2011 WL 1653289 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

Jacob ENNEN, Appellant,

v.

INTEGON INDEMNITY CORPORATION, Gmac Insurance Management Corporation, Craig Allen, Allen Law Group & Tyler & Tyler, Inc., d/b/a Integra Insurance Services, Appellees.

No. S-13832.
March 14, 2011.

Trial Court Case No. 3AN-08-04378CI
Appeal from the Superior Court, Third Judicial District at Anchorage the Honorable Craig Stowers, Presiding

Appellees' Answering Brief

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*VIII *AUTHORITIES PRINCIPALLY RELIED UPON*

Civil Rules

Rule 41. Dismissal of Actions.

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(b) Involuntary Dismissal -- Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event that a motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then weigh the evidence, evaluate the credibility of witnesses and render judgment against the plaintiff even if the plaintiff has made out a prima facie case. Alternately, the court may decline to render any judgment until the close of all the evidence. If the court renders judgment on

the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on ***ix** decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

*1 I. *JURISDICTIONAL STATEMENT*

Appellees Integon Indemnity Corporation and GMAC Insurance Management Corporation (jointly referred to hereafter as "the Integon defendants") dispute the characterizations of the trial court's rulings in Appellant's Jurisdictional Statement (Ennen Br. at p.1), but agree that, after a bench trial, the trial court entered a Judgment in favor of the Integon defendants. Exc. 1459. Plaintiff Jacob Ennen (hereafter referred to as "Ennen") filed a Notice of Appeal. Exc. 1455. This Court has jurisdiction pursuant to AS 22.05.010(a) and Appellate Rule 202.

II. *ISSUES PRESENTED FOR REVIEW*

1. Whether the judgment dismissing the claim against the insurance company be affirmed where the trial court correctly concluded that a passenger asserting a claim for injuries caused in a single car accident by the negligence of the named insured/driver of the vehicle does not have a direct cause of action for tortious bad faith against an auto liability insurance company for a delay in providing for underinsured motorist benefits.

2. Whether the judgment dismissing the claim against **the** insurance company be affirmed, where after a trial on the merits the finder of fact found that the plaintiff/passenger failed to carry his burden of proof to show by a preponderance of the evidence that the insurance company's conduct caused injury.

3. Whether the judgment dismissing the claim against the insurance company be affirmed, where after a trial on the merits the plaintiff/passenger failed to carry his burden of proof to establish by a preponderance of the evidence any amount of ***2** compensatory damages caused by the insurance company's conduct and where the plaintiff/passenger did not timely assert a claim for nominal damages.

III. *STATEMENT OF THE CASE*

A. *Parties*

Jacob Ennen was the plaintiff below, and he is now the appellant and cross-appellee in the consolidated appeals brought after the trial court entered Judgments after a bench trial without a jury. The appellees and cross-appellants were two of the defendants

below: Integon Indemnity Corporation and GMAC Insurance Management Corporation (referred to jointly as the "Integon defendants"). The cross appeal is the subject of separate briefing from the issues addressed here.

The Integon defendants brought a third-party claim against Craig Allen and the Allen Law Group (referred to jointly as "Allen"). The trial court dismissed the third-party complaint over the objection of the Integon defendants. The Allen defendants are cross appellees. The appeal from the dismissal of the third party claim is the subject of separate briefing from the issues addressed here.

Ennen originally named Tyler & Tyler, Inc., dba Integra Insurance Services ("Tyler") as a defendant below. Tyler was dismissed by stipulation. Exc. 1016-18.

B. ***Nature of the Case, Course of Proceedings, and Disposition Below***

1. Nature of the Case

This is a tort claim alleging insurance bad faith. Ennen alleged that the Integon defendants "engaged in a willful scheme and practice to submit a proposed illegal Alaska automobile insurance policy to the Alaska Division of Insurance (ADOI);" and that "once ***3** the policy was accepted by ADOI, the defendants sold ... the policies with the illegal provisions;" and "when claims were made by . . . injured persons to whom UM/UIM benefits were owed, the [Integon] defendants refused to acknowledge and pay proper amounts for UM/UIM coverage;" and "covered up the existence of the UM/UIM coverage and benefits." Exc. 1304.

Ennen alleged that the bad faith "submission of the proposed illegal policy" ("the 'front end' of the scheme") was the predicate for the "failure to acknowledge/evaluate/pay proper UIM benefits" (the alleged " 'back end' of the scheme"). Id; *see also* Exc. 567-68, ¶¶ 14, 16; Exc. 570, ¶ 22.

2. Course of Proceedings Below

On January 11, 2008, Ennen filed a complaint for insurance bad faith seeking an unspecified amount for alleged emotional and **financial** distress and punitive damages. Exc. 563-601. The defendants filed Answers. Exc. 602-08; Exc. 609-13; Exc. 614-19. The Integon defendants' Answers included an affirmative defense that Ennen's claim was time-barred as a matter of law and an affirmative defense that Ennen's damages were the result of the actions or inaction of Ennen or others. Exc. 607; Exc. 618-19.

Integon filed a Third Party Complaint against Craig Allen and the Allen Law Group (jointly referred to here as "Allen") alleging that, to the extent Ennen had suffered any damages as the result of the delay in his receipt of amounts available under the UIM provisions of the Shanigan policy, the damages were the result, in whole or in part, of the negligence of his attorney, Allen, and that the Integon defendants were entitled to apportionment under AS 09.17.080. Exc. 620-22.

***4** Allen filed an Answer. Exc. 623-25. Allen then filed a Motion to Dismiss the apportionment claim as to punitive damages. Exc. 626-38. Allen subsequently filed a Motion to Dismiss any third-party claim for apportionment. Exc. 708-09. The trial court entered two Orders granting Allen's motions to dismiss Integon's third-party claim for apportionment. Exc. 764-67; Exc. 768-69.

The case was tried [1] to the court sitting without a jury. At the close of Ennen's case-in-chief, the Integon defendants made an oral motion for judgment in their favor as a matter of law, [2] supported by a written memorandum. Exc: 1137-56. The court took the motion under advisement, and trial proceeded.

When both parties rested, the Integon defendants made a second motion for judgment in their favor as a matter of law. Exc. 1169-90. The trial court took the motion under advisement. Tr. 1289:2-16; Tr. 1291:2-1292:8.

3. Disposition Below

On February 2, 2010, the trial court granted the Integon defendants' motions. Exc. 1303-97. The trial court applied Alaska law and ruled that under the circumstances of this case, Ennen could not maintain an insurance bad faith action sounding in tort ***5** premised upon fiduciary duties the Integon defendants allegedly owed to him. Exc. 1307-16.

The trial court also made alternative findings of fact "with respect to Ennen's allegations of insurance bad faith and related damages issues" if the trial court was "in error on this legal question." Exc. 1304. After listening to all of the testimony and considering all of the evidence, the trial court did "not [find] by clear and convincing evidence that [the Integon] defendants engaged in an intentional scheme and practice to deceive and deny UIM claims at the 'front end' (in the submission of the illegal AK 400 policy to ADOI, or in the mishandling of other Alaska UIM claims)." Exc. 1319. The court also found there was no intentional concealment or non-payment of the claim, but it found that defendants should have recognized the claim and were reckless in not recognizing the claim. Exc. 1320-22.

The trial court found that Ennen failed to carry his burden of proof at trial to show that "the belated payment of Ennen's UIM benefits caused him either actionable emotional or **financial** distress." Exc. 1323. Sitting as the fact finder, the trial court also found that "[w]hatever **financial** distress that Ennen suffered because of the belated payment" he received from Integon was "fully compensated by the payment of the full UIM benefit and full prejudgment interest." The trial court "could not discern an evidentiary basis to make a finding of emotional distress or **financial** distress proximately caused by the defendants' recklessness." Exc. 1324. And while the trial court did make alternative findings of fact regarding reckless conduct, the trial court made "no award of compensatory damages." Id.

***6** Ennen moved for reconsideration. Exc. 1398-1440. The court denied that motion. Exc. 1447. Ennen filed his Notice of Appeal. Exc. 1455-56. Final Judgments were entered in favor of Integon (Exc. 1459-60) and Allen. Exc. 1457-58. The Integon defendants filed their Notice of Appeal and Cross Appeal. Exc. 1523-25.

C. *Statement of Facts*

In August 1999, the Alaska Division of Insurance reviewed and approved a proposed Integon Insurance Company auto policy, known as the AK 400 (7/99) policy form, for use in the State of Alaska. Exc. 1343, ¶ 58. Integon subsequently issued an auto insurance policy to Gordon Shanigan using the AK 400 (7/99) policy form ("the Shanigan policy"). While riding in Shanigan's pickup on November 7, 2000, Ennen was injured in a one-car auto accident when Shanigan drove off the highway.

Ennen hired Attorney Craig Allen to recover damages for his personal injuries, and to negotiate with the insurance companies affording coverage for Shanigan's negligence in causing the auto accident. Exc. 464; Tr. 324:22-25; Tr. 343:12-17; 343:18-344:19.

Ennen settled a claim against Integon's insured, Shanigan, for personal injuries for a $50,000 payment by Integon under the bodily injury liability coverage (Coverage A) of Shanigan's auto insurance policy. Exc. 469; Exc. 470; Exc. 475; Exc. 581-84. Ennen signed and returned a release (Exc. 474), and Integon delivered a $50,000 check to Allen. Exc. 475. The settlement was accepted (Tr. 346:14-18), and Integon closed its claim file on February 14, 2001. Tr. 347:7-21. Peters, the adjustor that paid the claim, and others at Integon did not recognize that Ennen had a viable UIM claim. E.g., Tr. 796:8-12.

***7** Allen also represented Ennen in negotiating with another insurance company affording Shanigan coverage for the auto accident, Deerbrook Insurance Company ("Deerbrook"). Tr. 350:4-12; Tr. 350:20-351:10. Two days after Peters tendered the offer of a $50,000 payment, Allen contacted Shanigan's insurance agent, and confirmed that Deerbrook (a subsidiary of Allstate Insurance Company) was on notice of the accident and "investigating whether there was effective coverage." Exc. 467.

On April 1, 2001, Allstate contacted Allen's office, and confirmed that the Deerbrook auto insurance policy afforded coverage. *Id*. On May 29, 2001, one of Allen's employees left a message for him concerning a conversation the employee had with "Tina, Allstate in Alaska":

"Craig, I reached Tina who says: *Alaska law allows a defense and UIM settlement since Jacob is a passenger in an 1 vehicle accident. Law allows 9% interest from date of loss, plus Rule 82 atty fees*, all of which she will explain in her letter she will get to us sometime this week, along with a release. After we return release, she will issue checks. First check will be approximately $56,000; second check about $53,000."

Exc. 468. Emphasis supplied.

On June 5, 2001, Allen "[g]ot faxed letter from [Allstate's] Tina: approx. $118,000.00 total w/interest, et cetera." Id The following day, Allen received a hard copy of the letter from Allstate's Staff Claims Service Adjuster, Tina Watts, stating, in part,

"it appears insured [Gordon Shanigan] is liable for this loss. Our policy provides liability and underinsured motorist benefits to your client in the amount of $50,000 each. Alaska law allows prejudgment interest and attorney fees on a policy limit settlement."

Exc. 477.

***8** However, Allen did not act on this information by contacting Integon to raise the issue whether additional amounts were available under Shanigan's Integon auto liability insurance policy. Ennen's damages exceeded the amounts paid under the Integon and Allstate insurance policies issued to Shanigan. Therefore, additional amounts were available under the underinsured motorist ("UIM") coverage (Coverage C) of Shanigan's Integon auto liability insurance policy. Exc. 585-87. Ennen did not pursue a claim against Shanigan's estate for damages in excess of the payments by the two auto liability insurance companies. Nor did Ennen obtain an assignment of any claim or rights that Shanigan's estate may have asserted against the Integon defendants.

When it reached the original settlement with Ennen, Integon did not spot the potential application of the UIM coverage to this single car accident. When Integon recognized the oversight several years later, Integon sought out Ennen, and contacted him through his attorney, Allen. Tr. 361:14-362:12. Integon reopened its adjusting file for the accident, and, on April 3, 2007, Integon paid Ennen $90,241.50. This amount represented the facial limits of the UIM coverage under the Shanigan policy, together with interest and Rule 82 attorney's fees. Exc. 1306. Nevertheless, nearly a year later, Ennen filed suit alleging tortious bad faith. Id.

IV. *SUMMARY OF THE ARGUMENTS*

1. As a passenger injured in a single car accident asserting a claim against the policyholder/driver's underinsured motorist coverage of Shanigan's auto liability insurance policy, Ennen was a third party claimant. Underinsured motorist (UIM) coverage acts as excess to the policyholder/driver's liability insurance coverage.

***9** As a third-party claimant in the UIM context, Ennen cannot maintain a bad faith tort cause of action because Ennen did not have a fiduciary relationship with the auto liability insurer, Integon. An auto liability insurance company has a duty to defend its policyholder against liability claims asserted by others, including passengers in the insured auto. The trial court correctly recognized that Integon's duties to Shanigan in the context of the insurance policy's liability coverage creates a conflict of interest that is contrary to Ennen's attempt to assert a tort claim that requires the existence of a fiduciary relationship.

2. Even if this Court concludes that the trial court erred in ruling Ennen could not maintain a bad faith tort cause of action against the Integon defendants, the judgment dismissing the claim should be affirmed where Ennen failed to carry his burden of proof to show by a preponderance of the evidence that the Integon defendants' conduct caused him any injury.

3. Even if this Court concludes that the trial court erred in ruling Ennen could not maintain a bad faith tort cause of action against the Integon defendants, the judgment should be affirmed where, after a trial on the merits, Ennen failed to carry his burden of proof to establish by a preponderance of the evidence any amount of actual damages.

V. *ARGUMENTS*

A. *Standard of Review*

Questions of law are reviewed de novo. *Wasserman v. Bartholomew*, 38 P.3d 1162, 1169 (Alaska 2002). The clearly erroneous standard applies to the review of a case tried to the court without a jury. ***10** *Am. Computer Inst., Inc. v. State*, 995 P.2d 647, 651 (Alaska 2000). "Under this standard we reverse only when we are left with a 'definite and firm conviction that a mistake has been made.' Therefore, we must 'take the view of the evidence most favorable to the prevailing party below,' and give due regard to 'the trial court's opportunity to judge the credibility of the witnesses.' " *Municipality of Anchorage v. Gregg*. 101 P.3d 181, 186 (Alaska 2004).

B. *As a passenger injured in a single car accident asserting a claim against the policyholder/driver under the underinsured motorist coverage of the auto liability insurance policy, Ennen did not have a fiduciary relationship with the auto liability insurer, Integon.*

1. The trial court correctly ruled that where Ennen made a claim against Integon's policyholder, Shanigan, Ennen was a third-party claimant.

Where the basis of Ennen's bad faith claim was that the Integon defendants delayed paying monies under the UIM provisions of an auto insurance policy issued to Shanigan, the trial court correctly held that Ennen could not maintain a bad faith tort cause of action against the Integon defendants.

First, while Ennen may have been an insured for purposes of the UIM coverage in the event of an accident caused by an underinsured third party, when Ennen asserted a claim against Integon's policyholder, Shanigan, for his injuries resulting from a single car accident, Ennen was a claimant. Second, Ennen did not enter into a contract with Integon. As a claimant asserting that his injuries were caused by Integon's named insured, Ennen had no fiduciary relationship with Integon.

***11** a. The UIM coverage was excess to Shanigan's liability insurance limits.

This was a single-car accident, and the negligent, at-fault driver was Shanigan, Integon's named insured. The only claim Ennen made for his injuries was asserted against Integon's named insured, Shanigan. The $50,000 Ennen received in the original settlement with Integon was made under Coverage A of Shanigan's auto liability insurance policy. The BI coverage provided protection against the risk of Shanigan's liability to third-party claimants for bodily injuries caused by Shanigan's negligent operation of his vehicle.

The policy language provides, in part, that "[i]f you pay a premium for this coverage, we will pay damages for **bodily injury**. for which any **insured** becomes legally responsible because of an **auto** accident." Exc. 581. "On February 23, 2001, Integon paid Ennen the $50,000 bodily injury liability limits of Shanigan's policy *in return for a release of all claims against Shanigan's estate."* Ennen Br. at p. 3. Emphasis supplied.

Under AS 21.96.020(c), "[a]n insurance company offering automobile liability insurance in this state for bodily injury or death shall, initially and at each renewal, offer coverage ... for the protection of the persons insured under the policy *who are legally entitled to recover damages for bodily injury or death from owners or operators of uninsured or underinsured motor vehicles*." Emphasis supplied. Integon's policy with Shanigan conformed to this requirement.

***12** The UIM coverage of Shanigan's policy stood as excess liability insurance to the $50,000 in bodily injury liability coverage of Shanigan's policy. The insuring clause defining the UIM coverage (Part C of the Shanigan policy) states that it is for amounts which an **"insured** is legally entitled to recover from the owner or operator of an . . . **underinsured motor vehicle** up to the Limit of Liability as defined in this Part." Exc. 585. Emphasis in original.

As a matter of law, UIM coverage stands as excess or supplemental liability insurance for the negligent, at-fault driver. See *Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829, 832, 833 (Alaska 2001) ("Excess coverage thus strives to provide additional coverage, as needed to fully compensate injured motorists, after available liability coverage has been completely exhausted."). In the context of a two-car accident underlying *State Farm Mutual Auto. Ins. Co. v. Wilson*. 199 P.3d 581, 586 (Alaska 2008), this Court identified the UIM coverage available to satisfy the injury claims of a passenger as representing additional liability insurance, in excess of the amount paid by the other driver's liability insurer.

Where Ennen was claiming amounts under the UIM provisions of the auto liability insurance issued to Shanigan, Ennen was not a first-party insured making a claim against the policy, but, instead, he was "a third-party claimant (or perhaps that he occupie[d] a middle position between a first party and a third party, as discussed . . . in the. *Manolakakis* case)." [3] Exc. 1316.

***13** Ennen spends a great deal of effort arguing that because passengers are insureds under the UIM coverage that he was making a "first-party" claim against Integon. There is no dispute that, as a passenger, Ennen was an insured within the definitions used in the UIM coverage. [4] But his bad faith claim against the Integon defendants (the cause of action that is the subject of this appeal) rested upon Integon's delay in payment of money "which such **insured** is legally entitled to recover from the owner or operator of an . . . **underinsured motor vehicle."** [5] Where Integon's policyholder, Shanigan, was the owner/operator of the underinsured motor vehicle, it is a coverage that addressed Shanigan's liability to third parties, including passengers, injured due to Shanigan's negligence. In that context, Ennen was claimant.

***14 b. Ennen never made a first-party claim under the Shanigan policy.**

Ennen never made a claim as a first-party insured, nor did Ennen take an assignment of rights Shanigan might have asserted regarding the Integon defendants' conduct in defending Shanigan or in paying amounts to resolve Shanigan's liability to Ennen.

2. The trial court correctly found that Ennen had no fiduciary relationship with the insurer.

The trial court acknowledged the conflict that exists where Integon owed duties to its named insured, Shanigan. Exc. 1309, 1311. Shanigan paid the premiums to Integon, and, following the accident caused by its policyholder's negligence, Integon had a duty to defend Shanigan against claims brought by a third party.

The duties owed to Shanigan conflict with, and would be adverse to, Ennen's claim under the liability coverage or excess liability coverage afforded under the UM/UIM provisions of the Shanigan policy. This conflict in the context of UIM insurance was acknowledged in *Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565 (7th Cir. 1978), cited by Ennen. The court in *Craft* recognized that "a determination that the uninsured motorist is legally liable to the insured is a condition precedent to the obligation of the insurer to pay off on the policy. *In this determination the insurer stands in the shoes of the uninsured motorist with regard to the question of whether the latter was negligent and with regard to his defenses such as contributory negligence"* 572 F.2d at 568. Emphasis supplied.

***15** Ennen's claim against the Integon defendants required (and was correctly held to lack) a foundation of a fiduciary relationship. Exc. 1316. Under long established Alaska law, "[a]n insurer could hardly have a fiduciary relationship both with the insured and a claimant because the interests of the two are often conflicting." *O.K. Lumber, supra*, 759 P.2d at 525. It is this conflict of interest that precludes a fiduciary relationship essential to a tort claim for insurance bad faith. This acknowledged

conflict of interests in the UM/UIM setting has caused some courts to refer to the relationship between a liability insurer and a party (who may be an insured under the terms of the UM/UIM coverage) as "hybrid" -just as Judge Singleton did in *Manolakakis*.

Ennen attempts to minimize the conflict that exists in the UIM context or suggest that other courts have disregarded the conflict. For example, Ennen cites *Voland v. Farmers Ins. Co.*, 943 P.2d 808 (Ariz. App. 1997), and claims that decision represents the rejection of "the trial court's ruling that a UM/UIM claim is a 'hybrid' that negates all duties to the insured." Ennen Br. at 35.

Ennen's portrayal of that Arizona case misses the mark on a number grounds: First, the Arizona appellate court said it "generally agree[d] with the following observations by the Alabama Supreme Court: 'Uninsured motorist coverage ... is a hybrid in that it blends the features of both first-party and third-party coverage.' " 943 P.2d at 811 (quoting *LeFevre v. Westerberry*. 590 So.2d 154, 159 (Ala. 1991)).

Second, Ennen relies upon characterizations of dicta. Ennen tells this Court that the holding in *Voland* should be viewed as a "rejection of "the trial court's ruling that a UM/UIM claim is a 'hybrid' that negates all duties to the insured." The issue addressed ***16** in *Voland* was whether "the implied covenant of good faith and fair dealing requires an insurance carrier to pay undisputed portions of uninsured motorist (UM) benefits to its insured/claimant before the latter executes a release or obtains an arbitration award." 943 P.2d at 810. The Arizona Court of Appeals affirmed the trial court's grant of summary judgment for the insurers, and dismissed plaintiff's bad faith claim. Third, the facts in *Voland* are distinguishable. The plaintiff was not a passenger claiming to be a first-party insured, but rather the named policyholder asserting rights under "her State Farm and Farmers auto insurance policies." *Id*.

In *Manolakakis v. Insurance Corp. of New York*. 400 F. Supp. 2d 1204 (D. Alaska 2005), Federal District Court Judge Singleton examined the relationship between an insurance company and an additional insured under Alaska law in the context of a bad faith claim arising out of a dispute regarding UIM benefits payable under a policy of auto liability insurance purchased by the plaintiff's employer. Id. at 1205. The facts are sufficiently similar to those in this case that it may be helpful to summarize.

Manolakakis was driving a taxi cab for a company owned by Selmani. Selmani had purchased an auto insurance policy for his taxi cab company from ICNY. Manolakakis was seriously injured in an accident with an underinsured motorist. After the accident, ICNY paid Manolakakis the statutory $100,000 UIM limits stated in the policy. Manolakakis then sued ICNY based upon an allegation that the insurance company had not accurately informed Selmani of the premium charge for additional higher coverage limits. Manolakakis also alleged in a second claim for relief that ICNY's refusal to pay additional amounts as UIM benefits was bad faith, that is, the ***17** result of ICNY's bad faith in misleading Selmani about the cost of additional coverage with higher limits.

When Selmani purchased the insurance policy, the insurance company (ICNY) offered the statutory UM and UIM coverage limit, and the insurance company quoted a higher premium rate to Selmani for higher UM/UIM coverage limits. ICNY had submitted a request to the Alaska Division of Insurance for review and approval of the proposed premium rates, but the proposed rates for the additional coverage limits had not been approved at the time those rates were quoted to Selmani. Selmani chose the statutory coverage limits.

Manolakakis asserted two claims. The first claim sought reformation of the insurance policy to increase the policy limits based upon misrepresentations ICNY made about the rates that Selmani relied upon when comparing the cost in his decision regarding the amount of UIM coverage to purchase. In addition to his claim for reformation of the contract, Manolakakis also "contended] that he should be permitted to state a claim for breach of the covenant of good faith and fair dealing." Id. at 1207.

The District Court ruled that Manolakakis did have standing "as a third party intended beneficiary of the contract of insurance" to seek a contractual remedy, *i.e.*, reformation of the coverage limits. *Id*. at 1206. The District Court denied ICNY's motion to for summary judgment against the reformation claim on the ground that there were genuine issues of fact whether plaintiff's employer, the named insured, would have purchased the higher coverage limits if the insurance company had accurately

informed plaintiff's employer of the actual cost of the optional increased UM and UIM limits, and ***18** that the plaintiff would have been an intended beneficiary of that increased coverage. Id. at 1206-07.

The second claim alleged that ICNY was liable to Manolakakis for the tort of bad faith refusal to pay more than the lower, statutory minimum UIM coverage limits stated in the employer's auto insurance policy. ICNY's refusal to pay amounts above the stated limits was allegedly in bad faith, as those limits had been established as the result of misrepresentations made to Selmani long before the accident.[6] The District Court found that ICNY had "offered insurance at a premium the company could not legally charge at the time the offer was made," and, therefore, "[i]n a real sense the company [had] misrepresented the cost of basic insurance and implicitly misrepresented [the cost of] increased insurance, which a reasonable person would assume would cost at least more than basic insurance." 400 F. Supp. 2d at 1207. Judge Singleton rejected the argument ***19** that the statements made to Selmani about the premium amounts were irrelevant. "It is one thing to say nothing, it is another to actively mislead." 400 F.2d at 1206.

However, in addressing the tort claim for bad faith based upon a failure to pay additional amounts as UIM benefits, the District Court held that it "[was] not necessary to determine which claim [plaintiff] is bringing, since viewed either as a tort or as breach of contract, the claim should be limited to . . . the named insured," and it granted partial summary judgment dismissing the bad faith claim as a matter of law. Id. at 1207, 1208.

Ennen rests his tort claim rests on the following language in the Shanigan policy: " 'Insured' as used in this Part, means: * * * b. Any person occupying your covered vehicle with the permission of the named insured." Exc. 585. Judge Singleton found that Manolakakis was an additional insured for purposes of the UIM coverage.

Manolakakis was injured while driving, and while he was an insured under the auto policy issued to his employer. However, Judge Singleton ruled that Manolakakis occupied "a middle position between the named insured who may sue in tort or contract for breach of the covenant and an injured third party seeking damages from the insured." Id. at 1207. Assuming that the plaintiff was "an intended beneficiary of the UM and UIM coverage," Judge Singleton recognized that a special relationship did not exist between ICNY and Manolakakis, and, without such a relationship, Manolakakis was not able to maintain a tort claim for bad faith against the auto insurance company. Applying Alaska law, Judge Singleton ruled that the claim sounding in tort should be limited to the named insured. 400 F. Supp. 2d at 1207. "[T]he policies articulated by the Supreme Court of Alaska for not allowing injured parties, *i.e.*, incidental beneficiaries, to sue on such a ***20** claim apply equally to intended beneficiaries. In neither case does the plaintiff negotiate with the insurer regarding the components of insurance." Id. at 1207-08.

3. The trial court did not misapply the *Loyal Order of Moose* decision.

As noted above, Ennen argues that *Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co.*, 797 P.2d 622 (Alaska 1990) was "controlling precedent" overlooked by Judge Singleton. Ennen argues that *Loyal Order* "establishes [Ennen's] status as an intended third-party beneficiary" of the Shanigan policy and that Ennen "could bring a bad faith tort claim against Integon." Ennen Br. at p. 22.

First, both Judge Singleton and the trial court in this case accepted that the plaintiff was insured under the terms of the UIM coverage, but neither Manolakakis nor Ennen had entered into contracts with the respective insurance companies, and (despite the label "insured") both were claimants for purposes of the UIM provisions of policies issued to another (Selmani, and here, Shanigan). Instead of addressing the reasons both courts offered for the results, Ennen spends pages arguing that he is "a first-party insured," "an intended beneficiary," or a "non-named additional insured."

The issue presented in *Loyal Order* was not whether "non-named or additional insureds" were "owed the duty of good faith and fair dealing," as Ennen argues. The issue framed in that case was "[d]oes Alaska recognize the tort of bad faith in the principal and surety context of a commercial construction claim?" *Loyal Order, supra*. 797 P.2d at 626.

Seconds Ennen erroneously contends that in *Loyal Order* this Court held that "a non-named or an additional insured - [is] a first party insured, owed a duty of good faith ***21** and fair dealing." In a subsequent case, this Court described its holding in *Loyal Order of Moose* as "address[ing] payment and performance bonds for construction contracts. We held that sureties on those bonds owe their obligees a duty of good faith and fair dealing, and that breach of that duty gives rise to an action for bad faith." *O'Connor v. Star Insurance Co.*, 83 P.3d 1, 5 (Alaska 2003).

Third, the *Loyal Order* decision is mentioned in two paragraphs of the trial court's Order. See Exc. 1310-11. The trial court correctly noted that this Court cited two lines of precedent in its *Loyal Order* decision, and "reiterated its first-party/third-party distinction" in addressing tort claims for bad faith. Exc. 1310.

Fourth, the factual circumstances as well as the legal issue and holding in *Loyal Order* are distinguishable from Ennen's claim. The defendant surety in *Loyal Order*, issued performance and payment bonds "naming Moose Lodge as 'obligee.' " *Loyal Order, supra*, 797 P.2d at 622.[7] Ennen was not named in the policy between Integon and Shanigan.

Fifth, the general contractor obtained the performance and payment bonds naming the Lodge as the obligee for the specific purpose of meeting a requirement in the construction contract with the Lodge. *Loyal Order, supra*. 797 P.2d at 622 ("Pursuant to the parties' contract, for included additional consideration, [general contractor] obtained [the] performance and payment bonds * * * naming Moose Lodge as 'obligee.' "). Ennen ***22** cites no evidence that Mr. Shanigan and Integon entered into the insurance contract pursuant to an obligation owed to Ennen or with the intent to benefit Ennen.

The court in *Loyal Order* held that, as the obligee named in the payment and performance bonds, the Lodge was "an intended creditor third-party beneficiary," and a special relationship existed between a surety and its obligee that would expose the surety to liability in tort for breach of the implied duty of good faith and fair dealing. Id. at 628. Ennen was not an intended creditor third-party beneficiary.[8] He had no contract with Integon. He accepted a ride with Shanigan, and, in asserting a claim that his injuries were caused by Integon's policyholder, Shanigan (as, the owner/operator of an underinsured vehicle), Ennen was a claimant; not someone in a fiduciary relationship with Shanigan's insurance company.

Ennen claims "the vast majority" of courts in other jurisdictions have held that a "non-named insured with a UM/UIM claim" can sue in tort for breach of the implied covenant of good faith and fair dealing. Ennen Br. at p. 30. In support of this proposition, Ennen offers *Pemberton v. Farmers Ins. Exchange*. 858 P.2d 380 (Nev. 1993), a case that does not involve a "non-named insured."

Pemberton was injured in a two car collision with Grabow. Grabow tendered the $15,000 in liability limits under his State Farm auto policy. Pemberton made a UIM ***23** claim, but he was not a "non-named insured." Pemberton was the named insured under the Farmers policy. After settling her claim against Grabow for $15,000, Pemberton made a limits demand under the UM coverage of her policy with Farmers. Pemberton accepted Farmers' payment of the $100,000 limits of her UM coverage, and reserved the right to pursue a bad faith claim against Farmers. 858 P.2d at 381.

4. Ennen took no assignments from Shanigan of any right to pursue claims against the Integon defendants.

This Court is told that the trial court ruled that Integon "*cannot* be punished for its bad faith conduct and other wrongful conduct because it owed Jacob Ennen no duty," and Ennen predicts "devastating consequences for Alaska insurance consumers" if the trial court's legal ruling is upheld. Ennen Br. at p. 39. Ennen offers no explanation why, in a case where his injuries exceeded that amounts available under the liability insurance available to the tortfeasor, Shanigan, that the tort remedy could not have been preserved by the simple step of taking an assignment of Shanigan's rights vis-a-vis Integon from his estate.

Citing *C.P. v. Allstate Ins. Co.*, 996 P.2d 1216 (Alaska 2000), Ennen argues the "duties an insurer owes a first-party insured are distinctly different from any duty owed to a third-party claimant, who is a stranger to the policy." Ennen Br. at p. 18. In

C.P., Allstate issued a homeowners policy to Mr. and Mrs. Lancaster. The Lancasters' son and his daughter lived with the named insureds. An eleven year old friend of the insured's granddaughter spent the night in the house, and the Lancasters' son sexually assaulted her.

***24** The victim of the assault, C.P., and her parents sued the Lancasters for negligence and sued the insureds' son for the assault. The **elder** Lancasters tendered the defense of the negligence claim to Allstate. Allstate rejected the tender. C.P. and her parents then settled their claims with the **elder** Lancasters in exchange for a confession of judgment, an agreement to arbitrate the amount of C.P.'s damages, and an assignment of the **elder** Lancasters' claims against Allstate for the latter's refusal to defend the claim. Based upon the assignment, C.P. sued Allstate and its claims adjuster, Norton. 996 P.2d at 1219.

The Federal district court certified three questions to this Gourt. The first question was whether a salaried claims adjuster employed by a liability insurer owed duties sounding in tort to the insured homeowners. As part of its response to the first of the three certified questions, this Court addressed its holding in *O.K. Lumber*, and reiterated third parties cannot maintain a cause of action against insurers for bad faith: " 'An insurer could hardly have a fiduciary relationship both with the insured and a claimant because the interests of the two are often conflicting.' " *C.P. v. Allstate, supra,* 996 P.2d at 1221 (quoting *O.K. Lumber, supra*. 759 P.2d at 526). Yet Ennen insists that *C.P. v. Allstate* establishes that Ennen could bring a tort claim for bad faith. See Ennen Br. at 19. He contends that *C.P. v. Allstate* stands for the proposition that "the fact crucial to the holding in *O.K. Lumber* was that O.K. Lumber was not an insured under the Providence Washington policies." Ennen Br. at p. 19.

Ennen overlooks the role that the assignment played in the outcome of *C.P. v. Allstate*. It is well established that an insured's cause of action for breach of the implied ***25** covenant is assignable to the injured third party claimant. See *O.K. Lumber, supra,* 759 P.2d at 525. In *C.P. v. Allstate*, this Court noted that it had previously recognized that the insureds' cause of action for breach of the implied covenant of good faith and fair dealing was assignable to the injured third party claimant. The assignment of the insureds' rights against Allstate that C.P. took when she settled her claim against the insureds was the key fact that distinguished the result in *O.K. Lumber* (dismissal of the tortious bad faith claim) from this Court's ruling allowing C.P. to pursue a tort claim for bad faith against Allstate. "Because C.P. [was] the assignee of the insureds' rights against their insurer, C.P. [was] suing as a first party, [and] not as a third party." *C.P. v. Allstate, supra*. 996 P.2d at 1221.

In its February 2, 2010 Order, the trial court recognized the importance of the assignment in its discussion of *C.P. v. Allstate*. The trial court noted that this Court had explained "why the parents, *as assignees of the insureds*, could assert a claim against the insurer." Exc. 1311. Emphasis supplied. *C.P. v. Allstate* stands for the proposition that unless a third party claimant takes an assignment of the insureds' rights, the third party claimant does not have a basis to pursue a claim for tortious bad faith.

5. Ennen's effort to urge this Court to overturn the trial court's considered ruling based upon assertions that he was denied compensation is incorrect and misplaced.

Ennen attempts to conflate his unsuccessful effort to pursue a tort claim for punitive damages with "Alaska's strong public policy favoring full compensation for citizens injured by irresponsible uninsured and underinsured drivers." Ennen Bri at 9. Years before this lawsuit was filed, Ennen received the limits of the bodily injury (BI) ***26** coverage under Shanigan's policies with Integon and Allstate, the limits of UIM coverage under Shanigan's policies with Integon and Allstate, and he received prejudgment interest and Rule 82 attorney's fees from Integon and Allstate.

As summarized by the trial court, three months after the accident, Ennen accepted [a] $50,000 settlement [from the Integon defendants, and] signed a release of claims." Next, he was paid "an additional $118,575 in June 2001 in settlement of his injuries [UIM benefits, Rule 82 attorney's fees, and prejudgment interest] under another policy." And, the Integon defendants "reopened Ennen's claim file, and issued Ennen a check in the amount of $90,241.50 dated April 3, 2007, in full payment of his UIM benefits, with Rule 82 attorney's fees and prejudgment interest through the date of the check." Exc. 1306.

Here, the Integon defendants discharged any obligations owed under the terms of the insurance contract. As the trial court correctly and repeatedly stated (in boldface type and italics) in its February 2, 2010 Order, Ennen made a no contract claim in this case. Exc. 1305, Exc. 1307; Exc. 1313. Integon's payment of amounts available under the UIM provisions of Shanigan's policy were delayed, but the Integon defendants paid prejudgment interest in full. Exc. 1324.

Further, as discussed below in the section regarding the alternative findings regarding actual damages, the trial court (sitting as the fact finder) found Ennen failed to prove the Integon defendants' conduct (whether characterized as 'correct and proper,' 'negligent,' or 'reckless') caused Ennen no actual injury. Exc. 1323.

***27** Ennen's claim rests upon the proposition that monies should have been paid (sooner) under the UIM coverage of the Integon insurance contract because Integon's policyholder, Shanigan, was liable to Ennen for negligently causing the injuries Ennen sustained in the auto accident. In dismissing Ennen's bad faith claim, the trial court correctly acknowledged that Integon had no fiduciary relationship with Ennen because, in that context, Integon owed duties to its policyholder, Shanigan, that conflicted with, and were adverse to, Ennen's interests.

6. Ennen's argument that the trial court erred in its legal ruling because. he claims to have been an intended third party beneficiary is misplaced.

Next, Ennen argues that he was "an intended third party beneficiary of the Integon policy." Ennen Br. at 24. Under those circumstances, Ennen argues that he may sue in tort for breach of the implied duty of good faith and fair dealing. Id. at p. 25.

That argument was rejected by this Court when it was offered in *O.K: Lumber*. "O.K. Lumber argues that a third party claimant may sue for breach of this covenant, either because it is a third party beneficiary of the covenant or because public policy so dictates. We disagree." See *O.K. Lumber, supra*, 759 P.2d at 525.

It is well established that all contracts in Alaska have an implied covenant of good faith and fair dealing. "This covenant [of good faith and fair dealing] sounds primarily in contract; in limited situations, however, it may sound in tort." *Municipality of Anchorage v. Gentile*. 922 P.2d 248, 260 (Alaska 1996). The basis of Ennen's claim was that Integon delayed payment of monies available under the UIM coverage. The trial ***28** court correctly ruled that in that context "[t]he [Integon] defendants had no fiduciary duty to Ennen." Exc. 1316.

In *State Farm Fire & Cas. Co. v. Nicholson*. 777 P.2d 1152 (Alaska 1989), this Court looked to the purchaser's motivation for obtaining insurance and the parties' unequal bargaining power. 777 P.2d at 1156. Because of the special relationship between the insured and insurer, the recognition of a remedy sounding in tort was deemed to be appropriate to secure the reasonable expectations of the insured when entering into the insurance contract. The existence of the "special relationship between the insured in the insurance context justified this result." Id. at 1155, 1156-57.

When he entered into the auto liability insurance contract with Integon and paid premiums, Mr. Shanigan may have intended, [9] and, in the eyes of the law, he is deemed to have had, a reasonable expectation that Integon would defend him (or his estate) against, and indemnify if a claim was made against him (or his estate)(which Integon in fact did). Ennen did not take an assignment of any rights Shanigan may have had against Integon when he settled his claim against Shanigan.

Ennen, however, did not enter any contracts with the Integon defendants. "[W]e decline to recognize a tort duty of good faith and fair dealing independent of the contractual relationship." *O.K. Lumber, supra*, 759 P.2d at 526. Ennen's relative bargaining power is not a relevant factor. The duty of good faith and fair dealing is "a product of the fiduciary relationship created by the contract between the insurer and its ***29** insured." *O.K. Lumber, supra*. 759 P.2d at 525-26. There was no fiduciary relationship between Integon and Ennen in the context of a UIM claim. In that setting, the insurance company has divergent duties to parties with conflicting interests.

C. ***Ennen's attempt to claim on appeal that he was pursuing a separate negligence claim for relief is a non-starter.***

Next, Ennen argues that the trial court concluded that "Integon owed Ennen no duty." Ennen Br. at p. 10. Ennen's Statement of Issues frames this duty in terms of common law negligence: "Does an insurer owe a duty of care to handle competently a UIM claim for a claimant who is defined by the policy as an insured for UM/UIM coverage?" Ennen Br. at p. 1.

First, the tort of insurance bad faith is an intentional tort. As a matter of law, negligence does not meet the standard for bad faith articulated by this Court. *Hillman v. Nationwide Mutual Fire Insurance Co. ("Hillman II")*. 855 P.2d 1321, 1324 (Alaska 1993). Second, burying an allegation of negligence in a string of allegations of wrongful conduct in the Complaint does not set out an independent claim sounding in tort. Nor did the trial court express a legal conclusion in its February 2, 2010 Order that Integon owed Ennen no duty sounding in common law negligence. As the trial court commented, Ennen "did not expressly frame his claim as a[n]. . . independent tort cause of action," and, if permitted, Ennen's pleading and reliance upon "the identical factual allegations purporting to be bad faith," would "obliterate any meaningful distinction" between causes of action. Exc. 1317. Third, the fact finder in this case found that Ennen failed to carry his burden of proof at trial to show that the Integon defendants' conduct (whether ***30** characterized as reckless or negligent) caused his alleged injuries. Any error regarding this alleged failure to recognize a common law negligence claim is harmless error.

D. ***Even if this Court concludes the trial court erred in its legal ruling, the Judgment should be affirmed where the finder of fact concluded Ennen failed to carry his burden of proof on causation and damages.***

The trial court made alternative findings of fact and conclusions of law. Ennen directs this Court's attention to the alternative findings of fact regarding bad faith. Yet Ennen's claimed injury rests upon allegations that he sustained emotional and **financial** damage as the result of a delay in his receipt of Integon's payment of UIM benefits payable under the Shanigan policy due to Shanigan's negligence in causing the auto accident. Exc. 573, ¶ 30-Exc. 574, ¶ 32. The trial court's finding that Integon did not award Ennen such damages is an alternative basis for upholding the trial court's judgment.

Approximately one page of Ennen's Opening Brief is directed at the trial court's alternative findings of fact regarding damages [10] -- claiming "[i]t was clear error to rule that Ennen's damages were fully compensated by payment of interest on the UIM coverage." Ennen Br. at p. 47. Ennen then adds an argument asking this Court to find that the trial court erred when it did not award nominal damages (Ennen Br. at p. 49) - relief that Ennen did not ask for until he filed a reply brief in support of his Motion for Reconsideration after the trial court had found that Ennen failed to establish either proximate cause or damages. Exc. 1451.

***31** The first argument is misplaced and fails to meet the clearly erroneous standard. "[I]n a case tried to the court without a jury . . . [this Court's] scope of review is limited to a determination of whether the findings are clearly erroneous. This is plainly set forth in the third sentence of. . . Civil Rule 52(a) which states: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard is given to the opportunity of the trial court to judge the credibility of the witnesses.' " *Chirikoff Island Cattle Corp. v. Robinette*. 372 P.2d 791, 792 (Alaska 1962). The second argument is both untimely and not properly presented to this Court.

1. Ennen misstates the trial court's findings of fact on damages.

There was no dispute that Integon paid both the UIM benefits and all amounts of interest more than a year before Ennen filed his complaint. Exc. 1305, 1306. Ennen does not direct this Court's attention to any allegation or evidence that the Integon defendants owed any amount of money under the insurance contract, as interest, or as Rule 82 attorney fees.

Ennen erroneously suggests that the trial court ruled that "interest the insurer already owes under the contract" was "the only compensation that may be recovered for bad faith failure to pay timely the policy benefits." Ennen Br. at p. 46. He argues that "[n]othing in logic says that payment with interest.... erases the harm caused by the failure to pay in a timely manner." *Id*.

Contrary to Ennen's characterizations of the trial court's rulings, that court expressly recognized that Ennen had alleged the Integon defendants caused him "non-economic emotional and **financial** distress damages," and that Ennen "also [made] a ***32** claim for punitive damages." Exc. 1305. The trial court permitted Ennen to present his evidence of his alleged injuries and to attempt to establish that his circumstances (and alleged emotional distress) were caused by the conduct of the Integon defendants.

Ennen alleged that his **financial** and emotional distress began more than a year after the auto accident--sometime in 2002. Due to the auto accident, Ennen was unable to work. Tr. 651:4-652:9. Integon Indemnity paid Ennen $50,000 three months after the November 7, 2000 accident. A second insurer, Allstate, paid $5,000 in MedPay and paid Ennen an additional $118,575.62 in June 2001. Tr. 660:4-16. Within the next six to 18 months, Ennen purportedly spent the insurance proceeds when he built a home, bought a car and invested in a construction business that failed. Tr. 645-650.

Ennen had the burden of producing evidence that his alleged emotional and **financial** distress beginning in 2002 were caused by the Integon defendants. He failed to carry that burden of proof. Exc. 1323-24.

2. The trial court correctly found that Ennen failed to carry his burden of proof at trial to establish that the Integon defendants' conduct caused Ennen's alleged injury.

A plaintiff has the burden of proving each and every essential element of a tort claim, including a tort claim of insurance bad faith. Causation is an essential element. The issue of proximate cause is normally a question of fact for the finder of fact to decide. See *Dura Corp. v. Harned*. 703 P.2d 396, 406, 408 (Alaska 1985).

After hearing all of the evidence, as the trier of fact, the trial court concluded Ennen failed to carry his burden of proof regarding either causation or damages. "The court does not find by a preponderance of the evidence that the belated payment of ***33** Ennen's UIM benefits caused him either actionable emotional or **financial** distress." Exc. 1323.

"The court also could perceive no evidence of emotional distress proximately caused by defendants when Ennen did not know he was entitled to additional money benefits, and believed he had received all the insurance benefits he was supposed to have received." Exc. 1324. "Whatever **financial** distress that Ennen suffered because of the belated payment of his UIM benefits was fully compensated by the payment of the full UIM benefit and full prejudgment interest." Exc. 1324.

The judgment entered in favor of the Integon defendants should be affirmed where Ennen fails to show that, sitting as the trier of fact, the trial court expressly found Ennen failed to carry his burden of proof at trial to establish causation. Ennen's burden in this appeal is to show clear error in the trial court's alternative findings of fact. Instead, Ennen offers this Court generalizations, such as "[p]art of what the premium buys is peace of mind,"[11] and "[m]any types of consequential damages, including emotional and economic damages, have been recovered in bad faith cases in Alaska." Ennen Br. at 47. Those generalizations offer no support to Ennen's appeal challenging the trial court's February 2, 2010 Order and the subsequent Judgment.

Ennen's evidence on damages was admitted and considered after a full trial on the merits. The fact finder concluded that Ennen failed to carry his burden of proof regarding causation or damages.

***34 3. The fact finder decided Ennen failed to carry his burden of proof to establish the amount of any actual damages.**

In his Complaint, Ennen undertook to prove that he sustained damages "in excess of $100,000 as a result of Defendants' wrongful actions." Exc. 574, ¶ 32. The Integon defendants disputed Ennen's claim to have sustained damages as a result of their conduct. *See* Exc. 606-07, ¶ 32; Exc. 618, ¶ 32. Ennen produced two witnesses to testify regarding his alleged **financial** and emotional distress. He produced no other evidence.

The trial court "listened carefully" to the witnesses' testimony at trial on the issue of damages. Exc. 1323. In proposed Findings of Fact and Conclusions of Law submitted after the trial, Ennen reiterated assertions that he was "injured as a direct result of the wrongful failure to evaluate and settle his UIM claim in 2002." Exc. 1381, ¶ 5. Ennen asked the trial court to make an award of $200,000. See Exc. 1381, ¶ 6.

After hearing the testimony, the trier of fact "could not discern an evidentiary basis to make a finding of emotional distress or **financial** distress proximately caused by the defendants' recklessness." Exc. 1324. Ennen claims that "the public policy of Alaska," and the holding of *Allstate Ins. Co. v. Dooley*. 243 P.3d 197 (Alaska 2010), stand for the proposition that "[e]very wrong deserves a remedy." Ennen Br. at p. 40.

The issue in *Dooley* was whether the trial court erred when it denied the defendant's motion for summary judgment dismissing the plaintiff's spoliation claim. There was no genuine issue of fact that the evidence in question came to light prior to conclusion of the trial.

***35** This Court vacated the trial court's denial of the defendant's motion. This Court concluded that where the late-produced evidence was available at the time of trial, the tort of fraudulent concealment of evidence, not spoliation, was the appropriate cause of action. *Dooley*, 243 P.3d at 203-04. In reaching that conclusion, this Court noted its "strong policy in favor of trying cases on their merits militate[d] in favor of allowing a fact finder to determine whether concealing the evidence caused a party to incur actual damages." Id. at 202.

Here, the case was tried on its merits, and Ennen was allowed to present any and all evidence. Ennen does not argue that the trial court erred by excluding evidence offered at trial in support of his allegations that the Integon defendants' caused him injuries and his claimed damages. The trial judge in this case had the opportunity to observe the testimony and listen to the witnesses. [12] It was his function to assess credibility and the totality of the testimony. See *Stansberry v. Manson*. 420 P.2d 449, 450-51 (Alaska 1966). Sitting as the fact finder and deciding the case on its merits, the trial judge found that Ennen had failed to carry his burden of proof to show that the Integon defendants' conduct was the proximate cause of Ennen's claimed damages.

Ennen's brief does not direct this Court to any evidence overlooked by the trial court. He does cite this Court to a portion (Exc. 1380-81) of the Continued Findings of Fact and Conclusions of Law. See Ennen Br. at p. 47. In that section, the trial court did incorporate (and, presumably, accepted and adopted) Ennen's proposed comment that ***36** there was testimony at trial concerning Ennen's **financial** and emotional hardship occurring between 2002 and 2007. See Exc. 1380, ¶ 1. However, if this Court examines this portion of the Order, it will see that the trier of fact then added, in his own handwriting, "but this testimony does not persuade the court that Ennen sustained any compensable damages caused by defendants." Exc. 1380, ¶ 1.

The trial court accepted Ennen's proposed findings about Ennen's circumstances during the period from 2002 to 2007. See Exc. 1380, ¶ 2 - Exc. 1381, ¶ 5. The trial court then drew a line through a proposed finding that 'Ennen was injured as a direct result of the Integon defendants' conduct,' and it struck that proposed finding from the Continued Findings of Fact and Conclusions of Law. Exc. 1318, ¶ 5. Next, the trial court also struck Ennen's proposed finding that an award of $200,000 [13] was "a reasonable amount of compensation" in its entirety. See Exc. 1381, ¶ 6.

Where an appeal is taken following a bench trial, this Court has said it is not the function of an appellate court to "re-weigh the evidence which was adduced before the trial court or to substitute [its] judgment for that of the trial court." *Martens v. Metzgar*. *supra*, 591 P.2d at 544. The judgment in the Integon defendants' favor should be affirmed where trial court, as the trier of fact, concluded that Ennen did not carry his burden of proof at trial regarding the essential elements of proximate cause and damages.

***37** There is no doubt that Ennen sustained serious injuries in the auto accident. There is no question that Ennen's ability to work, his ability to enjoy life were adversely affected by the regrettable accident. The Integon defendants did not cause the auto accident. Ennen points to no evidence that when Ennen accepted a payment of $50,000 from Integon, he was angered or

emotionally upset--with thoughts that he had been deprived of additional monies. The trial court found that both Ennen and his attorney, Allen, thought that Ennen had received all that was available. Exc. 1306.

Ennen did not become upset that the Integon defendants owed more money when Ennen's settled his claim with Allstate with the assistance of his attorney, Allen. Quite the contrary, the trial court expressly found that Allen said nothing. [14] Ennen remained unaware that any additional amounts were available. Tr. 353:17-354:3. Ennen spent the money: giving gifts to family and friends, buying cars and trucks, buying property and building a house and investing in a business that failed. Tr. 355:11-358:20. He quickly dissipated the settlement proceeds. [15]

Six years after getting a full release in exchange for a $50,000 payment to claimant who settled his claim with the assistance of counsel, Integon sought out Ennen. ***38** Exc. 474. When Ennen received Integon's payment of $90,241.50, it was greeted as an unexpected windfall. Tr. 362:8-17.

Here, the trial court addressed a number of issues and made findings of fact in the alternative--including damages. After listening carefully to the evidence, the trial court made no award of compensatory damages. Exc. 1324. Where there has been a failure of proof- that is, the plaintiff has failed to produce evidence to support an essential element of the plaintiff's claim (whether the essential element is one of liability or damages), the analysis under Civil Rule 41(b) and Civil Rule 50 should reach the same conclusion - dismissal of the plaintiff's claim.

Ennen alleged that he "suffered foreseeable mental, emotional, physical, and **financial** distress" beginning at some unidentified date in 2002. The trial court listened carefully to the evidence concerning Ennen's allegations that the Integon defendants' conduct caused the alleged injuries that Ennen alleged commenced months after the original settlements. Exc. 1323.

The trial court heard evidence that when the settlement was received early in 2001, those funds replaced income that Ennen was receiving from other sources, such as Public Assistance, Social Security, heating assistance and Food Stamps, for which Ennen no longer qualified so long as he had money in the bank. Ennen became eligible to receive those benefits once again, after he spent the settlement funds. Tr. 650, 662-664.

Ennen produced no bank statements or other records to establish his **financial** condition prior to the accident or afterwards. He produced no records to document when or how he spent the money. However, the trial court heard testimony that Ennen quickly ***39** dissipated the substantial funds he had received in the 2001 settlements. In short order, Ennen bought two cars, and he gave money and gifts to family members, including moving his mother and sister back to Alaska and purchasing a diamond ring for his grandmother. He also purchased property from his uncle, built a house, bought yet another vehicle, and installed a driveway, a septic system and a well. Tr. 643-648.

Ennen also put money from the 2001 settlements into a business with his uncle that soon failed because the business did not generate enough money to purchase insurance. Tr. 648-650. There is no evidence in the record that Ennen was ever paid anything from this business. Indeed, it is clear that much of the funds went to his family in one manner or another. Ennen did not testify that he saved any of the money for living expenses, how much of the money he spent on living expenses in 2001, or how that compared to monies he would have received from other sources, had he not received the settlements. There was no evidence that Ennen sought to put the money aside for a rainy day, or that he would have had more money for living expenses in 2002 or 2003 if he had received amount Integon paid in 2007 in 2000, or in early 2001.

Had Ennen received the additional UIM payment in 2001, Ennen's attorney Allen would have kept one third as attorney's fees. See Tr. 643. When Integon paid the money in 2007, Ennen received the full amount of the payment, without a reduction for attorney's fees, together with all amounts owed as interest, plus additional amounts as Rule 82 attorney's fees. Tr. 656. If the UIM funds had been timely paid, Ennen would have received about $30,000; in fact, in 2007, he received over $90,000 because no attorney's fees were taken, and interest had been accruing at 9%. Integon's payment of ***40** additional amounts in 2007 were a welcome and important windfall for Ennen, who had recently had a daughter. Tr. 656-657. But he did not save these

funds either. Ennen quickly spent those funds, including the purchase of two additional cars, one for himself and one for his girlfriend. Tr. 657-658, 664-665.

The evidence of what Ennen did with the money he did receive in 2001 supports the trial court's conclusion that Ennen failed to produce by a preponderance of the evidence a causal link between Integon's delay in payment and his alleged damages, but that any link is entirely speculative. In fact, the evidence supports a conclusion that the delay in payment, though unwitting, probably benefitted Ennen by, in essence forcing an investment of the funds at the prejudgment interest rate of 9%. The trial court, sitting as the trier of fact, was in the best position to weigh the evidence. That weighing cannot be lightly set aside. The trial court's findings of fact and conclusion that Ennen failed to carry his burden of proof is supported by substantial evidence and must be sustained.

In a jury trial, a Rule 50 motion should be granted where no evidence of an essential element of the claim has been produced. The jury has no evidence to consider, nor, therefore, any basis to draw inferences. The applicable rule in a bench trial is Civil Rule 41(b). "Alaska has traditionally held a pragmatic view of Rule 41(b): 'Where the plaintiffs proof has failed in some aspect the motion should, of course, be granted.' " *Fletcher v. Trademark Construction Co., supra,* 80 P.3d at 732 (quoting *Rogge v. Weaver,* 368 P.2d 810, 813 (Alaska 1962), and holding the trial judge did not err in refusing to view the evidence in the light most favorable to the plaintiff when granting the defendant's Rule 41(b) motion). The test for a Rule 41(b) motion does not require ***41** applying all inferences in the non-moving party's favor at the conclusion of all of the trial, because the trial court is the fact finder.

The trial court's alternative findings regarding Ennen's failure to prove causation and damages is entitled to as much deference from this Court as would a jury's verdict that the defendants' conduct caused no damages to Ennen. Civil Rule 52(a). "A trial court's award of damages is reviewed as a finding of fact and will not be disturbed on appeal unless clearly erroneous." *Mackie v. Chizmar,* 965 P.2d 1202, 1204 (Alaska 1998); *see also Otis Elevator Co. v. Garber*. 820 P.2d 1072, 1075 (Alaska 1991).

Ennen showing in this appeal fails to meet the standard of appellate review. "The determination by a trial court sitting as a finder of fact as to the proper amount to be awarded as damages is not to be disturbed on appeal unless it is clearly erroneous, [citation omitted] So long as the trial judge 'follows the correct rules of law, and his estimation appears reasonable and is grounded upon the evidence, his finding will remain undisturbed.' " *Pluid v. B.K.*. 948 P.2d 981, 983 (Alaska 1997).

Therefore, even if this Court finds error in the trial court's legal conclusion regarding Ennen's bad faith claim, the trial court did not find an evidentiary basis to establish that Ennen's claimed emotional and **financial** distress were proximately caused by the Integon defendants' conduct.

4. Dismissal of Ennen's claim should not be reversed based upon an untimely claim for nominal damages.

Finally, Ennen's argument that the trial court should have awarded nominal damages was not timely raised to the trial court. There was no mention of nominal ***42** damages until after the trial court denied his Motion for Reconsideration. Ennen first asserted this argument about nominal damages in a March 11, 2010 reply memorandum (Exc. 1451) filed nine months *after* the trial concluded, seven months *after* the briefing was closed on the Integon defendants' motions for dismissal (Exc. 1260-1302), one month *after* the trial court entered its Order (Exc. 1303-97) containing the alternative finding that Ennen had failed to carry his burden at trial to show his alleged damages or that they were proximately caused by the Integon defendants' conduct, and one day *after* the trial court signed the March 10, 2010 Order denying Ennen's motion for reconsideration. Exc. 1447.

This argument about awarding nominal damages was not timely raised. *See Stadnicky v. Southpark Terrace Homeowners' Ass'n. Inc.*, 939 P.2d 403, 405 (Alaska 1997) (an issue raised for the first time in a motion for reconsideration deemed not timely, and therefore not properly before the court on appeal). Ennen made no request for the trial court to review its denial of his motion to reconsider based on the suggestion in Ennen's reply brief that the trial court should have awarded nominal damages.

First, Ennen's argument that the trial court erred when it did not award nominal damages should be deemed to be waived. That argument should not be considered in this appeal. See *Baseden v. State*. 174 P.3d 233, 239 n. 17 (Alaska 2008).

Second, the trial court made "no award of compensatory damages." Exc. 1324. The trial court's findings of fact, including a decision not to award any damages, are reviewed for **abuse** of discretion. See *Holmes v. Wolfe*. 243 P.3d 584, 588 n.7 (Alaska 2010)(citing *Brown v. Dick*. 107 P.3d 260, 267 (Alaska 2005)); *see also. DeNardo v. GCI* ***43** *Communication Corp.*, 983 P.2d 1288, 1292 (Alaska 1999); *Gerstein v. Axtell* 960 P.2d 599, 601 (Alaska 1998); *O'Callaghan v. State*. 920 P.2d 1387, 1388 (Alaska 1996).

Third, Ennen's claim for tortious bad faith collapses where there was no fiduciary relationship, Ennen failed to meet his burden to prove causation and any actual damages, and it is inappropriate to ask this Court to reverse based on a belated request for nominal damages as a means to reinstate a defectively pled and presented claim for punitive damages. In *Haskins v. Shelden*. 558 P.2d 487 (Alaska 1976), this Court cited McCormick's treatise on damages for the following: " 'it seems to be agreed without dissent that the allowance of exemplary damages does not widen the range of actionable wrongs. In other words, no state of facts exists upon which a claim for exemplary damages could be based, which would not be actionable if the claim for exemplary damages were omitted. . . . Consequently, the first inquiry must be, Does the complaint state a cause of action if the allegations relied upon solely to support the claim for exemplary damages be disregarded? If it does not, it is insufficient, and the claim for exemplary damages collapses with the rest of the case.' " 558 P.2d at 492 (quoting McCormick, Damages § 83 (1953)).

In *Haskins*, the plaintiff's claim was allowed to proceed because the plaintiff asserted a claim for replevin "which justified specific relief . . . independent of the punitive damages." 558 P.2d at 492. As the trial court emphasized here, Ennen did not assert an alternative tort claim (Exc. 1316-17), and he made no claim based upon the contract--that is, no claim for breach of contract, no claim for reformation, rescission or any other remedy sounding in contract. See Exc. 1305, 1307. Ennen made no claim that ***44** amounts were owed under the contract, nor any amounts as interest or Rule 82 attorneys fees. This was a claim seeking punitive damages based on submission of a proposed form of auto insurance policy (reviewed and approved by the Alaska Division of Insurance) and for conduct in the handling of third parties' insurance claims.

Ennen was not a policyholder. Exc. 1307. Ennen was not an assignee, or a designated representative of other Integon Indemnity policyholders. Ennen made allegations about alleged misconduct occurring years before the November 7, 2000 accident - related to the submission of an "illegal" proposed policy form, the sale of the Policy, and premiums paid for the insurance.

Ennen never purchased a policy, never relied upon representations allegedly made in the marketing of Integon Indemnity Corporation auto insurance, nor did he ever pay premiums to either Integon Indemnity Corporation or GMAC Insurance Management Corporation. Sitting as the trier of fact, the trial court found that the allegedly "illegal" provisions did not play any role in causing Ennen's claimed injuries. Exc. 1323-24.

The trial court admitted this type of testimony and similar evidence Ennen offered about alleged improper conduct in the submission of proposed language to the Alaska Division of Insurance. Just as the plaintiff in *Manolakakis* was held not to have a viable tort claim for bad faith as a matter of law in connection with allegedly wrongful conduct occurring prior to the date the insurance company and the plaintiff had a contractual relationship, in the end, the trial court correctly held that Ennen had no fiduciary relationship with the Integon defendants, and that the lack of such a relationship is fatal to his effort to maintain a tort claim for insurance bad faith.

***45** The trial court sat as the finder of fact. While the Integon defendants respectfully insist the trial court erred in its alternative findings regarding recklessness, there can be no dispute that, as the trier of fact, the trial court found the Integon defendants' conduct (whether characterized as reckless, or otherwise) caused no injury to Ennen. Exc. 1323-24. Ennen failed to carry his burden of proof at trial to establish either causation or any amount of damages proximately caused by the Integon defendants' conduct.

5. The trial court acted within its discretion when it did not award any nominal damages.

The trial court, as the fact finder, correctly awarded no nominal damages. Nor was the trial court required or allowed to award nominal damages, as Ennen argues.

The fact finder decided Ennen failed to carry his burden to prove actual damages. The trial court found that Ennen was fully compensated for the delay in his receipt of Integon's second payment under the Shanigan policy by the payment of all amounts available and prejudgment interest. Exc. 1324. That finding was supported by substantial evidence. [16]

The court rejected Ennen's claim for further emotional distress damages. The trial court, after careful consideration, found that Ennen failed to prove the defendants' conduct caused his alleged emotional distress. Exc. 1323-24.

The trial court did not fail to recognize that a plaintiff was entitled to seek emotional distress damages, as Ennen suggests. It is a matter of the fact finder deciding ***46** that this plaintiff did not carry his burden at trial to prove he suffered emotional distress and uncompensated **financial** distress damages caused by the defendants. Id

All potential damages were considered and addressed by the court. The court specifically found that Ennen did not meet his burden of proof "that Ennen sustained any compensable damages caused by defendants." Exc. 1380. Given the court's earlier ruling that Ennen had been fully compensated (Exc. 1306), this secondary finding thus addresses the issue of emotional distress. The court rejected, and struck through, Ennen's proposed finding that "Ennen's distress could have been considerably eased" by payment of funds in 2002. Exc. 1381.

Where, as here, the trial court found that all **financial** loss had been compensated well prior to suit, and further found there were no additional uncompensated emotional distress damages, the trial court was not required to award nominal damages as a matter of law. An award of nominal damages is simply not appropriate where the trier of fact has found that a plaintiff has already been fully compensated for his damages.

Nor was the court legally required to make an award of nominal damages. Ennen cites this Court to *Zok v. State*, 903 P.2d 574 (Alaska 1995). Yet the holding of that case demonstrates why the trial court did not err in not awarding Ennen nominal damages. The *Zok* case involved an intentional tort, wrongful arrest. Nominal damages were available in *Zok* because proof of damages was not an element of that tort. The Court held that "[t]he reasoning behind this rule is that, as a matter of law, a plaintiff in a false arrest case need offer no proof of actual damages because injury in the sense of monetary loss is not an element of the tort." Id. at 577.

***47** In contrast, Ennen's claim required proof of actual damages. Ennen alleged actual damages. Unlike *Zok*, this case did not involve an intentional tort, such as false arrest or trespass, where nominal damages are allowed.

This Court examined the *Zok* holding in considerable detail in the *Anchorage Chrysler Center* case. See *Anchorage Chrysler Center. Inc. v. DaimlerChrvsler Motors Corp.*, 221 P.3d 977, 990-91 (Alaska 2009). This Court discussed the two types cases where nominal damage awards were allowable. The first type of case was exemplified by *Zok. i.e.*, where monetary loss was not an element of the tort. The *Anchorage Chrysler Center* decision distinguished the facts of *Zok*, and found that the fraudulent misrepresentation claim did not fall within this category because monetary damages were in fact an element of a fraud claim. The second type of case where nominal damages could be awarded was where a plaintiff did prove that it suffered an actual loss caused by the defendant's conduct, but was not able to establish the extent or amount of damages. Id. The Court allowed nominal damages in the *Anchorage Chrysler Center* case because it found that Anchorage Chrysler Center had established by undisputed evidence that it had in fact suffered economic loss of an undetermined amount. Id. at 992.

However, this Court expressly rejected the argument that a court should abandon the damages element necessary to establish a fraud claim, and award nominal damages as a matter of vindication of rights. Id. at 992. That holding is dispositive of Ennen's

argument here. Like the tort of fraud, a claim for breach of the covenant of good faith and fair dealing requires proof of damages. See *State Farm Fire & Cas. Co. v. Nicholson*. 777 P.2d 1152, 1156 (Alaska 1989) ("the measurement of recoverable damages in tort is ***48** . . . [a] reasonable amount which will compensate plaintiff for all actual detriment proximately caused by the defendant's wrongful conduct"); *Alaska Pacific Assur. Co. v. Collins*. 794 P.2d 936, 947 (Alaska 1990) (bad faith is a tort action permitting tort damages). Neither this case's posture, nor the result of *Zok* (rejecting an award of nominal damages) support Ennen's request for nominal damages here.

It would be contrary to public policy to award an unsuccessful plaintiff with punitive damages where that plaintiff failed to carry his burden to prove that the defendants' conduct caused any underlying injury. To do so would discourage voluntary payment of claims and settlements prior to suit, and simply encourage contentious litigation by parties with no actual injuries to seek recovery of punitive damages. [17] Claims for punitive damages are not allowed unless relief is granted in the underlying claim. Ennen did not obtain any affirmative relief.

E. *Ennen is not entitled to an award of punitive damages where the fact finder awarded no damages or any affirmative relief*.

A punitive damages claim cannot stand alone. *DeNardo v GCI Communication Corp., supra*. 983 P.2d at 1292. There cannot be an award of punitive damages where the plaintiff does not prevail on the merits and obtain some affirmative relief. *E.g. Haskins v. Sheldon*. 558 P.2d 487, 492 (Alaska 1976). A party claiming punitive damages must carry its burden of proof in the trial court and prevail on a claim for affirmative relief. ***49** That is, the plaintiff must not only establish that "defendant's conduct rose to the requisite level of culpability," but also establish "that plaintiff suffered 'substantial damage,' even if the amount of actual damages may be uncertain." *Lockhart v. Draper*, 209 P.3d 1025, 1028 (Alaska 2009). [18] A viable judgment in plaintiff's favor, i.e., some type of affirmative relief, is a prerequisite for an award of punitive damages. *See Coulson v. Marsh & McLennan, Inc*., 973 P.2d 1142, 1149 (Alaska 1999) ("Because Coulson has failed to prevail on the merits of any of her tort claims, the appropriateness of punitive damages for those claims is a moot question."); *see also Rutledge v. Alyeska Pipeline Serv. Co.*, 727 P.2d 1050, 1057 (Alaska 1986).

Other jurisdictions follow a similar rule. *E.g.*, *Hockenberg Equip. Co. v. Hockenbere's Equip. & Supply Co. of Des Moines. Inc*., 510 N.W.2d 153, 156 (Iowa 1993); *Kizer v. County of San Mateo*. 806 P.2d 1353, 1357 (Cal. 1991) ("actual damages are an absolute predicate for an award of exemplary or punitive damages. . . . Even nominal damages, which can be used to support an award of punitive damages, require actual injury."); *Cheung v. Daley*. 42 Cal. Rptr. 2d 164, 167 (Cal. App. 1995) ("an award of exemplary damages must be accompanied by an award of compensatory damages."); *Edmond v. Fairfield Sunrise Vill., Inc.*, 644 P.2d 296, 298 (Ariz. App. 1982) (punitive ***50** damages "are a derivative sort of damages and may only be awarded if the plaintiff has recovered actual damages."); *Ali v. Jefferson Ins. Co.*, 449 N.E.2d 495, 499 (Ohio Ct. App. 1982).

Ennen alleged a tort claim for bad faith. Although the trial court made alternative findings of recklessness, Ennen failed to persuade the trier of fact that he was entitled to any affirmative relief. The trial court ruled against him on liability as a matter of law. Exc. 1324. The trial court, as finder of fact, made alternative findings against Ennen regarding damages, and found that Ennen failed to carry his burden of proof to establish either causation or damages. Exc. 1324, 1380. The trial court awarded no compensatory damages or any affirmative relief. Exc. 1324. There is no foundation for Ennen's request that this Court remand the case to the trial court to now try Ennen's demand for punitive damages.

VI. *CONCLUSION*

The Integon defendants respectfully request that this Court affirm the Judgment entered in their favor.

Footnotes

1 On March 20, 2009, Integon presented Ennen with an Offer of Judgment. Exc. 1473-75. Ennen rejected the Offer of Judgment. Exc. 1466, ¶ 2 - Exc. 1467, ¶ 4.

2 The Integon motions at the end of Ennen's case-in-chief and at the close of all of the evidence were labeled as Civil Rule 50 motions. Where the trial is to the court without a jury, Civil Rule 41(b) provides the applicable dismissal rule and standards. See *Frank v. Golden Valley Elec. Ass'n. Inc.*, 748 P.2d 752, 756 n. 9 (Alaska 1988); *Fletcher v. Trademark Construction Co.*, 80 P.3d 725, 732 (Alaska 2003). The appropriate Civil Rule was raised in support of the Integon defendants' motions. See Exc. 1267-68.

3 Although the trial court's February 2, 2010 Order contains a discussion of the *Manolakakis* decision, Ennen's only mention of that case is confined to a footnote in Ennen's Opening Brief arguing that Federal District Court erred in its ruling in *Manolakakis* because Judge Singleton "failed to cite or discuss" *Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co.*, 797 P.2d 622 (Alaska 1990). Ennen erroneously insists *Loyal Order* is "controlling precedent on the issue of intended third-party beneficiary," and, "as a result, [Judge Singleton] misinterpreted" *O.K. Lumber Co. v. Providence Washington Insurance Co.*, 759 P.2d 523, 525-26 (Alaska 1988)." Ennen Br. at p. 21, n. 2.

4 The General Definitions section of the Shanigan policy states that **" 'You'** or **'Your'** refer to: 1. The 'named insured' shown in the Declarations; and 2. The spouse if a resident of the same household." Exc. 580. Emphasis in original. The only named insured was Gordon Shanigan. Part C of the Shanigan policy contains the Uninsured/Underinsured Motorist provisions. There are additional definitions, stating that "The 'General Definitions' section of **your** policy applies to PART C; with the addition of or changes to the definitions specified," and **" 'Insured'** as used in this Part, means: . . . b. Any person occupying **your covered auto** with the permission of the named insured." Exc. 585. Emphasis in original.

5 "If **you** pay us a specific premium for Uninsured/Underinsured Motorist Bodily Injury Coverage ... we will pay damages for **bodily injury** to an **insured** caused by an accident which such **insured** is legally entitled to recover from the owner or operator of an . . . **underinsured motor vehicle** for negligence up to the Limit of Liability as defined in this Part. Exc. 585.

6 This fact echoes Ennen's allegations that Integon's failure to pay amounts available under the UIM coverage was not inadvertent, but, instead, "part of a scheme whereby Integon Indemnity came [to Alaska] to garner an unfair advantage" by misleading the Alaska Division of Insurance to approve an "illegal" auto insurance policy form (Ennen's attorneys referred to the AK 400 policy form as a "tool to deny claims"). *But see* Exc. 1388. In August 1999, the Alaska Division of Insurance reviewed and approved a proposed Integon Insurance Company auto policy, known as the AK 400 policy form, for use in the State of Alaska. Exc. 1343, ¶ 58. Ennen's bad faith claim rested upon his allegation that the failure to pay amounts under the UIM provision in Shanigan's policy when Integon paid $50,000 under the BI coverage in February 23, 2001 was the result of the Integon defendants' deliberate decision (presumably made at some unspecified date prior to August 1999) to 'use this tool' to deny payment of UIM claims to Integon Indemnity insureds. Tr. 23:6-9; 53:6-20. That is, Ennen rested his bad faith claim on allegedly improper conduct that occurred years before the accident, while admitting elsewhere that "[a]n insured does not have a UIM claim until all liability claims are resolved and all liability coverages are exhausted." Ennen Br. at p. 9.

7 *State Farm Life Ins. Co. v. Davis*. 2008 WL 5245332 (D. Alaska, Dec. 17, 2008) (cited by Ennen) is also inapposite. The claimant in *Davis* was the *named and only primary beneficiary* under the life insurance policy at issue.

8 The First Restatement of Contracts classified beneficiaries as either donee or creditor beneficiaries. *See* Farnsworth, E.A., *Contracts*. §10.2 (1982), p. 715. "A person can enforce a contract as a creditor beneficiary if 'no purpose to make a gift appears * * * and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee [here, Shanigan] to the beneficiary [here, Ennen]' " *Restatement of Contracts*. §133(1)(c).

9 "Intent is determined by focusing on the objective motive of the promisee." *State Farm Life v. Davis, supra*. 2008 WL 5245332, *3 (cited by Ennen; applying *Restatement (Second) of Contracts* § 302).

10 "If, however, the court is in error of this legal question, the court has made alternative factual finding with respect to Ennen's allegations of insurance bad faith *and related damages issues*." Exc. 1304. Emphasis supplied.

11 Ennen paid no premiums to the Integon defendants. The damages he sought were based solely upon the delay of his receipt of money under the UIM provisions of an auto liability insurance policy Integon Indemnity issued to Gordon Shanigan.

12 "Deference to the findings of the superior court is particularly appropriate when, as in this case, the bulk of the evidence at trial is oral testimony." *Martens v. Metzgar*, 591 P.2d 541, 544 (Alaska 1979).

13 When resisting the Integon defendants' request for Rule 68 attorney's fees, Ennen represented that he "made no request for a specific amount of compensatory damages at trial." Exc. 1493.

14 Allen "did not advise Ennen that he had not received all of the benefits to which he was entitled under the Integon policy." Exc. 1306.

15 Tr. 359:1-6. Shortly before trial, Ennen adopted a theory that his injuries allegedly caused by the Integon defendants' conduct did not occur until an indeterminate date in 2002 - when he had dissipated the $50,000 payment from Integon and the $118,575 received from Allstate in 2001. *E.g.*, Exc. 1380, ¶ 1 ("Ennen's **financial** and emotional hardship occur[ed] between 2002 and 2007).

16 The trial court recognized that prejudgment interest was appropriate compensation for loss of use of money, citing to *Liimatta v. Vest* 45 P.3d 310, 322 n. 44 (Alaska 2002). Exc. 1324.

17 The resolution of question in the *Exxon Valdez* case cited by Ennen, i.e., whether the punitive damages award exceeded maximum amount of punitive damages allowable under constitutional principles, has no bearing on the trial court's rulings and findings in this matter. See *In re Exxon Valdez*. 472 F.3d 600, 619 (9th Cir. 2006), vacated on appeal sub nom., *Exxon Shipping Co. v. Baker*. 128 S. Ct. 2605 (2008).

18 The case of *State v. Carpenter*, is distinguishable, and does not assist Ennen. There, the plaintiff received affirmative relief of over $5,000 on her spoliation claim. 171 P.3d 41, 50, 64 (Alaska 2007). The discussion in *Carpenter* as to whether punitive damages were appropriate for spoliation came in the context of a review whether the punitive damages were excessive, not whether they were allowable in the first instance. This Court held that, because spoliation interferes with proof of the underlying claim, a higher amount of punitive damages was constitutionally allowable. There is no evidence in this case that the Integon defendants engaged in any conduct that impaired Ennen's ability to present proof of his allegations of causation or damages.

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