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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000928-MR

SAMANTHA G. HOLLAWAY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CI-02603

DIRECT GENERAL INSURANCE COMPANY OF MISSISSIPPI, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

MOORE, JUDGE: Samantha Hollaway appeals an order and judgment of the Fayette Circuit Court summarily dismissing her claim of bad faith against appellee, Direct General Insurance Company of Mississippi, Inc. ("Direct General"). Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 19, 2007, Samantha Hollaway filed a claim with Direct General in which she asserted that its insured, Harry Sykes III, had caused an automobile accident ten days earlier behind the Biscayne Apartments complex in Lexington, Kentucky. Hollaway sought compensation for the damage to her car attributable to the accident and also demanded $125,000 (or the limits of Sykes' policy[1]) for bodily injuries she allegedly sustained as a consequence. However, aside from a few general allegations recited in the verified complaint she eventually filed in this matter,[2] the record before us contains nothing describing Hollaway's version of the July 9, 2007 accident. Rather, the only explanations of how the accident may have occurred appear in roughly eight pages of notes taken

[1] In her brief, Hollaway emphasizes that when she became aware that Sykes' policy limits were only $25,000, she "immediately lowered her demand to meet these policy limits."

[2] Hollaway apparently agrees with the version of the accident as related by Danny Bartlett, the individual who was driving her car at the time of the accident, described below. But, her verified complaint only describes the accident as follows:

> 6. On July 9, 2007, Defendant [Harry] Sykes operated a motor vehicle, near Northland Drive in Lexington, Kentucky. Defendant Sykes owed a duty of care to all others, including Plaintiff.
>
> 7. Defendant Sykes operated a motor vehicle in a negligent manner, with said negligence being the sole and proximate cause of his collision with Plaintiff's vehicle, in which Plaintiff was a passenger. The collision caused the Plaintiff to suffer physical injuries.
>
> 8. As a result of Defendant Sykes' negligence, Plaintiff has been damaged by incurring medical expenses, losing past income, undergoing pain and suffering, having an increased likelihood of requiring future medical treatment, and the impairment of her ability to earn money in the future.

by Direct General claims adjustors.[3] In particular, the notes summarize two telephonic interviews its claims adjustors conducted on July 19, 2007, with the two drivers involved in the accident (*i.e.*, Sykes and another man named Danny Bartlett).

According to the notes, Bartlett stated that he was driving a car owned by Samantha Hollaway, and Hollaway was riding in the front passenger seat. They were proceeding through a parking area behind the apartment complex when they spotted Sykes' vehicle backing out of a parking spot about twenty-five or thirty feet ahead of them. Bartlett stopped the car to allow Sykes to continue backing out. But, as Sykes' car backed out, it angled toward them and then kept driving backward until its rear end collided with the front end of the car driven by Bartlett. Bartlett also stated that he was unable to do anything to avoid the collision because Sykes' car had backed up too quickly.

Sykes, on the other hand, stated that he had been backing out of his parking spot behind the Biscayne Apartments and had slowly angled his car and was preparing to drive forward, when Hollaway's car, traveling in the wrong lane, drove around a nearby curve and rear-ended him. Sykes also stated that he had

[3] Direct General included these eight pages as evidence in support of its motion for summary judgment; the veracity of these notes has never been contested by any party. Both parties have relied upon these notes in support of their various arguments below and throughout this appeal. Sykes also answered a set of interrogatories posed by Hollaway. His answers are of record, and they mirror the details of his version described in the Direct General notes. Aside from that, the record reflects that several depositions were taken in this matter and several answers to interrogatories were exchanged, but none of this evidence appears of record.

been unable to do anything to avoid the collision because Hollaway's car had been traveling too fast.

Both versions of the accident did, however, agree in the following respects: 1) Sykes, Bartlett, and Hollaway were wearing seatbelts at the time of the accident; 2) no airbags deployed as a result of the accident; 3) Sykes' car sustained no damage; 4) Hollaway's vehicle only sustained $463.42 in damage on its driver's side near the tire on the left front fender; 5) the police never investigated the scene of the accident; and 6) both vehicles were drivable afterward and able to leave the scene of the accident under their own power.

The notes further indicate that Direct General paid Hollaway $463.42 for the damage to her car a few weeks after she filed her claim, but they do not explain why Direct General chose to do so beyond categorizing this amount as "a minor impact claim." As it relates to Hollaway's claim for bodily injury, however, Direct General only offered a settlement of $5,000. This offer was made in March 2008, and it remained at $5,000 until approximately May 2010. According to the notes, Direct General offered this amount, rather than the $125,000 or policy limits Hollaway demanded, because the differing accounts of the accident made it unclear whether their insured, as opposed to Bartlett, had caused the accident and because it appeared that Hollaway's claimed injuries might not have been caused by the accident.[4]

[4] One of the injuries asserted by Hollaway included "a mild disc bulge at L5-S1 with a small annular tear," as described in an August 23, 2007 MRI note from St. Joseph East Hospital. The impression of the radiologist reading the MRI was "minimal degenerative change without evidence of acute fracture." Hollaway does not contest that she had preexisting back injuries,

Following several unsuccessful requests for Direct General to increase its settlement offer of $5,000, Hollaway filed suit on May 29, 2008. She asserted a claim of negligence against Sykes; a claim for underinsured motorist (UIM) benefits from her own carrier, Allstate; and, a third-party bad faith claim against Direct General, under the purview of the Kentucky Unfair Claims Settlement Practices Act (KUCSPA), Kentucky Revised Statute (KRS) 304.12-230, alleging that Direct General had failed to reasonably evaluate, investigate, and negotiate a settlement of her bodily injury claim.[5]

In response, Sykes filed an answer denying any negligence on his part, and he also filed a contribution claim against Bartlett asserting that Bartlett had been solely responsible or comparatively negligent for causing the accident. Allstate asserted cross-claims against both Sykes and Bartlett for indemnity in the event it was obligated to pay Hollaway UIM benefits, depending upon which of the two drivers was eventually adjudged liable for causing the accident. And, Direct General filed an answer denying Hollaway's allegations of bad faith.

Most of these claims were settled and dismissed with prejudice approximately two years later, between May and August of 2010. But, there are no

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and one of Direct General's adjustors, Lori Banks, was deposed in this matter and testified Hollaway had informed her that she "had had some appointment in March of 2007 where she went to a doctor for back injuries."

The notes also reference a "stage IIIA labral detachment," discovered by Dr. Paul Harries in a subsequent January 7, 2008 MRI/arthrogram of Hollaway's right hip. Nothing else of record describes this injury further or attributes it to the July 9, 2007 accident.

[5] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1989) (recognizing the existence of a claim by a third party for damages sustained by reason of an insurance company's violation of the KUCSPA).

settlement agreements of record, which would be relevant in reviewing a claim for bad faith. Nothing indicates that either Sykes or Bartlett ever admitted responsibility for causing the accident. No evidence of record indicates that any of Hollaway's claimed injuries were attributable to the accident. All that the record reflects is that Direct General paid Hollaway $22,500 to settle her claims against Sykes; Sykes then voluntarily dismissed his contribution claim against Bartlett; and, that Allstate's indemnity claims against Sykes and Bartlett were likewise dismissed. The only claim that was not dismissed at this time was Hollaway's claim of bad faith against Direct General.

In February 2013, Direct General moved for summary judgment, and the overarching theme of its motion was that it had not acted in bad faith because it had the unqualified right to insist, prior to making any settlement offer with Hollaway, that Hollaway prove her case. In that regard, it argued that Hollaway had failed to put forth evidence demonstrating beyond dispute that Sykes had been liable for causing the July 9, 2007 accident; in support, it cited the discrepancies between Bartlett's and Sykes' accounts of how the accident had occurred. Direct General also argued that Hollaway had failed to put forth evidence demonstrating beyond dispute that the accident in question had been responsible for causing her alleged injuries; and, in support, it cited the relatively minor impact the accident had upon the parties' respective vehicles, the fact that all parties had been wearing seatbelts at the time and that no airbags had deployed, and Hollaway's indication

that she had been treated for preexisting conditions in the same region of her body where the accident had allegedly injured her.[6]

In rebuttal, Hollaway asserted that when Direct General paid her $463.42 property damage claim within three weeks of July 19, 2007, and later paid her $22,500 in May 2010, to settle her bodily injury claim, Direct General had thereby admitted that Sykes had caused the July 9, 2007 accident and all of her alleged injuries. Therefore, Hollaway reasoned that Direct General's liability for paying her claim had been demonstrated beyond dispute, and its refusal to pay her $22,500 until May 2010, or to offer her a settlement higher than $5,000 prior to that time, was some evidence demonstrating that Direct General had acted in bad faith and with malice or in reckless disregard of her rights.

Hollaway also relied heavily upon the following quote from *Farmland Mutual Insurance Co. v. Johnson*, 36 S.W.3d 368, 375 (Ky. 2000):

> Although matters regarding investigation and payment of a claim may be "fairly debatable," an insurer is not thereby relieved from its duty to comply with the mandates of the KUCSPA. Although there may be differing opinions as to the value of the loss and as to the merits of replacing or repairing the damaged structure, an insurance company still is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner. In other words, although elements of a claim may be "fairly debatable," an insurer must debate the matter fairly.

[6] Direct General also argued that Hollaway had failed to introduce evidence supporting that she had sustained emotional damages stemming from its alleged bad faith. Direct General has raised this as an alternative basis for affirming the circuit court's judgment, but, in light of how we have resolved this appeal, addressing this point is unnecessary.

Citing *Farmland*, Hollaway further argued that Direct General had not "debated" the matter of her claim "fairly" because, during the period of time when it had only offered her a settlement figure of $5,000, Direct General: 1) allegedly knew that she was unemployed and in desperate need of money; 2) had allegedly made duplicative requests for Hollaway's medical records, medical bills, and wage loss documentation; 3) had allegedly refused to fully evaluate Hollaway's claim until she was "released from care"; 4) had failed to prove, prior to refusing the full extent of Hollaway's settlement demands, that Hollaway's alleged injuries had *not* been caused by the July 9, 2007 accident; and 5) during their initial discussions, one of its claims adjustors had allegedly called her attorney "crazy nuts" for initially demanding $125,000 to settle her claim, and had allegedly emphasized to her attorney that if the matter went to trial Direct General would "find really good doctors to testify against Ms. Hollaway."

As an aside, Hollaway primarily cited two sources in support of her allegations: 1) a set of answers to interrogatories posed by Direct General, which her counsel had "respectfully submitted" on her behalf, but which she had failed to sign or swear to under oath; and 2) an eight-page document she attached to her response, styled as an "expert report" from an individual named Bill Woolums, ostensibly a "bad faith expert" Hollaway had retained for this litigation. Incidentally, this latter document is undated, unsigned, unsworn, and refers to,

summarizes, and attempts to draw inferences from over a thousand pages of medical records and deposition testimony not appearing of record.[7]

After considering the parties' arguments, the circuit court agreed with Direct General that the evidence of record supported that there had been a genuine dispute at all relevant times regarding who had been liable for causing the accident and what injuries, if any, the accident had inflicted upon Hollaway. The circuit court held that this legally precluded any finding that Direct General had acted in bad faith. Accordingly, the circuit court granted summary judgment in favor of Direct General.

Hollaway now appeals.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the

[7] In its reply to Hollaway's response to its summary judgment motion, Direct General stated that this document "appears to have been prepared by Plaintiff's counsel." There is nothing of record, much less a denial from Hollaway's counsel, to refute this statement.

question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

On appeal, Hollaway argues that it was improper for the circuit court to summarily dismiss her bad faith claim. In *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), the Supreme Court of Kentucky established the following criteria for all bad faith actions:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (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 reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed . . . [A]n insurer is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or facts.

Id. at 890 (quoting *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846-47 (Ky. 1986) (Leibson, J., dissenting)).

We begin our analysis by clarifying that the two primary sources Hollaway relied upon to rebut Direct General's motion for summary judgment--sources she continues to rely upon in this appeal--cannot be considered "evidence," much less the affirmative evidence required of her at the summary judgment phase. This is because she did not sign and swear to her interrogatory answers--her first source--as required by CR 33.01(2); and, her "expert report" from Bill Woolums--her second source--cannot be characterized as an affidavit.[8]

[8] In relevant part, CR 56.05 provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . .

Of equal importance, Hollaway's action against Direct General was and continues to be premised upon a fundamental misunderstanding of when Kentucky law, under the KUCSPA, recognizes that an insurer has exercised bad faith in evaluating, investigating, or negotiating a settlement of a claim. As noted, Hollaway's cause of action is largely based upon a quote from *Farmland*, 36 S.W.3d at 375, to the following effect: "Although there may be differing opinions as to the value of the loss . . ., an insurance company still is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner."

But, as one Court applying Kentucky law has observed:

> Taken in context, however, this language was clearly limited to cases where liability was a certainty. In later cases, the Supreme Court of Kentucky has held that the language does not apply when liability is not certain. For example, the Court held that there was a duty to negotiate where the liability is "reasonably clear." *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005). This means, the Court squarely held, that an insurer is required to "make a good faith attempt to settle any claim, *for which liability is beyond dispute*, for a reasonable amount." *Id*. (emphasis added.) The Court further observed: "The language of the [KUCSPA] is simply inadequate to establish a broad-based requirement that insurance settlements must always be 'fair and equitable' in the traditional sense." *Id*.

Lee v. Medical Protective Co., 904 F.Supp.2d 648, 655-56 (E.D. Ky. 2012).

As noted, this "expert report" document was not signed or sworn to by any person, and none of the documents it referred to and attempted to summarize, except for the various pleadings in this matter, appears of record at all.

In short, the common thread running through each of the three *Wittmer* elements is that the insurer has tort liability for bad faith if, and only if, its liability for paying the claim in question was "beyond dispute." *Coomer*, 172 S.W.3d at 395; *see also Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287, 293-95 (Ky. App. 2007) (undisputed coverage under burglary policy); *Simpson v. Travelers Ins. Companies*, 812 S.W.2d 510, 512 (Ky. App. 1991) (insurer's obligation to pay "must be conceded"). Absent that, an insurer has a right to defend the case, without making any settlement offer *at all*, until appellate review is final. *Lee*, 904 F.Supp.2d at 656; *see also Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989) (insurance carrier has no duty to "pay bogus claims or abandon legitimate defenses").

Here, Hollaway's assertion that Direct General's liability for paying her claim was "beyond dispute" appears to be entirely dependent upon the bare fact that Direct General settled her property damage claim for $463.42, and later settled her bodily injury claim for $22,500. However, under Kentucky law, a settlement is not evidence of legal liability, nor does it qualify as an admission of fault. *See Combs v. Stortz*, 276 S.W.3d 282, 291 (Ky. App. 2009); *Ashland Oil & Refining Co. v. General Tel. Co.*, 462 S.W.2d 190, 194 (Ky. 1970).

And with that said, what remains is a situation in which Direct General's legal liability for paying Hollaway anything at all remains, to this day, an unresolved question. This is because, even if Hollaway did prove beyond dispute that the July 9, 2007 accident caused her alleged injuries (and nothing of

record supports such a proposition), Hollaway did not prove beyond dispute that Sykes caused the July 9, 2007 accident. Indeed, Sykes maintained that Bartlett was responsible; he filed a cross-claim to that end; nothing demonstrates that it was unreasonable for Direct General to rely upon Sykes' version of events in order to contest liability; and, even after Direct General settled Hollaway's negligence claim on Sykes' behalf, nothing of record demonstrates that Sykes ever admitted that he was responsible.

CONCLUSION

For the reasons stated above, the Fayette Circuit Court correctly granted summary judgment in favor of Direct General regarding Hollaway's claim of bad faith. We therefore AFFIRM.

ALL CONCUR.

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