

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000064-MR

CHRISTY LARIMORE, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE
ESTATE OF CONNOR LARIMORE, DECEASED,
AND AS MOTHER AND NEXT FRIEND OF
ZACHARY LARIMORE, A MINOR; AND
TERRY LARIMORE, INDIVIDUALLY,
AND AS FATHER AND NEXT FRIEND
OF ZACHARY LARIMORE, A MINOR

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUZAN SCHULTZ GIBSON, JUDGE
ACTION NO. 09-CI-007763

TRAVELERS INSURANCE COMPANY D/B/A
THE TRAVELERS HOME AND MARINE
INSURANCE COMPANY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal of a summary judgment entered by the Jefferson Circuit Court in an action for bad faith and a violation of the Unfair Claims Settlement Practices Act (UCSPA). Based upon the following, we reverse the decision of the trial court and remand this case for further proceedings.

BACKGROUND INFORMATION

This case involves a motor vehicle accident that occurred in Jefferson County on January 7, 2009. On that date, appellant Terry Larimore was traveling westbound on Highway 22 with his sons, Connor and Zachary, as passengers when a vehicle being operated by Kellan Emge crossed the center line and struck his vehicle head-on. There was no dispute that Emge was at fault.

The accident had catastrophic results as Larimore's son Connor died from his injuries and both he and his son Zachary were severely injured. Larimore was insured by Travelers Insurance with maximum underinsured motorist (UIM) coverage of 250/500. Travelers did not pay the claim made by the Larimores, however, until nineteen months after the accident. The Larimores had retained counsel at this point and had filed suit. After settlement, the Larimores brought this action under the UCSPA and common law bad faith. The trial court granted summary judgment to Travelers on these claims. The Larimores now appeal the granting of summary judgment.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

“[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the granting of summary judgment by the trial court.

DISCUSSION

The appellants assert that the trial court erred in granting Travelers summary judgment and in holding, as a matter of law, that it was not guilty of bad

faith or a violation of the UCSPA. In determining that there was no possible way a jury could find in favor of the Larimores on this issue, the trial court held as follows:

Mr. Quinley's deposition testimony appears to criticize the delay of Travelers in paying to Plaintiffs the insurance benefits under its UIM and PIP coverage. However, the conduct complained about by Plaintiff's [sic] does not appear to arise to harassment or deception on the part of Travelers. Furthermore, there is no proof or evidence supporting a reasonable inference that the purpose of the delay was to extort a more favorable settlement or to deceive the insured with respect to the applicable coverage. As such, it does not appear that Plaintiff's [sic] can prove that Travelers committed common law bad faith as a matter of law.

Opinion and Order at pp. 18-19.

In Kentucky, actions for bad faith against insurers may be brought under either the common law or the UCSPA, Kentucky Revised Statutes (KRS) 304.12-230. In *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993), the Supreme Court of Kentucky held that, in order to prevail on a bad faith claim, the insured has the burden of proving the following:

(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no basis for denying the claim or acted with reckless disregard or whether such a basis existed.

Citing *Federal Kemper Insurance Company v. Hornback*, 711 S.W.2d 844,846 (Ky. 1986).

The essence of the question as to whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages depends first on whether there is proof of bad faith and next whether the proof is sufficient for the jury to conclude that there was ‘conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.’ Restatement (Second) Torts, Sec. 909(2) (1979), as quoted and applied in *Horton v. Union Light, Heat and Power Co., Ky.*, 690 S.W.2d 382, 388–90 (1985). *Federal Kemper, supra*, 711 S.W.2d at 848.

Id.

In *USAA v. Bult*, 183 S.W.3d 181 (Ky. App. 2006), a panel of our court held that in order to present a claim of bad faith to the jury, “the conduct must be driven by evil motives **or** by an indifference to its insureds’ rights.” *Id.* (Emphasis supplied). It went on to hold that “[e]vidence of mere negligence or failure to pay a claim in timely fashion will not suffice to support a claim for bad faith.” *Id.*

Bult did involve the insurer’s paying more slowly than it should have and the possibility of conflict given that it was the insurer of both parties. In the case, however, the actions were more egregious. The experts in *Bult* testified as the following examples of bad faith on the part of USAA:

The insurer’s failure to employ separate claims adjusters for each of its two insureds; Moriarty’s initial setting of the reserve for the company’s liability for Ashley’s death at \$75,000; USAA’s failure to inform the Bults of all the benefits to which they were entitled under their own policy immediately following the accident; USAA’s failure to offer the \$100,000 liability coverage before October 23, 1997; Moriarty’s failure to follow by letter his phone calls of August and October 1997; USAA’s failure to send a personal representative to the Bults’ home to establish a line of communication; USAA’s

failure to supervise Moriarty more carefully; the failure of USAA to maintain a sufficient staff to handle complex claims more promptly; and USAA's failure to pay the first-party benefits in a more timely manner.

Bult at 187.

As set forth above, the summary judgment standard in Kentucky is very high. The trial court erred in finding that there were no material issues of fact on the issue of common law bad faith in this case. The Larimores met their burden of some affirmative evidence when they produced an expert who opinioned that Travelers' actions were in bad faith. The Larimores' expert also explained that Travelers made unreasonable demands on the Larimores and this could be construed as reckless indifference to their rights.

In entering summary judgment, the trial court essentially made its own finding of fact regarding the level of harm caused by the delay of Travelers in settling with the Larimores. A jury, as finder of fact, could have determined that the length of delay by Travelers was so egregious that it rose to the level of bad faith.

The appellants also contend that the trial court erred in determining that Travelers was entitled to summary judgment under the UCSPA. KRS 304.12-230

The Act provides that:

It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:

. . . .

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

. . . .

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;...

Hamilton Mutual Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, 293 (Ky. App. 2007).

In its factual scenario, the trial court sets forth the word “allegedly” many times. The allegations set forth by both the appellants and the appellees are factual allegations which should be weighed by a jury. In determining that summary judgment was appropriate under the UCSPA, the trial court found as follows:

...[I]t does not appear that Plaintiffs can recover on their claim against Travelers for bad faith under the Unfair Claims Settlement Practices Act as a matter of law. Neither Mr. Quinley’s deposition testimony nor the record as a whole establishes Travelers committed any intentional misconduct emanating from an evil motive or reckless indifference to the rights of others.

Opinion and Order at p. 19.

Quinley’s pretrial disclosure set forth that:

- (a) Travelers had sufficient information within days of the accident to determine that the Larimores were entitled to the maximum \$500,000 UIM limits under their policy;
- (b) Neither Travelers' policy issued to the Larimore family, its claims manual or common insurance industry practice require documentation which Travelers' claims justified its refusal to pay the Larimore family the underinsured motorist coverage benefits which they had purchased and to which they were clearly entitled.
- (c) Much of the documentation requested by Travelers was either non-existent or unavailable to the Larimores, a fact which was know[n] or should have been know[n] by the Travelers representatives in handling the Larimore family's claims.
- (d) Travelers took no action on its own to obtain any documentation, if any such additional documentation was needed for its file, despite the fact that detailed documentation about the motor vehicle accident and the injuries and damages sustained by the Larimore family was contained within the police report, accident reconstruction documents and photographs, all of which war readily available to Travelers.
- (e) In addition to taking no action on its own to obtain whatever additional documentation it deemed necessary, Travelers continually made unreasonable demands on the Larimore family for unnecessary and oftentimes non-existent documentation and information.
- (f) Travelers failed in its acknowledged responsibility to affirmatively act to obtain whatever additional information or documentation it needed, although it is clear from its files that Travelers did not need or require any additional information or documentation in order to pay the Larimore family the UIM benefits to which they were entitled.
- (g) Travelers unreasonably refused to pay the Larimore family UIM benefits for over seven (7) months while the Larimore family was unrepresented by counsel. During

this time, Travelers took virtually no action, despite repeated pleas for help from the Larimore family, thereby requiring them to seek legal counsel.

(h) Even after the filing of a lawsuit for UIM benefits against Travelers, Travelers continued to refuse for an additional year to pay the Larimore family their UIM benefits, despite its continued obligation of good faith even after the lawsuit was filed and even though Travelers could have, through discovery, obtained any additional documentation or information, if in fact Travelers truly felt such additional documentation was necessary.

(i) After refusing to pay the Larimore family UIM benefits for over 18 months, Travelers only belatedly offered payment of the UIM benefits to the Larimores on the eve of an impending jury trial.

(j) Even when Travelers ultimately offered payment of UIM benefits to which the Larimore family was entitled, Travelers sought a release of any bad faith claims which the Larimore family had against Travelers for its conduct in the handling of their claims. Such an attempt by Travelers to obtain a release of the Larimore family's bad faith claims in exchange for payment of UIM benefits to which they were entitled is not only inappropriate but another example of Travelers' bad faith conduct on this claim.

Quinley clearly was setting forth that it was his expert opinion that there may have been a violation of the UCSPA and common law bad faith on the part of Travelers.

Travelers, however, argues that, under the holding in *Bult*, there must be a finding that there is "sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to

award punitive damages to the jury.” *Id.* at p. 186 (emphasis in original).

Travelers contends that the appellants did not meet this threshold.

Here, Travelers repeatedly made demands of the Larimores including asking for a copy of their son’s funeral program, and refused to settle while admitting liability. Thus, the Larimores introduced evidence creating a genuine factual issue in which a jury might find that Travelers acted in bad faith, intentionally committed misconduct emanating from an evil motive, or acted with reckless indifference to their rights. It was an error, therefore, for the trial court to grant summary judgment on this issue. For the above reasons, we reverse the decision of the trial court and remand this case for further proceedings.

ALL CONCUR.

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