other things, to make reasonable efforts to settle a third party's lawsuit against the insured." (*Ibid.*) An insurer breaches this obligation where "the injured party made a reasonable settlement offer within the policy limits and the insurer rejected it." (*Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 525.)

Emma first offered to settle for the $1 million limits of Nguyen's malpractice policy with MedPro in December 2016. She then kept that offer on the table for the next *seven months*. (PAMF #42.) On June 14, 2017, Emma's counsel advised MedPro that the policy-limits demand would only remain open for one more day. (PCOE 169.) MedPro responded the next day with a $500,000 counter-offer (PCOE 233), thereby rejecting Emma's policy-limits offer a fourth time.

Thus, the ultimate question is whether the $1 million policy-limits demand was a "reasonable" offer as of June 15, 2017. If so, then MedPro acted in bad faith by rejecting it.

"[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Assn. Inter–Ins. Bureau* (1975) 15 Cal.3d 9, 16.) In making that assessment, the fact-finder must assess what the insurer "knew or should have known at the time the demand was rejected." (CACI 2334.)

Ultimately, "[w]hether the insurer has acted unreasonably, and hence in bad faith, in rejecting a settlement offer is a question of fact to be determined by the jury." (*Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 Cal.App.3d 783, 792; accord *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1454; *Donahue Constr. Co. v. Trans. Indem. Co.* (1970) 7 Cal.App.3d 291, 304; *Marsango v. Automobile Club of So. Cal.* (1969) 1 Cal.App.3d 688, 696.)

Here, a jury could easily conclude the policy-limits demand was a "reasonable" settlement offer as of June 2017, and thus that MedPro committed bad faith by rejecting it.

First, under California law, "[t]he size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci v. Security Exchange Co. of New Haven* (1967) 66 Cal.2d 425, 431.) Thus, the fact that Nguyen was hit with a $6 milliom judgment "furnishes an inference" that Emma's $1 million policy-limits offer was reasonable. At the summary judgment stage, that inference *alone* is sufficient to defeat MedPro's motion.

Second, on June 15, 2017—the last day to accept Emma's $1 million policy-limits demand—one of the attorneys MedPro retained to defend Nguyen (Chris Hall) advised MedPro via email "that the current settlement value of the case … is in the $1,000,000 to $1,250,000 range." (PAMF #27; PCOE 174.) This provides yet *another* basis to infer that a $1 million settlement was reasonable.

Third, a month after MedPro rejected Emma's offer to settle for Nguyen's $1 million policy limits, the insurer for Nguyen's employer (Philadelphia Indemnity Insurance Co.) offered its own $1 million policy in response to Emma's policy-limits demand on that carrier. (PCOE 240.) Philadelphia's willingness to pay its $1 million policy further supports an inference that Emma's identical offer to MedPro was reasonable.

Fourth, even MedPro's own back-of-the-napkin analysis showed that *any* judgment against Nguyen's would greatly exceed her policy limits.

Here, Golden refers to an email dated June 15, 2017—the last day to accept Emma's policy-limits demand—from the MedPro claims adjuster (Jill Mickelsen-Soto) to her supervisor (Anthony Ball) regarding how to respond to that offer.

In that email, Mickelsen provides estimates of high and low verdict ranges based solely on "*defense expert's* projections of care costs and life expectancy." (PCOE 219, italics added.) On the "low" end, Mickelsen estimated a verdict of **$1,250,000**; on the "high" end, Mickelsen predicted a verdict of **$3,000,000**.

In other words, even based solely on damage estimates provided by *defense experts*, MedPro knew that *any* judgment against Nguyen would exceed her policy limits by **25%** to **200%**.

Given that MedPro knew any judgment against Nguyen would exceed her policy limits by **25%** to **200%** even based solely on numbers from "defense experts," a reasonably prudent insurer would have realized that a settlement for policy-limits was not just reasonable, but actually a *bargain*. (See *Crisci*, *supra*, 66 Cal.2d at p. 433 [insurer engages in bad faith where it declines a settlement offer within policy limits when the insurer "knew that there was a considerable risk of substantial recovery beyond [the] policy limits"]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 ["When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim."].) Accordingly, on that fact alone, MedPro acted in bad faith when it rejected that settlement. (PAMF #26, 33.)

The fact that two-out-of-three arbitrators felt Emma's statutory offer to compromise ("998 offer") was "defective and unreasonable" is *not* evidence to the contrary.

For one, that 998 offer was served in December 2016. (PCOE 283–284.) And, in its motion to tax costs, MedPro only claimed that the offer was premature "*at the time it was served.*" (PCOE 288, italics added, capitalization omitted.) And although Howard subsequently attempted to "re-open" that offer three times (including in June 2017), as to those attempted "re-openings," MedPro only argued that, technically speaking, they were not valid extensions of the original 998 offer. (PCOE 290.)

Moreover, unlike the eventual jury that will determine whether MedPro acted unreasonably when it rejected the policy-limits offer, the arbitrators did not have access to MedPro's claim file.

Thus, the arbitrators' split-determination that Emma's policy-limits offer was premature in December 2016**,** and does not even remotely disturb the premise that MedPro acted unreasonably in rejecting that offer in June 2017. (PAMF #28.)

1.2 MedPro botched its settlement analysis.

The prior section showed that MedPro committed bad faith when, in June 2017, it rejected Emma's policy-limits demand despite the knowledge that any judgment against Nguyen would greatly exceed her policy limits. In this section, Golden explains that MedPro's failure to accept that policy-limits demand was the direct result of two fundamental and indefensible errors in its settlement analysis.

First, MedPro's settlement analysis was predicated on the absurd belief that it had a 55% to 60% chance to win the case. Here, Golden refers to the fact that, in Mickelsen's email of June 15, 2017, she discounts the average of her high/low verdict ranges by 60% to account for MedPro's assumption it had a 60% "chance to win" the case. (PCOE 219.)

Whether that assumption was a reasonable one is itself a question of fact for the jury. (E.g., *Cain*, *supra*, 47 Cal.App.3d at p. 792.) And here, a reasonable jury could easily conclude that, on these facts, a 60% chance to win was not just unrealistic, but *absurd*. (PAMF #10.)

For one, MedPro—an experienced medical-malpractice carrier—knew or should have known that for a vocational nurse, the failure to re-insert a breathing tube is essentially *res ipsa* negligence. Indeed, the nursing expert MedPro retained to testify regarding standard of care (Karen Geneau, R.N.) reviewed the case *twice* between November 2016 and February 2017. (PCOE 073, 099.) Both times, Geneau indicated she "does not feel she can defend it on the standard of care issues." (PCOE 099.) And the vocational nurse who cared for Emma just prior to Nguyen testified that Nguyen committed "gross negligence" when she tried to reinsert Emma's dislodged breathing tube instead of using a new tube with a guide. (PCOE 251–252.)

Moreover, the evidence shows that, in their candid moments, MedPro and the attorneys MedPro retained to defend the case all knew that defending Nguyen was an uphill battle:

- From August 2016 through arbitration, the persistent concern at MedPro was that, rather than a calm, collected professional, Nguyen was "panicked and shaky during her efforts to resuscitate [Emma Borges]." (PAMF #7.)
- When MedPro's "large case committee" reviewed the case in December 2016, the "consensus" was "that [it] may be difficult to defend." (PCOE 304.)
- In June 2017, Robert Ignasiak, MedPro's Senior Vice-President of Claims (PCOE 356, 358), acknowledged that the evidence "hampered the ability to defend the care." (PCOE 303.)
- After MedPro rested its case at arbitration in September 2017, Nguyen's lead counsel (Margaret Holm) bluntly reported to MedPro that "I harbor no illusions of a defense award." (PCOE 273.)

But perhaps the best indication that Nguyen's case was obviously indefensible from the outset, is that all three arbitrators—including MedPro's hand-picked arbitrator—found Nguyen liable. (See Def. Appx., Ex. 51.)

Ultimately, a reasonable jury could easily conclude that, far from a 60% chance to win, MedPro should have instead assumed it was *very unlikely* to defend the case. (PAMF #10.)

Second, in assessing settlement, MedPro did not consider all four aspects of Borges's damages.

As MedPro acknowledges, Emma's damages—and, thus, Nguyen's exposure—consisted of four line-items: [1] past medical expenses, [2] future medical expenses, [3] future loss of earnings, and [4] pain and suffering. (PAMF #13.)

Regarding **[1] past medical expenses**, MedPro knew on June 15, 2017, that Emma's medical care ranged from $298,820 to $532,420 per year. (PAMF #14,) By June 15, 2017, it had been 1.67 years since Emma was injured. (PCOE 032 [October 6, 2015].) Thus, MedPro could have estimated past medical expenses of at least **$500,000** ($298,820 x 1.67 = $499,029). (PAMF #15.)

Regarding **[2] future medical expenses**, MedPro created a range based on life expectancy. (PCOE 219.)

For the *low end*, MedPro assumed Emma would only live another **two years**. Thus, with care ranging from $298,820 to $532,420 per year (PAMF #14), MedPro estimated future medical expenses of **$549,051** on the low end. (PAMF #17.)

For the *high end*, MedPro operated under the assumption "Plaintiff will have an expert who will argue a longer life expectancy, possibly up to 5 years," and that "[t]his will increase her projected lifetime medical expenses up to approximately **$2,500,000**." (PAMF #18.)

Regarding **[3] future loss of earnings**, MedPro's own economist (David Weiner) generated estimates of Emma's future loss of earnings ranging from **$432,254** to **$795,915**. (PAMF #21.)

Regarding **[4] noneconomic damages**, they were capped at $250,000 because of MICRA, Emma's noneconomic. (See Civ. Code, § 3333.2, subd. (b).) Given Emma's injuries, MedPro had to know she would be entitled to a full **$250,000** in the event Nguyen was found liable.

In short, when it rejected Emma's policy-limits demand on June 15, 2017, MedPro knew or should have known that *any* judgment against Nguyen would be an *excess* judgment, ranging from **$1,731,305** on the low end ($500,000 + $549,051 + $432,254 + $250,000 = $1,731,305), to **$4,045,915** on the high end ($500,000 + $2,500,000 + $795,915 + $250,000 = $4,045,915). (PAMF #23, 24.)

But MedPro failed to appreciate that fact because, when it assessed the policy-limits demand in June 2017, it only considered [1] past medical expenses and [2] future medical expenses, and apparently did *not* factor in any money for [3] future wage loss *or* [4] noneconomic damages.

We know this from the very June 15, 2017 email from the MedPro adjustor (Jill Mickelson) to her supervisor (Anthony Ball) regarding how to respond to Emma's policy-limits demand which was set to expire that day. (PCOE 219.) In that email, Mickelsen assessed the reasonableness of that demand as follows:

For the "low" end of the verdict range, Mickelsen wrote "$750,000" for "care," (ostensibly future medical care based on a *two-year* life expectancy), to which she added $500,000 (ostensibly for past medical care), for a total of "**1,250,000**." (PCOE 219.)

For the "high" end of the verdict range, Mickelsen wrote "$2,500,000" for "care" (ostensibly future medical care based on a *five-year* life expectancy (e.g., PCOE 192)), to which she again added $500,000 (ostensibly past medical care) for a total of "**3,000,000**." (PCOE 219.)

But on their face, those numbers do not include money for *future wage loss* or *noneconomic damages.* (PAMF #29, 30.) Indeed, MedPro Senior Vice-President of Claims (Robert Ignasiak) confirmed that MedPro never took "into account future loss of earnings" in analyzing Nguyen's exposure. (PCOE 391.)

MedPro's failure to account for future wage loss is inexcusable: MedPro knew long before June 2017 that Emma would make a claim for future wage loss. (PAMF #20.) And if MedPro did not already have estimates of Emma's wage-loss in hand, it certainly could have: MedPro retained its economist (Weiner) before April 2016 and only needed Emma's birthday to run estimates of her wage-loss claim. (PAMF #22.) Moreover, any uncertainty regarding Emma's ultimate life expectancy did not preclude Weiner from estimating Emma's future earnings. Indeed, Weiner issued a wage-loss analysis on September 15, 2017 (PCOE 262), four days *before* MedPro deposed Emma's expert on life expectancy. (Def. Memo. at p. 24 ["At his September 19 deposition, Dr. Goldie finally disclosed his opinion, for the very first time, that Emma'[s] life expectancy could be 35 years."].)

MedPro's failure to include noneconomic damages is also indefensible. Indeed, MedPro knew or should have known that Emma was entitled to non-economic damages of $250,000. (PCOE 039.)

Thus, to her "low" verdict estimate of $1,250,000, Mickelsen should have added at least **$432,254** (the low estimate of Emma's loss of future earnings (PCOE 262)), and **$250,000** (for noneconomic damages), for a new total of **$1,932,254**. (PAMF #31.)

And to her "high" verdict estimate of $3,000,000, Mickelsen should have added **$795,915** (the high-end estimate of Emma's loss of future earnings (PCOE 262)), and **$250,000** (for noneconomic damages), for a total of **$4,045,915**. (PAMF #31.) Tellingly, Mickelsen had actually used $4,000,000 for the high-end verdict estimate initially, until she inexplicably—and erroneously—decreased it to $3,000,000. (PCOE 227.)

In short, correctly accounting for all four line-items of Emma's damages shows a verdict range of **$1,932,254** to **$4,045,915** even using numbers from the defense experts. Thus, had it done the math correctly, MedPro would have seen on June 15, 2017, that *any* judgment against Nguyen would exceed her policy limits by **100%** to **300%**. Accordingly, a reasonable jury could easily find that MedPro committed bad faith by rejecting the policy-limits offer in June 2017. (PAMF #25.)

Notably, this conclusion does not change even if—to be most charitable to MedPro—one credits MedPro's absurd assumption it had a 60% chance to win the case.

To estimate an insured's exposure in light of an estimated "chance to win," MedPro used a two-step process:

First, it took an average of the high and low potential verdicts against Nguyen. (PCOE 219.)

Second, it discounted that average by the likelihood that MedPro would prevail. (*Ibid*.)

If the resulting number exceeds the policy limits, then a policy-limits settlement is imminently reasonable. (PCOE 385—386 ["[I]f it's determined that the exposure exceeds the limits, we need to take efforts to try to resolve that case."].)

Of course, a low/high verdict range of **$1,932,254** to **$4,045,915** yields an average of **$2,989,084**. But even reducing that number by 60% still yields exposure to Nguyen of **$1,195,633**.

In other words, even using (a) damage estimates from MedPro's experts, (b) MedPro's analytical method, and (c) MedPro's unreasonable assumption it had a 60% chance to win, Nguyen's estimated exposure *still* exceeded her policy limits by **20%**. A reasonable jury could thus conclude that MedPro botched its settlement analysis in this case.

1.3 MedPro cannot dodge liability for its failure to accept the policy-limits offer.

MedPro offers several excuses in an attempt to dodge liability for its failure to settle this case for Nguyen's $1 million policy limits. As discussed in the sections below, all fail.

1.3.1 MedPro cannot blame Emma's lawyer for its failure to evaluate the case.

MedPro first blames Emma's lawyer (Neil Howard) for MedPro's failure to properly evaluate the case in June 2017. Specifically, MedPro accuses "Howard [of] withholding key discovery necessary for MedPro's complete case assessment." (Def. Memo. at p. 6.)

For example, MedPro complains that Howard did not provide Emma's Medi-Cal lien—which identified Emma's past medical expenses as $668,742 (PCOE 258)—until August 2017, a month before arbitration. (Def. Memo. at p. 23.) And MedPro complains that, although the parties designated experts in February 2017, Howard did not make, Dr. Goldie—the expert who would address Emma's life expectancy—"available for deposition until September 19, 2017, … just four business days prior to the arbitration." (Def. Memo. at p. 18.)

There are three flaws with MedPro's effort to blame Howard for its failure to evaluate the case.

First, MedPro's claim that Dr. Goldie held the key to its settlement analysis is pure revisionist history. Indeed, nowhere in *any* of the correspondence rejecting Emma's past policy-limits demands—including, most notably, the June 15, 2017 email in which it rejected the policy-limits demand (PCOE 233)—does MedPro indicate that it needed plaintiff's expert testimony regarding Emma's life expectancy to assess a policy-limits offer. (PAMF #41.)

Second, as demonstrated earlier, the absence of the Medi-Cal lien and Dr. Goldie's testimony did not impair MedPro's ability to recognize that a $1 million policy-limits demand was "reasonable." (PAMF #34, 35.)

Indeed, by June 2017, MedPro had already estimated that Emma's medical care was between $300,000 and $500,000 per year. (PAMF #14.) Thus, even without the Medi-Cal lien, MedPro was fully capable of estimating Emma's past medical expenses. (PAMF #15.)

And, by June 2017, MedPro was already operating under the assumption that "[Emma] will have an expert who will argue a longer life expectancy" than two years, "possibly up to 5 years," and that "[t]his will increase her projected lifetime medical expenses up to approximately $2,500,000."

(PAMF #18.) Thus, even without that information, MedPro knew or should have known in June 2017 that any judgment against Nguyen would greatly exceed her policy limits, and therefore that a policy-limits settlement was imminently reasonable. (PAMF #24, 25, 34, 35.)

Third, MedPro would be wise to remember this is not a dispute between MedPro and Howard; it is a dispute between MedPro and its insured, Nguyen, for strapping her with a $4 million excess judgment in a case MedPro could have settled for just $1 million.

MedPro has clearly lost sight of that fact: While Nguyen's name appears just 33 times in MedPro's brief, MedPro mentions Howard over **100** times.

And MedPro has clearly focused on the wrong party: Howard did not owe MedPro a duty to diligently provide information. But MedPro owed Nguyen a duty to diligently investigate her claim.

Indeed, MedPro knew Emma had a Medi-Care lien since August 2016. (PCOE 061.) Thus, if MedPro felt it needed that information to assess Nguyen's exposure, it had plenty of time to get it. And it also had the means: MedPro's hired defense counsel admitted they "could have subpoenaed th[ose] bills" at any time. (PAMF #16.)

Similarly, Emma designated Dr. Goldie as her medical expert in February 2017. (Def. Memo. at p. 18.) If MedPro truly felt Dr. Goldie had "vital," "game-chang[ing]" information for their assessment of Nguyen's exposure, it had plenty of time to get it. And again, it had the means: Certainly, MedPro's hired defense counsel could have compelled Dr. Goldie's deposition much earlier than a mere four business days before arbitration. (PCOE 433.)

In short, an uncooperative plaintiff's attorney is a poor excuse for a major malpractice carrier to offer an insured who was hit with a $6 million judgment in a case the carrier could have settled for her $1 million policy limits. Thus, while MedPro tries to paint Howard as uncooperative, the jury will nonetheless see a malpractice-insurance carrier that lacks a sense of urgency.

Also absurd is MedPro's claim that it was the victim of a "set up" Howard "orchestrated" against MedPro. (Def. Memo. at p. 6.) But there was no set-up: MedPro already had everything it needed in June 2017 to know that a $1 million settlement was beyond reasonable. (PAMF #24, 25, 34, 35.) And even if MedPro needed more—which it did not—it could have gotten it with reasonable

diligence. Moreover, Howard kept his $1 million offer open for *seven months* between December 2016 and June 2017. (PAMF #42.)

Of course, this is not to mention that although Emma filed her lawsuit in January 2016, neither Emma nor Howard saw a *dime* until July 2020, when MedPro finally paid its $1 million policy. (Def. Memo. at p. 6.) And no one will see a dime of the excess judgment unless and until this bad-faith action—now pending for two years—finally resolves. It suffices to say that waiting five years and counting to get paid is a strange game of 3D-chess.

1.3.2 MedPro cannot blame its own lawyers for its failure to evaluate the case.

When MedPro is not blaming *Emma's lawyer* for its failure evaluate the case, MedPro implies that the *defense lawyers it retained to defend Nguyen* were to blame. Specifically, MedPro bemoans the fact that they never recommended that MedPro accept Emma's offer to settle for Nguyen's $1 million policy limits. (E.g., Def. Memo. at p. 12.) But there are two problems with that effort.

First, under California law, "the advisability of a settlement in the interests of the insured *is upon the insurance carrier*." (*Garner v. American Mut. Liability Ins. Co.* (1973) 31 Cal.App.3d 843, 848. italics added.) Indeed, MedPro conceded it "had a nondelegable duty to perform [its] own investigation and analysis," and that "ultimately it is MedPro's policy and it's MedPro's money, and it's MedPro's decision … whether to accept or reject a policy limits demand or whether to settle or not settle a case." ((PAMF #32.) Thus, regardless of counsel's advice, the buck stopped with MedPro.

Second, MedPro is wrong when it claims the defense attorneys never recommended that MedPro accept the $1 million policy-limits demand.

At 7:13 a.m. on June 15, 2017—the last day to accept Emma's policy-limits demand—one of the defense attorneys (Chris Hall) advised MedPro's claims supervisor (Anthony Ball) via email "that the current settlement value of the case … is in the $1,000,000 to $1,250,000 range." (PAMF #27.) That email is not only fatal to MedPro's motion, but likely sinks its entire case. Not surprisingly, MedPro has tried to bury that email ever since it was sent.

Indeed, at 4:33 p.m. on June 15, 2017—some nine hours after Hall sent his email regarding "settlement value"—Hall oddly sent a *second* email to MedPro clarifying that he meant "*verdict* value," not "settlement value," in his earlier email. (PCOE 229, emphasis in original.) Hall then sent

a *third* email at exactly 5:00 p.m. As if to plant evidence, Hall's 5:00 p.m. email is a *verbatim copy* of his original 7:13 a.m. email, except the phrase "settlement value" has been changed to "verdict value." (Compare PCOE 174 with PCOE 235.) Although MedPro's claims supervisor (Anthony Ball) never replied to Hall's first two emails (PCOE 310), Ball responded *exactly one minute* after Hall's last, "doctored" email: "Chris, Thanks! Tony." (PCOE 237.)

At his deposition, Hall "could not recall" what caused him to re-visit his 7:13 a.m. email and could not "recall" if anyone (i.e., Ball) instructed him to do so. (PCOE 314–315.) At his deposition, Ball testified he did not "recall" receiving *any* of Hall's emails on June 15, 2017. (PCOE 338.)

And the plot thickens: MedPro produced Hall's 5:00 p.m. email in discovery, but withheld Hall's 7:13 a.m. *and* 4:33 p.m. emails. (Golden had to get them from Hall's colleague, Holm.) When asked to explain this discrepancy, MedPro claimed that it removed Hall's 7:13 a.m. and 4:33 p.m. emails from MedPro's claim file because, in MedPro's view, they had been "rendered moot." (PCOE 398.) But at his deposition, MedPro's Senior Vice-President of Claims, Robert Igasiak, testified that removing *anything* from the claim file would be inappropriate and inconsistent with MedPro protocol. (PCOE 383.)

Ultimately, even this clumsy effort to conceal evidence failed: At his deposition, Hall confessed that while in some cases "the settlement value will be less than the certified value," MedPro was not "following that" approach in this case "because of the liability picture" and the sense that MedPro would not "get as much discount per settlement as [it] would in some other cases." (PCOE 314.) Thus, while "settlement value" might be less than "verdict value" in a typical case, Hall testified that they were using them "interchangeably" here, such that "verdict value" and "settlement value" were one and the same. (PCOE 313–314.)

1.3.3 MedPro cannot shield itself with another insurer's money.

Throughout its brief, MedPro notes that Nguyen was also insured under her employer's policy with Philadelphia Indemnity Insurance Co., which offered an additional $1 million in coverage. (Def. Memo. at p. 12.) To the extent MedPro insinuates that it was justified in rejecting an offer for Nguyen's $1 million policy limits unless Nguyen's total exposure exceed $2 million, MedPro is wrong.

Under California law, an insurer cannot consider other insurers' policies when deciding whether to settle for its own policy limits. Instead, "in deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment." (*Johansen*, *supra*, 15 Cal.3d at p. 16.) Thus, "[w]hen multiple insurance policies provide coverage, each insurer's obligation is to cover the full extent of the insured's liability up to policy limits." (*Howard*, *supra*, 187 Cal.App.4th 498m 525.)

Indeed, Robert Ignasiak, MedPro's Senior Vice-President of Claims, conceded that, in evaluating a settlement offer, MedPro's duty was to evaluate Nguyen's exposure relative to the limits of MedPro's $1 million policy *alone*. (PCOE 386; PMAF #38.)

1.3.4 MedPro's pre-arbitration tender was too little, too late.

Days before arbitration, MedPro offered $1 million to settle the case. (PCOE 409.) MedPro argues this offer "proves" it acted in "good faith." (Def. Memo. at p. 22.) Not so.

First, because it included a wrongful-death waiver, that offer was not actually a full $1 million to Emma. Indeed, under California law, wrongful-death claimants are entitled to a separate $250,000 in noneconomic damages beyond the $250,000 owed to the personal-injury plaintiff. (*Schwarder v. United States* (9th Cir. 1992) 974 F.2d 1118, 1126.) Thus, as MedPro concedes, a wrongful-death claim "would encompass another $250,000" in noneconomic damages in addition to $250,000 for Emma alone. (See PCOE 224.) Accordingly, the $1 million offer to settle Emma's malpractice claim *and* her parents' potential wrongful-death claim was really a $750,000 offer to Emma. (PMAF #39.)

At his deposition, MedPro's claims supervisor (Anthony Ball) conceded that the $1 million offer should *not* have included a wrongful-death waiver. (PCOE 345–346.) This is a crucial fact because Emma would have accepted MedPro's $1 million offer in September 2017 but for the wrongful-death waiver. (PAMF #40.)

Second, even if it had entailed a full $1 million to Emma, MedPro's offer *still* would not insulate it from bad faith: "Even if the insurer attempts to resume negotiations by a belated offer of the policy limit, that action does not necessarily relieve it of the onus of an earlier bad faith rejection." (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 798, disapproved on another ground in

Crisci, *supra*, 66 Cal.2d 425; see also *Martin v. Hartford Acc. & Indem. Co.* (1964) 228 Cal.App.2d 178, 185 [an insurer is not "exculpat[ed] from bad faith by a belated and ineffective tender"].)

Here, MedPro could have settled for Nguyen's $1 million policy limits in June 2017. And MedPro had enough information at the time to know that $1 million was a good deal in light of Nguyen's tort exposure. Thus, MedPro was in bad faith the moment it rejected that offer and cannot avoid the consequences "by a belated and ineffective tender." (*Martin*, *supra*, 228 Cal.App.2d at p. 185.)

MedPro's cited cases are not to the contrary.

In *Pureco v. Allstate Indemnity Co.* (C.D. Cal. Nov. 27, 2018, No. 218CV02079SVWFFM) 2018 WL 7143624, the insurer "accept[ed] Plaintiff's settlement demand one day after the deadline." (*Id.* at *9.) Here, MedPro's $1 million offer—which was not a policy-limits offer as to Emma—came *three months after* Emma made her June 2017 policy-limits demand, and just days before arbitration.

Wade v. EMCASO Ins. Co. (10th Cir. 2007) 483 F.3d 657—a case under Kansas law—is also distinguishable.

First, unlike MedPro, the carrier in *Wade* did not have enough information to assess the policy-limits demand. (*Id.* at pp. 670–671.) Here, by contrast, MedPro had more than enough information to know, in June 2017, that a policy-limits demand was imminently reasonable.

Second, the insured in *Wade* assigned his bad-faith claim to the third-party plaintiff. (*Id.* at p. 667.) Under Kansas law, this allowed the court to consider "any responsibility the plaintiff might have for the insurer's lack of adequate information." (*Id*. at p. 670.) But again, this is a first-party bad-faith case against MedPro by its insured, Nguyen.

Third, *Wade* held that an insurer's "failure to ... meet a deadline unilaterally imposed by the third-party plaintiff" does not amount to bad faith under Kansas law. (*Id.* at p. 670.) But in California, "Plaintiff[s] in [a] personal injury action ha[ve] a right to set a time limit for acceptance of her offer," and an insurer's "continuing duty to protect its insured … must be measured in the light of the time limitation which plaintiff had placed on her offer." (*Martin*, *supra*, 228 Cal.App.3d at p. 185.)

2. MedPro's failure to settle within policy limits supports a breach-of-contract claim.

Golden asserted a breach-of-contract claim in his complaint. (PCOE 012.) Citing *Archdale*, *supra*, 154 Cal.App.4th 449, MedPro argues that any breach-of-contract claim Nguyen might have had against MedPro was extinguished when, in July 2020, MedPro finally paid the $1 million policy to Emma. (Def. Memo. at p. 16.)

But the breach-of-contract claim asserted in *Archdale* "relate[d] only to the *express* promises made by AIS in its policy, that is, to defend the underlying action and provide an indemnity to the extent of its policy limits." (*Archdale*, *supra*, 154 Cal.App.4th at p. 466.) Thus, that claim was extinguished when *Archdale* provided a defense and tendered its policy.

Here, Golden's breach-of-contract claim is predicated on a breach of the *implied* covenant of good faith and fair dealing. And *Archdale* confirms that the implied covenant of good faith to settle a claim within policy limits "is an implied-in-law term of a contract and its breach will necessarily result in a breach of that contract." (*Archdale*, *supra*, 154 Cal.App.4th at p. 469.) Thus, Golden is "entitled to recover, *on a contract theory* ..., the full amount of the judgment to the extent it exceeded the policy limits already paid by [MedPro]." (*Id.* at p. 468, italics added.)

3. Golden has a valid claim for emotional distress against MedPro.

Golden also asserted a claim for negligent infliction of emotion distress ("NIED"). (PCOE 016.) MedPro argues that California law does not "recognize a NIED claim against an insurer." (Def. Memo. at p. 24.) There are two problems with that argument.

First, it is entirely academic: Under California law, an insurer's bad faith absolutely permits recovery for "extra-contractual damages such as those for emotional distress." (*Archdale*, *supra*, 154 Cal.App.4th at p. 467, n. 19.) Thus, whether or not Golden has a standalone NIED claim, MedPro is liable for any emotional distress resulting from the excess verdict with which it strapped Nguyen.

Second, under California law, the "special relationship" between insurer and insured "gives rise to an independent duty to protect the insured's peace of mind and emotional well-being," thereby "giving rise to a separate claim for emotional distress." (*Schwartz v. Life Insurance Co. of North America* (S.D. Cal. 2006, No. 06cv1416 DMS (WMC)) 2006 WL 6185656, at *3; see also *Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 573, 578.)

4. MedPro is not entitled to summary adjudication of the prayer for punitive damages.

MedPro next argues that "Golden's punitive damage claim fails." (Def. Memo. at p. 25.)

But under California law, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Only when the moving "carries [its] burden of production" does the burden "shift" to "the opposing party … to make a prima face showing of the existence of a triable issue of material fact." (*Ibid.*; see also *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 956.)

Here, MedPro did not even *attempt* to meet its burden of production to show that there are no triable issues regarding whether Golden is entitled to punitive damages. Instead, it argues that "Golden has not come forward with *any* evidence ... to demonstrate 'oppression, fraud, or malice.'" (Def. Memo. at p. 25, italics original.)

This was insufficient to shift the burden of production to Golden: "Summary judgment law in this state … continues to require a defendant moving for summary judgment *to present evidence*, *and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.*" (*Aguilar*, *supra*, 25 Cal.4th at p. 854, italics added; see also *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186 ["We cannot agree with those who may be understood to suggest that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove its case."], superseded by statute on other grounds as stated in *Rice v. Clark* (2002) 28 Cal.4th 89, 96–98.)

Thus, because MedPro did not carry its burden of production, Golden has no obligation to come forward with evidence to demonstrate oppression, fraud, or malice at this point. (*Certain Underwriters*, *supra*, 56 Cal.App.4th at p. 956.)[2]

CONCLUSION

For the foregoing reasons, this Court should **deny** MedPro's motion in its entirety.

[2] MedPro cannot cure its failure to carry its burden of production by making that showing on reply. It is elementary that a party seeking summary judgment may not rely on new facts or evidence in its reply papers. (*San Diego Watercrafts*, *supra*, 102 Cal.App.4th at p. 316.)

Dated: November 20, 2020

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