IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER SCHATZBERG, D.C., *et al.*	:	**CIVIL ACTION**
Plaintiffs	:	
	:	**NO. 10-2900**
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*	:	
Defendants	:	

NITZA I. QUIÑONES ALEJANDRO, J. OCTOBER 7, 2015

MEMORANDUM OPINION

INTRODUCTION

Presently before this Court is a motion for partial summary judgment[1] filed pursuant to Federal Rule of Civil Procedure ("Rule") 56 by State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "Defendants" or "State Farm"), [ECF 180], which seeks to dismiss the defamation claims asserted by the Schatzberg Entities (the "Schatzberg Entities" or "Plaintiffs").[2] Plaintiffs have opposed this motion. [ECF 194]. The issues presented in the motion have been fully briefed by the parties and are ripe for disposition. For the reasons stated herein, State Farm's motion for partial summary judgment is granted.

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[1] In the underlying motion, State Farm seeks judgment as to the Schatzberg Entities' defamation claims *only*, and not to the Schatzberg Entities' claims under the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S. §1701 *et seq*.

[2] Plaintiffs include the following: Peter Schatzberg, D.C., Peter Schatzberg, D.C., P.C. d/b/a Delaware County Pain Management and Philadelphia Pain Management, Delaware Pain Management, LLC, d/b/a Delaware Pain Management & MRI, American Medical Rehabilitation, Inc., and Philadelphia Pain Management, Inc.

BACKGROUND[3]

Briefly, the procedural posture of this protracted matter is as follows: On June 17, 2010, Dr. Schatzberg, D.C., ("Dr. Schatzberg") *only* filed a complaint against State Farm asserting claims for defamation and false light. [ECF 1]. Before a response was filed, on July 22, 2010, Dr. Schatzberg *and* Philadelphia Pain Management, Inc., filed an amended complaint and asserted claims for: defamation, false light invasion of privacy, violation of the Pennsylvania Motor Vehicle Financial Responsibility Law, statutory bad faith, violation of the civil Racketeering Influenced and Corrupt Organizations Act ("RICO"), and conspiracy to violate RICO. [ECF 9]. On August 30, 2010, State Farm filed a motion to dismiss each of these claims, [ECF 14], which the Schatzberg Entities opposed. [ECF 15]. By Order dated July 12, 2012, with its accompanying Memorandum Opinion, [ECF 24 and 23, respectively], the Honorable Gene E.K. Pratter granted State Farm's motion, *in part*, and dismissed all but the Schatzberg Entities' claim for defamation.

Thereafter, on August 9, 2012, State Farm filed an answer and counterclaim to the amended complaint. [ECF 28]. In the counterclaim, State Farm asserted claims against each of the Schatzberg Entities for violations of the Pennsylvania Insurance Fraud statute, 18 Pa. C.S. §4117 *et seq.* (Count I), common law fraud (Count II), violation of RICO (Count III), unjust enrichment (Count IV), and restitution (Count V). On August 20, 2012, the Schatzberg Entities filed a motion to dismiss State Farm's counterclaims. [ECF 32]. Judge Pratter heard oral argument on the motion to dismiss on October 25, 2012. [ECF 46]. However, before the motion to dismiss was adjudicated, this matter was reassigned on July 19, 2013, to the undersigned's

[3] By Order and accompanying Memorandum Opinion dated October 7, 2015, this Court granted the Schatzberg Entities' motion for summary judgment as to State Farm's various counterclaims. [ECF 325 and 324, respectively]. To the extent that said earlier Memorandum Opinion relied upon undisputed facts, those facts have been adopted herein.

docket. [ECF 71]. In the interim, on November 13, 2012, State Farm filed an amended answer and counterclaim to the amended complaint, incorporating by reference the counterclaim in its original answer. [ECF 47]. By Order dated February 21, 2014, this Court denied the Schatzberg Entities' motion to dismiss State Farm's counterclaims. [ECF 89].

On March 11, 2014, the Schatzberg Entities filed an answer and a "counterclaim" to State Farm's counterclaim (hereinafter, the "Schatzberg Entities' Counterclaim"). [ECF 95]. The Schatzberg Entities' Counterclaim was amended on April 8, 2014, [ECF 100], and again on July 7, 2015. [ECF 231]. The counterclaim, as amended, included additional claims for defamation premised on statements made by State Farm to the National Insurance Crime Bureau ("NICB"), the Pennsylvania Attorney General's Office, and to other third parties, as well as numerous claims couched under the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL").

On November 21, 2014, State Farm filed the instant motion for partial summary judgment seeking to dismiss the defamation claims asserted by the Schatzberg Entities in the amended complaint and in their second amended counterclaim. [ECF 180]. When deciding this motion for partial summary judgment, this Court has considered all relevant facts in this matter in the light most favorable to the nonmoving party, *i.e.*, the Schatzberg Entities. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). These relevant facts are summarized as follows:

> Plaintiff Peter Schatzberg, D.C., ("Dr. Schatzberg") is a licensed chiropractor and the sole owner of a large chiropractic and pain management practice established in 1998, which currently has four locations in the Delaware Valley area. (Amend. Comp. ¶7). Dr. Schatzberg is the sole owner and shareholder of the Schatzberg Entities. (*See* ECF 95, Answer and Counterclaim of Schatzberg Entities at ¶2). A large number of the patients treated at Dr. Schatzberg's facilities have suffered injuries in motor vehicle accidents. The treatment costs for these patients were billed to insurance companies, including State Farm.

State Farm's investigation of the Schatzberg Entities began in 2009 when Doug Babin, a member of State Farm's Special Investigative Unit ("SIU") since 1998, noticed a pattern of standardized treatment in numerous claim files that involved patients treated at the Schatzberg Entitites. (Ex. 5, Babin Tr. 6:21-23; 144:7-10). In a deposition, Mr. Babin testified that the SIU is charged with investigating, paying, and defending insurance claims. (Ex. F, Babin Tr. 12:10-12). Part of Mr. Babin's responsibilities within the SIU was to review claim files for "NICB indicators," using a list of approximately 100 indicators of potential fraud developed by the National Insurance Crime Bureau. (Ex. F, Babin Tr. 40:24-43:25). Mr. Babin described the pattern he discovered as follows:

> The pattern that I noticed after review of the files was a lot of the claims involved standardized treatment plans, six to eight modalities in every claim. The initial reports and the discharge reports looked very similar. Again, the standard of care was virtually the same on every patient. Multiple diagnoses that were the same on patients. The doctor failed to get prior accident records, primary care doctor's records, ER records. The treatment plan never changed as through the course of time. Diagnostic testing was performed and then the results weren't gone over with the patient. The treatment never changed after the diagnostic testing was done. And it seemed like virtually everybody needed future medical care of some kind in the form of a monetary value. Transportation was involved of patients from South Philadelphia and Folsom to Delaware MRI for MRI's that were conducted on virtually 90 percent of the patients that I reviewed. 100 percent attorney involvement. Every claim that I looked at had an attorney involved in some way, shape or form. And through the course of the treatment the treatment never changed. It was always six to eight modalities. And no prior accident records or records of any kind were obtained. (Ex. 5, Babin Tr. 145:11-146:15).

After noticing what he deemed to be a suspicious pattern in the initial review of claim files, Mr. Babin continued his investigation and reviewed additional files. This review included over 100 randomly selected claim files, including medical records.

(Ex. 6, Babin Tr. 40:16-42:19; 45:2-5). By January 15, 2010, Mr. Babin concluded that he had sufficient information to start a project. (Ex. 6, Babin Tr. 83:2-17). The investigation continued and included the review of additional files. (Ex. 6, Babin Tr. 106:21-107:2).

As part of its investigation of the Schatzberg Entities, State Farm retained Attorney Cy Goldberg and his law firm in 2009 to assist in the investigation and provide an opinion. (Ex. 5, Babin Tr. 113:19-114:6). As part of this endeavor, Mr. Babin gathered and forwarded claim files to the Goldberg firm for review. (Ex. 5, Babin Tr. 113:23-114:2; 119:4-24). According to the Schatzberg Entities, State Farm had previously retained the Goldberg firm to investigate claims and initiate legal actions against other medical providers which State Farm suspected of fraud. (Amend. Comp. at ¶67). Plaintiffs further plead in their amended complaint that "Mr. Goldberg has enjoyed very public success as an attorney who sues doctors for fraud on behalf of State Farm." (Amend. Comp. at ¶84).

Mr. Babin's investigation also included interviews or attempted interviews of nine former employees of the Schatzberg Entities. (Ex. E, State Farm's Answers to Interrogatories; Ex. 5, Babin Tr. 120:5-18; 132:4-22; Ex. F, Babin Tr. 122:19; 147:20-155:117; 175:3-11; 179:10-181:7; Am. Comp. ¶¶75-77). These interviews were either by telephone or in person. (*Id.*) Most, if not all interviews, lasted only a few minutes and provided little, if any information, to substantiate State Farm's suspicions. (*Id.*).

The Schatzberg Entities contend that over the course of State Farm's investigation, Mr. Babin expressly informed or implied to those he sought to interview that the Schatzberg Entities were involved in a fraudulent billing practice.[4] The Schatzberg Entities contend these statements were false and defamatory.

Sometime after State Farm filed its counterclaim on August 9, 2012, State Farm began denying all bills from the Schatzberg Entities pursuant to a so-called "TIN block." Concurrent with each denial, State Farm sent a form letter to the claimant and/or the attorney, which read, in part: "The bills submitted by Peter Schatzberg are at issue, along with the bills for other State Farm

[4] While Mr. Babin testified that he had not informed the interviewees of State Farm's suspicions that the Schatzberg Entities were involved in fraudulent billing practices, or had directly accused the Schatzberg Entities of fraud, for purposes of the underlying partial motion for summary judgment, these facts are construed in the Schatzberg Entities' favor.

insured's in a civil lawsuit initiated by State Farm against Peter Schatzberg. Therefore, the claim for payment of any and all bills submitted by Peter Schatzberg relating to treatment to (REDACTED) with respect to this claim and date of loss are denied." (Ex. AA).

Following the deposition of a State Farm corporate designee on the subject of these form letters, State Farm changed the language of the form letters to read as follows: "The bills submitted by Peter Schatzberg are at issue in civil litigation between State Farm and Peter Schatzberg. Therefore, the claim for payment of bills submitted by Peter Schatzberg relating to treatment to (REDACTED) with respect to this claim and date of loss are denied at this time." (Ex. AC).

Plaintiffs contend that these statements in both exemplary letters, to the extent they imply fraud, were false and defamatory.

On September 27, 2012, State Farm sent a letter to the NICB, reporting its suspicions of the Schatzberg Entities' fraud. (Sec. Am. Counterclaim to Counterclaim ¶92; Ex. 6, Babin Tr., 39:5-10; 48:7-49:6). State Farm submitted a similar report to the Pennsylvania Office of Attorney General. (Ex. 6, Babin Tr., 31:16-32:18; 80:3-25). Plaintiffs contend that these statements were false and defamatory.

LEGAL STANDARD

Rule 56 governs the summary judgment motion practice. Fed. R. Civ. P. 56. Specifically, this rule provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Under Rule 56, the court must view the evidence in the light most favorable to the nonmoving party. *Id.* at 255; *Galena v. Leone*, 638 F.3d 186, 196 (3d Cir. 2011).

Rule 56(c) provides that the movant bears the initial burden of identifying the basis for the motion and those portions of the record which the movant "believes demonstrate the absence

of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden can be met by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 322.

After the moving party has met its initial burden, summary judgment is appropriate if the nonmoving party fails to rebut the moving party's claim by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" that show a genuine issue of material fact or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." *See* Fed. R. Civ. P. 56(c)(1)(A-B). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party may not rely on bare assertions, conclusory allegations or suspicions, *Fireman's Ins. Co. of Newark v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982), nor rest on the allegations in the pleadings. *Celotex*, 477 U.S. at 324. Rather, the nonmoving party must "go beyond the pleadings" and either by affidavits, depositions, answers to interrogatories, or admissions on file, "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.*

"[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. In such a situation, the moving party is entitled to judgment as a matter of law. *Id.*

DISCUSSION

In their amended complaint and counterclaim, Plaintiffs allege that State Farm defamed Dr. Schatzberg and the Schatzberg Entities through various oral and written statements, made to third parties, which represented that Plaintiffs were engaged in fraudulent billing practices.

These defamatory statements were made to: (1) former employees of the Schatzberg Entities; (2) attorneys for various insureds and/or claimants of State Farm who were patients of the Schatzberg Entities; and (3) the NICB and the Pennsylvania Office of Attorney General.[5]

In its motion for partial summary judgment, State Farm has moved to dismiss all of the Schatzberg Entities' defamation claims on the sole ground that the alleged defamatory statements are subject to various statutory and/or common law privileges and immunities.[6] Specifically, State Farm argues that each of the alleged defamatory statements was made in the course of its investigation of the suspected fraud by the Schatzberg Entities and is, therefore, subject to either statutory and/or common law privileges and immunities.[7]

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[5] In their motion for partial summary judgment, State Farm identifies and categorizes the alleged defamatory statements on which Plaintiffs' defamation claims are premised as outlined above. Notably, in their response, Plaintiffs do not provide their own list of defamatory statements or categories, nor do they dispute Defendants' categorization.

[6] In their motion, State Farm argues *only* that the alleged defamatory statements are subject to various privileges and immunities. They do not argue, for example, that the alleged statements were either truthful or incapable of defamatory meaning. Notably, State Farm does contend in its opposition [ECF 187] to Plaintiffs' motion for summary judgment on State Farm's counterclaims [ECF 178] that the alleged statements underlying Plaintiff's defamation claims were actually true.

[7] That Pennsylvania has a strong public policy to combat insurance fraud is evidenced by the various statutory schemes addressing the subject. For example, Pennsylvania's Vehicle Code contains an entire chapter on Motor Vehicle Insurance Fraud. *See* 75 Pa. C.S. §1801 *et seq.* It requires every insurer licensed to write motor vehicle insurance in Pennsylvania to "maintain a motor vehicle insurance antifraud plan." 75 Pa. C.S. §1811. Insurers that fail to follow the antifraud plan are subject to penalties. 75 Pa. C.S. §1815. Further, "[e]very insurer . . . who has a reasonable basis to believe insurance fraud has occurred shall be required to report the incidence of suspected insurance fraud to Federal, State or local criminal law enforcement authorities." 75 Pa. C.S. §1817. Significantly, the Motor Vehicle Insurance Fraud statute provides immunity for these reports: "No person shall be subject to civil liability for libel, violation of privacy, or otherwise by virtue of the filing of reports or furnishing of other information, in good faith and without malice, required by this subchapter." 75 Pa. C.S. §1818.

The Pennsylvania legislature has also created by statute within the Office of Attorney General "a Section of Insurance Fraud to investigate and prosecute insurance fraud. . . ." 40 P.S. §325.41. A subsection of this chapter contains a similar immunity provision: "In the absence of malice, persons or organizations providing information to or otherwise cooperating with the section, its employees, agents or designees shall not be subject to civil or criminal liability for supplying the information." 40 P.S. §325.47(a). Similar immunity is provided in the Insurance Companies chapter of the Pennsylvania Code:

In responding to State Farm's motion, the Schatzberg Entities have not challenged that the representations at issue are subject to the various privileges and/or immunities identified by State Farm. Rather, the Schatzberg Entities argue that the exception for actual malice applies, and, therefore, State Farm remains liable for its defamatory statements.[8] In light of these

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> (a) In the absence of fraud or bad faith, no person or his employees or agents shall be subject to civil liability and no civil cause of action shall arise against any of them for any of the following:
>
> (1) Information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished by them to or received from Federal, State or local law enforcement officials, their agents and employees and designees.
>
> (2) Information relating to suspected fraudulent insurance acts or persons suspected of engaging in such acts furnished by them to or received from other persons subject to the provisions of this act.
>
> (3) Information furnished by them or received from a Federal, State or local agency, the National Association of Insurance Commissioners or another organization established to detect and prevent fraudulent insurance acts, their agents, employees or designees or a recognized comprehensive database system approved by the Insurance Department.
>
> * * *
>
> (c) Nothing in this section is intended to abrogate or modify a common law or statutory immunity heretofore enjoyed by any person.
>
> (d) As used in this section the following words and phrases shall have the meanings given to them in this subsection:
>
> "Absence of bad faith" means without serious doubt that the information furnished or received, or the report or bulletin published, is not true.
>
> "Absence of fraud" means without knowledge that the information furnished or received, or the report or bulletin published, is not true.

40 P.S. §474.1. As stated above, the Schatzberg Entities concede that these privileges and immunities apply to State Farm's alleged defamatory statements, but argue that each is subject to an exception for actual malice.

[8] As noted above, the Schatzberg Entities concede by way of their response that the various privileges and immunities relied upon by State Farm apply to State Farm's alleged defamatory statements

arguments, the only issue before this Court is whether the Schatzberg Entities have presented evidence from which a reasonable factfinder could find that State Farm acted with actual malice when it made the otherwise privileged representations regarding the suspected fraud by the Schatzberg Entities.[9] For the reasons set forth below, this Court finds that Plaintiffs have not met their burden.

The burden of showing actual malice is substantial. *Blackwell v. Eskin*, 916 A.2d 1123, 1125 (Pa. Super. 2007). To establish malice, the Schatzberg Entities must show that State Farm knew that the statements were false or recklessly disregarded their falsity. *Id.* A showing of actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* (citations omitted). Evidence of ill-will or of defendant's desire to harm the plaintiff's reputation, although probative of the defendant's state of mind, without more, does not establish actual malice for defamation purposes. *Id. at* 1126. "Failure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation. Recklessness generally and in the context of actual

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subject only to a waiver for actual malice. This Court agrees. Because the alleged statements pertain to a matter of public concern, they are subject to these privileges and immunities unless made with actual malice. *Moore v. Vislosky*, 240 F. App'x 457, 463 (3d Cir. 2007); *Bentlejewski v. Werner Enterprises, Inc.*, 2015 WL 4111476, at *6 (W.D. Pa. July 8, 2015) (holding that to overcome a conditional privilege on a matter of public concern, a plaintiff must show actual malice); *Raintree Homes, Inc. v. Birkbeck*, 2013 WL 5234255, at *3 (Pa. Super. Aug. 7, 2013) ("If the plaintiff is a public figure or the speech at issue pertained to a matter of public concern, the plaintiff must prove both that the statements made were inherently false and that they were printed with 'actual malice' rather than simple negligence."). As in *Chicarella v. Passant*, 494 A.2d 1109, 1113 (Pa. Super. 1985), State Farm's interest in only paying legitimate claims is raised by its suspicion of fraudulent claims by the Schatzberg Entities, and "[i]t is also in society's best interest for valid insurance claims to be ascertained and fabricated claims exposed."

[9] In Pennsylvania, the burden of proof for a claim of defamation is set forth by statute. *See* 42 Pa. C.S. §8343(a); *Foster v. UPMC S. Side Hosp.*, 2 A.3d 655, 663-64 (Pa. Super. 2010). As relates to the underlying motion, the Schatzberg Entities, as Plaintiffs, bear the burden of proof as to whether an applicable privilege has been abused such that the alleged defamatory statements are not subject to the privilege. *Id.*

malice is not easily shown." *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 135 (Pa. 2004). Mere proof of a failure to investigate, without more, cannot establish a publisher's reckless disregard for the truth which would constitute "actual malice;" rather, the publisher must act with a high degree of awareness of probable falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *see also Blackwell*, 916 A.2d at 1126 (rejecting plaintiff's argument that the defendant's deliberate failure to investigate evidenced actual malice).

Here, to meet their burden of proof that actual malice exists, the Schatzberg Entities rely on the report of their purported expert, James Schratz, in which he opines that State Farm's investigation was inadequate as it fell below the insurance industry standard for proper claims handling and fraud investigation. Specifically, Mr. Schratz is critical of the overall depth and scope of Mr. Babin's investigation, Mr. Babin's failure to interview witnesses other than former employees, and State Farm's failure to provide adequate oversight to the investigation. This reliance, however, is misplaced.

The mere presence of an expert opinion supporting a non-movant's position (here, the Schatzberg Entities) does not necessarily defeat a motion for summary judgment, such as that filed by State Farm. Rather, there must be sufficient facts in the record to validate the opinion rendered. *In re TMI Litigation*, 193 F.3d 613, 716 (3d Cir. 1999); *Advo, Inc. v. Philadephia Newspapers, Inc.*, 51 F.3d 1191, 1198-99 (3d Cir. 1995); *Kosierowski v. Allstate Insurance Co.*, 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999) (rejecting plaintiff's argument that expert's report opining that insurer engaged in bad faith created genuine issue of material fact). As the First Circuit Court of Appeals aptly stated in *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 8, 92 (1st Cir. 1993):

> We are not willing to allow reliance on a bare ultimate expert conclusion to become a free pass to trial every time that a conflict

> of fact is based on expert testimony . . . Where an expert presents "nothing but conclusions – no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected," such testimony will be insufficient to defeat a motion for summary judgment.

While the Schatzberg Entities' purported expert may be able to assist a jury in determining the industry standard for insurance fraud investigations, Mr. Schratz cannot, and has not opined on the ultimate legal question of whether State Farm acted with actual malice, *i.e.*, with knowledge that the alleged statements were false.[10] *See Allstate Property & Casualty Insurance Co.*, 2008 WL 4104542, at *6 (E.D. Pa. Aug. 29, 2008) (holding an expert incompetent to testify as to whether an insurer's conduct, including alleged failure to investigate, constituted bad faith); *Franklin Prescriptions, Inc. v. New York Times Co.*, 2004 WL 6035282, at *1 (E.D. Pa. March 9, 2004) (precluding plaintiff's expert from testifying as to actual malice); *Kubrick v. Allstate Ins. Co.*, 2004 WL 45489, at *16 (E.D. Pa. Jan. 7, 2004) (noting plaintiffs' concession that their expert "cannot testify as to the ultimate issue of whether Allstate acted in bad faith."); *Dattilo v. State Farm Insurance Co.*, 1997 WL 644076, at *5 (E.D. Pa. Oct. 17, 1997) ("Bad faith is a legal concept of general application which does not require that scientific, technical or specialized knowledge be presented to assist the trier of fact."); *OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 55-56 (D.D.C. 2005) (holding that a defamation plaintiff cannot meet its summary judgment burden on the issue of actual malice by relying upon an expert who opines that the defendant's investigation fell below industry standards); *Lohrenz v. Donnelly*, 223 F.Supp.2d 25, 36 (D.D.C. 2002) (stating "courts have generally disfavored expert testimony in determining actual malice, which is essentially a determination of defendants' subjective state of mind."). In addition, "[t]he Supreme Court has made clear that even an

[10] Notably, Plaintiff's expert report is silent as to whether the Schatzberg Entities engaged in the alleged fraudulent practices or whether State Farm's alleged statements to that effect were false.

extreme departure from professional standards, without more, will not support a finding of actual malice." *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989)). Thus, even if State Farm's investigation fell below industry standard, such shortcoming, by itself, cannot support a finding of actual malice.

Consistent with their expert report, Plaintiffs contend that State Farm's investigation of the Schatzberg Entities' suspected fraud was inadequate. In particular, Plaintiffs highlight that State Farm interviewed, or attempted to interview, only nine individuals, each of whom was a former, rather than current, employee of the Schatzberg Entities, that each of the interviews was generally only brief in duration and provided no substantive information, and that the investigation was led by Doug Babin, who was neither a doctor nor an insurance adjuster. These described inadequacies do not amount to the actual malice required to overcome the applicable privileges and immunities asserted by State Farm, and are belied by the evidence of record.

The fact that State Farm sought interviews of only former employees, and not current employees of the Schatzberg Entities, is of little significance and provides no evidence as to actual malice. In fact, had State Farm intentionally sought out current employees of the Schatzberg Entities after State Farm retained counsel, as the Schatzberg Entities seem to suggest they should have, such contacts might possibly have breached various ethical considerations which preclude such contacts when made in the realm of anticipated litigation. *See, e.g.*, Pa. R. Prof. C. 4.2. In light of this ethical constraint, State Farm's decision to limit its investigatory interviews to former, rather than current employees, is reasonable and, thus, cannot be construed as evidence of actual malice. Although State Farm's interviews of the former employees of the Schatzberg Entities provided little, if any, information relevant to State Farm's investigation,

evidence in the reviewed claim files in State Farm's possession reasonably supported State Farm's suspicions.

Similarly, the fact that State Farm's internal investigation was led by Mr. Babin, who is neither a doctor nor an adjuster, is of little import, and provides no reasonable inference that State Farm acted with actual malice. It is undisputed that, at the time of the underlying investigation, Mr. Babin had worked in State Farm's SIU for more than 10 years, and was tasked with applying and identifying specific "indicators" of suspected fraud when reviewing claim files. Plaintiffs have offered no reasonable explanation for why one must be either a doctor or an adjuster to identify these indicators. Identifying such indicators of fraud was at the very essence of the SIU's and Mr. Babin's responsibilities.

As stated, State Farm's investigation of the Schatzberg Entities' suspected fraudulent billing practices began in 2009 when Mr. Babin noticed a pattern of standardized treatment in claim files in his inventory that involved the Schatzberg Entities. (Ex. 5, Babin Tr. 144:7-10). In applying the NICB indicators of fraud, Mr. Babin found a specific, similar pattern of standardized treatment that was questionable. After specific NICB indicators of fraud were identified by Mr. Babin in the initial review of the Schatzberg Entities' claim files, State Farm retained an attorney, Cy Goldberg, and his law firm in 2009, to assist in the investigation and to provide an opinion as to whether the evidence found supported the existence of fraud. (Ex. 5, Babin Tr. 113:19-114:4). State Farm's investigation continued and was ongoing when Dr. Schatzberg filed his lawsuit in 2010. (Ex. 6, Babin Tr. 95:11-96:4). State Farm's investigation continued up until the time State Farm filed its counterclaim. (Ex. 6, Babin Tr. 106:21-107:2; 114:14-22).

While Plaintiffs contend that State Farm's retention of Attorney Goldberg and his law firm somehow evidences actual malice because Attorney Goldberg and his firm have a history of bringing claims against medical providers for fraud, this Court sees otherwise. Hiring a third party, be it a law firm, private investigator or some other entity, to assist in an investigation of suspected fraud cannot be reasonably construed as evidence of actual malice, *i.e.*, recklessness as to the truth of the alleged statements. To the contrary, retention of a third party to assist in an investigation evidences the retaining party's exercise of reasonable diligence. The Schatzberg Entities cite to the fact that Attorney Goldberg has been retained by State Farm in a number of other matters in which State Farm has alleged fraud by medical providers, and identify several of these matters in their amended complaint at Paragraph 67. Plaintiffs allege in their amended complaint: "Mr. Goldberg has enjoyed very public success as an attorney who sues doctors for fraud on behalf of State Farm." (Am. Comp. ¶84).[11] In this Court's view, such success belies any notion that State Farm's retention of this attorney and firm, or any attorney who obviously has experience in such matters, is evidence of actual malice. Based on this evidence, this Court is of the opinion that no reasonable factfinder could conclude that State Farm's retention of a law firm with experience and success litigating insurance fraud claims against medical providers is evidence of actual malice on the part of State Farm.

Though Plaintiffs challenge the adequacy of State Farm's investigation, the Schatzberg Entities do not dispute that State Farm's investigation included the review of hundreds of claim files and bills and the retention of a law firm (the Goldberg firm), experienced in such matters, and which had successfully prosecuted fraud claims against various health care providers. The Goldberg firm itself spent numerous hours reviewing claim files. While the parties may dispute

[11] A docket review of the cases cited by Plaintiffs reveals that Attorney Goldberg's firm was at least partially successful in several of these cases.

the ultimate findings of State Farm's investigation, the undisputed facts that State Farm undertook such an investigation and hired specialized counsel to assist in the investigation, refutes any reasonable inference that State Farm acted with actual malice. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974) (finding that the "failure to investigate, without more, cannot establish reckless disregard for the truth. . . ."); *Blackwell*, 916 A.2d at 1126 (rejecting plaintiff's argument that the defendant's deliberate failure to investigate evidenced actual malice).

Plaintiffs also argue that State Farm's decision to wait until August 9, 2012, to file its counterclaim in this matter is evidence of actual malice. Specifically, Plaintiffs argue that State Farm's decision to wait more than two and a half years after State Farm determined it had enough evidence to start a "project" regarding its suspicions can only be attributed to State Farm's knowledge that no such fraud existed. Plaintiffs' argument, however, amounts to nothing more than speculation and is not evidence of the actual malice required to overcome the applicable privileges and immunities. Procedurally, State Farm's answer to Plaintiff's complaint was not due until after State Farm's motion to dismiss was disposed of, an event that occurred on July 12, 2012. Thus, State Farm's filing of its answer and counterclaim when it became due can hardly be construed as evidence of actual malice.

Finally, Plaintiffs also point to State Farm's eventual changing of the wording on State Farm's letters to insureds and/or their counsel as evidence of actual malice. As stated, in August 2012, State Farm began denying all bills of the Schatzberg Entities pursuant to its TIN block. Concurrent with each denial, State Farm sent a form letter which stated, in part, as follows:

> The bills submitted by Peter Schatzberg are at issue, along with the bills for other State Farm insured's in a civil lawsuit *initiated by State Farm* against Peter Schatzberg. (Ex. AA) (emphasis added).

After a State Farm corporate designee was deposed in this action concerning these letters, State Farm changed the language in the form letters to read:

> The bills submitted by Peter Schatzberg are at issue in civil litigation *between State Farm and Peter Schatzberg*. (Ex. AC) (emphasis added).

Despite Plaintiffs' speculation as to the motive behind the imprecise wording of State Farm's original letters, this change in the wording does not evidence the actual malice required to overcome the privileges and immunities applicable to State Farm's alleged statements.

After a comprehensive review of the record and case law, this Court opines that no reasonable factfinder could conclude that State Farm acted with actual malice during the course of its investigation and/or when the statements were allegedly made. Under the circumstances noted, Plaintiffs have not overcome the privileges and/or immunities that apply to State Farm's alleged statements.[12]

CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgment is granted. An Order consistent with this Memorandum Opinion follows.

NITZA I. QUIÑONES ALEJANDRO, U.S.D.C. J.

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[12] State Farm has a pending *motion to strike the affidavit of J'Amy Kluender*, [ECF 232], which was referred to the Honorable Carol Sandra Moore Wells for disposition by Order dated September 2, 2015. [ECF 305]. The Kluender affidavit was first filed with this Court on March 28, 2015. [ECF 214]. Because the content of that affidavit does not alter the analysis and outcome set forth in this Memorandum Opinion, this Court need not wait for the Magistrate Judge's ruling on the motion.