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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000396-MR

HALE GENERAL CONTRACTING, INC.;
TERRY HALE; and BRENDA HALE — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 09-CI-00864

MOTORIST MUTUAL INSURANCE
COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: The Warren Circuit Court entered judgment in conformity with a jury verdict dismissing, with prejudice, Terry Hale's claim of bad faith against the appellee, Motorist Mutual Insurance Company ("Motorist"). Hale now

appeals,[1] arguing the circuit court committed error in admitting certain evidence during trial. Finding no error, we affirm.

On May 24, 2008, Hale was operating a motor vehicle owned by Hale General Contracting, Inc., on a public road in Warren County, Kentucky, when he was involved in a motor vehicle accident with another vehicle driven by Joyce Button. At the time, Hale had a policy of insurance with Motorist Mutual Insurance Company which provided uninsured and underinsured (UM/UIM) coverage. He initiated an action in Warren Circuit Court on May 20, 2009, against Motorist for UM/UIM coverage because the cost of treating his injuries resulting from the accident exceeded the $25,000 limit of Button's auto insurance policy.

Discovery commenced, and Hale first itemized the extent of his damages on January 12, 2010—an amount he alleged was $1,394,656.84. The circuit court directed the parties to mediation, and mediation was held on January 10, 2012. In his brief, Hale describes what happened next as follows: "At this mediation, Motorist failed and refused to mediate and negotiate in good faith; therefore, at the conclusion of the mediation, the Hales immediately prepared and filed a motion to amend their complaint, asserting a first party bad faith claim against Motorist."

Shortly thereafter, the circuit court bifurcated Hale's action and a jury trial was set for the month of September, 2012, for the sole purpose of resolving

[1] Hale General Contracting, Inc., and Brenda Hale were listed as parties below and were likewise added as appellants. However, both of these parties were dismissed as plaintiffs prior to the trial of Hale's bad faith claim, and neither has any legal interest in the outcome of this appeal.

Hale's UM/UIM claim. One month prior to the trial date, Motorist offered Hale $50,000 to settle. Hale refused. The trial proceeded with Hale and his spouse (who claimed loss of consortium due to the accident) collectively asking for a maximum amount of $856,905 in damages. A jury ultimately rejected the loss of consortium claim and awarded Hale $300,000 for past and future pain and suffering; $33,750 in medical expenses; and $45,000 in past and future economic loss. Hale's total recovery was reduced, however, by 15% for his comparative negligence in failing to wear a seatbelt, and was further reduced by $35,000 to reflect his receipt of $10,000 in no-fault benefits and Button's $25,000 policy limits. Accordingly, the net sum of his recovery was $286,838. Motorist filed no appeal.

In January of 2015, Hale's bad faith claim against Motorist proceeded to trial. The circuit court ultimately dismissed this claim with prejudice after a jury made the following findings: (1) Motorist had not failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (2) Motorist had not refused to pay Hale's claims without conducting a reasonable investigation based upon all available information; (3) Motorist had not violated its duty to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability had become reasonably clear; and (4) Motorist had not compelled Hale to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amount Hale ultimately recovered in his lawsuit.

Hale's arguments on appeal are two-fold. First, he contends the circuit court committed reversible error by allowing Motorist to introduce evidence regarding its negotiations with Hale and the parties' settlement positions during and after the January 10, 2012 mediation. This, he asserts, is because Kentucky Rule of Evidence (KRE) 408[2] provides that settlement negotiations are *always* inadmissible. Second, Hale argues the circuit court committed reversible error by also allowing Motorist to introduce expert opinion evidence that tended to prove he had exaggerated his estimate of economic damages resulting from the May 24, 2008 accident, and that he had also been comparatively negligent in causing the accident and a large extent of his own injuries by failing to avoid or lessen the severity of the accident by keeping a proper lookout, and by admittedly failing to wear a seatbelt. Hale asserts this expert evidence became irrelevant for all purposes after the jury in the September, 2012 trial found in his favor.

Both of Hale's arguments have no merit because they are predicated upon a misapprehension of the issues presented in the January 2015 trial. To

[2] KRE Rule 408 provides:

> Evidence of:
>
> (1) Furnishing or offering or promising to furnish; or
>
> (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

reemphasize, the overarching issue was whether Motorist committed the tort of bad faith by denying coverage and otherwise failing to offer Hale an adequate settlement prior to the September 2012 trial date. The essential elements of such an action—elements which are not referenced or discussed in Hale's brief—were explained in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993) as follows:

> [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)).

As to Hale's first argument, Motorist did not introduce evidence of its settlement negotiations with Hale to prove either its liability for or the invalidity of Hale's UM/UIM claim or its amount. KRE 408 prohibits such a use for this type of evidence. Moreover, doing so would have been pointless because the prior jury verdict following the September 2012 trial (which Motorist never appealed) had already resolved the matter of Motorist's liability.

Instead, it is readily apparent from the record that Motorist introduced this evidence for "another purpose" that the language of KRE 408 does not prohibit. Specifically, Motorist used this evidence to establish that any failure on

its part to offer a settlement with Hale between the January 10, 2012 mediation and September, 2012 trial did not injure Hale in any cognizable way. It demonstrated (1) all of Hale's multiple settlement demands, which ranged between $1.3 million and $400,000, were well in excess of what he eventually recovered in his UM/UIM judgment; and (2) Hale admitted, over the course of his deposition testimony, that he never would have settled for the amount he was awarded in his UM/UIM judgment.

Motorists also points out in its brief that the tort of bad faith can warrant punitive damages and requires proof that an insurer engaged in outrageous conduct due to an evil motive or reckless indifference. How a jury can be expected to determine whether the insurer's settlement conduct was outrageous without knowing something of its negotiations with the insured is, as Motorists notes, a mystery. The circuit court accordingly did not violate KRE 408 by admitting this evidence, and Hale cites no rule of law that otherwise would have excluded it.

Hale's second argument similarly misses the mark. To begin, Hale cites no rule of law standing for the proposition that evidence, once disbelieved by a jury at some point in time, ceases to be evidence for any and all purposes thereafter. This is because no such rule of law exists. Furthermore, by reintroducing the expert evidence it had previously introduced in the September, 2015 UM/UIM trial, Motorist was not attempting, as Hale repeatedly insists throughout his brief, to retry the UM/UIM action.

Instead, Motorist introduced this evidence because it was relevant to the second element of the tort of bad faith, which requires an insurer to "lack a reasonable basis in law or fact for denying the claim." *Wittmer*, 864 S.W.2d at 890. A central issue in the January 2015 trial was whether it was reasonable for Motorist to rely upon its own experts' assessments of the facts and circumstances of the accident, Hale's injuries, and Hale's estimates of economic loss as a basis for refusing to settle with Hale prior to the September, 2012 trial date.

At or about the time of the January 12, 2010 mediation, these experts had opined to Motorist that Hale had overestimated the economic damages component of his various settlement demands, and that Hale had been comparatively negligent in causing the May 24, 2008 accident and most of his resulting injuries. Hale does not question these experts' respective qualifications or the methodologies underpinning their conclusions; Hale does not argue it was unreasonable for Motorist to have relied upon these experts' conclusions as a basis for determining, under the facts, that it had a legitimate comparative negligence defense; and, as noted in *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989), an insurance carrier has no duty to settle if doing so would force it to "abandon legitimate defenses."

We have addressed the breadth of Hale's appellate arguments and have determined they are without merit. The Warrant Circuit Court is therefore AFFIRMED.

NICKELL, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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