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Court of Appeals of Indiana.
Appellate Brief

Court of Appeals of Indiana.
ALLSTATE INSURANCE COMPANY, Appellant/Defendant,
v.
Ted K. FIELDS and Rosella M. Fields, Appellees / plaintiffs.
No. 45A03-0612-CV-602.
November 9, 2007.

Appeal from the Lake Circuit Court
Case No. 45D01-0608-CT-145
The Honorable Diane Kavadias-schneider, Special Judge
Brief of Appellees

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*1 I. INTRODUCTION

In 1995, Allstate implemented a lucrative scheme by which it abandoned traditional insurance principles to the detriment of its policyholders and co-opted the court system for use as its own business tool. Allstate's Claims Core Process Redesign ("CCPR") forced policyholders to settle for less than their due or face years of delay and aggressive litigation. That is what happened to Ted and Rosella Fields when they sought to recover benefits owed after at-fault driver Jimmie Woodley's insurance company went into liquidation. Contrary to its prior determination that Woodley caused the crash, Allstate first intervened in the Fieldses' underlying case to assert Woodley was not at fault. Then Allstate embarked on a course of delay over the span of years when, according to its own expert, the claim should have been decided in a day.

II. STATEMENT OF ISSUES

1. When an insurer sets out to transform its claims-handling process into a profit center by forcing policyholders to accept less than fair value on their claims or face years of delay and aggressive litigation tactics, can that insurer be held accountable to policyholders whose claims are so handled?

2. Did the trial court properly exercise its discretion to enter default as a sanction against Allstate for its pattern of discovery abuse and repeated, persistent refusal to abide by court orders?

3. Should the appellate court re-examine the rationale of Woodley v. Fields, 819 N.E.2d 123 (Ind.Ct.App. 2004) ("Fields I") in light of:

A. the Supreme Court's grant of transfer following the Fieldses' petition which emphasized that this is a claims delay, not a claims denial, case;

B. the filing date of the Fieldses' bad faith suit 14 months after their initial claim, not 59 days as Allstate misrepresented, rendering it impossible for Allstate to have met its initial burden for summary judgment; and

*2 C. the subsequent precedent of Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968 (Ind. 2005) suggesting that ostensibly reasonable actions may constitute bad faith when the insurer acts with duplicity and delay in its claims-handling?

4. Did the judge's decision to step-aside following an improper, unverified recusal motion by Allstate require vacating prior orders where the only alleged connection between the judge and the Fieldses' attorney related to well-publicized pro bono and philanthropic endeavors more than a year old?

5. Can any evidentiary error be preserved when a defaulted party decides to not present evidence at its damages trial, allegedly due to preliminary in limine rulings by a prior judge, and, after resting, stacks the record with volumes of previously undisclosed, mainly inadmissible evidence as its "offers of proof," particularly where the trial judge made clear the defaulted party would be allowed to present evidence challenging damages and permitted argument that it acted in good faith?

6. Did the trial court abuse its discretion in entering judgment on a verdict supported by the law and properly-admitted evidence?

III. STATEMENT OF THE CASE

Ted and his wife Rosella ("the Fieldses") sued Jimmie Woodley in October, 1995 over an accident in which Ted was injured and his car wrecked. (App. 91, 705, 718) After Woodley's insurer, Coronet, entered liquidation, the Fieldses on January 9, 1997 submitted uninsured motorist bodily injury ("UMBI") and property damage ("UMPD") claims to their insurance company, Allstate, and followed up with detailed supporting documentation on January 30, 1997. (App. 213, 292, Appellee App. 1-92) Allstate's own investigation revealed that Woodley was at fault. (App. 3094, 3103) Allstate submitted the matter to its attorneys on January 16, 1997, and petitioned to intervene in the case on February 10, 1997, asserting that Ted Fields, not Woodley, was at fault, despite its own investigation which proved otherwise. (App. 103,212,3094,3103) On March 14, 1997, the Fieldses filed a motion seeking leave to amend their complaint to add a bad faith count against Allstate. (App. 108) That motion was granted nearly a year later, and the court specifically deemed *3 the complaint filed March 3, 1998. (App. 188)

On December 24, 2002, the Fieldses filed their fourth motion for default, citing Allstate's "persistent refusal to comply with the Orders of this Court". (App. 984-986) That sanction was granted on February 3, 2003, after Allstate ignored additional court orders, and in light of its "pattern of defying or disregarding court orders and its intransigence in complying with discovery throughout the litigation". (App. 45, 46, Appellee App. 131)

Allstate appealed. (App. 1432) On December 15, 2004, this Court found Allstate's motion for partial summary judgment should have been granted. Fields I, 819 N.E.2d at 136. The Indiana Supreme Court granted transfer, vacating the decision. KCAllstate Ins. Co. v. Fields, 831 N.E.2d 750 (Ind. 2005); Ind. Appellate Rule 58(A). Thereafter, the high court dismissed the appeal on jurisdictional grounds. H Allstate Ins. Co. v. Fields, 842 N.E.2d 804 (Ind. 2006).

Following remand, Allstate renewed its motion for relief from the default order, its motion for summary judgment, its motion to reopen discovery, and its opposition to in

limine orders relating to the default. (App. 1462, 1482, 1536, 1557) Less than 48 hours after Judge Arredondo denied these motions, Allstate filed a 22-page, unverified motion to recuse the judge, alleging its sudden discovery only the day before of long-existing and well-publicized public service participation of the judge in helping select schoolteachers for an award endowed by plaintiffs' attorney Kenneth Allen and his wife. (App. 47, 1611, 1668) After reviewing Judge Arredondo's prior orders, Special Judge Kavadias-Schneider on August 24, 2006, rejected Allstate's attempts to overturn the prior rulings, though she expressed her willingness to consider anew the in limine order related to the default. (App. 1687, 1699, 1748, Tr. 12-13) In response to her request for briefs on that order, *4 uncharacteristically, Allstate submitted a scant three-pages, lacking substantive argument. (App. 1931) In another pre-trial hearing on September 18, 2006, the Special Judge made clear that Allstate would be allowed to put on evidence to rebut any allegation that its bad faith actions were the result of a scheme. (Tr. 124)

At trial, the Special Judge also made clear her continued position that Allstate had the right to defend itself on the extent of actual and punitive damages, and found it could present evidence of good faith in properly doing a file review. (Tr. 1341) She allowed Allstate to focus on the first 59 days before the Fieldses sought leave to amend their complaint to add a bad faith count against Allstate and to argue that it had not sought to delay payment and that the verdict should be zero. (Tr. 414-415, 1614-1615, 1625-1626, 1644-1645) Allstate turned down the Special Judge's invitation for it to present expert testimony to counter the Fieldses' evidence that in 1995 the company embarked on a plan to force policyholders to either accept less money on their claims or face prolonged litigation. (Tr. 1335-1341)

The jury's verdict against Allstate was $20 million, of which $18 million entailed punitive damages. (App. 49) The punitive damages were reduced to $6 million by operation of C Ind. Code §34-51-3-4, and the Special Judge entered judgment for Fieldses accordingly. (App. 51) This appeal ensued following the denial of Allstate's post-trial motions. (Tr. 3712)

*5 IV. STATEMENT OF FACTS [FN1]

FN1. That Allstate's Statement of Facts is not written in a light most favorable to the judgment is manifest. To save trees and the Court's time, however, each and every fact Allstate has spun in this 10-year old case will not be re-addressed; rather, only the most salient facts will be mentioned.

Standards and principles of claims handling

In opposing summary judgment, and at trial, the Fieldses presented evidence of fundamental standards and principles concerning insurance claims-handling. (App. 132A, 736-738; Tr. 435, 530-540) People buy insurance to reduce risk, "to soften the impact of financial loss from accidents" and for "peace of mind", insurance expert Gary Fye explained in his affidavit designated in opposition to summary judgment. (App. 736) The role of an insurance company in selling insurance is "imbued with the concept of public trust" and the presumption is that insurers are to "conduct their activities legally and with

a high degree of good faith and fair dealing." Id. Fye discussed principles essentially parallel to the claims-handling standards and principles insurance expert Donald Dinsmore discussed at trial and that Allstate's own expert, Thomas Macke, agreed applied, namely that an insurance company:

1. Must assist its policyholders with their claims: First-party claims-handling is not supposed to be an adversarial process.

2. Must implement reasonable rules and procedures for promptly investigating claims.

3. Must conduct a prompt investigation based on all information available to it.

4. Cannot delay investigation or settlement by demanding a formal Proof of Loss form when it already has substantially the same information.

5. Cannot cause any unfounded delay in paying claims.

*6 6. Cannot mislead or deceive its policyholders.

7. Cannot force its policyholders into a court fight to recover amounts due under the policy.

8. Cannot exercise any unfair advantage to pressure policyholders into settling.

9. Must promptly and fairly offer to settle claims if liability is reasonably clear.

10. Cannot put its own financial interests above those of its policyholders or seek profit from claims-handling.

(Tr. 435, 530-540, Appellee App. 132A)

Uninsured Motorist ("UM") insurance applies to the policyholder's damage claims when the tortfeasor has no liability coverage. (App. 737) "UM benefits are essentially the verdict value of the insured's claim against the tortfeasor subject to policy limits - without having to go through a trial. The insurer doing less than affirmatively attempting to learn the extent of its policyholder's injuries turns the insurance policy into a 'self service contract' while the insurance company has 'sold a full-service product.'" Id. "Adjusters should accept, not 'settle' first party claims. ... To seek settlement rather than recognizing the insured's ownership of the claim makes the insured an opponent by making the process adversarial." (App. 738).

A new system for profiting from policyholders' claims

Allstate's handling of the Fieldses' UM claims began two years after the company embarked on a radical new system for claims-handling - a system that turned the traditional standards and practices on their head by promoting the deliberate delay and

undervaluation of damage claims, forcing policyholders to accept less than the full value of their claims orface aggressive litigation with Allstate. (Tr. 547-549, 551-552, 1283-1285) *7 Expert Donald Dinsmore, an attorney and consultant with 30 years of insurance industry experience, expressed that view and relied upon materials developed by Allstate's consultant, McKinsey & Company, as well as affidavits of former Allstate claims adjusters and managers that entered the public record in another court case (Id.; Tr. 569, 1287), and presented his opinions and conclusions, as follows:

Based upon McKinsey & Company's recommendations developed for Allstate over the course of the prior three years, in 1995 Allstate implemented its CCPR. (Tr. 547-548) This redesign rested on the concept of the "Zero Sum Game" - that is, any money paid to policyholders on their claims would mean less money for Allstate's shareholders. (Tr. 552) The idea was to turn claims into a profit center by forcing policyholders to "settle for less or litigate" and "the policyholder is faced with either taking a discounted lower amount or facing very aggressive litigation." (Tr. 1285) The resulting promotion of delay and undervaluation of claims was not merely an honest mistake of an individual adjuster but part of a deliberate scheme. (Tr. 1283) The McKinsey documents are consistent with how Allstate handles claims across the country. (Tr. 1284) The process involves unreasonably low evaluation of claims then a discounted settlement offer to policyholders, take it or leave it. (Tr. 1284) [FN2]

FN2. In a proceeding out of the jury's hearing (Tr. 1292), Dinsmore reviewed selected slides that McKinsey & Company prepared while developing its CCPR for Allstate. (Tr. 1293-1296) The trial court allowed him to refer to the slides to help the jury assess his credibility but not to read from or present the slides themselves. (Tr. 1302-1303) Dinsmore did read portions of the slides to the court (Tr. 1293-1296) (emphasis added):

Slide 2982: "Claims is an economic game. We will win the economic game."
Slide: 5166: "Our goal is to redefine the game to radically alter our whole approach to the business of claims."
Slide 3372: "The new game BI [bodily injury] subjective cases, 90 percent good hands, all settle in less than 250 days ... 10 percent boxing gloves, not beginning until 1,000-plus days and continuing through 1500 days."
Slide 7341: "The Colossus sites have been extremely successful in reducing severities [claims payments] with reductions in the range of 20 percent for Colossus-evaluated claims."
Slide 5403: "Do not reevaluate fair value or approve settlement amount. Stand firm on final offer with no real negotiation."
Slide 6325: "A key part of this process will be development of market-wide strategies to strengthen negotiation in litigation approaches. These strategies will include significantly higher levels of litigation."
Slide 1427: "Establishing a new fair market value will require a consistent process execution and aggressive new litigation strategies."
Slide 4964: "Aggressive litigation yields positive results. UM/UIM severities can be lower on average by 12 percent through aggressive litigation tactics."
Slide 2939: "Aggressively manage those cases that become represented through more

aggressive litigation approaches. Many plaintiff attorneys yield to more aggressive tactics."
Slide 2929: "New plays, new game plan, mandatory standards, refocused accountabilities and new incentives, changing the rules, modify bad faith laws, new game objective: build competitive advantage through fundamental rethinking of industry and our approach."

*8 The CCPR involved both property and casualty claims and extended to Allstate's handling of first-party claims by their own policyholders as well as to third-party claims. (Tr. 1296)

Under traditional concepts of insurance, insurers make a promise to deal with their policyholders fairly and in good faith, to spread the risk of loss. (Tr. 510-511) Policyholders who suffer loss are to be made whole. (Tr. 514) The insurance company has a special relationship of trust under which claims are to be fully and promptly paid. (Tr. 517) In implementing the CCPR and adopting a "Zero Sum Game" approach, Allstate changed this relationship at its core. (Tr. 551)

Using its CCPR, Allstate violated the principles of good faith and fair dealing by turning *9 its claims-handling into a profit center. (Tr. 550- 551, 562) The new system improperly pitted the insurance company against its policyholders, both philosophically and in the handling of particular claims, such as that of the Fieldses. (Tr. 562-563)

Allstate's claims-payout was reduced in several ways by following CCPR techniques - including the use of the "Colossus" computer program engineered to produce low evaluations, forcing adjusters to go through numerous levels of authority before paying a claim, the use of a rigid evaluation system that does not factor in all damages (Tr. 563-565), and rewarding adjusters with bonuses for settling within the low-ball computer analyses thus suppressing the amounts paid for legitimate policyholders' claims. (Tr. 566-568) In none of his 24 years in the insurance industry nor in his additional 6 years as a lawyer/consultant reviewing the industry could Dinsmore recall ever coming across another company paying bonuses to its adjusters to lower claims payments. (Tr. 569)

What Allstate did was make its policyholders accept lower offers or face aggressive litigation tactics. (Tr. 570) McKinsey told Allstate that its uninsured motorists claims "could be lowered by an average of 12 percent by using aggressive litigation tactics." (Id.) This percentage translates into an enormous amount of money.

Historically in the industry, about 70 cents out of each dollar of insurance premium went to pay losses. (Tr. 514) The other 30 cents accounted for the expenses and profit of the insurance company. (Id.)

Allstate's premium-to-loss ratio dropped from just under 70 cents on the dollar for the period 1987 through 1994, before it adopted the CCPR, to 52 cents on the dollar for the years 1995 through 2004. (Tr. 591) The difference in the loss ratios for the period from 1995 through 2004, after the CCPR's adoption, amounted to $1,147,000,000, based on *10 data from A.M. Best's Guide, relied upon by industry analysts and supplied to the

jury. (Tr.591-592, Ex. 4). Allstate Corporation's chief financial officer and Allstate Insurance Company vice president Dan Hale acknowledged that A.M. Best "does its homework" and is a "quite reliable" source of information. (Tr. 1128) He explained that "pure loss ratio" is the percentage of each premium dollar an insurer pays out on claims. (Tr. 1126) The jury was provided charts based on the A.M. Best data showing the drop in Allstate's pure loss ratio before and after CCPR. (Tr. 1127-1128; Trial Ex. 4(d) Appellee App.133-157) Hale also conceded that Allstate was paying out much less than the industry average on bodily injury claims, though he attributed that to Allstate's size. (Tr. 1161) The jury was supplied with slides of presentations made to investors by Allstate's top executives, including chairman and CEO, Edward Liddy, president and COO, Thomas Wilson, vice president Ronald McNeil and Mr. Hale via Mr. Hale's videotaped deposition. (Tr. 1140-1147; see figures 1 & 2; Appellee App. 133-157) These presentations touted Allstate's newly-gained "competitive advantage through claims" and showed that Allstate's claims payment or "severity" was now far lower than the industry average. (Tr. 1140,1142) Slides boasted of transforming Allstate claims" through *11 its "claims core process redesign." ("CCPR") (Tr. 1144, 1154)
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Fieldses' Claims Handled Consistently with the New Model

Expert Donald Dinsmore stated that Allstate handled Ted's UMBI claim consistent with its CCPR. (Tr. 563) Its Colossus computer evaluation of damages was a very small percentage of what the proper value should have been. (Tr.564-565) Ted's UMBI and UMPD claims were easy claims that could have been dealt with in a week but were not handled properly. (Tr. 572) Allstate failed to conduct a prompt investigation and failed to look at the Fieldses' car for property damage, [FN3] or even do a computer search, [FN4] prior to year 2000, to determine what the car was worth. (Tr. 574) Once Allstate had all the information it needed on Ted's UMBI claim, it delayed making a reasonable offer. (Tr. 576) It had that information by March 1997, but did not offer to settle Ted's UMBI claim until January 1999, and that initial offer appeared *12 contingent on the Fieldses giving up their claims against Allstate for its bad faith. (Tr. 576- 577) Questioned about that, Allstate's attorney proposed a release that excluded bad faith, but which would have extinguished the Fieldses' UMPD claim for which no payment had been offered. (App. 1186) No release is required for the Fieldses to get the UM benefits they were entitled to under the insurance policy, and Allstate had no grounds to require such a release. (Tr. 578-579).

FN3. Allstate's own expert acknowledged the applicable standard of care required it to "conduct a prompt investigation based on all information available to it." (Tr. 435, 530-540) Allstate's policy gave it the right to inspect the Fieldses' car damage. (App. 1099)

FN4. In contrast, Woodley's liability carrier, which owed no duty of good faith to the Fieldses, conducted such a computer search and made an offer to settle the UMPD claim within just a few weeks after first receiving the claim. (App. 3092)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Allstate's own expert, Thomas Macke, answered a hypothetical question regarding a 40-year-old man involved in a car crash through no fault of his own. (Tr. 439) The man suffers a herniated disk in his neck and low back. (Id.) The at-fault driver eventually becomes uninsured when his insurance company goes insolvent. (Id.) The injured man had been working steadily at United States Steel for 20 years, though he had to stay off work for at least five months following the crash to undergo surgery. (Tr. 440) The hypothetical was based on the facts known to Allstate and input into its Colossus computer analysis program on February 27, 1997. (App. 691-693, 3094, Appellee App. 4-5)

Asked if the man's claim would be worth more than his $50,000 policy limits for bodily injury, Macke responded, "That's a no brainer" stating "the value of the claim far exceeds the $50,000 limits. Depending on the outcome of the surgery, you're talking somewhere between $250,000 and $500,000." (Tr. 440- 441) The company, once it had the operative report on the man's surgery along with wage loss records should be able to make that determination within a day. (Tr. 459)

In his affidavit, offered in opposition to Allstate's summary judgment motion, Fye also addressed the Colossus computer system, calling the program

clearly fraudulent on its face: it purports to assess 'civil general damages' but its baseline data are settlements, not civil general damages assessed by *13 juries. The settlements are tweaked as well by tossing out high ones. That this artificial intelligence system favors the house is a gross understatement. Yet when it supported (the Fieldses') claim in 1997, the claim-handlers ignored it and sought more processing to delay further.

(App. 739) Fye additionally opined that Allstate's handling of the Fieldses' claim was not error but that the company "hoped to profit from the delay, and possibly soften the insured's settlement demands so he would settle for less than the obligation." (App. 740) He added that the company's "[i]ndemnity control initiatives, bonus compensation plans, and a system of target goals for claim payments have made this company a frequent party in 'bad faith' cases nationally" and listed an index of hundreds of documents supporting his conclusions. (App. 740, 750-758)

The claim

Underlying litigation and claims made to Allstate.

Ted was injured and his automobile destroyed on September 1, 1995, when Woodley's vehicle crashed into Ted's in Gary, Indiana. (App. 91, 705, 718) That December, Ted notified Allstate of his claim against Woodley, an insured driver at the time, provided Allstate with his initial medical bills of $2,468, and later received $1,000 in medical payments benefits under his policy. (App. 211, 283-284)

After Coronet entered liquidation rendering Woodley an "uninsured motorist" under Allstate's policy, Ted wrote Allstate on January 9, 1997, making UM coverage claims, which Allstate received on January 14, 1997. (App. 213-214) On January 16, 1997, Allstate referred the handling of the claims to attorneys, Spangler, Jennings & Dougherty. (App. 212)

A list of Ted's special damages then totaling $24,894.72, complete except for his surgeon's bill, along with narrative medical records, operative reports and bills, and a letter *14 from U.S. Steel confirming Ted's absence for five months immediately following the crash, were submitted to Allstate by certified mail on January 30, 1997, along with a cover letter stating:

Enclosed herewith please find the medical specials and narrative medical records regarding my client and your insured, Ted K. Fields. As you can see, this submission is incomplete and we will forward any additional bills to you upon receipt. However, it is evident, based upon the currently available medical specials and wage loss, that this is a policy limit case. We therefore respectfully demand that you tender the limits of uninsured motorist coverage in this case at once.

(App. 292, 689, Appellee App.92) The police report with statements by Woodley and Ted showing Ted was not at fault in the underlying accident also was provided, although Allstate had independently investigated and reached that conclusion already. (App. 213, 3094, Appellee App. 4-5)

Allstate responded on February 4, 1997, promising to "address your policy limits demand in the very near future" and also enclosing a set of medical authorization and proof of loss forms. [App. 295)

On February 10, 1997, Allstate sought leave in a petition filed by its attorney Edward Hearn to intervene in the underlying litigation against Woodley. (App. 103-105) In its petition, Allstate alleged that Woodley was not the owner of an uninsured automobile, that he was not negligent, that Ted caused or contributed to the accident and that Ted had not complied with the terms and conditions of Allstate's policy. (Id.) These allegations all contradicted the facts as Allstate knew them, particularly since its prior investigation found that Woodley was at fault. (App. 3094)

Colossus analysis

Allstate's adjuster Joanne Ritchie conducted a Colossus computer analysis of Ted's *15 claim on February 27, 1997. (App. 689-690, 702) Allstate uses Colossus, which looks to average settlements not verdicts, in evaluating UMBI claims. (App. 702) Allstate only conducts a Colossus analysis after it has sufficient information to properly evaluate a claim. (Tr. 913) Ritchie input into Colossus details of "cervical disc bulge, prolapse, lesion, lumbar L5 sacrum disc herniation" and noted that surgery had been done. (App. 690) In addition to the cervical disc, Ted's lumbosacral disc was herniated. (App. 691) He

had been off work from September 1, 1995 to February 4, 1996. (App. 693) Allstate's Colossus analysis noted that Ted's "Spinal injuries did NOT involve any aggravation of a pre-existing condition which led to SURGERY." (App. 694) (emphasis in original) Also, as of the July 29, 1999 date of Allstate's T.R. 30(B)(6) deposition in which she was the company's designated representative, Ritchie had no knowledge of any information showing a preexisting condition. (687, 691) The Colossus analysis found the value of Ted's claim to range from $44,388 to $50,288. (App. 692) Allstate attributed no fault to Ted in causing the accident in the analysis. (App. 695)

Allstate's written analysis of Ted's claim on February 27, 1997, noted that conservative treatment was first sought one day after the crash, and included "traction at home, immobilization, physical therapy/exercises, cortisone or local anesthetic injections and MRI/CT scan." (App. 694) It further noted Ted made seven visits to a general practitioner or as an outpatient, three visits to a treating specialist, and that surgery was first performed on November 15,1995. (Id.) Post operative treatment included a cervical discectomy and immobilization with a polythene collar for six weeks, and home traction for four weeks. (Id.) A subsequent disc removal was performed, and no future treatment was deemed to required for Ted's spine. (Id.)

*16 On February 28, 1997, Allstate sent a copy of Ted's medical/wage authorization to his medical treaters and his employer, with a request for records. (App. 1133-1135)

Initiation of bad-faith action against Allstate

On March 14, 1997, the Fieldses sought leave to amend their complaint to add Allstate as an additional party defendant. (App. 108) The amended complaint alleged a breach of Allstate's duty of good faith. (App. 111-113) Allstate objected to the motion to amend. (App. 167) On March 3, 1998, the trial court overruled the objection and granted leave to file the amended complaint, deeming it filed "as of today" and Allstate's answer to be timely and responsive. (App. 188)

Meanwhile, however, counsel for Allstate proceeded to seek information the company already had been provided. (App. 296) Then, in a letter dated August 18, 1997, Hearn stated:

I have contacted the Allstate adjuster in charge of this particular file. Allstate has not received any medical documentation or a compilation of medical specials as you indicate in your July 14, 1997 correspondence to me.

(App. 297) Allstate, in fact, had received such documentation. (Appellee App. 1-93)

Motion for partial summary judgment and three motions for default

Allstate filed a motion for partial summary judgment on March 26, 1998, seeking judgment as a matter of law on the Fieldses' claim. (App. 194.) On April 23, 1998, the Fieldses moved for an enlargement of time to respond to Allstate's summary judgment

motion. (App. 217) In support, the Fieldses stated that Allstate's T.R. 30(B)(6) deposition, which had originally been scheduled for December 11, 1997, had been continued to June 12, 1998, and Allstate had yet to respond to the Fieldses' outstanding written discovery in accordance with the trial court's April 14, 1998 order to provide "complete and non-evasive *17 answers" to several of the Fieldses' discovery requests. (App. 215, 217-218) On April 27, 1998, the trial court granted the motion and enlarged the time for the Fieldses' response to and including July 13, 1998. (App. 219)

After Allstate did not appear at its own deposition, the Fieldses moved for default on August 5, 1998, which the trial court construed as a motion for enlargement of time to respond to Allstate's motion for partial summary judgment. (App. 219A, 220) When Allstate's T.R. 30(B)(6) finally proceeded on October 22, 1998, after it was continued by the company, its designated representative refused to answer 21 questions about its claim practices and procedures, including whether these procedures were adhered to in processing the Fieldses' claim. (Id.; App. 229-237) The Fieldses renewed their motion for default (App. 229), which the trial court denied, while noting that the company's "intransigence in complying with Plaintiffs' discovery requests may very well become Plaintiffs' prima facie showing of bad faith on the part of [Allstate]." (App. 318) The court ordered Allstate "to give full and complete answers to the deposition questions certified herein to the Court." (Id., emphasis in original). On October 29, 1998, Allstate filed a revised designation of evidence in connection with its summary judgment motion, in essence restarting the clock for responding. (App. 221)

At its deposition on December 9, 1999, Allstate refused to answer 13 questions which were certified to the trial court. (App. 374, 378) Based on this, the Fieldses filed a third motion for default, which was denied.(App. 400)

Attempted settlement

On January 25, 1999 - two years after it received the police report, medical records and off-work verification that supported Ted's claim and 21 months after its Colossus *18 analysis and after it independently used Ted's authorizations to request medical and employment records (App. 694-696, 1133- 1135, Appellee App. 1-2) -- Allstate offered the "policy limits" to settle the Fieldses' UM claims, remaining silent as to the amount. (App. 1178) On April 16, 1999, nearly three months later and after repeated inquiries from Ted's counsel (App. 1179, 1182, 1185), Allstate detailed its offer in a release ("first release") and settlement agreement, proposing to pay only the $50,000 limit for UMBI claims in exchange for the dismissal of both the Fieldses' UMBI and UMPD claims. (App. 1186) The Fieldses objected to the release on May 26, 1999, noting Allstate had attempted to settle both UMBI and UMPD claims without paying the previously-offered $10,000 policy limits for the UMPD. (App. 1188)

The Fieldses received no response from Allstate until August 11, 1999, when Allstate sent a "revised" release covering the UMBI claim alone, ignoring the Fieldses' UMPD claim. (App. 1189) At this juncture, the Fieldses declined to sign, noting nothing in the Allstate policy required a signed release to receive the benefits owed them under the

contract. (App. 1192)

Allstate then filed a motion to make the Fieldses settle Ted's UMBI claim, which motion was denied on December 28, 1999. (App. 327, 341)

Delaying on the Fieldses' UMPD claim

Allstate was specifically placed on notice that the Fieldses' vehicle was a total loss by letter of February 20, 1997. (App. 1129) Ted spoke of the car still parked in his driveway, undriveable, when he gave his deposition in April 1998. (Tr. 1182) Had Allstate bothered to send an adjuster or request an inspection, it would have seen the wrecked vehicle. (Id.)

On November 6,2000, Allstate obtained a valuation of Ted's car, which had been sold *19 by then for salvage, pegging its adjusted market value at $2,240. (App. 705) On January 15, 2001, nearly four years after the Fieldses placed Allstate on written notice that their car was totaled, Allstate made an offer to settle their UMPD claim in the exact amount of its valuation. (App. 1206) On February 5, 2002, the company offered to pay the Fieldses' add another $1,000 for loss of use, on the condition that Fieldses sign a release and settlement agreement. (App. 1221)

Summary judgment proceedings

The Fieldses responded to Allstate's motion for partial summary judgment on February 26, 2001. (App. 667) Included in support of their position, the Fieldses designated expert testimony by affidavit, discussed above, from Gary Fye, establishing that Allstate's delay and its CCPR violated accepted practice in the industry. (App. 728-758) As to Allstate's UM claims-handling, Mr. Fye contrasted the company's "Good Hands" advertising to its practice of treating customers the same as third-party claimants, not giving its insureds the benefit of the doubt, and not informing its customers that

> they will wait up to years after the accident when questions arise. Neither are customers told they will wait up to years after the accident while Allstate forces the insured to compile proof of injury until some undefined time when Allstate is ready to attempt to evaluate the claim. Allstate communicates no objective criteria or standards for this process to insureds and attorneys, preferring instead to simply delay until the insured somehow gets it right.

(App 738-739)

The trial court denied Allstate's motion for partial summary judgment on March 30, 2001. (App. 821)

Dropping discovery

At a May 10, 2002 hearing, Allstate sought an order to compel the Fieldses to fully answer a fourth set of interrogatories. (Appellee's App. 106) The Fieldses noted that *20

Allstate had failed to confer with counsel as required by Lake County L.R. 8(C), (Id. at 107), and that they already had answered a total of 178 interrogatories, without Allstate obtaining leave to ask more than 30 as required by local rule. (Id. at 109-111)

Thereafter, in a letter faxed on June 14, 2002, Allstate offered to withdraw all of its previously tendered written discovery in exchange for an answer to a single interrogatory seeking every fact which was the basis for the Fieldses' contractual and extra-contractual claims. (Appellees App. 125) The Fields accepted this offer by letter of June 19, 2002 and answered that interrogatory. (Appellees App. 127)

At trial, after Allstate objected to the Fieldses' plans to present more damages than had previously been disclosed, counsel informed the court of Allstate's June 14, 2002 offer to withdraw prior written discovery, and its acceptance. (Tr. 295-296, 319-320)

Partial confession of judgment, and fourth motion for default

At the May 10, 2002 hearing, the court also considered Allstate's motion to pay policy proceeds into the court. (App. 901; Appellee App. 115) The Fieldses opposed the motion, noting that Allstate had failed to cite any authority allowing such payment into the court when liability for the funds remained in dispute. (App. 935) Allstate's attorney then at the hearing suggested Allstate could amend its answer to admit the Fieldses were entitled to the $50,000, and added, "I'd like to pay it into the Court by way of a stipulated settlement or confessed judgment." (Appellee App. 117-118) The Fieldses' attorney then agreed to the payment, with the understanding that Allstate would unequivocally concede that it owed the money. (Id. at 118) Accordingly, the trial court ordered Allstate to submit its proposed confession of judgment by June 14, 2002. (App. 944)

Allstate's confession of partial judgment was filed with the trial court on June 17, 2002. *21 (App. 945) Two days later, the Fieldses objected, seeking to strike paragraphs one through ten as being unsubstantiated, argumentative, largely hearsay and self-serving, and noting it did not contain an affidavit conceding, among other things, that the debt was just and owing as required by C Ind. Code § 34-54-2-3. (App. 949)

Allstate filed no response to the Fieldses' objection, and the trial court ordered on July 1, 2002, that the first ten paragraphs of Allstate's confession of partial judgment be stricken and further directed Allstate to file the requisite C Ind. Code § 34-54-2-3 affidavit. (App. 980) After Allstate chose to ignore the court's order over the course of nearly six months to file the required affidavit, the Fieldses moved for the fourth time to default Allstate for its "persistent refusal to comply with the Orders of this Court". (App. 984-986)

On December 31, 2002, Mr. Hearn contacted James Brammer, the attorney at the Allen lawfirm handling the Fieldses' matter, saying that Allstate's co-counsel, Mark Smith, would require additional time to respond to the Fieldses' fourth motion for default. (App. 998, 1315) Mr. Brammer responded that, if Mr. Smith required additional time, he should call directly to avoid any confusion or misunderstanding about how much additional time would be necessary to respond. (App. 998; Appellees App. 129-130) Mr. Brammer did

not agree to any enlargement of time with Mr. Hearn, and Mr. Smith never called Mr. Brammer regarding such. (Id.)

On January 6, 2003, the trial court ordered Allstate to file and serve any objections to the Fieldses' fourth default motion within 14 days of the order, or by January 20, 2003. (App. 988) The January 6, 2003 order also stated the following:

[I]n the absence of any such objections, the party filing the motion shall thereupon submit their proposed order granting the motion to the Court for its consideration and entry.

*22 (Id.) The distribution list for the order named Mr. Hearn but not Mr. Smith. (Id.) Not only did Mr. Smith fail to contact Mr. Brammer to arrange for any additional time to respond, neither he nor Mr. Hearn (whose appearance had been on file since February 10, 1997) advised the court of any "agreed" extension or sought leave of court for additional time to respond. (Id.; App. 29, 41) Allstate altogether failed to timely file a response to the Fieldses' fourth motion for default. (App. 29)

As a result, on January 29, 2003, nine days after Allstate's response was due, the Fieldses filed a motion for summary ruling on their fourth motion for default, noting Allstate's persistent and continued failure to comply with the trial rules and the orders of the court. (App. 998) On February 3, 2003, The court granted the motion for summary ruling over Allstate's objection that one of its attorneys had not received a copy of the court's January 6, 2003 order requiring a response to the motion within 14 days. (App. 1000, 1001, 1004)

On July 8, 2003, Allstate filed the requisite statutory affidavit confessing judgment that the trial court had ordered it to file more than two years before. (App. 980, 1290). Three days later it sought relief from the order of default. (App. 1268) The motion was denied following a hearing. (App. 1430)

In the wake of the default, the Fieldses filed a motion in limine broadly seeking to bar evidence or argument that the company had handled their claim in good faith, or handled it with "anything other than dishonest purpose, moral obliquity, furtive design and/or ill will", that the Fieldses had suffered no damages, and that Allstate was not liable for punitive damages should actual damages be proven at trial. (App. 1239-1240) The trial court granted the motion in limine. (App. 1373-1376) After the case was transferred, and a *23 month before trial, however, the Special Judge advised Allstate she would consider motions in limine anew. (Tr. 12-13)

Allstate appealed the order denying it relief from default. (App. 1432), leading to the prior decisions of Fields I, discussed in the Statement of the Case section.

Events after remand

Following remand, Allstate filed on June 27, 2006, a renewed motion for relief from the order of default, and for summary judgment. (App. 1461, 1482) It also renewed its opposition to rulings on the Fieldses' motions in limine relating to default. (App. 1536)

Judge Arredondo denied Allstate's renewed motions in an order faxed to the parties at 4:36 p.m. on July 19, 2006. (App. 47-48) On July 21, 2006 at 8:26 a.m., Allstate filed its 22-page motion for a change of judge. (App. 1611-1632) In its motion, which was unverified contrary to the explicit requirements of Ind. T.R. 76(B)(6), Allstate claimed that the order had caused it to conduct "a brief search" and to learn on July 20th of Judge Arredondo's involvement chairing a selection committee for teaching excellence awards underwritten by Nina & Kenneth Allen. (App. 1611, 1616) Allstate included a picture that had been long featured on the opening page of the Allen firm's website, showing Mr. Allen and his wife along with honored teachers and Judge Arredondo. (App. 1661-1662) Allstate further objected to Mr. Allen having donated $1,501 to the Indiana Equal Justice Fund, on which Judge Arredondo served as a director. (App. 1615)

In opposition to the recusal motion, the Fieldses noted the matters complained of were pro bono and charitable involving no untoward economic ties, but well-publicized public service. (App. 1668) They further noted Allstate's frequent favorable results in trials before the Lake Circuit Court, including an important case involving plaintiffs represented by the *24 Allen lawfirm, and detailed several cases in which the Circuit Court had ruled against clients represented by the Allen firm in other significant matters. (App. 1669, 1670- 1671). The Fieldses' response included an affidavit by Mr. Allen, noting that he had not contacted Judge Arredondo directly regarding work on the awards committee, and that, other than at the public awards ceremony attended by the honored teachers and held at the Allen firm, he had not personally met with the judge or discussed the matter privately. (App. 1683) Though Allstate's unverified recusal motion was procedurally deficient and alleged no untoward financial ties or family involvements that would require recusal (App. 1671, 1679-1680), Judge Arredondo stepped aside, and citing his recusal, Allstate on August 8, 2006, filed a motion before the newly-assigned Special Judge to set aside Judge Arredondo's orders denying partial summary judgment, granting default, granting the motion in limine, denying relief from entry of default; and denying Allstate's renewed motion summary judgment, opposing motions in limine, and seeking to reopen discovery. (App. 1687-1698) The next day, on August 9, 2006, Allstate sought the same relief in a lengthy series of renewed motions. (App. 1699-1793) The motions were considered and denied by Special Judge Kavadias-Schneider on August 24, 2006 as to all the prior rulings, except for the ruling on motions in limine. (Tr. 12)

Consideration and ignoring of the in limine order

On August 24, 2006, a month and a day before trial commenced, Allstate argued to Special Judge Kavadias-Schneider that motions in limine approved by the prior judge "say, Allstate, if you come into court you can speak, and you can speak as long as you say, you're guilty, you're evil, you're malicious, you're oppressive, and you're fraudulent. You can't say anything else." (Tr. 10) The Special Judge responded that although she would *25 let stand previous rulings, including the default, she planned to reserve judgment on motions in limine. (Tr. 12-13, 15) Judge Kavadias-Schneider also stated that she was not about to let anyone call Allstate "evil" or "those kind of words" and that Allstate was entitled to challenge in writing any former rulings that precluded the company from arguing or putting into evidence that it conducted its affairs in this matter

with anything other than dishonest purpose, and ill will. [FN5] (Tr. 25)

FN5. An electronic search of the transcript found that only Allstate invoked the words "dishonest" and "ill will" throughout the entire trial.

Allstate promised to file its argument on Judge Arredondo's in limine order relating to the default by the next Monday, August 28, 2006, and that it would stand with the current orders unless the court modified them. (Tr. 23-25) On September 1, 2006, Allstate filed its three-page brief, without substantive argument, opposing the order in limine. [App. 1931- 1932) Allstate did reference its prior motion filed along with motions totaling 106 pages filed en masse on various orders for which it sought reconsideration based on the prior judge's recusal. (App. 1687-1793)

In a pre-trial hearing held September 18, 2006, the Special Judge stated that if the Fieldses are "trying to show a scheme, a collusion here, systemwide with this company, I think that certain testimony then would be allowed to rebut that." (Tr. 124) This was the only pre-trial ruling focused on reconsideration of the in limine orders, and no written order followed. (Tr. 125-126)

During a sidebar in the midst of trial, after Allstate protested that it could not put on evidence showing its good faith, the judge stated, "I've taken the posture from the beginning of our discussions that you were not precluded from bringing in any type of *26 evidence to mitigate" damages. (Tr. 1341) When Allstate protested that the issue involved doing a file review to show Allstate's proper claims-handling and good faith in the face of the evidence concerning the McKinsey consulting work and the systemwide CCPR, the judge invited the company to bring in an expert, which Allstate declined to do. (Tr. 1341)

At opening, without objection from the Fieldses and contrary to the prior in limine orders of Judge Arredondo, the Special Judge allowed Allstate to focus on the initial correspondence during the first 59 days of the Fieldses' claim in an effort by Allstate to challenge its bad faith. (Tr. 413-415) She found that the correspondence went directly to the issue of whether Allstate delayed handling the claim, i.e., its liability. (Tr. 414) Allstate was also allowed in closing to focus on the same period and argue that it had acted in good faith, that the Fieldses had not suffered actual damages, and that no punitive damages were appropriate. (Tr. 1614-1615, 1625-1626, 1642-1645) It also argued that the $50,000 that Allstate sought to pay the Fieldses, upon signing a revised release, would not have extinguished their bad faith or their UMPD claim. (Tr. 1633-1634)

Ongoing stress, related damage

At trial, the Fieldses presented evidence of Ted's stress and related ill-health resulting, in part, from Allstate's delayed claims-handling: Ted spoke of thinking that once Woodley's insurance company was out of the picture that his own insurance company would quickly pay his UM claims. (Tr. 1181) At first, Ted was calm, but as the months went by, his

stressful anger grew sending his blood pressure higher and higher. (Tr. 1181-1182) He suffered related health problems, including depression. (Tr. 1185) Due in part to his elevated blood pressure, he underwent heart surgery. Id. He also had a stroke in 2003. (Tr. 1186) He had trouble with his speech, and then had another stroke the next year. (Tr. *27 1187) He suffered major depression and quit work. (Tr. 1188)

Ted testified that at some point Allstate offered to pay the $50,000 if he'd sign a release, which he would not do, disturbed that the delay had gone on way too long. (Tr. 1190) He said the company had not paid him yet. (Tr. 1181) Contrary to Allstate's claim (Br. 12), he did not say the company "'forced' him into litigation and refused to pay his claims for nearly 10 years." (Emphasis in original.) [FN6]

FN6. Allstate's citations to Tr. 189, 263, 1181 and App. 2920-2924 do not support its assertion, which mischaracterizes the nature of the case - Allstate stands accused of improperly delaying payment on the Fields' claim, not refusing to make payment.

Ted's treating physician, Dr. Arjun Gupta, first saw Ted in May 1995, when he was in good health, and treated him through 2006. (Tr. 649, 654) After the car crash, Dr. Gupta referred Ted to Dr. Zelaya, a neurosurgeon, who determined that Ted would need surgery to treat his herniated disc. (Tr. 655) Dr. Gupta said Ted's surgery was directly, causally related to the car crash. (Tr. 694) Ted was required to stay off work from September 1, 1995 through February 1, 1996 because of his surgery and his treatment before and after the car crash, and that his medical expenses were necessary and causally connected to it. (Tr. 660, Appellee App. 92)

Dr. Gupta testified Ted saw Dr. Reff, a Chicago psychiatrist, in connection with stress he suffered in large measure due to the issues he was having with his insurer. (Tr. 676- 677). Dr. Gupta directly testified there was a causal-connection between the greater stress Ted reported resulting from his insurance company's refusal to settle his claim and his development of diabetes, high blood pressure, cardiovascular disease, and stroke. (Tr. 678-679, 719, 723)

Psychiatrist Dr. Robert Reff opined that stress contributed to the development of Ted's *28 medical problems (Tr. 781-782), and that ongoing, continuous stress, unlike day-to-day periodic stress, makes it far more likely that a person will develop depression. (Tr. 784)

Dr. Gene Fedor, an orthopedic surgeon who examined Ted, testified that surgeons charge $7,000 to $15,000 or more to perform surgery on herniated discs, and that hospitals charge another $25,000 to $40,000 for the disc operation alone. (Tr. 738-739, 748-749) He also said Ted suffered herniated cervical and lumbar discs in his car crash on September 1, 1995, and that a lumber disc operation would double the costs. (Tr. 750) Patients following the operation usually have permanent partial impairment. (Tr. 750)

Dr. Fedor also opined that the stress which accompanies depression would be a cause, though not the only cause, of Ted's other conditions, including hypertension, diabetes,

cardiovascular disease, and stroke. (Tr. 751-753)

After the Fieldses rested, Allstate limited its case to a brief examination of Ted, and then rested. (Tr. 1464)

Post trial

After trial, Allstate filed a 92-page Motion to Correct Errors largely rehashing the same arguments it had raised before, mainly claiming the default simply arose out of Allstate's failing to confess judgment as ordered, and seeking to start the 10-year-old case anew. (App. 3704) The Fieldses' response included an affidavit (omitted from the Appellant's appendix) dated November 16, 2006, by George S. Ivancevich, who had served as Magistrate Judge in Lake County from approximately 1998 through 2004, and who presided over nearly all the pre-trial hearings held in this case in the Circuit Court. (Id., Appellee App. 131) The former magistrate judge testified, in part:

4. Affiant, after employing his own legal analysis and independent judgment, recommended to the Judge of the Lake Circuit Court *29 that a default be entered against Allstate in Fields v. Woodley in light of Allstate's pattern of defying or disregarding court orders and its intransigence in complying with discovery throughout the litigation, and Affiant's recommendation was accepted by the Lake Circuit Court.

5, At times in Fields v. Woodley, Affiant recommended that rulings adverse to the Fields[es] be entered; similarly, in other cases, whenever appropriate based on Affiant's legal analysis and independent judgment, Affiant recommended that rulings be made adverse to other parties represented by Kenneth J. Allen & Associates, including, inter alia, the entry of final judgment against such parties. In each of these instances, Affiant's recommendations were accepted and approved by the Honorable Lorenzo Arredondo, Judge of the Lake Circuit Court.

(Id.)

Allstate unsuccessfully moved to strike this affidavit, characterizing the magistrate's communications to Judge Arredondo as "ex-parte"; the court denied the motion to correct errors, without addressing the affidavit. (App. 3708)

V. SUMMARY OF ARGUMENT

In 1995, Allstate Insurance Company embarked on a plan by which it forced its policyholders to settle for less or face years of delay and the prospect of lengthy litigation to recover their just claims. That is what happened to Ted and Rosella Fields in this case. When Allstate delayed payment on Ted's UMBI claim that, expert testimony showed, it could have determined in a day was worth the $50,000 policy limit, the Fieldses first sought leave and then sued the company for bad faith in March 1998, 14 months after their claim was first presented to Allstate.

Allstate's summary judgment motion failed to make a prima facie case as to the Fieldses'

UMPD claim. Also, considering the motion on the merits, summary judgment was *30 properly denied based on the designated evidence and particularly in light of evidence at trial showing that Allstate continued to delay paying the Fieldses long after the company had the evidence that Ted's UMBI claim exceeded the policy limits.

Because Allstate acted in bad faith in delaying the Fieldses' claim, the company's ongoing, wrongful acts continued after the Fieldses filed their suit against Allstate. A rule barring consideration of such ongoing wrongful conduct would only encourage post-litigation bad faith delay by unscrupulous insurers. In a wrongful claims denial case, the same consideration does not apply since the bad faith acts would have culminated in the denial.

Allstate's ensuing disregard and defiance of court orders and its intransigence in discovery led to its default, not its mere failure to file an affidavit required by the confession of judgment which it voluntarily sought. While repeatedly refusing to appear or answer questions during depositions, Allstate itself abused discovery propounding, without seeking leave of court, many times more interrogatories than allowed. Later, Allstate agreed to withdraw all its pending written discovery in exchange for answers to an interrogatory concerning the basis for Allstate's liability. It was that proposal which resulted in Allstate not obtaining.additional discovery concerning Ted's ongoing health problems related to his stress spurred by Allstate's bad faith delay.

Allstate not only acted oppressively toward its policyholders, the Fieldses, it extended its bullying tactics to the trial court itself, seeking recusal of the judge immediately after he declined to reconsider his prior default order in the wake of remand. Judge Arredondo's subsequent decision to step aside did not require his prior decisions to be vacated in the then six-year-old case, given that Allstate's improperly unverified recusal motion regarded *31 long well-publicized matters involving pro bono activities and eleemosynary awards sponsored by Nina and Kenneth Allen, not untoward economic ties. Judge Arredondo's default order was recommended by the magistrate then overseeing the case and later affirmed by Special Judge Kavadias-Schneider.

When the judge made clear that she would consider anew all motions in limine, Allstate punted, preferring an argument that it had been "prevented" from defending itself instead of presenting its evidence. At trial, Allstate was allowed to argue that it acted in good faith, but it chose not to introduce evidence to support that contention, nor to mitigate damages. Its voluminous offers of proof after the jury was sent to deliberate did not remedy its waiver of its right to present evidence. Rather, the proffer was another purposeful tactic Allstate employed to bully the trial judge and "stack the deck" on appeal.

VI. ARGUMENT

A. The trial court was correct in not granting summary judgment.

Fields I erred in three key ways in determining that summary judgment should have been granted to Allstate: (1) considering Ted's UMBI claim as the only issue; (2) accepting

Allstate's false claim that the Fieldses had not submitted required proof of loss forms; and (3) considering the Fieldses' bad faith claim to have been commenced a year before it was actually deemed filed.

Standard of review

Summary judgment may be granted under T.R. 56(C) where there is no genuine issue as to any material fact and where the moving party is entitled to a judgment as a matter of law. The court must accept as true those facts alleged by the nonmoving party, *32 construe the evidence in favor of the non- movant, and resolve all doubts against the moving party. H Shambaugh & Son v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002) The party appealing the denial of summary judgment has the burden of persuasion on appeal that the trial court's ruling was improper. H Jordan v. Deery, 609 N.E.2d 1104, 1107 (Ind. 1993). The Court will affirm the trial court's ruling on summary judgment if it is sustainable upon any basis found in the record, regardless of whether the trial court relied upon that basis in making its decision. Indiana Newspapers, 787 N.E.2d 893, 900 (Ind.Ct.App. 2003).

The party seeking summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. If this prima facie showing is not made, "then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the movant's motion." Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005).

1. As a threshold matter, Allstate failed to establish a prima facie case in its motion.

The amended complaint, designated on summary judgment, alleged Allstate had breached its duty of good faith in failing to make prompt and fair settlement of both the Fieldses' UMPD and UMBI claims. (App. 109, 221) In its motion, Allstate did not address and, thus, failed to carry its initial burden of showing it used reasonable good faith efforts to effectuate fair settlement of the UMPD claim. (App. 197-214) Because of this, summary iudament had to be denied from the outset. Magwerks. supra. 829 N.E.2d at 975.

2. Plaintiffs' summary judgment response was timely.

On October 29, 1998, Allstate designated new evidence, automatically giving the Fieldses another 30 days to respond under Ind. T.R. 56(c), and making Allstate's point *33 moot. (App. 221) Furthermore, Allstate waived the issue of the timeliness of Fieldses' first response to summary judgment by making no mention in Fields I of the argument it now seeks to raise concerning the timeliness of the Fieldses' response to summary judgment. See Citizens Action Coalition, Inc. v. Northern Indiana Public Service Co., 582 N.E.2d 387, 391-392 (Ind.Ct.App. 1991) ("The law is well-established that an issue is waived if it was available on the first appeal but was not presented.") See also H McFarland v. State, 579 N.E.2d 610, 611 (Ind. 1991), Ohio Valley Trust Co. v. Wemke, 179 Ind. 49, 99 N.E. 734, 736 (1912).

Even if Allstate had not designated new evidence and even had it not waived its argument in Fields I, the trial court was well-justified in revising its prior order. The Fieldses

sought, and the trial court permitted, an extension of time for responding to Allstate's summary judgment motion, until July 13, 1998, so that they could complete discovery, including taking Allstate's deposition, scheduled for June 12, 1998. Allstate refused to appear, making it appropriate for the court to exercise its broad discretion to revisit its enlargement of order. C State ex rel. Rans v. St. Joseph Superior Court, 246 Ind. 74,78,201 N.E.2d 778, 779-80 (1964) ("[A] court may ... upon its own motion ... modify a ruling entered in the same term of court, since such a matter is in fieri."). Indiana has long recognized the impropriety of granting summary judgment when requests for discovery are pending, particularly those likely to develop a genuine issue of material fact such as the deposition of a party and answers to interrogatories. H Shoup v. Mladick, 537 N.E.2d 552, 553- 554 (Ind. Ct. App. 1989).

*34 3. Genuine issues of material fact justify the denial of Allstate's motion for partial summary judgment.

That a legal duty is implied in all insurance contracts, requiring insurers to deal in good faith with their insureds, is axiomatic. Vernon Fire and Cas. Ins. Co. v. Sharp, 349 N.E.2d 173, 180 (Ind. 1976). This duty of good faith and fair dealing extends beyond the obligation to refrain from an unfounded denial to pay policy proceeds; insurers also may not cause an "unfounded delay" in making payment, deceive their insured, or exercise "any unfair advantage to pressure an insured into a settlement of his claim." Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 519 (Ind. 1993).

The insurers obligations are .... rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest and maximizing gains and limiting disbursements. Liberty Mut. Ins. Co. v. Parkinson (1985), Ind.App., 487 N.E.2d 162 quoting Egan v. Mutual of Omaha Insurance Co. (1976), 24 Cal.3rd 809, 620 P.2d 141, 169 Cal.Rptr. 691.

C Transport Ins. Co. v. Terrell Trucking, Inc., 509 N.E.2d 220, 227 (Ind. Ct. App. 1987)

The evidence here establishes that Allstate's handling of the Fieldses' claim is surrounded by factual issues concerning its employment of delay, deception, and unfair advantage.

A question of designated evidence

The purpose of a summary judgment motion is to dispose of a case expeditiously without the need for trial. Once a trial has taken place, that purpose no longer can be fulfilled. It makes no sense subsequent to trial for the appellate court to put on blinders to the evidence beyond that designated pre-trial in summary judgment proceedings. In addressing precisely this point, the Seventh Circuit Court of Appeals found persuasive the *35 reasoning of Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358 (9th Cir. 1987):

To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and

affidavits at the time of the summary judgment motion demonstrated the need for a trial. Watson v. Amedco Steel, 29 F.3d 274, 278 (7th Cir. 1994).
Watson further quoted several other cases, including Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377-78 (11th Cir. 1988) ("Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal"), and noted that "a number of those courts indicated that they could find no case in which a reviewing court had overturned a jury verdict on the ground that the appellant should have succeeded on summary judgment." Watson, 29 F.3d at 277-278.

a. The evidence points to fact issues regarding Allstate's bad faith

1. Allstate had the required proof of loss

In its decision in Fields I, this Court gave weight to Allstate's deceptive argument that the Fields had not signed, completed and returned a particular "proof of loss form" supposedly required by the policy. See, Fields I, 819 N.E.2d at 126, 134-136. But Allstate's argument was false in that its policy only required some "proof", i.e., evidence of the actual loss claimed, not a specific "proof of loss" form signed by Ted. The policy provides:
Proof of Claim, Medical Reports
As soon as possible, any person making a claim must give us written proof of claim. It must include all details we may need to determine the amounts payable.
We must be given authorization to obtain medical reports and other records pertinent to the claim.
*36 (App. 1099) (original emphasis) This language squares with the principle that only "substantial compliance" is required in submitting proof of loss. Couch on Insurance 2d, Proof of Loss, §49A:20, pp. 547-48. Also, under Ind. Code § 27-4-1-4.5 (12), Allstate was not entitled to require its proof of loss forms that essentially duplicated data it already possessed. (App. 1138-1139)
Evidence at trial, including that of Allstate's own expert, as well as designated evidence on summary judgment, established that Allstate had adequate information to determine that Ted was due the policy limits on his UM claims long before the Fieldses sought to amend their complaint in March 1997 to add a bad faith count against Allstate.
Trial Exhibit 9 includes the Fieldses' documentation supporting Ted's claim sent to Allstate on January 30, 1997 and received by the company on February 4, 1997. (Appellee App. 1-93, App. 295, Tr. 631). The exhibit illustrates Allstate's attempt to mislead this Court by construing facts obliquely and drawing all inferences in its own favor. It contains far more than an incomplete "summarized list of Fields' [sic] medical expenses and wage losses" (original emphasis) as Allstate would have this court believe. (Br. at 5, 32) In fact, Ted's extensive supporting documentation included:
- The police report showing that by both Woodley and Ted's account, Woodley was at fault for the crash. (Appellee App. 4-5);
- Medical records detailing Ted's initial therapy, his lack of prior surgeries, the diagnosis of herniated disc, the diskectomy at C6-C7. (Id. at 13-90);
- Disability certificate showing Ted's total incapacity after the accident and predicting Ted's ability to return to work on February 4, 1996. (Id. at 87);

• U.S. Steel's letter of February 16, 1996 showing Ted stayed off work after the crash from September 1, 1995 until February 4, 1996, and his hourly pay. (Id. at 92)
• Allstate's acknowledgment on February 4, 1997 of its receipt of the January 30, 1997 letter and included materials. (Id. at 93)

*37 This was indeed all the information necessary to "prove" that the Fieldses' "loss" exceeded their policy limits, and duplicated the information sought by Allstate's form. (App. 1138-1139)

Allstate admitted it had Ted's authorization for medical records, having used them by the time it referred the case to its lawyers on January 16, 1997. (App. 807) Still, in response to Allstate's repeated requests, on February 20 and March 10, 1997, the Fieldses re-sent new forms authorizing Allstate to obtain Ted's medical and wage records. (App. 718, 1137) Thereafter, Allstate kept asking for authorizations, and even insisted on August 18, 1997, through its attorney, that it had never received any medical documentation, a blatant misrepresentation. (App. 296, 297)

The company's February 27, 1997 Colossus analysis, which was designated evidence on summary judgment, was based on the detailed documentation supplied to it on January 30, 1997. Allstate testified it utilizes Colossus "[u]pon receipt of sufficient information to properly evaluate a claim, medical records, bills." (Tr. 893) And the company had the authorizations to obtain them directly from the health-care providers and Ted's employer. Yet, Allstate perpetuated its bad faith claims-handling and delayed paying Ted's claim by feigning that it did not have the necessary records. Instead of seeking to assist Ted, the company took an obstructive, adversarial stance.

From the outset Allstate put its interests above those of the Fieldses in handing their UM claim. On December 4, 1995 and February 8, 1996, Allstate notified Coronet Insurance Co. that its investigation showed Woodley was at fault in the crash, and sought reimbursement for its medical expense payments to the Fieldses. (App. 3094, 3103) In contrast, when the Fieldses made their UM claim, Allstate immediately employed a lawyer *38 and then petitioned to intervene in the underlying action against Woodley, falsely asserting that Ted, not Woodley, was to blame. (App. 103, 212) Thus, Allstate turned the facts upside-down so that it could take a position directly contrary to the interests of its policyholders, even after it asserted contrary, true facts when those facts served its own interests. In thus holding its own interests above those of its policyholders, Allstate not only violated a fundamental claims-handling principle accepted by its own expert, it wrongfully dealt with the Fieldses' claim with an interested motive, employing its superior position tied to its vast financial and legal resources to force the Fieldses to settle for less than the actual value of their claim or face a prolonged battle in the courts over matters Allstate knew to be false. For such conduct alone, Allstate was properly held liable for punitive damages. Vernon Fire v. Sharp, supra, 349 N.E.2d at 185 ("Plaintiffs evidence showed that the insurers dealt with his claim with an 'interested motive' and wrongfully attempted by virtue of their superior position to exact additional consideration from the plaintiff before performing their obligations under the contract. This evidence was sufficient to establish a serious intentional wrong.")

2. Allstate had reason to know Ted's UMBI claim exceeded the limit.

The information it plugged into Colossus showed that Allstate knew then Ted had

suffered two herniated discs, had one spinal operation in the wake of the crash, that a preexisting condition did not aggravate his damages, and that Ted was not to any degree at fault for the crash. (App. 690-691, 695) Allstate also knew Ted was off work for five months as a result of the crash. (Appellee App. 92)

Insurance expert Donald Dinsmore testified at trial that Allstate should have realized this was a policy limits case on the UMBI coverage within seven days of it having this *39 information. (Tr. 572) Dinsmore also discussed Allstate's planned program of delay to force policyholders to accept settlements lower than their rightful claims or face lengthy litigation. Based on a hypothetical parallel to what happened to Ted Fields, Allstate's own expert, Macke, testified that the company should have determined within a day that this was a limits case on the UMBI coverage, given that the actual damages would stand between $250,000 and $500,000. (Tr. 440-441, 459) The medical testimony by orthopedist Dr. Fedor showed that surgical and hospital fees for one diskectomy alone would total from $32,000 to $55,000, double that for two, and that permanent injuries would likely remain. (Tr. 748-749)

Thus, the evidence pointed to an issue of fact, appropriate for a jury to decide, as to whether Allstate acted in bad faith, even within the 59-day period before the Fields sought leave to file their bad faith claim against the insurer.

Admittedly, the bills and medical records sent to Allstate on January 30, 1997 were incomplete insofar as the surgeon's bill was omitted. But that is irrelevant. The included records established the fact that surgery had been performed and was caused by the accident. The records in hand showed Allstate that the claim was worth far more than the limits. More evidence was unnecessary.

Even excluding the evidence at trial, the trial court's denial of summary judgment made good sense.

3. Designated evidence supported denial of summary judgment.

The Colossus analysis was part of the designated evidence, showed Allstate's knowledge of Ted's injuries, and pointed to a genuine issue of fact as to whether the company had in good faith delayed acting on Ted's claim, given its knowledge as of *40 February 27, 1997.

Also designated was Allstate petition of February 10, 1997 to intervene against Ted, falsely alleging that Woodley was not uninsured and that Ted was at fault, despite Allstate's notice of Coronet's liquidation and the fact that Allstate had previously concluded in its own earlier investigation that Woodley was at fault. (App. 3094, 3103) In taking such an adversarial stance founded on "facts" that it knew to be false, Allstate acted in bad faith, even though the position was connected to its litigation conduct.

In Monroe Guaranty Insurance Company v. Magwerks Corporation, 829 N.E.2d 968 (Ind. 2005), our Supreme Court held that an insurer breached its duty of good faith in handling the policyholder's claim when the insurer first determined that a roof had collapsed, but then duplicitously contested that very issue. This claims-handling conduct, in itself, justified the jury's finding of bad faith and imposition of punitive damages even though the court recognized an underlying good faith issue as to the meaning of 'collapse' under the contract. Similarly, here whether Woodley had caused the crash may have been a contestable issue at one point, but Allstate could not have its attorneys press that issue

in court, and cause an "unfounded delay in making payment", [FN7] given its prior investigation and determination that Woodley was at fault. (App. 3094) That Allstate plugged Ted's lack of fault into its Colossus analysis 17 days after it filed its Petition to Intervene, noting that Ted was not at fault (App. 695), shows the company uncovered no further facts causing it to change its prior conclusion.

FN7. This is expressly recognized as a bad faith act by Erie Ins. Co v. Hickman, supra, 622 N.E.2d at 519.

*41 Summary judgment must be denied where resolution hinges upon the weight of the testimony and "[m]ere improbability of recovery at trial does not justify the entry of summary judgment against the plaintiff." Nelson v. Jimison, 634 N.E.2d 509, 512 (Ind.Ct.App. 1994) In Nelson the court determined it was up to the jury to weigh the reasonableness of the insurance company's explanations for delay in paying the policy limit where expert testimony indicated the insurer had no reasonable basis to dispute the value, the insurer had lost claims documents, and the policyholder repeatedly tried to convince the insurer of the value of her claim. The designated evidence on summary judgment established each of those factors here, even before the Fields sought leave to amend their complaint to add a bad faith count.

b. The 59-day holding of Fields I needs re-examination.

Before determining that the court had no jurisdiction over the appeal in Fields I, the Indiana Supreme Court granted transfer, thereby vacating this Court's opinion finding that the only relevant period to examine was the 59 days between the Fieldses filing a claim with Allstate and their motion seeking leave to file a bad faith claim. This needs to be re-examined for two reasons.

1. The Fields' claim was filed March 3, 1998, not the year before.

Allstate misled this Court to believe that the Fieldses' motion for leave to file their amended complaint related back to March 14, 1997, the date they first sought leave to sue Allstate, i.e., 59 days after Allstate received the claim. To the contrary, the trial judge expressly deemed the complaint filed on March 3, 1998, nearly 14 months after the Fields filed their claim. (App. 188) Thus, Allstate's repeated allegations that it was sued just 59 days after it received the claim were false. That the Fields sought leave to file an amended *42 complaint in order to add Allstate as a defendant, in itself, meant nothing; their motion was merely a request for permission to sue Allstate. Palacios v. Kline, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991). Even when leave is granted, a plaintiff seeking to add an additional party faces several hurdles before the pleading relates back to the date permission to amend was first sought. Ind. T.R. 15(C); Fifer v. Soretore-Dodds, 680 N.E.2d 889, 891 (Ind. Ct. App. 1997). Had Allstate's objection to the Fieldses' motion been granted and permission to amend denied, Allstate would not have been made a party-defendant. And had the limitations period run between the time the Fieldses sought leave to amend and the date the complaint was deemed filed, Allstate certainly could, and doubtless would, have sought dismissal under the statute of limitations as in Fifer.

In her concurrence, Judge Robb noted the result "could have been significantly different" but for Ted and Rosella's "bad timing in filing their bad faith claim." Woodley v. Fields, 819 N.E.2d 123, 137 (Ind.Ct.App. 2004). That statement was based on the deception perpetrated by Allstate by which it convinced this Court that suit was filed 59 days after the UM claim was made, not 14 months.
Given that by early 1997 Allstate had authorizations that enabled the company to independently obtain Ted's medical and wage loss records, as a matter of reasonable inference, it certainly could have used those authorizations to obtain any additional records it allegedly needed to determine that Ted's injuries exceeded the $50,000 limit on bodily injuries, and paid Ted before well before the March 3, 1998 date the Fieldses' bad faith claim was actually filed. Under these facts, Allstate's failure to pay the Fieldses' claim prior to then created a genuine issue of material fact as to its bad faith, rendering summary judgment inappropriate.

*43 2. Post-filing bad faith behavior is relevant in a delay case.

Even more fundamentally, this Court erred in relying upon dicta in Gooch v. State Farm Mut. Auto. Ins. Co., 712 N.E.2d 38 (Ind.Ct.App. 1999), reh'g denied, trans. denied, to find bad faith conduct after the filing of a bad faith claim to be irrelevant in cases involving bad faith delay. In fact, such a sweeping rule only encourages unethical insurance companies to not act on a claim and to try to spur a bad faith lawsuit so that, thereafter, the company will be free to engage in bad faith delay without concern that its ongoing misdeeds will be subject to jury review. After all, delay favors the insurer, which gains profit by investing the money owed, but withheld from, its insureds; and the longer the delay, the higher that profit - a return the insurer reaps even if it eventually pays out the claim.
In White v. Western Title Insurance Co., 710 P.2d 309 (1986), reh'g denied, the California Supreme Court determined, en banc, that an insurer's ongoing conduct after the filing of a lawsuit against it - including a bad faith claim - could be admissible evidence. In discussion it elaborated on the matter at issue here:
[A] sharp distinction between conduct before and after suit was filed would be undesirable. Defendant's proposed rule would encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith. ... The policy of encouraging prompt investigation and payment of insurance claims would be undermined by defendants proposed rule.
Id. at 885-886.
See also, O'Donnell v. Allstate, 734 A.2d 901, 904 (Pa.Super. 1999), which similarly found that not allowing evidence of ongoing bad faith behavior following the filing of a bad faith claim is contrary to the puroose of Pennsylvania law.
*44 The same logic applies in this case, which is based on bad faith delay, not denial of a claim. The distinction is important since in a denial case the parties focus on the events leading up to the denial, which is, necessarily, prior to the filing of the case. In the context of an unfounded delay of claim, however, the transition between conduct before and after the filing of a bad faith action is seamless, and no single moment marks when the tort occurred. In a delay case, no just reason exists to arbitrarily encourage and give

insurers safe-harbor to continue engaging in dilatory conduct, knowing that the conduct cannot be used as evidence of delay against them merely because it was egregious enough to have already prompted bad faith litigation. This argument, with more elaboration, was made to the Supreme Court in the Fieldses' successful petition seeking transfer. (Appellee App. 158)

c. Allstate's focus on pre-existing injury itself evidences bad faith.

After the Fieldses provided Allstate with the forms it needed to obtain Ted's medical and employment records, the company had the ability itself to verify Ted's claims. It obtained these records, but then reached for another excuse to delay payment.
Allstate argues that its own authorization form was not used, preventing the company from probing any pre-existing medical conditions. Under the facts of this case, the argument is ludicrous and stands as evidence of Allstate's bad faith approach to claims-handling. First, Allstate's Colossus analysis on February 27, 1997 provides a reasonable inference that it knew that Ted had no such pre-existing condition, since that is the information the company itself input.
Also, Allstate's policy does not exclude injuries that were aggravated by pre-existing conditions. (App. 1097-1099) Even if it had, Allstate would still be responsible for those *45 injuries from the accident that injured Ted's spine and put him out of work. See H Union Sec. Life Ins. Co. v. Acton, 703 N.E.2d 662 (Ind.Ct.App. 1998), transfer den.
As the UM insurer, Allstate must pay the damage caused by the tortfeasor to the extent of its policy coverage. See H Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249, 253 (Ind. 2005). That a tortfeasor takes the victim as she finds him is black-letter law. Bolin v. Wingert, 764 N.E.2d 201, 207-208 (Ind. 2002). Thus, Allstate was plainly responsible for aggravation of any pre-existing conditions that led to surgery and unemployment resulting from the crash.

d. Allstate failed to adequately investigate property claim

As to the Fieldses' UMPD claim, Allstate was notified on February 20, 1997 that Ted's car was a total loss. Allstate knew that its policy entitled it to inspect the car and knew, at least as of as of April 1998, that the wrecked vehicle was sitting in Ted's driveway. (App. 1129, Tr. 1182) Had the company followed through on its duty to conduct a reasonable investigation to assist its insured, it could have readily viewed the car and determined the truth of Ted's claim. Yet, it took Allstate until January 15, 2001 to offer any payment for UMPD. (App. 1206) In contrast, Coronet Insurance, which owed no duty of good faith and fair dealing toward Ted, determined Ted was entitled to full value on his car on November 8, 1995, two months after the crash. (App. 3092)
For each of the above reasons, the trial court did not err in denying summary judgment to Allstate on the Fieldses' bad faith claim.

B. The trial court did not abuse its discretion in defaulting Allstate.

1. Ongoing wrongful acts led to default.

Contrary to Allstate's claim, it was not defaulted for an inadvertent failure to file an *46 affidavit confessing judgment. Rather, as former Magistrate Ivancevich, who presided over nearly all the proceedings in this case, testified, the default sanction was recommended "in light of Allstate's pattern of defying or disregarding court orders and its intransigence in complying with discovery throughout the litigation,[which] recommendation was accepted by the Lake Circuit Court." (Appellee App. 131)

The Fieldses' first three default motions concerned Allstate's failures to appear and to answer questions in discovery, despite the trial court's warning on the second motion that Allstate's "intransigence in complying with Plaintiffs' discovery requests may very well become Plaintiffs' prima facie showing of bad faith". (App. 318)

Allstate then ignored the court's order that it file the requisite affidavit that the debt was just and owing in the confession of judgment which Allstate itself had proposed. (App. 980) After nearly five months passed, the Fieldses filed their fourth default motion, citing the company's "persistent refusal to comply with the Orders of this Court". (App. 984-986) Although Allstate's default was ordered based on that motion, it was the defendant's continued disregard of court orders that led to the default. Allstate's continued ignoring of the Court's January 6, 2003 order to serve objections to the default motion within 14 days (App. 988) led to the motion for a summary ruling at the end of that month. The non-inclusion of Allstate's new counsel Mark Smith on the order's service list did not nullify the order since Allstate's other counsel was given notice. See H Strutz v. McNagny, 558 N.E.2d 1103 (Ind.Ct.App. 1990) (party had no right to multiple attorneys at a summary judgment hearing) Logal v. Cruse, 267 Ind. 83, 368 N.E.2d 235 (Ind. 1977) (notice to attorney is notice to the client).

*47 What former Magistrate Ivancevich described as Allstate's "pattern of defying or disregarding court orders" is reflected in this course of events leading to the Fieldses' four default motions. By even ignoring the court's order to file objections to the default motion, Allstate waived its right to a hearing. As the court found in H Drew v. Quantum Sys., 661 N.E.2d 594 (Ind.Ct.App. 1996),

Dismissal is not unjust where (1) the party was given additional time within which to respond and was expressly warned that failure to comply would result in dismissal, and (2) no response or motion for additional time was timely made and no reason excusing a timely response is demonstrated.

citing C Bums v. St. Mary Medical Center, 504 N.E.2d 1038, 1039 (Ind.Ct.App. 1987)

The Court's order to file an objection to the default motion within 14 days was tantamount to an explicit warning that exactly what the motion sought would be entered if it were ignored. While Drew as well as Bums involved non-compliance with discovery, Bums specifically noted, Trial Rule 55 draws no distinction between default judgments entered as discovery sanctions and those entered for other reasons." Id. at 1040. Indiana does not require lesser sanctions than dismissal especially, as stated in H Meyer v. Wolvos, 707 N.E.2d 1029, 1032 (Ind.Ct.App. 1999), "when the disobedient party has demonstrated contumacious disregard for the court's order to the extent that it has or threatens to delay or obstruct the rights of the opposing party so that any other relief would be inadequate." C Nesses v. Specialty Connectors Co., Inc., 564 N.E.2d 322,327 (Ind.Ct.App. 1990). Under such circumstances "[w]hether to impose the ultimate sanction of dismissal or default is a matter for the trial court's discretion." H Pierce v. Pierce, 702 N.E.2d 765,767 (Ind.Ct.App. 1998). Here, Allstate over the course of years had stretched

out the litigation and obstructed the Fieldses' rights, by refusing to answer discovery questions despite the court's admonition, and by violating court orders.
*48 Also, the trial court specifically found in defaulting Allstate that the defendant had "refused" to comply with its order on confession of judgment. (App. 44, 45) Since refusal is a wilful act, the court did expressly find that Allstate had acted willfully, as required by non-Indiana cases Allstate cites.
Allstate's ongoing disregard of discovery rules and court orders was itself evidence of its bad faith handling of the Fieldses' claim. Allstate's contumacious conduct was part and parcel of its McKinsey strategy: to use the courts as a business tool, forcing policyholders to either accept less than the true value of their claims or become embroiled in extended litigation. The default order was thus inextricably tied to the merits of the case and did not violate due process.
For the same reasons the court did not abuse its discretion defaulting Allstate, the special judge acted within her discretion in not setting it aside. Allstate's argument to the contrary rests upon the false claim that the default was prompted simply by its not filing the required affidavit confessing judgment when ordered. But since that was only "the stick that broke the camel's back" as former Magistrate Ivancevich's affidavit shows, [FN8] Allstate's filing of the required affidavit two years after it was ordered to do so did not make everything *49 right. There was no simple "mistake, surprise, or excusable neglect" that could justify relief under T.R. 60(B)(1).

FN8. In its brief as well as in its appendix, Allstate ignores former Magistrate Ivancevich's affidavit of November 16, 2006. (Appellee App. 131; App. 3704) In a trial court motion to strike the affidavit, Allstate objected the magistrate made the recommendation in an ex parte conversation with the court. (App. 3708) But the use of magistrates has long been upheld in **H** Indiana. Matheney v. State, 688 N.E.2d 883, 895 (Ind. 1997). It's absurd to characterize a magistrate talking with a judge as an "ex parte" communication. See Parks v. McWhorter, 106 Ill. 2d 181, 185 (Ill. 1985). Allstate knew Magistrate Ivancevich presided over hearings regarding discovery matters. Because Mr. Ivancevich was no longer presiding at the time of his affidavit, Allstate's assertion of a breach of attorney and judicial cannons of ethics was equally groundless. See **H** Timberlake v. State, 753 N.E.2d 591, 610 (Ind. 2001) (a judge is prohibited from "from engaging in ex parte conversations that relate to pending proceedings".) Mr. Ivancevich was no longer a judge and no proceedings were pending before him.

2. Rather than pay, Allstate sought to force "settlement."

Instead of simply paying Ted the $50,000 due on his UMBI claim, Allstate first proposed to pay "policy limits" in settlement of the claims. (App. 1178) Only after being questioned about the extinguishment of their bad faith claim, did Allstate prepare a release that excluded it. Then Allstate persisted in its bad faith by attempting to extinguish Ted's UMPD claim with the payment of the $50,000 limit on the UMBI claim, contrary to the interests of its insured and its obligations under the policy. (App. 1186) In crafting settlement releases that would have eliminated claims the Fieldses were entitled to make, Allstate was not tending to the best interests of its policyholder or acting in good faith. While Allstate had the contractual obligation to pay Ted's legitimate claims, Ted

had no policy obligation to sign a release to obtain the money that was due him. Allstate sought to pay the $50,000 into the court over the Fieldses' objection. This is what led to Allstate's offer to confess judgment, an idea it conceived and volunteered, which it then failed to perfect in contravention of court orders. There was no legitimate basis for Allstate to pay the money into the court rather than to the Fieldses. The only reasonable inference is Allstate wanted to further frustrate its policyholders and deny them the full payment they demanded.

C. The trial court did not abuse its discretion in affirming the default

For the same reasons that default was properly entered in the first place, the trial court did not abuse its discretion in declining to set it aside.

*50 D. Allstate's bullying tactics were properly rejected by the special judge.

Upon remand following Fields I, Allstate once again asked Judge Arredondo to reconsider the default. When the judge declined to do so, Allstate turned its bullying tactics on the court, seeking the judge's recusal. In its unverified motion, Allstate claimed that it conducted research the day after Judge Arredondo's decision, which was faxed late in the afternoon, suddenly discovered an alleged "close personal connection" between the judge and Mr. Allen. (App. 1611) In fact, the connection was not personal, but consisted of Judge Arredondo having chaired an "Excellence in Teaching" committee helping select recipients for the awards sponsored by Mr. Allen and his wife, and long given top play on the firm's website. Allstate also complained of Mr. Allen having contributed to the Indiana Equal Justice Fund to support legal services when the judge served as one of the fund's 26 directors. (App. 1661-1663) These were matters of civic pride and publicity, not secret interests. (Id., 1659- 1660) Judge Arredondo chaired the committee because he was a former teacher, and never met with Mr. Allen nor discussed the committee's work privately with him; and the judge received no money for his service. (App. 1683) Even though Allstate failed to verify its recusal motion as required to show that its knowledge of ties was newly discovered, the judge stepped aside. Allstate proceeded to make renewed motions for reconsideration of former orders by Judge Arredondo in the case, which were later appropriately denied by the special judge. In its unverified motion, Allstate did not even bother to cite T.R. 79(C) or Canon 3(E) of the Code of Judicial Conduct, neither of which would require disqualification under the circumstances presented. Given the totality of these circumstances, Judge Kavadias-Schneider did not abuse her discretion in ordering the 10-year-old case to trial, rather than starting from *51 square one and re-visiting the Allstate's motions that Judge Arredondo had ruled upon and reconsidered twice.

E. The jury's verdict must stand

1. Standard of review

The standard of review of a jury verdict is well-settled. The court neither re-weighs the evidence nor judges the credibility of witnesses. Instead it looks to the evidence most

favorable to the verdict together with all reasonable inferences to be drawn from that evidence. Staton v. State, 853 N.E.2d 470, 474 (Ind. 2006); H Ritter v. Stanton, 745 N.E.2d 828, 843 (Ind.Ct.App. 2001).

The same evidence, discussed above, which precluded entry of summary judgment, also requires the jury's verdict be upheld. That evidence most favorable to the Fieldses together with all reasonable inferences establishes that Allstate's delay of two years in making an offer (improperly contingent upon a release) on Ted's UMBI claim and its similar and even longer delay as to the UMPD claim constituted bad faith, meriting the actual and punitive damages assessed by the jury.

2. Allstate used the in limine order of July 25, 2003 as a pretext, feigning it was prevented from presenting a defense.

a. The in limine order was merely preliminary, later waived and not enforced at trial.

In limine orders do not determine the ultimate admissibility of evidence; rather they are intended to prevent presentation of evidence to the jury prior to the trial court ruling upon it in the context of the trial. C Norton v. State, 273 Ind. 635, 650 (Ind. 1980) Because in limine orders are preliminary, it is necessary for objections to the evidence by made at trial, or rulings in limine are waived. C Ind. Evidence Rule 103(a). Here such waiver occurred.

*52 At the beginning of trial, the Fieldses waived objections based on Judge Arredondo's in limine order tied to the default. [FN9] They did this by not formally renewing their objections to Allstate's efforts to show its good faith by focusing in its opening upon actions during the first 59-day period of the Fieldses' claim. (Tr. 415) Also, both prior and during trial, Judge Kavadias-Schneider made clear she would not enforce the in limine order to prevent Allstate from introducing evidence of its good faith and to mitigate damages. At opening, she allowed Allstate to focus on the 59-day period of the Fieldses' claim, and the correspondence therein. (Tr. 413-414) And she allowed Allstate to argue that it bore no fault whatsoever in its handling of the Fieldses' claim during that period and was thus not guilty of bad faith. (Tr. 1614-1615, 1625-1626, 1642-1645The Special Judge thereby modified the in limine rulings of July 25, 2003, which the Fieldses had already waived.

FN9. The order was tied to the default since, contrary to Allstate's claims, the Fieldses' Amended Complaint did not merely assert the five narrow facts cited by Allstate (Br. 56), but broadly alleged intentional and wrongful acts by the insurer in breaching its insurance contract with the Fieldses. (App. 112) Allegations of such misconduct pose factual issues. See e.g., H Witham v. Norfolk & W. R. Co., 561 N.E.2d 484, 486 (Ind. 1990), and Judge Arredondo's in limine order related to these issues. In any event, Allstate waived such arguments by signing pre-trial orders-both before and after Fields I- which amended the pleadings. C North Miami Consol. School Dist. v. State, 300 N.E.2d 59; C 261 Ind. 17, 20 (Ind. 1973) ("Thus, the [pre-trial]order [supplants] the allegations raised in the pleadings and controls all subsequent proceedings in the case.")

During trial, the Special Judge told Allstate, "I've taken the posture from the beginning of

our discussions that you were not precluded from bringing in any type of evidence to mitigate ... damages." She then invited the company to bring in its own witness to show its good faith in conducting file reviews; Allstate turned down the invitation. (Tr. 1341) In a bad faith case, being able to present substantive evidence challenging the degree of oppressive and willful behavior is tantamount to being able to challenge whether the behavior was willful, oppressive and in bad faith. There is, after all, no bright line dividing *53 wrongful but well-intentioned behavior and willful wrongdoing. Finding the line involves judging the extent of wrongdoing. By being able to offer substantive evidence to challenge that extent of its willful wrongdoing, the way was open for Allstate to present the defense of its choice. And, in fact, as discussed, Allstate was allowed to argue its good faith.

b. Allstate's strategic decision to rely on the in limine order.

Prior to trial, Allstate made a strategic decision to not press the case that it should be able to argue it acted in good faith, when Judge Kavadias-Schneider made clear she would be inclined to change the in limine ruling of the prior judge. After the judge stated a month before trial that she would reconsider the in limine rulings of Judge Arredondo, and requested briefs on the matter, Allstate submitted a brief that contained no substantive argument, but merely referenced dates, referring to a prior brief seeking reconsideration based on Judge Arredondo's recusal, which Judge Kavadias-Schneider already had rejected. (Tr. 12-13, Tr. 23-25) By "punting" on the in limine argument, Allstate showed its tactical decision to use Judge Arredondo's ruling on the motions in limine as insurance rather than opting to seek to present evidence and argument that it had acted in good faith. When litigants knowingly waive rights, the waiver stands. See **H** Kubsch v. State, 866 N.E.2d 726, 738 (Ind. 2007); **H** Timberlake v. State, 690 N.E.2d 243, 255-256 (Ind. 1997).
Here, however, Allstate really only waived its pretense to a defense based on Judge Arredondo's in limine order. In fact, as discussed, the order was not only preliminary but not enforced from the outset, when Allstate was allowed to focus on the first 59-day period of the Fieldses' claim, to the closing, when Allstate argued it acted in good faith so that no damages should be awarded.

*54 c. Presenting 'offers of proof in lieu of evidence

Allstate did not even bother to ask to introduce its evidence concerning that 59-day period. Instead, Allstate, at the close of its defense, simply opted to lead the trial court into saying it was standing by the former judge's rulings so that it could make a record, albeit a spurious one, as to the preliminary in limine orders of July 25, 2003. (Tr. 1457-1463)
Then, during jury deliberations, Allstate proceeded to present alleged written "offers of proof" constituting hundreds of pages en masse (Tr. 1730- 1738), spanning Volumes 11 to 15 of its Appendix. But Allstate never tried to present the evidence to the jury, or make an offer to proof while the trial judge could decide whether the evidence should be admitted. [FN10]

FN10. Since the same defect afflicts all of Allstate's offers of proof, discussing them individually is unnecessary. But a telling example of Allstate's choice to abandon its evidence is shown by its presentation of correspondence prior to the Fieldses' proposed bad faith claim of March 14, 1997 as supposed offers of proof. (See e.g. App. 2776-2788) Having been allowed to address this evidence in its opening, Allstate surely would have been allowed to introduce the evidence during trial, had it tried, rather than as part of a bulk presentation after it rested.

An offer to prove under Evid. R. 103(b) has the dual purpose of providing the trial judge with an opportunity to reconsider his evidentiary ruling and preserving the issue for appellate review. H State v. Wilson, 836 N.E.2d 407, 410 (Ind. 2005). "To accomplish these two purposes, an offer of proof must be sufficiently specific to allow the trial court to determine whether the evidence is admissible and to allow an appellate court to review the correctness of the trial court's ruling and whether any error was prejudicial." Id. Here, Allstate's supposed "offers of proof" were fatally deficient in that they did not allow the trial judge to reconsider, in context, the preliminary evidentiary rulings of the prior judge. No judge could wade through the avalanche of paper Allstate presented after it *55 closed. Nor should she be required. At its core, Allstate's offer was yet another example of its oppressive, bullying approach to litigation, attempting to force the trial judge to sift through reams of paper, in which perhaps an item or two of admissible evidence is hidden, hoping to later pull out snippets of that secreted evidence for appellate review.
Much of Allstate's proffer consisted of evidence never disclosed in discovery, [FN11] or omitted from the pre-trial order, and was thus inadmissible, even if it had been presented while the case was being tried. Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 82 (Ind. 2006); Ind. T.R. 16(J). For example, proffered witnesses David Bell, Lynn Cirrincione, Lawrence Gagnon, Edward Hearn, and Michael McCabe were never listed on the pre-trial order. Many of the witnesses that were so listed testified at trial, e.g., Dr. Arjun Gupta, Thomas Macke, Joanne Ritchie, Carolyn Fehming, and Cindy Jenkins, though their testimony was not whatAllstate represented it would be. Rather than cross-examine these trial witnesses on the matters alleged in its proffer, Allstate waived or restricted its questioning in favor of presenting, after trial, a more favorable, albeit fictional, account of what it pretended their testimony might have been.

FN11. Unlike Allstate, the Fieldses sought pre-trial disclosure of all expert witness testimony (App. 145), and, inter alia, the identity of others with knowledge of the plaintiffs' claim, of Allstate's claims processing procedures, the training of claims personal and documents related to the foregoing, in written discovery which was never withdrawn. (App. 136-149) Allstate's answers, and revised answers, provided mostly objections. (Id.; Appellee App. 124.1-124.13)

Practically all of the evidence proffered was not produced pre-trial in response to the Fieldses' written discovery requests. By not producing the proffered documents or disclosing its proffered witnesses or their opinions in discovery, not seeking to introduce the evidence at trial, and dumping the documents on the trial judge en masse after the jury began deliberating, Allstate waived its right to rely on any admissible evidence

concealed *56 within its reams of paper.
In short, Allstate essentially abdicated its defense at trial so it could argue on appeal that it had not been allowed to present its defense. But the argument was a charade based on independently inadmissible evidence and built upon the false premise that Judge Kavadias-Schneider enforced the prior judge's in limine orders to bar Allstate from presenting evidence at trial. In fact, she did not.

3. Allstate was not entitled to a directed verdict

Judgment on the evidence is proper where all or some of the issues are not supported by sufficient evidence. H Smith v. Baxter, 796 N.E.2d 242, 243 (Ind. 2003).] The Court looks only to the evidence and the reasonable inferences drawn most favorable to the nonmoving party, and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case. Id. If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper. Id. When the trial court refuses to set aside the jury verdict, it is not the province of an appellate court to do so "unless the verdict is wholly unwarranted under the law and the evidence." H Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048,1056 (Ind. 2003). For the same reasons set forth above that summary judgment was properly denied, and particularly in the subsequent light of the evidence at trial, Allstate was not entitled to a directed verdict. As discussed, there was evidence of Allstate's bad faith, and the Fieldses' damages flowed from the resulting delay of years. Indeed, given the default entered, no such evidence was required.

*57 4. The jury instructions were proper.

Jury instructions are entrusted to the discretion of the trial court, and its decision will not be disturbed unless there is an abuse of discretion. H Hartford Steam Boiler Inspection & Ins. Co. v. White, supra, 775 N.E.2d 1128, 1141 (Ind.Ct App. 2002). The court's instruction that Allstate's liability was not at issue flowed from Allstate's default in this bad faith case. Because of the default, the Fields were not required to prove Allstate's bad faith. It was a given, and jurors were appropriately instructed as to the burdens of proof on compensatory and punitive damages.

a. Burden of Proof

In accord with Indiana Pattern Jury Instruction 9.03, the court instructed the jury that punitive damages had to be proved by clear and convincing evidence. In accord with IPI 11.02, it instructed the jury that compensatory damages would have to be proven by a preponderance of the evidence. Allstate's citation of Freidline v. Shelby Insurance Co., 774 N.E.2d 37 (Ind. 2002) and H Masonic Temple Ass'n. v. Indiana, 779 N.E.2d 21(Ind.Ct.App. 2002) does not address the issue it seeks to raise because in neither case was the defendant defaulted forbad faith. In fact, in Masonic, the court focused upon the clear and convincing evidence standard as applying to punitive, not compensatory, damages. In Erie v. Hickman, supra, 622 N.E.2d at 523, the court struck the punitive damage claim for failure to show breach of the .duty of good faith by clear and

convincing evidence, while it upheld the compensatory damage award proved by a preponderance. See also Donald v. Liberty Mut Ins. Co., 18 F.3d 474, 484 (7th cir. 1994) (applying preponderance standard in bad faith case as to actual, but not punitive, damages).
Here, too, the underlying tort, for which compensatory damages are warranted, was *58 Allstate's breach of its duty of good faith. But to obtain punitive damages, the trial courts instructions properly required proof by clear and convincing evidence.

b. Unfair Claims Practices Act

The trial court was right to instruct the jury that it could consider the violation of provisions of the Unfair Claims Practice Act, KCInd. Code §27-4- 1-1, et seq. ("UCPA"or "Act") in determining punitive damages. (Tr. 1696) This instruction is in keeping with Ansert by & H Through Ansert v. Adams, 678 N.E.2d 839,842 (Ind.Ct.App. 1997). Contrary to Allstate's assertion, Ansert found, "While a violation of the [UCPA] statute would necessarily offer some evidence of bad faith, such a showing would not, standing alone, provide the evidence necessary for imposition of punitive damages". Id. at 842. Thus, the Act is not irrelevant, as Allstate contends. The jury was properly instructed, in keeping with Ansert, that it could consider violation of provisions of the Act, not that a violation required punitive damages.
The Act itemizes prohibited unfair claims-handling practices. The purpose of the Act is to promote public interest by protecting health and property of Indiana policyholders from unfair and deceptive acts. Id., C 15 U.S.C. 1011, et seq. While statutory enforcement is entrusted to the Department of Insurance, the Act's provisions reflect the minimum standard of care for insurers handling claims.
The general rule has long been that,
where legislation prescribes a standard of conduct for the purpose of protecting life, limb or property from a certain kind of risk, and harm to the interest sought to be protected comes about through the breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities.
*59 F. Harper, F. James & O. Gray, The Law of Torts (2nd ed. 1986) § 17.6 at 619 (emphasis added). Accord: W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser&Keeton on THE Law OF Torts § 36 at 220 (5th ed. 1984).
As Justice Cardozo explained, this rule is rooted in the principle that failure to comply with a statutory requirement designed to protect the public "is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." H Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815 (1920) (Cardozo, J.). The concept has also been embodied in the Restatement (Second) of Torts § 285 (1965), "The standard of conduct of a reasonable man may be ... (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide".
The jury was properly instructed on the Act's provisions for another reason: Allstate trained its adjustors to follow the Act. In its deposition on December 9, 1999, Allstate testified:
Q. Are adjustors at Allstate taught to follow Indiana statutes in handling claims?
A. Yes.

Q. And can we agree that it would be wrong for an adjustor at Allstate not to do so?
A. Yes.
(Appellee App. 95)
An actor's state of mind is of primary concern in assessing punitive damages. Allstate's adjustors were trained in the provisions of the Act. Therefore, the jury could reasonably infer that Allstate's violation were not merely inadvertent but knowing and deliberate. These factors, again, go to the heart of punitive damages. The jury was entitled to measure Allstate's behavior juxtaposed to the Act - a law which Allstate knew reflected the minimum standard of care but which it routinely and knowingly violated.
*60 Although Allstate's liability had been established by default, its violations of the Act remained relevant to show its degree of reprehensibility-a key factor in determining punitive damages. The jury was properly instructed under Pattern Instructions. IPI 11.107.

c. Discovery and Ted's ongoing health problems.

Allstate voluntarily made a tactical decision to withdraw all its pending discovery in exchange for an answer to a new and multifaceted interrogatory. (Appellee App. 117-118) As a result, defendant has no cause to complain that evidence of Ted's total medical expenses were not disclosed pre-trial. Also as discussed in the Statement of Facts, testimony by each of three of Ted's medical providers, as well as by Ted himself, linked his ongoing ailments, in part, to the stress Ted suffered as a result of Allstate's years of delay in paying his UM claim under his policy. (Tr. 678-679, 781-782, 784, 751-753) It makes no difference that Ted may have been prone to stress and related health troubles as a result of Allstate's bad faith delay in paying claims. As our Supreme Court stated in Bolin v. Wingert, supra, 764 N.E.2d at 207-208:
It is hornbook law that a tortfeasor takes the injured person as he finds her, and the tortfeasor is not relieved from liability merely because an injured party's pre-existing physical condition makes him or her more susceptible to injury. When some injury was foreseeable and the defendant's negligence proximately caused the aggravated injury, this rule allows recovery for an injury even if its ultimate extent was unforeseeable.
That the stress caused by Allstate's bad faith delay in paying his claim put Ted under an increased risk of harm from other health conditions is itself compensable. See Wolfe v. Estate of Custer, 867 N.E.2d 589; (Ind.Ct.App. 2007) While Wolfe discussed the increased risk of harm doctrine as applied to negligent medical providers, the same should apply here to an insurer whose purposeful bad acts caused an individual to suffer emotional distress with substantial consequences to his health. It was appropriately left up *61 to the jury to weigh the evidence and assess the degree to which Allstate's bad faith conduct was a substantial factor in spurring stress and related health conditions that would trouble Ted for the remainder of his life.
Allstate did not bother to present any evidence of its own to challenge the cause of Ted's stress and related health problems. Its written proffer of testimony from witnesses who were called at trial doesn't square with the facts. Compare, proffer of testimony of Dr. Gupta regarding hypertension with his contrary trial testimony. (App. 2622, Tr. 644, especially cross examination starting at Tr. 692 and redirect at Tr. 719) After all, Allstate had the burden of putting on substantial evidence to challenge the direct testimony of

Ted's doctors since "all doubts and uncertainties as to the proof of the exact measure of damages must be resolved against the defendant because the most elementary conception of justice and public policy requires that the wrongdoer bear the risk of uncertainty which his own wrong has created." C Dado v. Jeeninga, 743 N.E.2d 291, 296 (Ind. Ct.App. 2001).

That Ted's emotional distress began sometime after March 14, 1997 makes no difference because, as discussed, Ted can recover in connection with Allstate's ongoing bad faith delay after that date, at least to the time of the actual filing of the complaint and properly thereafter since his claim was based on claims-handling delay not denial.

d. Rejected instructions

The trial court was right to reject Allstate's instructions which were redundant or incorrect statements of law. Allstate's payment of the $50,000 into the court was not accompanied by the required confession of judgment for two years, and could not erase liability for its lengthy delay in making that payment, perpetrated pursuant to its business *62 plan and its CCPR. Nor can Allstate deny or escape its failure to ever pay the Fieldses directly as required by its contract. Allstate's proposed jury instruction falsely suggested that it had properly completed its obligations under the contract by tendering the money to the court. But its obligation under its contract of insurance was to pay the Fieldses, not some third-party, upon proof of a covered loss.

Furthermore, Allstate's proposed instruction that its conduct could only be judged based on the information available to it at the time of its decision or evaluation, did not square with its default for its ongoing bad faith conduct. While the instruction might be appropriate to a bad faith claim for denial of claim, it was irrelevant to Allstate's ongoing, bad faith delay in claims-handling.

5. Post litigation events

The dicta in Gooch and the arguments Allstate raises are discussed above. In fact, the trial court was correct in recognizing the ongoing nature of bad faith delayed claims-handling case, and the resulting relevancy of post-filing conduct.

6. Having raised its litigation conduct, Allstate opened the door to its consideration, which was proper anyway.

Allstate designated its Petition to Intervene and proposed first amended complaint in its summary judgment motion. (App. 194, 207) In its reply on summary judgment relied on its Answer as "proof" of good faith since it withdrew certain specious defenses alleged in its petition. (App. 812-813) In its offer to prove, it also sought to introduce evidence purporting to show that 'Allstate's litigation conduct was proper." Br. at 57. If litigation conduct is otherwise inadmissible, Allstate opened the door to its admission waiving any basis to complain about it.

*63 Furthermore, Allstate filed its Answer prior to leave being granted by the trial court to allow the Amended Complaint. The Answer was thus filed before the lawsuit against Allstate was even commenced; it was therefore not "post-filing" conduct.

As a matter of note, in White v. Western Title, supra, 710 P.2d 309, 317, the California Supreme Court considered, and rejected, parallel arguments made by the defendant-insurer that evidence of bad faith litigation conduct would be unfairly prejudicial, finding, "We trust that the jurors will be aware that parties to a lawsuit are adversaries, and will evaluate the insurer's conduct in relation to that setting." The court addressed the defendant's concerns that a jury would misunderstand the function of litigation tactics, noting the trial court retained discretion to weigh probative value against prejudicial effect. Id. at n.9. Also, in Gooch, the court specifically recognized the relevance of litigation conduct by the insurer that led to the bad faith claim, and concluded the summary judgment was precluded because "a genuine issue of material fact exists as to whether this behavior was designed in bad-faith to force Gooch to settle her claim." Id., 712 N.E.2d at 43.

7. It was not error to admit witnesses and medical records to which Allstate waived discovery.

By letter dated June 14, 2002, Allstate offered to abandon all its pending discovery, including its 178 prior interrogatories that the Fieldses had answered despite the company's failure to obtain leave to file more than 30 as required by Lake County L.R. 8(B). (Appellee App. 109-111, 125) Allstate made its tactical offer, which the Fieldses accepted, in exchange for answer to a single new interrogatory concerning the basis for their contractual and extra-contractual claims. (Appellee App. 125, 127) Perhaps Allstate made this offer because, for the first time, it began to realize the deleterious effect its *64 obstinance was having on the trial court which had by then warned Allstate that its "intransigence in complying with Plaintiffs' discovery requests may very well become Plaintiffs' prima facie showing of bad faith." (App. 318). Or perhaps Allstate preferred not to refocus the trial judge's attention on the blitzkrieg of 178 interrogatories it propounded without the required leave of court. For whatever reason, Allstate made an agreement regarding discovery which is binding, see, Ind. T.R. 26(F), empowering parties by implication to modify discovery rules by agreement, and renders its argument regarding supplementation of withdrawn discovery requests specious.
Because Allstate abandoned its discovery concerning Ted's damages, the Fieldses had no duty to supplement information they had previously provided Allstate regarding Ted's damages - a situation not applicable in the criminal cases Allstate cites. Judge Kavadias-Schneider did not abuse her discretion in weighing these matters and allowing the trial to proceed. (Tr. 298-300, 319-328)

8. The punitive damage award entered by the trial court is supported by the evidence.

While the Fieldses presented evidence about Allstate's CCPR and the more than $1 billion in profits it made nationally over the course of 10 years by squeezing claims-payments from its policyholders, they also presented evidence linking the CCPR to how Allstate handled Ted's individual claim. In **H** Ford v. Ammerman, 705 N.E.2d 539, 561 (Ind.Ct.App. 1999), transfer denied, cert denied, KC529 U.S. 1021(2000), the plaintiffs alternatively proposed $58 million in punitive damages based on Ford's total profits in producing the Bronco II across the country, and the jury awarded that amount, which was

then cut by the trial court to $13.8 million. In upholding the reduced award, the Indiana Supreme Court found that the plaintiffs were not entitled to damages based on the profits *65 Ford made across the nation on the defective automobile.
Here, the Fieldses presented evidence that the CCPR produced more than $1.147 billion in profits to Allstate Insurance Company over the course of 10 years by reducing the company's claims loss-ratio from just under 70 cents on the dollar to 52 cents on the dollar. (Tr. 591-592) Plaintiffs did not seek that amount in punitive damages, and the jury's award of $18 million in punitive damages, cut by operation of statute to $6 million, represents a tiny fraction of one percent of the profits that Allstate reaped nationally by squeezing the rightful claims due to its policyholders. Expert Donald Dinsmore testified to the deliberate application of the CCPR procedure not only nationally but in this very case, thus satisfying the requirement of State Farm Mutual Insurance Co. v. Campbell, 538 U.S. 408, 421 (2003):
Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.
In its instruction 32, the trial court addressed these principles, advising the jury,
You may not use evidence of out-of-state conduct to punish the defendant for action that was lawful in the jurisdiction where it occurred.
In considering punitive damages, your determination of Allstate's degree of reprehensibility may include consideration of conduct outside the State of Indiana, but only to the extent it demonstrates the deliberateness and culpability of its conduct within the State of Indiana, and only if such conduct outside the State of Indiana is connected to the specific harm suffered by Mr. Fields.
Tr. 1714.

9. The jury was properly informed of Allstate's unjust profits through the CCPR.

Dan Hale, chief financial officer of Allstate Corporation and senior vice president of Allstate Insurance Company (Tr. 1105), testified that about 80 percent of the Allstate *66 Corporation's net income is derived from Allstate Insurance Company and that company's subsidiaries, as detailed in a table (part of Group Exhibit 4(d) at trial and presented as Exhibit 5 at the deposition.) (Tr. 1117-1118, 1121; Appellee App. 132) [FN12] In Ramada Hotel Operating Co. v. Shaffer, 576 N.E.2d 1264, 1270 (Ind.Ct.App. 1991), transfer denied, in contrast, only a "tenuous" financial connection was shown between the defendant and the corporation whose finances the plaintiff cited in seeking punitive damages. Here, the link was substantial, and the jury was supplied with documentary evidence by which it could apportion Allstate Insurance Company's share. (Group Exhibit 4)

FN12. In addition to Mr. Hale's videotaped deposition testimony, the jury was provided the financial data and organizational charts (Group Exhibit 4(d)) by which it could analyze the relationship between Allstate Corp. and Allstate Insurance Company.

Further, in Instruction Number 33, the court told the jury that in considering punitive damages, it could only consider evidence regarding the finances of Allstate Insurance

Company, and not those of Allstate Corporation. Tr. 1715.
Under the totality of these circumstances, Allstate has failed to show error in the. admission of evidence regarding Allstate Corporation that requires a new trial.

10. Unauthenticated and incompetent evidence was not admitted.

a. The trial court did not allow Mr. Dinsmore to read McKinsey slides to the jury.

Contrary to Allstate's claim, the trial court did not allow the Fieldses' expert Donald Dinsmore to read excerpts of McKinsey slides and other documents published in the book "From Good Hands to Boxing Gloves" to the jury. Allstate cites Tr. 1292-1296 for this claim, but the top of Tr. 1292 shows the proceedings were held outside the presence of the jury. The court ruled that Mr. Dinsmore could give his opinion based on the documents he had reviewed, but not read from them. Tr. 1301. That is what he did when the jury was called *67 back. Tr. 1305.

b. It was not error to admit documents from Allstate's own website.

Allstate stipulated to admissibility of website documents. (See joint motion to amend pre-trial order, and order granting same, entered August 22, 2003) The website was authenticated by Hale (Tr. 1138), and also self-authenticating. Evid. R. 902(9). Allstate's website statements constituted admissions and were not hearsay under Evid. R. 801(d)(2) or excepted under Evid. R. 803(6). The remaining documents admitted thru Mr. Hale's testimony from A.M. Best's were properly admitted under Evid. R.s 803(17) and 1006.

11. Allstate, in fact, never paid Ted.

As a threshold matter, whether or not Ted was paid years after his case began is inconsequential since he admitted that Allstate had, in fact, offered payment of the $50,000 policy limit. (Tr. 1190) Allstate's subsequent $50,000 deposit with the Clerk was therefore irrelevant post-litigation conduct properly excluded under Evid. R.s 402 and 403, or in any event harmless given the jury's knowledge that Ted had already declined Allstate's offered payment. Ind. T.R. 61.
Nothing prevented Allstate from paying Ted directly the money due him without a release, not required by the insurance contract. In fact, the contract construed as it must be most favorably to the Fieldses, required Allstate to pay them. But it never did. (Tr. 1439) Instead it first demanded the release which would have surreptitiously settled all the Fieldses' claims. Then it prepared another release that would have extinguished the UMPD as well as the UMBI claims upon payment of only one of the coverages owed. When Allstate finally presented a release targeted to the UMBI claim, exclusively, the jury was *68 informed Ted would not sign it. Ted was within his rights in refusing to jump over yet another unnecessary hurdle placed in his path by Allstate.
Allstate cites six separate transcript citations in claiming that Ted and his attorney "repeatedly told the jury that Allstate refused to pay the claim for ten years." Br. 78 (emphasis in original), citing Tr. 189, 263, 1181, 1190-1191, 1427 and App. 2920-2924. Allstate warps the record for the sake of indignant flamboyance. Tr. 189, 263, and 1427

involved conversations between counsel and the court, not statements to the jury, and involved more complexities than a simple claim that Allstate had never paid Ted. At Tr. 1181, and 1190-1191, Ted truthfully testified he had not yet been paid, but he also testified to Allstate's offer to pay the $50,000. The appendix cites noted by Allstate simply refer to the documents relating to its paying $50,000 into court.
Allstate further argues "[i]t is uncontroverted that Fields' UMBI proceeds were available to be withdrawn from the Clerk of the Circuit Court from June 17, 2002 forward, and Fields simply declined to do so." The cited supporting documents concerning Allstate's deposit into the court do not support that conclusion. (App. 2920-2923). In fact, while Allstate did deposit the $50,000, the money could not be released by the clerk without an order from the court when the case came to a conclusion. (Tr. 1430-1431) Ted attempted to obtain such an order, but his motion was unsuccessful given the stay obtained by Allstate. (App. 1449, 1455) Even Allstate's counsel admitted to doubts about the Fieldses' ability to withdraw the money, prior to the court being divested of jurisdiction by the appeal in Fields I. (Tr. 1431)

F. Allstate mischaracterizes the $2 million actual damages.

As previously discussed, Ted's medical providers at trial provided evidence of the *69 causal link between his stress and high blood pressure resulting from Allstate's bad faith actions and his ensuing medical problems. Allstate is wrong in claiming the $2 million was solely for emotional distress damages.

G. The punitive award is not excessive.

Allstate re-raises the same 59-day argument addressed elsewhere. The punitive verdict was reduced to three times the Fieldses' actual damages by operation of Indiana law. Since Erie v. Hickman, supra, 622 N.E.2d at 520, Indiana courts have recognized that punitive damages may be based on the independent tort for the breach of the insurer's obligation to exercise good faith. As Allstate's own expert testified based on a parallel hypothetical, in the spring of 1997, before the bad faith claim was filed against it, Allstate had adequate knowledge to pay Ted's claim within a day. Mr. Dinsmore testified it should have paid within a week. Instead of paying promptly, Allstate chose a course of delay, and then it chose a litigation strategy, consistent with its business model, involving the obstruction of discovery and the contumacious disregard of court orders, which led to its default.
The evidence at trial showed that Allstate's bad faith delay in this case was part of a broader plan designed to force policyholders to settle for less than the true value of their claim or face prolonged litigation if they refuse. Over the course of a decade, as the result of implementing this plan, Allstate reduced its loss ratio of claims paid to premiums collected from nearly 70 cents on the dollar to 52 cents on the dollar, wrongfully shifting enormous amounts from Allstate's policyholders to its stockholders.
Instructed as to the clear and convincing evidence standard before imposition of punitive damages, the jury found that Allstate should pay ten times Ted's actual damages. *70 While the standard of review is de novo, H Stroud v. Lints, 790 N.E.2d 440, 442 (Ind. 2003), this is not a case such as State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S.

408 (U.S. 2003), where the Utah Supreme Court upheld $145 million punitive damages on compensatory damages of $1 million before reversal in the Supreme Court. Allstate's profits from the implementation of its plan to force policyholders to settle for less or litigate dwarf the punitive damage verdict found by the jury, and the punitive damages judgment was reduced to three times Ted's actual damages by operation of law. In the full context of Allstate's wrongdoing, the facts of this case merit the $6 million judgment for punitive damages.

VII. CONCLUSION

WHEREFORE, Plaintiffs Ted K. Fields and Rosella M. Fields respectfully request the judgment be affirmed.