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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000293-MR

FRED MESSER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 12-CI-00428

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND SPALDING, JUDGES.

ACREE, JUDGE: Appellant Fred Messer appeals the Perry Circuit Court's order granting Appellee Universal Underwriters Insurance Company's motion for summary judgment and dismissing the third-party bad faith claim Messer brought

against Universal pursuant to the Kentucky Unfair Claims Settlement Practices Act (UCSPA), KRS[1] 304.12-230. We affirm.

FACTS AND PROCEDURE

Mark Taylor worked for Mountain Ford, Inc. detailing vehicles in preparation for sale to the public. On March 30, 2012, around midnight, Taylor was driving a Mountain Ford Jeep on a two-lane road heading west. Messer was driving a Lexus heading east when the two vehicles collided. Both vehicles were totaled. The Jeep was insured by Universal and the loss beneficiary was Mountain Ford. The insurance covered the replacement cost for the Jeep and liability to third parties to a maximum of $500,000 for accidents that occurred when the vehicle was driven with Mountain Ford's permission. Universal also insured Mountain Ford pursuant to a $5,000,000 excess or "umbrella" coverage policy.

The police report of the collision says, "Unit one [Messer's vehicle] was traveling East on Lost Creek Road (KY-1146) when the operator failed to maintain proper control and allowed his vehicle to cross the center line in a right[-]hand curve." Additionally, blood tests conducted by both the Kentucky State Police and the Appalachian Regional Hospital indicated Messer had methadone, THC, and benzodiazepines in his system. In short order, Messer's insurer, Kentucky Farm Bureau, paid its liability policy limits to Taylor.

[1] Kentucky Revised Statutes.

A representative of Taylor's attorney reported the accident to Universal by telephone on April 11, 2012. A Universal clerk took notes of the conversation that included the representative's assertion that Taylor was driving the Jeep with Mountain Ford's permission. Upon investigation, Universal learned from Taylor's supervisor that Taylor's use of the vehicle exceeded the employer-defined permitted use. The supervisor later testified that Taylor drove the vehicle home on the night in question without Mountain Ford's permission or the supervisor's permission. On April 24, 2012, Universal denied coverage to Taylor because his use of Mountain Ford's vehicle was non-permissive.

Similarly, on May 2, 2012, Universal denied Messer's claim for third-party insurance benefits because Taylor's use of the Jeep was non-permissive and, therefore, outside the terms of coverage under its contract of insurance with Mountain Ford. Non-permissive use of an insured vehicle was a policy exclusion.

Consistent with Universal's position that Taylor was driving Mountain Ford's vehicle without permission, and after paying Mountain Ford for the total loss of the Jeep, Universal sought subrogation for that loss from Taylor in a letter to his attorney dated August 2, 2012. The letter demanded that Taylor "issue a draft [to Universal] in the amount of $11,706.93." After more direct communication among insurers, Messer's insurer paid Universal's subrogation claim for the damage to Mountain Ford's vehicle.

Messer points out that the same letter states "liability rests with your client Mark Taylor." He interprets the letter as Universal's acknowledgement that Taylor's negligence was the cause of the accident. The police report and toxicology reports mentioned earlier do not support Messer's interpretation. Universal expressly acknowledges nothing more than that the letter reflects only its claim that Taylor owed Universal a sum of money equal to that which it paid Mountain Ford for the total loss of the vehicle Taylor drove without permission.

On September 9, 2012, Messer filed an action in Perry Circuit Court against Taylor alleging Taylor caused the accident, and against Mountain Ford alleging it negligently entrusted its vehicle to Taylor. Messer also submitted a third-party claim with Universal to pay his substantial alleged damages.[2]

After Universal denied Messer's third-party claim, he made a bad faith claim against Universal for violation of the UCSPA. The circuit court bifurcated the action allowing the accident-based tort claim to proceed while the UCSPA claim was abated. For quite a while, whether Taylor's use of Mountain Ford's vehicle was permissive or non-permissive remained a disputed fact at the center of the tort claim, but it also impacted the question of third-party coverage.

[2] Messer alleged damages exceeding $4,000,000.

Universal's investigation of Messer's insurance claim progressed, and discovery proceeded on Messer's tort claims. On December 19, 2012, Universal valued Messer's claim at $0.00 (zero dollars) based on its position that Taylor did not have permission from its insured, Mountain Ford, to use its vehicle. A year later, Universal made the same assessment for the same reason. On March 19, 2014, Universal began nearly monthly offers to settle Messer's third-party claim for $20,000.

Taylor's non-permissive use was one of Mountain Ford's defenses to Messer's claim of negligent entrustment. On October 13, 2014, to resolve the permissive/non-permissive use question, Messer filed a motion for partial summary judgment. He claimed there was no genuine issue of material fact regarding Taylor's use of the vehicle, specifically, that such use was permissive. Universal's response in opposition was supported by considerable documentary and testimonial countervailing evidence.

On November 10, 2014, the circuit court denied Messer's motion, concluding there was a genuine issue regarding the material fact whether Taylor's use of Mountain Ford's vehicle was permissive or non-permissive. The issue would have to be resolved by a jury. Until then, Mountain Ford's non-permissive-use-of-the-vehicle defense to Messer's negligent entrustment claim survived. Until then, the establishment of third-party coverage remained a point of genuine debate.

Later in November 2014, a jury heard proof on this single issue – whether Taylor was driving Mountain Ford's vehicle with permission "either expressly given or . . . [as] implied from the facts and circumstances." (Jury Instructions, Record (R.) at 2280). The jury found Taylor did have permission to drive Mountain Ford's vehicle and that Taylor was entitled to coverage by Universal under the terms of the policy. The circuit court entered an order to that effect on December 3, 2014.

Universal soon raised its reserve to nearly double what it had been, but still made Messer two more $20,000 settlement offers which Messer rejected.[3] However, after losing its defense of non-permissive use and as indicated in its claims notes dated February 23, 2015, Universal reassessed its insureds' – Mountain Ford's and Taylor's – potential exposures.

Notwithstanding evidence that Messer was driving impaired and crossed the centerline, Universal's claims analysts made a judgment call that a jury might still apportion as much as fifty percent of the fault for the accident to Taylor.

[3] Messer notes, and we acknowledge, that while Universal's offer never exceeded $20,000 prior to the jury's determination of permissive use, its reserve did increase. For the first twenty-one months after the accident, until December 2013, the reserve was about $4,000. After the case was set for trial, a Universal supervisor conducted "a verdict search and seeing verdicts from a few other eastern KY venues which are notoriously plaintiff-oriented in their awards," raised the reserve to about $100,000. (R. 4823). After the circuit court denied Mountain Ford's motion to dismiss, Universal raised the reserve to $234,000. It remained there until the jury resolved the permissive use question of fact when Universal raised it to $413,000 and eventually to the liability policy limits of $500,000.

Given Messer's claimed damages of more than $4,000,000 and Universal's contractual obligation to insure Mountain Ford under two policies totaling $5.5M in coverage, the analysts concluded its insureds' exposures could be substantial.

On March 3, 2015, Universal offered Messer $275,000 to settle. The next week Universal offered $375,000 and increased its offer several times until it reached an offer of $500,000.[4] Despite his knowledge of the $5,000,000 umbrella policy, Messer did not counteroffer and accepted the half-million-dollar offer on April 27, 2015. He then voluntarily dismissed the underlying tort claims.

Thereafter, the circuit court lifted its stay and discovery proceeded on the bad faith claim. On February 16, 2016, Universal moved for summary judgment arguing that until December 3, 2014, whether it was contractually obligated to pay was unresolved; that Taylor's liability was never beyond dispute; and that both precluded Messer's bad faith claim.

The circuit court denied Universal's motion on April 4, 2016. On October 4, 2016, Universal renewed the motion and cited the recent publication by the Kentucky Supreme Court of *Hollaway v. Direct General Insurance Co.*, 497 S.W.3d 733 (Ky. 2016). On October 27, 2016, after reviewing *Hollaway*, the circuit court granted Universal's motion. Messer appealed.

[4] On April 10, 2015, Universal offered Messer $400,000. On April 13, 2015 Universal offered $425,000. On April 15, 2015, Universal offered $475,000.

STANDARD OF REVIEW

Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). All facts and all inferences drawn from those facts are viewed in a light most favorable to the nonmoving party. *Id.* Because summary judgment involves only questions of law and the existence of disputed material issues of fact, an appellate court does not defer to a circuit court's decision and reviews the case *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

ANALYSIS

Although the same general jurisprudence applies to our review regardless of the character of an insurer's claim-resisting position, we recognize, as did Judge Bertelsman in *Lee v. Medical Protective Co.*, that Kentucky decisions analyzing bad faith claims fall into two broad categories. 904 F. Supp. 2d 648, 652 (E.D. Ky. 2012). One category uses language "implying a more expansive approach to a finding of bad faith" analyzing "factual situations where liability was clear and the conduct of the insurance company was oppressive." *Id.* Messer leans heavily on "the leading case adopting the expansive approach," *Farmland Mutual Insurance Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000), a case in which "the

insurance company misrepresented the terms of the policy to its insured." *Lee*, 904 F. Supp. 2d at 652 (citing *Farmland*, 36 S.W.3d at 377).

Messer's protestations notwithstanding, the instant case has none of the hallmarks of *Farmland* and similar cases, the facts of which reveal "a sustained effort on the part of [the insurer] to deny coverage long after it could and should have determined that it was legally obligated under its contract." *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 30 (Ky. 2017). More specifically, unlike the insurer in *Farmland*, Universal's coverage dispute was demonstrably reasonable.

"Uncertainty as to application of insurance policy provisions, such as the coverage issue in *Empire Fire*, is a reasonable and legitimate reason for an insurance company to litigate a claim." *Farmland*, 36 S.W.3d at 377 (citing *Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Serv., Inc.*, 880 S.W.2d 886 (Ky. App. 1994)). In *Farmland*, "there was no such legal uncertainty" regarding coverage. *Id.* There clearly was uncertainty in the case under review. Messer's bad faith claim is therefore categorically distinguishable.

"The greater number of the Kentucky bad faith cases are governed by the standards set forth in the landmark case, *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993)." *Id.* at 653.[5] In *Wittmer*, the Supreme Court reviewed a third-party

[5] The dissent in *Farmland* called the majority analysis "a significant departure from the holding in *Wittmer v. Jones*, Ky., 864 S.W.2d 885 (1993)[.]" *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 384 (Ky. 2000) (Cooper, J., dissenting). Considering our jurisprudence as a whole,

lawsuit for damage to an automobile. Although both coverage and the insured's liability were clear, the amount of damages was disputed. *Wittmer*, 864 S.W.2d at 887. The claimant's proof of damages was lacking in several respects. On review, the Court found the insurer's disagreement over damages was a reasonable ground for disputing the claim. *Id.* at 889-90. It was not a difficult case and factually distinguishable from the case before us.

However, the facts in *Wittmer* provided the opportunity for the Supreme Court to establish criteria for broad application in bad faith claims, including this one:

> [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 (1986) (Leibson, J., dissenting)). Obviously, the first element relates to coverage

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we agree with Judge Bertelsman when he answered his own question: "Is there, then, any way to reconcile these cases? Yes, by reading the language in the light of the facts." *Lee*, 904 F. Supp. 2d at 652.

only. And so, we continue our analysis by considering Messer's attempt to satisfy this first element – the coverage question.

Genuine dispute governing coverage question

Although Messer cites four subsections of the UCSPA, in general he faults Universal for "'not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear,' KRS 304.12-230(6)."[6] (Appellant's brief, p. 13-14). This approach is consistent with *Wittmer* in that "there is no such thing as a 'technical violation' of the UCSPA, at least in the sense of establishing a private cause of action for tortious misconduct justifying a claim of bad faith[.]" *Wittmer*, 864 S.W.2d at 890.

"The gravamen of the UCSPA is that an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which the insurance company is contractually obligated to pay." *Demetre*, 527 S.W.3d at 26 (quoting *Davidson v. Am. Freightways, Inc.*, 25

[6] Messer presented expert opinion evidence that this and other UCSPA violations occurred including that Universal failed to properly investigate the claim. The record, however, is so full of proof to the contrary that there cannot be said to be a genuine issue regarding the material fact of Universal's investigation. Even presuming the existence of this and other technical violations – such as *Wittmer*, *infra*, deems is impossible – Messer does not claim these alleged technical failures damaged him. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1997), *as modified* (Feb. 18, 1999), *holding modified by Hollaway v. Direct Gen. Ins. Co. of Miss., Inc.*, 497 S.W.3d 733 (Ky. 2016) ("Absent resultant damage, there can be no cause of action premised upon the violation of a statute[.]"). Delaying satisfaction of his tort claim is the essence of Messer's bad faith claim. The expert testimony has little bearing, if any, on the questions of permissive use affecting coverage, Taylor's liability for the collision, or Messer's damages.

S.W.3d 94, 100 (Ky. 2000)). "Absent a contractual obligation, there simply is no bad faith cause of action, either at common law or by statute." *Davidson*, 25 S.W.3d at 100 ("*[T]he insurer must be obligated to pay the claim under the terms of the policy* . . . ." (quoting *Wittmer*, 864 S.W.2d at 890 (citation omitted)).

In the current case, Universal's contract excluded coverage for vehicles involved in accidents when driven without Mountain Ford's permission.[7] After investigating that factual question, Universal concluded Taylor's use of Mountain Ford's vehicle was non-permissive and denied Messer's claim as not covered by its contract of insurance.

Of course, an insurer does not get to determine coverage unilaterally. There must be a reasonable basis for that determination. A claimant can test the reasonableness of the insurer's determination of no coverage in the circuit court and, if no genuine dispute exists, the bad faith claim can proceed. On the other hand, "[i]f a genuine dispute does exist . . . governing the coverage question, the insured's claim is fairly debatable and the tort claim for bad faith based upon the insurer's refusal to pay the claim may not be maintained." *Empire Fire*, 880

[7] This interpretation of the insurance contract is not contested. *See Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 65 (Ky. 2008) ("our initial permission rule must be limited: use of a vehicle which amounts to conversion is not covered through the omnibus clause unless the clause specifically allows for such coverage. *See* KRS 304.39-190; *Preferred Risk*[Mut. Ins. Co. v. Ky. Farm Bureau Mut. Ins. Co.], 872 S.W.2d [469,] 470-471 [(Ky. 1994)] (holding that the MVRA did not create a duty for vehicle owners to carry insurance for one who operates the vehicle after converting it).").

S.W.2d at 890 (emphasis added); *Travelers Indem. Co. v. Armstrong*, 565 S.W.3d 550, 568 (Ky. 2019) ("a reasonable basis in law or fact for denying the claim" is established by the "absence of a contractual obligation in an insurance policy for coverage . . . ." (citation and internal quotation marks omitted)).

A circuit court can only resolve the issue of coverage if there is no genuine issue of material fact bearing on that legal question. *Steelvest*, 807 S.W.2d at 480. In the case before us, Universal argued the material fact at issue was whether Taylor's use of Mountain Ford's vehicle was permissive. Messer believed the proof was so one-sided in support of a permissive-use finding as to eliminate any genuine issue regarding that fact. He attempted to satisfy the first element – the coverage question – by use of summary proceedings. That effort failed.

Messer tested Universal's no-coverage determination by filing a motion for partial summary judgment and arguing there was no genuine issue of material fact regarding Taylor's use of the Jeep with Mountain Ford's permission. He argued Universal's initial recordation of third-person information that Taylor used the Jeep with permission was an admission of insurance coverage. The circuit court was not persuaded by Messer's argument; neither is this Court.

Universal's investigation was just beginning when it made the initial notes regarding Taylor's vehicle use. It is no surprise that the insurer's subsequent investigation contradicted those notes. Constant overall claim reassessment is the

function of a claims adjuster. *Sinclair v. Zurich American Ins. Co.*, 129 F. Supp. 3d 1252, 1257 (D.N.M. 2015) ("[A]n insurer has an obligation to timely reassess its initial decision [regarding] coverage based upon information received subsequent to the initial decision, even if that information is received after suit is filed. *See Knotts* [*v. Zurich Ins. Co.*, 197 S.W.3d 512, 523 (Ky. 2006)].").

The record shows that among the additional information gathered during Universal's investigation was a first-person statement (and subsequent sworn testimony) from Taylor's supervisor that permission was not given. There was also Mountain Ford's written policy regarding use of its vehicles by employees. The subsequently obtained direct information carried more weight with Universal than the third-hand information originally received. Universal concluded the accident was not covered. This kind of evolving decision-making reflects the reasoning behind the Supreme Court's holding that an insurer's "early impressions of the case are not dispositive." *Hollaway*, 497 S.W.3d at 739.

The circuit court assessed the evidence and concluded a genuine issue of material fact did exist regarding permissive use. Until that fact question was resolved, the court could not determine as a matter of law whether Universal's insurance contract with Mountain Ford covered Taylor and the accident involving Messer. For as long as the coverage question remained unresolved, Messer had not satisfied the first element of *Wittmer*.

To further unpack this point, the circuit court's unchallenged November 10, 2014 order denying Messer's motion established there was a genuine issue of material fact regarding permissive use. In turn, this genuine issue established, as a matter of law, that the question of coverage was "fairly debatable"; that is, as of November 10, 2014, and until the underlying fact question was resolved by a fact finder, Messer had failed to prove Universal was obligated to pay his claim. Although Messer does not argue the circuit court's order was erroneous, we have considered it and find no error in the ruling.[8]

Universal's contractual obligation remained a fairly debatable question until December 3, 2014. On that date, the circuit court entered an order, based on the jury's factual finding of permissive use, that Universal was contractually obligated to pay and the first *Wittmer* element was established.

Summarizing our analysis thus far, Messer was precluded from bringing a bad faith claim against Universal for its conduct before December 3, 2014. *Pryor v. Colony Ins.*, 414 S.W.3d 424, 433 (Ky. App. 2013) ("[A] third-

[8] Messer does not challenge this denial of summary judgment on appeal. Although "sound reasoning supports the conclusion that an order *denying* summary judgment should not be reviewed on appeal[,]" *Bell v. Harmon*, 284 S.W.2d 812, 814 (Ky. 1955), cases such as this may justify exception. The logic typically given for declining review of summary judgment denials is that it "can in no sense prejudice the substantive rights of the party making the motion" because its merits can be established "upon the trial of the cause." *Id.* However, we have declared this a "general rule . . . where the question is *whether there exists* a genuine issue of material fact." *Transp. Cabinet, Bureau of Highways, Comm. of Ky. v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988) (citing *Bell*) (emphasis added). Here, Messer is arguing a genuine issue of material fact *did not exist* at the time of the ruling; therefore, the general rule does not apply.

party claimant may only sue the insurance company under USCPA when coverage is not contested or already established." (citing *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 516 (Ky. 2006)). We next analyze Universal's conduct after that date.

Taylor's liability was not reasonably clear

Universal never based denial of Messer's claim solely on noncoverage – *i.e.*, the absence of a contractual obligation to pay. It also denied the claim because it determined there was a reasonable basis in fact and law for denying Taylor was liable to Messer for the accident. In fact, to this day, Taylor's liability for the collision remains in doubt because the case settled before the jury could decide the question. *See Trimble v. Baker*, 273 Ky. 434, 116 S.W.2d 968, 971 (1938) ("[Q]uestion of whose fault caused the collision . . . was one resting exclusively with the jury."). Universal's agreement to pay Messer $500,000 proved nothing because "settlements are not evidence of legal liability, nor do they qualify as admissions of fault." *Hollaway*, 497 S.W.3d at 738. More was needed to establish Taylor's liability and Universal's bad faith.

Before an insurer can be liable for bad faith, the underlying liability must be established. "First, and most obviously, is liability for the accident itself – whether the . . . accident was a result of [the insurer's] insured's fault, thereby obligating the insurer to compensate [the claimant] for damages as a result of the accident." *Id*. The UCSPA only requires an insurer to "effectuate prompt, fair and

equitable settlements of claims in which [the insured's] liability has become reasonably clear[.]" KRS 304.12-230(6). "[R]easonably clear" has been interpreted as meaning "beyond dispute[.]" *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005).

The requirement to prove, beyond dispute, that the insured is liable "imposes a tall burden of proof on plaintiffs seeking to recover on a theory of bad faith." *Hollaway*, 497 S.W.3d at 737. That tall burden requires a claimant to demonstrate it was unreasonable for the insurer to argue the insured's conduct was not a substantial factor in causing the accident. Kentucky courts will not allow a jury to apportion fault to persons whose conduct was not a substantial factor in causing an accident. *Hayes v. D.C.I. Properties-D KY, LLC*, 563 S.W.3d 619, 623 (Ky. 2018).[9] The insurer can challenge the claimant's ability to meet that burden by filing a motion for summary judgment. That is what occurred in this case.

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[9] Citing *Shelton v. Ky. Easter Seals Soc'y, Inc*., 413 S.W.3d 901 (Ky. 2013), and, in turn, *Henson v. Klein*, 319 S.W.3d 413, 422 (Ky. 2010), the Supreme Court emphasized:

> the question of fault has always been answered by determining . . . whether the breach was a substantial factor in causing the injury claimed.
>
> What comparative negligence changed was the way we allocate, or apportion, fault. Under contributory negligence, if the plaintiff was to any degree at fault for his injury, all the damage was allocated to him, and he could recover nothing from the defendant, regardless of the defendant's degree of culpability. Under comparative negligence, the finder of fact allocates to each party a percentage of the total fault, and hence a percentage of the damages, based upon that party's conduct and the relationship of that conduct to the injury.

Hayes v. D.C.I. Properties-D KY, LLC, 563 S.W.3d 619, 623 n.3 (Ky. 2018).

Universal's summary judgment motion did not assert the mere absence of proof of Taylor's fault. It offered affirmative proof that Messer was 100% responsible for the collision. In addition to Taylor's sworn testimony that he did not cross the centerline, the evidence included: the police report citing Messer for failing to maintain control of his vehicle and crossing the centerline; the police accident reconstructionist's finding that the collision was in Taylor's lane; two toxicology reports indicating intoxicants in Messer's bloodstream; and Messer's insurer's post-investigation payment of Taylor's injury claims in the amount of its policy limits and the subrogation claim for the cost of Mountain Ford's Jeep.

Universal's motion and supporting evidence shifted the burden to Messer "to present at least some affirmative evidence showing that there is a genuine issue of material fact" regarding Taylor's liability. *Auto Owners Ins. Co. v. Consumers Ins. USA, Inc.*, 323 S.W.3d 781, 783 (Ky. App. 2010). Messer's argument in response had two components: (1) Universal admitted Taylor's liability in the aforementioned August 2, 2012 letter from Universal to Taylor's attorney as well as in claims notes indicating reserves of substantially more than Universal was offering in settlement (R. 4770, 4774-75); and (2) a general proposition that comparative negligence means even "the claimant who is 95% negligent recovers from the defendant . . . 5%, which is fairly attributable to the defendant's fault." (R. 4773). These arguments do not persuade the Court.

Messer asks us to consider Universal's August 2, 2012 letter to Taylor's attorney stating "liability rests with . . . Taylor" as Universal's admission of its insured's liability for the collision. Universal's alternative explanation is that the letter did nothing more than assert its subrogation claim against Taylor for his non-permissive use of Mountain Ford's vehicle. The same letter demanded that Taylor "issue a draft in the amount of $11,706.93." Universal's explanation is more plausible. However, even if Messer's interpretation of the letter is correct, it is not dispositive. To paraphrase *Hollaway*, if it is true that Universal "initially appeared to take responsibility for the accident, and attributed fault to its insured[,] . . . we also accept [Universal's] proposition that impressions may change as investigations proceed. We will not attribute changing positions as a result of new information or evidence to bad-faith failure to settle claims." *Hollaway*, 497 S.W.3d at 739. This letter did not and does not create the genuine issue of material fact necessary to prevent summary judgment in favor of Universal.

Messer also argues that Universal's dramatic upward reserve adjustments and the disparity between the reserve amount and the offer constitute a concession that, at least in some percentage, Taylor was liable. This argument misapprehends the role reserves play in insurance regulation.

The simplest definition of reserves is "money set aside by a[n] . . . insurance company to cover future liability." BLACK'S LAW DICTIONARY 1309

(7th ed. 1999). They are merely estimates of the insurer's total exposure. *See Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 143 (Ky. 2007) (Cumulatively, reserves are "the amount of money set aside to cover estimated claims, losses, and defense costs connected to outstanding policies over a particular period of time.").

Messer embraces "[a] common misconception . . . that an insurer's loss reserves are the same as settlement authority. They are not. The main purpose of a loss reserve is to comply with statutory requirements . . . . It does not automatically authorize a settlement at that figure." *Lipton v. Super. Ct.*, 48 Cal. App. 4th 1599, 56 Cal. Rptr. 2d 341, 349 (1996). Modern statutes of all states require every insurer to maintain reserves not only to assure the regulators of its ability to satisfy potential obligations under its policies, but also to guard against insolvency. *See* 43 Am.Jur.2d Insurance § 36. Kentucky is no exception. KRS 304.6-040(5); KRS 304.6-100(1); KRS 304.6-120 to 304.6-180; *see Nat'l Distillers and Chem. Corp. v. Stephens*, 912 S.W.2d 30, 32 (Ky. 1996).

Both the manner of setting reserves and their amount are relevant to demonstrate compliance with statutes and regulations compelling them in the first place. Reserves play a critical role in accounting practices that assure regulators of the solvency of an insurance company for the protection of all its shareholders and insureds. Understating reserves artificially inflates the insurer's financial health

and, in severe cases, can result in the seizure of assets and forced liquidation. *Delta Holdings, Inc. v. Nat'l Distillers and Chem. Corp.*, 945 F.2d 1226, 1239 (2d Cir. 1991) ("[T]he Kentucky Insurance Department began an investigation, . . . eventually concluding that the company's loss reserves had been deficient[,] . . . seized . . . assets, and commenced liquidation proceedings.").

The purpose then of insurance statutes and regulations is to discourage insurers from understating reserves. Consequently, "reserve amounts may be calculated based on the maximum possible exposure without regard for the strength of liability defenses or coverage defenses . . . [and] may not be based on a thorough factual or legal analysis of a case or claim." Douglas R. Richmond, *Recurring Discovery Issues in Insurance Bad Faith Litigation*, 52 TORT TRIAL & INS. PRAC. L.J. 749, 766-67 (2017).

In cases like *Queensway*, *supra*, our Supreme Court discussed the function of reserves. In *National Distillers and Chemical Corp. v. Stephens*, too, the Supreme Court recognized that reserves are compelled by regulation, stating:

> [I]nsurers . . . , in determining their financial condition, *estimate* the amount "necessary to pay all . . . unpaid losses and claims incurred on or prior to the date of statement, whether reported or unreported, together with the expenses of adjustment or settlement thereof." [(quoting KRS 304.6-040(2)).] The reporting and processing of claims arising from a single insured incident may string out over a period of several years, making it difficult to calculate the loss reserves which are reported as liabilities in the financial records of an

> insurance company. As a result, these reserve estimates may change as more information about the claim develops.

912 S.W.2d 30, 31 (Ky. 1996).

The reserves set by Universal are not, as Messer argues, an admission of its own or its insured's liability. "Although the relevancy of reserve information requires case-specific inquiry, the majority rule holds that reserves do not evidence an admission of coverage, fault, or liability by the insurer." Richmond, *supra*, at 768 (footnote omitted citing cases from multiple jurisdictions following the majority rule). We read our jurisprudence as in line with the majority rule. Additionally, it is logical that Kentucky is in the majority here.

If we followed the minority and ascribed as an additional attribute of reserves that they also constitute proof of the insurer's or its insured's liability, we would *encourage* insurers to understate reserves – a goal contrary to Kentucky insurance laws. We would be complicit in jeopardizing the integrity of regulatory compliance across the entire insurance industry. *See In re Couch,* 80 B.R. 512, 517 (S.D. Cal. 1987) (state law "establish[es] reserve policy."). "For this reason alone, a reserve cannot accurately or fairly be equated with an admission of liability or the value of any particular claim." *Id.* We acknowledge that an insurer's procedures for setting reserves can be relevant, but it would be illogical to hold that reserves themselves are proof of liability or the extent of fault.

The case of *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004), is consistent with our holding here. In *Trude*, the bad faith claimant alleged the insurer had "undervalued [third-party claimant] Wilder's claim during negotiations[.]" *Id.* at 807. Undervaluing claims goes against the regulatory scheme. In *Trude*, the Court first reiterated that "[r]eserve setting procedures are controlled in part by statute." *Id.* at 813. The Court then noted, as we have noted here, that the relevance of "[e]vidence of [an insurer's] reserve setting procedures" is found in its function to assure that the insurance company "is following the statutory and regulatory requirements" to establish adequate reserves rather than operating a contradictive "system for setting reserves . . . aimed at achieving unfairly low values." *Id.* Establishing unfairly low values for claims overstates the financial health of the insurer in violation of insurance laws. *Trude* holds that reserve-setting procedures that do not comply with insurance laws are relevant in bad faith cases to show violation of insurance laws. It does not hold that the reserve setting itself constitutes an admission of liability.

Our jurisprudence gives us no reason to believe Kentucky does not embrace the majority rule rejecting the inference that reserves represent an insurer's "objective assessment of a claims [sic] worth to which an insurer may be held." *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1190 (Colo. 2002) (citing *Signature Dev. Co., Inc. v. Royal Ins. Co. of America*, 230 F.3d 1215 (10th Cir.

2000) and cases cited therein). A reserve does not constitute evidence of coverage, liability, or fault because, contrary to Messer's interpretation of a reserve, it does not identify "the minimal amount the insurer's own adjuster had evaluated as being owed to the insured." *Voland v. Farmers Ins. Co. of Ariz.*, 943 P.2d 808, 812 (Ariz. Ct. App. 1997).

The other half of Messer's argument in response to Universal's summary judgment motion was that even if 95% of the fault is attributable to Messer, that would still make Taylor 5% liable. Given the amount of Messer's alleged damages, so goes his argument, this would still be a large sum of money for Messer to recover. But that is not how apportionment works.

We already explained above that no fault at all will be apportioned to Taylor unless his conduct "was a substantial factor in causing damages to the plaintiff," Messer. *Sargent v. Shaffer*, 467 S.W.3d 198, 210 (Ky. 2015). Universal's summary judgment motion asserted that it had a reasonable basis in law and fact for denying the claim, namely, that there was no proof of Taylor's liability. To defeat that motion, Messer needed to do more than create a genuine issue concerning whether Taylor was, to some degree or to any degree, at fault.

The genuine issue regarding Taylor's liability alone was enough to sustain Universal's position of having a reasonable basis for denying Taylor was at fault and, therefore, for denying Messer's claim. To eliminate the reasonableness

of Universal's dispute regarding Taylor's liability, Messer needed to establish that no reasonable juror could conclude otherwise than that Taylor's actions were a substantial factor in causing the accident. *Hayes*, 563 S.W.3d at 622.

In fact, Messer pointed to nothing in the record to support a finding that Taylor was at fault in any percentage. This is because he pointed to nothing supporting an inference that Taylor's actions were a substantial factor in causing the collision.[10] Most of Messer's response to the summary judgment motion centered on his expert witness's report that Universal's conduct was outrageous.

In some ways, this case is like *Hollaway*, *supra*. The insurer in *Holloway* also negotiated settlement based on the contested causation and damages issues. The unanimous Supreme Court began discussing the case by saying that "[i]n order to prevail on a third-party bad faith claim under Kentucky's Unfair Claims Settlement Practices Act, a plaintiff must prove not only the insurer's unreasonable failure to respond to a legitimate claim to recover policy proceeds but also must produce evidence that the insurer acted recklessly indifferent to the plaintiff's right to recover." *Id.* at 734. No substantial evidence appears in this record that would support the contention that Universal acted in such a manner.

[10] Messer's pre-trial memorandum referenced no evidence of Taylor's fault in causing the collision, but only that "the first significant issue in this case is whether the Defendant, Mark Taylor, exercised due car in operating the motor vehicle he was driving[.]" (R. 2786-87).

This Court cannot improve upon the Supreme Court's assessment in *Hollaway* which addressed the propriety of a directed verdict. We conclude the underlying discussion has equal applicability here in our review of summary judgment. The Court said:

> A bad faith claim under Kentucky law is, essentially, a punitive action. The tort of bad faith is non-existent under our law, unless the underlying conduct is sufficient to warrant punitive damages. Absent evidence of punitive conduct, an insurer is entitled to a directed verdict for any bad-faith claim levied against it. This explains why KUCSPA requires plaintiffs to prove that an insurer's actions during resolution of the claim were outrageous, or because of the defendant's reckless indifference to the rights of others.
>
> [The claimant] fails to offer any proof of intentional misconduct, instead suggesting that the [claim and settlement] process was a matter of interpretation, better fit for jury determination than summary judgment. . . . She offers nothing to support the assertion that [the insurer] never intended to negotiate with her fairly to reach a settlement for her claims. The KUCSPA only requires insurers to negotiate reasonably with respect to claims; it does not require them to acquiesce to a third party's demands. We are confident that the lower courts were correct in determining that summary judgment in favor of [the insurer] is appropriate at this juncture.

Hollaway, 497 S.W.3d at 739 (citation omitted).

The Supreme Court "recognized in *Wittmer*, *supra*, that to find bad faith there is a threshold, and the evidence must be sufficient to establish that a tort has occurred." *Guaranty Nat. Ins. Co. v. George*, 953 S.W.2d 946, 949 (Ky.

1997). Like the Supreme Court in *George*, "[w]e are of the opinion that [the insurer's] conduct in this case does not meet that threshold and rise to the level required to sustain an action for bad faith." *Id*.

Was there delay after the circuit court resolved the coverage question? Yes. However, "mere delay in payment does not amount to outrageous conduct absent some affirmative act of harassment or deception. *Cf. Zurich Insurance Co. v. Mitchell,* Ky., 712 S.W.2d 340 (1986). In other words, there must be 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." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452-53 (Ky. 1997), *as modified* (Feb. 18, 1999), *holding modified by Hollaway*, *supra.*

No doubt, some delay was attributable to the Christmas holidays. Thereafter, Universal submitted numerous offers of increasing amounts, each of which Messer rejected until Universal reached the limits of the liability policy. This process certainly took some time. But was the time between December 3, 2014 and the date of settlement – 145 days – such a delay as to constitute "outrageous conduct"? The answer remains "no" until Taylor's liability is established beyond dispute. That day never came. Because the case settled, it never will.

We conclude that nothing in this record creates a genuine issue of material fact regarding the propriety of Universal's claim and settlement process. And we agree with the circuit court's determination that Messer's evidence was insufficient to submit the case to a jury.[11] And here is the bottom line. Messer never eliminated the reasonable possibility that a jury could find him 100% at fault for colliding with Mountain Ford's vehicle being driven by Mark Taylor. Hence, it was reasonable, throughout the life of this case, for Universal to refute the allegation that its insured was liable for Messer's injury and damages. Messer's claim that Universal engaged in unfair claims settlement practices cannot withstand the scrutiny of this Court's review.

Because we are affirming the circuit court, there will be no trial. Therefore, there is no reason to review Messer's challenge to the circuit court's grant of Universal's motion *in limine* to exclude certain evidence.

[11] Universal also contested Messer's damages claim, just as the insurer in *Wittmer* contested damages. *Wittmer*, 864 S.W.2d at 887 ("State Farm refused to offer more than the cost of repair"). Universal was privy to the same proof of damages as Taylor whose counsel: (1) itemized Messer's compensatory damages at a little over $150,000; (2) had medical witnesses indicating Messer would have no future medical expenses; and (3) had credible proof that at least some of Messer's medical problems pre-existed the accident. (R. 2715). But we need not further address the effectiveness of that challenge because, as explained above, Taylor's liability remained, throughout this action, a reasonably debatable question.

CONCLUSION

For the foregoing reasons, we affirm the November 1, 2016 order of the Perry Circuit Court granting summary judgment in favor of Universal.

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