STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NEW MEXICO BANK & TRUST,
A conservator for Manuel Joseph Chavez

Plaintiff/Judgment Creditor,

No. D-202-CV-2011-05632

v.

VICTORIA WHITE,

Defendant/Judgment Debtor,

SAFEWAY INSURANCE COMPANY,

Garnishee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having listened to the trial testimony, having reviewed the trial exhibits and having considered the proposed findings of fact and conclusions of law submitted by Victoria Nopah (formally known as, and will be referred to in this document as Victoria White or Ms. White) and Safeway Insurance Company makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. Victoria White was the named insured on Safeway policy number 1066055-NM-PP-001 ("the Policy"). (Plaintiff Ex. 2.)

2. The Policy had liability limits of $25,000 per person and $50,000 per occurrence. (*Id*.)

3. On May 15, 2010, a vehicle driven by Ms. White collided with a motorcycle driven by Manuel Joseph Chavez Jr.

4. Attorney William H. Carpenter verbally advised Safeway he represented Manuel Chavez and his family and demanded policy limits on June 11, 2010. On June 18, 2010, Mr. Carpenter provided a letter of representation. (Carpenter testimony; Pl. Ex. 1.)

5. On, June 21, 2010, Safeway sent a letter to Carpenter requesting Chavez' current medical status and bills, and advised that attorney Bruce McDonald would represent the insured in the event of litigation. (Pl. ex. 3.)

6. Safeway declined to advise Mr. Carpenter of its policy limits. (Carpenter testimony; Pl. Ex. 4.)

7. No later than June 29, 2010, Safeway determined Ms. White would likely be found 100% at fault for the accident. (Martin testimony; Pl. Ex. 29, Safeway-CLNotes 00083). Safeway noted that Ms. White herself did not believe she was at fault, but the other evidence convinced Safeway she would be found completely at fault. (*Id.*; Pl. Ex. 29, Safeway-CL Notes 00092-00093.)

8. On July 2, 2010, Mr. Carpenter made settlement demands subject to a time limit of July 30, 2010. (Pl. Ex. 4.) Mr. Carpenter made two demands. One was to settle Manuel Chavez claim for the per person policy limit. (Carpenter trial testimony.) One was to settle the family's loss of consortium claim for the difference between the per occurrence limit and the per person limit. (*Id.*)

9. Mr. Carpenter's July 2, 2010 demand letter advised that a trustee and guardian would be appointed for Manuel Chavez and that such person(s) would be the ones with authority to sign a settlement agreement on behalf of Manuel Chavez. (Pl. ex. 4.)

10. It is common and routine practice to reach a settlement agreement for the benefit of a mentally incompetent person, contingent upon court approval of the settlement. (Carpenter

trial testimony.) During the course of negotiations, Safeway never raised the issue of Manuel Chavez's lack of mental capacity as a reason it could not settle the case. (*Id*.)

11. Mr. Carpenter advised Safeway he would not charge an attorney fee if Safeway would accept the demand without requiring further efforts from the plaintiffs' law firm. (*Id.*)

12. At no time did Safeway ask Mr. Carpenter to clarify if he was making two separate offers. (Carpenter testimony; Pl. Ex. 29.)

13. Safeway had the option to pay $25,000 to settle Manuel Chavez's injury claim, then litigate or arbitrate the issue of whether a consortium claim(s) triggered an additional policy limit. It chose not to do so. (Miller trial testimony; Ball trial testimony.)

14. Safeway determined it would pay no more than a total of $25,000, no matter how many demands were made on it. (Martin and George trial testimony; Pl. Ex. 9.)

15. Attorney Carpenter did not have a formal, written fee agreement with either of Mr. Chavez's parents. Before making the July 2, 2010 settlement demand, Mr. Carpenter had been in constant contact with Manuel Chavez, Jr.'s mother. Mr. Carpenter had a general understanding that he would act on behalf of the entire family and attempt to obtain as much settlement money for the family as was available. (Carpenter testimony.)

16. Mr. Carpenter had the apparent authority to settle the parents' claims.

17. During settlement negotiations, Safeway never raised an issue as to whether Mr. Carpenter had authority to settle the case on behalf of the parents. (Carpenter trial testimony.)

18. As of July 2, 2010, Safeway knew Manuel Chavez's injuries including brain injuries, a tibial fracture, left wrist dislocation and styloid fracture, rib fractures and bilateral clavicle fractures. His medical bills exceeded $186,000 of that date. (Pl. Ex. 29, Safeway

CLNotes 00082.) Safeway recognized that the value of the claim obviously exceeded the coverage available before July 30, 2010. (Martin trial testimony; George trial testimony.)

19. On July 8, 2010, Safeway adjuster Craig Martin contacted Lucinda Silva an attorney at Bruce McDonald's office. Ms. Silva told Mr. Martin that a loss of consortium claim is derivative of Chavez' bodily injury claim and, thus, "does not break into the occurrence limit" of the Policy, with the result that the applicable Policy limit was the $25,000 per person limit for bodily injury liability. (P. Ex. 29, Safeway CLNotes 00081; Martin trial testimony.) Nothing in the claims file suggests Ms. Silva knew the McDonald firm would be retained to defend Victoria White.

20. On July 19, 2010, Safeway offered to settle both the Manuel Chavez claim and any potential loss of consortium claims for a total of $25,000, conditioned on a "hold harmless letter." (Pl. Ex. 8.)

21. The term "hold harmless letter" has no generally accepted definition in the insurance industry and can mean any number of things. (Miller trial testimony.)

22. On July 19, 2010 attorney David Stout acknowledged the settlement offer. He requested a certified copy of the declarations page and insurance policy. (Pl. Ex. 8.) He also requested to know the language Safeway wanted in its hold harmless letter. (*Id.*) Mr. Stout advised Safeway that he could not evaluate the amount of coverage available under the policy without reading the entire policy. (*Id.*)

23. Elizabeth George, Safeway Regional Claims Manager, told Mr. Martin he could not give attorney Stout a copy of the insurance policy. (Martin trial testimony; George trial testimony.) Mr. Martin does not recall any reason being given for Ms. George's instruction. (*Id.*)

24. On July 19, 2010, Safeway advised Mr. Stout that the hold harmless letter must "state that your client/firm will handle all the medical bills, holding Safeway Insurance harmless for any liens, medical bills, etc." (Ex. 8.)

25. The hold harmless letter, as described in Mr. Martin's July 19 email was unacceptable to Carpenter and Stout. (Stout depo. testimony; Carpenter trial testimony.) The condition of a hold harmless letter was never withdrawn from Safeway's settlement offer. The terms of the hold harmless letter were not further discussed because no agreement as to money was ever reached. (Carpenter trial testimony.)

26. Instead of providing a certified copy of the policy to Mr. Stout, Safeway only provided a copy of the declarations page in a letter dated July 21, 2010. (Pl. Ex. 9.)

27. When Safeway sent the declarations page to Mr. Stout, Safeway further advised that the $25,000 offer was a "full and final offer" to settle both the Chavez injury claim and the loss of consortium claim. (Pl. ex. 9.)

28. On July 21, 2010, Mr. Martin spoke with Chris Dougherty at the McDonald law office. Mr. Dougherty confirmed that Mr. Stout was correct and that whether $25,000 or $50,000 was available depended on the language of the policy. (Pl. ex. 29, Safeway CLNotes 00076.)

29. Even after being told by counsel that Mr. Stout was correct and that the amount of coverage depended on the language of the policy, Safeway continued to vacillate on whether to produce the copy to plaintiffs' counsel. (Pl. ex. 26, Safeway CLNotes 00076.)

30. Safeway sent a copy of its entire policy to Mr. McDonald's office for review on July 21, 2010. (George testimony; Pl. Ex 20.) Yet, it only sent one page of the policy to Carpenter and Stout on July 26, 2010. (Pl. Ex. 10.)

31. Elizabeth George read the policy and formed the opinion that only $25,000 was available for both the primary claim and the consortium claim. (Pl. ex. 20.) Ms. George sent the policy to attorney Silva along with a message that Ms. George believed only $25,000 was available. (*Id.*)

32. Based on a review of two cases, attorney Silva opined that she agreed with Ms. George's opinion that only $25,000 was available. (Pl. Ex. 20.)

33. It was improper for Safeway to seek coverage advice from an attorney or firm Safeway already knew would be hired to defend Ms. White because there must be no contact between defense counsel and coverage counsel. (Miller trial testimony.)

34. On July 26, 2010, Safeway repeated its position that only $25,000 was available to settle both the bodily injury claim and the consortium claim. (Pl. Ex. 10.) Safeway stated it received this advice from "our counsel". (*Id.*)

35. On July 27, 2010, attorney Stout rejected Safeway's offer to settle all claims, including consortium claims, for $25,000. (Pl. ex. 11.) Mr. Stout repeated that he could not evaluate the offer without reading the policy. (*Id.*) Mr. Stout implicitly extended the deadline on the $50,000 settlement demand to August 3, 2010 and repeated his request for a complete copy of the entire policy.

36. Safeway did not accept either settlement demand before it expired. (Carpenter trial testimony.)

37. Safeway did not provide Mr. Stout a complete copy of the insurance policy before the settlement demands expired. (Pl. Ex. 9, 10, 12; Carpenter trial testimony.)

38. On at least four occasions before the settlement demands expired, Carpenter and Stout requested to see the Safeway policy. On July 2, 2010, Mr. Carpenter's letter requested the

policy. (Pl. ex. 4.) On or about July 19, 2010, Mr. Stout had a phone conversation with Craig Martin wherein Mr. Stout said he needed to see the insurance policy and explained why he needed it. (Stout depo. at 8.) That same day, Mr. Stout then sent an email confirming his request for the declarations page and policy. (Pl. ex. 29, note 00077.) On July 27, 2010, Mr. Stout's letter requested the policy again. (Pl. ex. 11.)

39. Safeway has a company-wide business practice of not disclosing its insurance policies to plaintiffs and claimants. (Martin trial testimony; George trial testimony.)

40. Safeway's practice to not produce insurance policies is contrary to general insurance practices. (Carpenter trial testimony; Miller trial testimony; *see generally* Ball trial testimony.)

41. Safeway never requested an extension of time to respond to the settlement demand. (Carpenter trial testimony; Miller trial testimony.) Safeway had sufficient information to evaluate the settlement demand while it was open. (Miller trial testimony; Ball trial testimony.)

42. Safeway's failure to accept Carpenter's July 2, 2010 settlement demand was not a fair balance of Safeway's interest and Victoria White's interest. (Miller trial testimony.) Safeway's failure to settle was in bad faith.

43. On August 13, 2010, Mr. Carpenter advised Safeway that Manuel Chavez's, Jr.'s mother would be retaining separate counsel. (Def. Ex. D.) Only after receiving the letter did Safeway agree to provide Carpenter and Stout a complete copy of the policy. (Pl. Ex. 12.)

44. By the time Safeway provided a complete copy of the policy, the settlement demand had expired. Mr. Carpenter had advised Safeway he no longer represented the interests

of the parents and Mr. Carpenter had incurred significant time, effort and money related to the case by the time Safeway provided the copy. (Carpenter trial testimony; Def. Ex. D.)

45. On September 15, 2010, Safeway sent a letter to Ms. White informing her that "Bruce McDonald will be representing you on this loss" and provided her Mr. McDonalds contact number. (Martin and White trial testimony; Def. Ex. BB.)

46. On September 28, 2010, Safeway discussed the case of *Dairyland v. Herman,* 124 N.M. 624 (1997), with Bruce McDonald. (Pl. ex. 29, note 000066-67.) Following that communication, Safeway decided to offer the entire, per-occurrence limit of $50,000 to pay the claims. (*Id.*) Safeway could have made that same decision before August 3, 2010, when the settlement demands were still open. (Miller trial testimony; Bell trial testimony.)

47. Safeway's consultation with Ms. White's defense counsel about Safeway's extra-contractual exposure was inappropriate. (Miller trial testimony.)

48. On September 28, 2010, Safeway's Elizabeth George emailed Bruce McDonald instructing him to offer $50,000 to settle both Chavez' bodily injury claim and his parents' loss of consortium claim, stating: "We would like to offer our policy limit of 25K to Manuel Chavez and the remaining 25K to the parents of Manuel Chavez for the loss of consortium claim." (Pl. Ex. 16.) Mr. McDonald replied the same day, September 28, 2010, reporting that he had conveyed that offer and that Mr. Carpenter said he would discuss it with his client but that "it probably wasn't going to do it," adding, "[Chavez] now has something in the range of $300,000 in medical expense claims." *Id.*

49. Mr. Carpenter testified that he consulted with the Chavez family and they decided to reject the offer and proceed to trial. (Carpenter trial testimony.)

50. Safeway's offer to settle for $50,000 was made almost two months after the demands had expired. (Pl. Ex. 16.)

51. On February 16, 2011, Mr. McDonald sent Ms. White a letter regarding their representation of her. *Plaintiff's Ex. 18*. White received this letter and understood that McDonald would be representing her and informing her on the matter. (White trial testimony.)

52. On May 31, 2011, Manuel Chavez's Conservator sued Victoria White and the case proceeded to trial.

53. A month and a half before trial, Mr. McDonald opined that the likely range of jury verdicts against Ms. White would be $2 million to $3 million on the defendant's best day; $4 million to $5 million as the most probable outcome; and $6 million to $7 million on the plaintiff's best day. (Pl. Ex. 23.)

54. A month and a half before trial, Mr. McDonald and Safeway conferred and agreed to stipulate that Ms. White was negligent and 100% at fault for the accident. (Pl. Ex. 23.)

55. Trial commenced on January 14, 2013 and judgment was entered against White in the amount of $3,002,000.00 on January 30, 2013. (Pl. Ex. 31.)

56. No one from Safeway ever explained to Ms. White why her case did not settle. (Martin trial testimony, White trial testimony.)

57. No one at Safeway advised Ms. White that it could have settled her case for $50,000 before August 3, 2010. (Martin trial testimony, White trial testimony.)

58. Safeway had a responsibility to keep its insured informed about offers and demands, especially in an excess limits case such as this. (Miller trial testimony.)

59. Ms. White was never advised of a disagreement between Safeway and Carpenter and Stout that caused her case not to settle. (*Id*.)

60. Safeway never consulted Ms. White about producing her insurance policy to claimants' counsel. (*Id.*)

61. No one from Safeway considered the effects an excess verdict would have on Ms. White, including the effect it would have on her credit, her ability to find employment and her ability to buy a house. (Martin testimony; George testimony.)

62. In February 2013, Safeway retained attorney Seth Bingham to "independently consult with and advise" Ms. White about the options she had in light of the judgment entered against her. (Pl. Ex. 24). Bingham discussed with Ms. White that Mr. Carpenter may ask for an assignment of rights, he discussed bankruptcy, how the judgment would affect her limited assets, her ability to buy a car and her ability to get a job. Ms. White understood broadly what happened at trial, but not necessarily how this judgment would affect her. (Bingham trial testimony)

63. Mr. Carpenter took an asset deposition of Ms. White after entry of judgment. (Carpenter and Bingham trial testimony.) Mr. Carpenter, Ms. White and Mr. Bingham met off the record after the deposition. (*Id.*) During the off record meeting, Mr. Carpenter discussed with Mr. Bingham and Ms. White involuntary bankruptcy, voluntary bankruptcy, garnishment and Ms. White's possible claim for bad faith. (Carpenter, Bingham and White trial testimony.) No agreement was entered into between Mr. Carpenter and Ms. White at that meeting. (*Id.*)

64. Post-judgment interest was ordered at 15% per annum, beginning on January 30, 2013. (Pl. Ex. 33.)

65. On February 20, 2013, Mr. Carpenter advised Safeway that it owed post-judgment interest of $27,141.37, plus $1,233.70 per day. (Exhibits 25 and 29.)

66. Safeway issued a check that included $287.56 in post-judgment interest, despite clear policy language stating that Safeway must pay interest on the entire judgment. (Pl. ex. 32 and 33; Def. Ex. 12, page 8, section 3(c) under Coverage Agreement Property Damage and Injury Liability Coverage.)

67. Mr. Chavez's Conservator brought a garnishment action against Ms. White and Safeway. (*Writ of Garnishment*, filed on August 4, 2015.)

68. Ms. White then brought the instant cross-claim against Safeway. (*Answer to Writ of Garnishment and Cross-Claim*, filed on October 6, 2015.)

69. On October 14, 2015, Safeway made a written tender, formally and unconditionally offering to pay all unpaid post-judgment interest on the entire amount of the judgment up to and including October 14, 2015, which Conservator accepted.

70. Safeway breached its common law duty to settle the claim against its insured.

71. Safeway did not accept reasonable settlement offers within policy limits. Safeway did not honestly and fairly balance its own interests and Ms. White's interests in rejecting settlement offers within policy limits. Accordingly, the failure to settle was in bad faith.

72. Safeway did not place itself in the shoes of Ms. White and conduct itself as though it alone was liable for the entire amount of the judgment.

73. Safeway violated the Trade Practices and Frauds Act (Article 16) of the Insurance Code by knowingly not attempting in good faith to effectuate a prompt, fair and equitable settlement of its insured's claim in which liability had become reasonably clear.

74. Safeway violated the Trade Practices and Frauds Act (Article 16) of the Insurance Code by knowingly failing to promptly provide its insured a reasonable explanation of the basis

relied on in the policy in relation to the facts or applicable law for the offer of a compromise settlement.

75. Safeway delayed payment of the amount of interest it owed. The delay in payment constituted a material breach of the insurance contract.

76. The unsatisfied amount of the judgment against Ms. White is $4,213,033.71 as of August 7, 2017. (Pl. ex. 39.)

77. Ms. White is entitled to compensatory damages for Safeway's bad faith failure to settle.

78. Ms. White is entitled to actual damages for Safeway's violation of the Trade Practices and Frauds Act (Article 16) of the Insurance Code.

79. Ms. White is entitled to nominal damages for Safeway's delay in paying post-judgment interest.

80. Safeway acted with a culpable mental state. Specifically, Safeway acted recklessly, wantonly and with dishonest judgment. Safeway's culpable mental state is evidenced by the following:

a. The direct involvement of Safeway's management-level employee, Elizabeth George, in the mishandling of this claim.

b. Safeway's choice to not explain to Ms. White why it failed to settle the claim.

c. Safeway's choice to claim it was relying on advice of counsel after counsel had told Safeway that plaintiffs' counsel needed to see the insurance policy to evaluate the claim.

d. Safeway's repeated use of Ms. White's defense counsel to give Safeway coverage advice.

CONCLUSIONS OF LAW:

1. New Mexico law provides that "[t]here is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policyholder." UJI 13-1701 NMRA. As relevant here, "[f]air dealing means to act honestly and in good faith in the performance of the [insurance] contract" and that "[t]he insurance company must give equal consideration to its own interests and the interests of the policyholder." *Id.*; *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, 85 P.3d 230; *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶12, 954 P.2d 56.

2. New Mexico law governing claims for common law bad faith failure to settle provides that "[a] liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits" and that "[a]n insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith." UJI 13-1704 NMRA.

3. No formal contract is necessary to create the attorney-client relationship. A contract may be implied from the conduct of the parties. *George v. Caton*, 1979-NMCA-028, ¶24.

4. Nominal damages can support a punitive damages award. *See Jones v. Auge*, 2015-NMCA-016, par. 64, *cert. denied.*

5. Cases where an insured is exposed to an excess verdict impose a heightened requirement on the insurance company. *See Dairyland, ¶14.* In those cases, "the insurer should place itself in the shoes of the insured and 'conduct itself as though it alone were liable for the

entire amount of the judgment." *Id., quoting Johansen v. California State Auto. Ass'n,* 123 Cal.Rptr. 288 (1975). Judicial deference to the insurance company's position lessens when there is a substantial likelihood of a recovery in excess of policy limits. *Id.*

6. *Dairyland*, states:

> The insurance company's duty to the insured is not an inflexible requirement that it utterly eliminate its insured's liability. There are probably many circumstances . . . in which extinguishing the insured's liability is a practical impossibility. . . . A better rule is that the insurer has a good-faith duty to minimize, if not eliminate, its insured's liability. The duty to the insured does not mandate an all-or-nothing approach. Rather, what is required is a balancing of the interests of itself and its insured, the reasonableness of the claimant's demands, and the probable outcome of litigation as opposed to settlement. *Id.* ¶28.

7. "New Mexico does not recognize the cause of action of negligent failure to settle." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 1984-NMSC-107, ¶¶13, 19, 690 P.2d 1022; *see Sloan*, 2004-NMSC-004, ¶20; UJI 13-1704 Comm. Cmt. Rather, "under New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state." *Sloan*, 2004-NMSC-004, ¶6 (emphasis added). "To be entitled to recover for bad-faith failure to settle, a plaintiff must show that the insurer's refusal to settle was based on a dishonest judgment," which means that "an insurer has failed to honestly and fairly balance its own interests and the interests of the insured." *Id.* ¶20;

8. Unlike compensatory damages, punitive damages for bad faith failure to settle require proof of a culpable mental state. UJI 13-1718.

9. Reckless conduct is the intentional doing of an act with utter indifference to the consequences. Dishonest judgment is a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured. Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's rights. UJI 13-1718

10. The minimum amount of compensatory damages for common-law bad faith failure to settle is, as a matter of law, the difference between the amount of the judgment against the insured and the limits of the policy. *In re Dydak*, 2012-NMCA-088, par. 69-74. As a matter of law, the prospects that an insured cannot actually pay the judgment or that the plaintiff will not actually enforce the judgment do not lessen the minimum amount of damages. *Id.*

11. Safeway's failure to settle the claims was unreasonable and in bad faith. Imposing conditions on settlement offers was unreasonable and in bad faith under these circumstances. *See Dairyland Ins. Co. v. Herman*. Refusing to provide plaintiff's counsel with a full copy of the insurance policy was unreasonable and in bad faith under these circumstances. Using Ms. White's defense counsel for coverage advice was unreasonable and in bad faith under these circumstances. Failing to tell Ms. White the reasons her case did not settle was unreasonable and in bad faith under these circumstances.

12. It is not within the Court's role to determine how the $25,000 per person versus $50,000 per occurrence issue would have been decided had Safeway requested a declaratory judgment seven years ago. The pertinent facts are:

a. a legitimate question existed as to the amount of coverage;

b. Safeway knew plaintiff's counsel could not evaluate the issue without seeing the entire policy; and

c. Safeway refused to supply a copy of the entire policy while the settlement demands were in effect.

13. Safeway violated the Trade Practices and Frauds Act (Article 16) of the Insurance Code.

14. Safeway violated the Trade Practices and Frauds Act (Article 16) of the Insurance Code by "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear, and by "failing to promptly provide an insured a reasonable explanation of the basis relied on in the policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." Cross Claim at 8. *Ct. Record*.

15. Liability for violation of the Insurance Code requires proof that the proscribed practice was "knowingly committed or performed with such frequency as to indicate a general business practice[.]" NMSA §59A-16-20. *See also* UJI 13-1706 NMRA (liability under the Insurance Code requires that defendant acted knowingly or engaged in [the proscribed practice] with such frequency as to indicate that such conduct was its general business practice").

16. Safeway is liable for bad faith failure to settle because Safeway's conduct following receipt of notice of claims and demands made against White's policy arising from the Accident involved dishonest judgment and a culpable mental state, as required to impose liability for bad faith. UJI 13-1704 NMRA; *Sloan*, 2004-NMSC-004, ¶¶6, 20, ¶22.

17. The "culpable mental state" required to prove first-party bad faith failure to pay is "frivolous or unfounded," *Sloan*, 2004-NMSC-004, ¶¶17-18, which is "the equivalent of a reckless disregard for the interests of the insured," *id.* ¶2. "Frivolous or unfounded" is defined as "an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim[.]" *Id.* ¶18.

> "Unfounded" in this context does not mean "erroneous" or "incorrect"; it means essentially the same thing as "reckless disregard," in which the insurer "utterly fails to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in

> the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."
> *Id.* (alterations and internal citations omitted).

18. Safeway's basis for not paying the post-judgment interest on the entire amount of the judgment in February 2013 was frivolous, unfounded and otherwise in bad faith. *See* UJI 13-1702; *Sloan*, 2004-NMSC-004, ¶18.

19. The minimum amount of actual damages for violation of the Trade Practices and Frauds Act (Article 16) of the Insurance Code in the context of a failure to settle, is the amount of the excess judgment against the insured. *In re Dydak,* 2012-NMCA-088, par. 69-74.

20. The minimum amount of damages awardable against Safeway, for its failure to settle, is $4,213,033.71.

21. Safeway breached its common law and contractual duty to timely pay post-judgment interest. Safeway's delay in paying the post-judgment interest amount was unreasonable and is further evidence of bad faith. *Travelers Ins. Co. v. Montoya*, 90 N.M. 556 (Ct. App.1977).

22. The Court awards Victoria White compensatory damages in the amount of $4,213,034.71

23. Punitive damages must be "reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances." *Chavarria v. Fleetwood Retail Corp.,* 2006-NMSC-046, ¶36 *citing to Aken v. Plains Elec. Generation & Transmission Coop., Inc.* 2002-NMSC-21, ¶19.

24. The Court assesses punitive damages against Safeway in the amount of $8,200,000.00.

25. Ms. White is entitled to her attorney's fees and costs under NMSA § 39-2-1.

26. Judgment is to be entered awarding Plaintiff $12,413,034.71 with post-judgment interest running at 15% per annum.

27. The Court retains jurisdiction over claims for Court costs under Rule 1-054(D), NMRA, fees and costs under NMSA §39-2-1, and interest under NMSA §56-8-4(B).

28. All requested findings of fact and conclusions of law not granted herein or inconsistent with these findings and conclusions are denied.

Nancy J. Franchini

NANCY J. FRANCHINI
DISTRICT COURT JUDGE