

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003240-MR

ANITA RENEE COSLOW TYLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JOHN WOODS POTTER, JUDGE  
ACTION NO. 95-CI-006828

STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, DYCHE, and SCHRODER, Judges.

COMBS, JUDGE: Anita Renee Coslow Tyler, the plaintiff in an automobile accident lawsuit, appeals from orders disposing of several post-judgment motions. She contends that the trial court erred by entering a judgment that conformed to her underinsured motorists coverage policy limits, by failing to enter specific findings of fact and conclusions of law with respect to its decision to enter the judgment, and by denying her motion to file an amended complaint. As we disagree with each of these contentions, we affirm.

On December 7, 1993, the appellant and Cassandra Allen were involved in an automobile collision in which Allen was the

driver of the second vehicle. The appellant suffered severe personal injuries. Allen's liability policy with The Colonial Insurance Company of California, however, had limits of only \$25,000. Allen's insurance company tendered its limits to the appellant.

Tyler was insured through State Auto Property & Casualty Insurance Company ("State Auto"), the appellee. She had two underinsured motorist coverage policies, which provided coverage of \$60,000.00 per policy for a total of \$120,000.00 in stacked underinsured motorist coverage. On December 7, 1995, Tyler filed this action against State Auto. She alleged that her damages exceeded the \$25,000.00 received from Allen's liability carrier and, therefore, that State Auto was liable to her pursuant to the underinsured motorists coverage.

At trial, the jury returned a verdict in Tyler's favor for \$233,403.08. Subsequently, appellant's counsel tendered to the court a judgment against State Auto in the amount of \$198,403.08.<sup>1</sup> The tendered judgment was entered on October 9, 1997. On November 7, 1997, however, the trial court granted State Auto's motion to vacate the former judgment in favor of an amended judgment in the amount of \$120,000.00. The court denied Tyler's subsequent motions requesting the trial court to set aside the amended judgment, to set forth specific findings of

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<sup>1</sup>This amount was computed by reducing the jury verdict by the amounts recovered from Colonial Insurance Company of California and by the amounts provided earlier to Tyler by State Auto in the form of basic reparations benefits.

fact and conclusions of law, and to permit her to file an amended complaint alleging bad faith.

State Auto satisfied the amended judgment and paid Tyler's court costs. An Order of Satisfaction, filed on December 11, 1997, appears of record. On December 15, 1997, Tyler filed a Notice of Appeal,<sup>2</sup> contending that the trial court erred by vacating the initial judgment and entering the revised judgment against State Auto in the amount of \$120,000.00. We disagree.

Tyler concedes in her brief that her policies with State Auto provided for underinsured motorists coverage limited to \$120,000.00. She argues, however, that the amount of the underinsured motorist coverage pertains only to "the issue of collectability of a judgment." (Appellant's brief at 6). As a result, she contends that the "amount of underinsured motorist coverage should not have been substituted in the judgment for the jury verdict." Id.

Tyler's action against State Auto is one sounding in contract. She readily admits that she is entitled to recover a maximum of \$120,000.00 pursuant to the clear contractual language of the policies at issue. We find that the trial court did not err by correcting the judgment to conform to the terms of the insurance contract.

It appears that Tyler has adopted her position with an eye toward a separately filed tort action against State Auto premised upon common law first-party bad faith claims. We fail

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<sup>2</sup>The appellee's motion to dismiss the appeal based upon satisfaction of the judgment was denied by another panel of this court on June 3, 1998.

to see, however, how the corrected judgment could adversely affect her action against State Auto. In Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), the Kentucky Supreme Court addressed the degree of proof necessary to sustain a claim of bad faith.<sup>3</sup> It announced the pertinent principles thus:

[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 claims 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 the facts.

Id. at 890 (quoting Justice Leibson's dissenting opinion in Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844, 846-47 (1986)). Neither the judgment nor the jury verdict rendered in this action appears to be governed by the elements outlined in Wittmer.

Next, Tyler contends that the trial court erred by failing to make findings of fact and conclusions of law following her motion requesting the court to restore the initial judgment entered on November 13, 1997. Pursuant to CR 52.01, the trial court was not required to find facts nor to state conclusions of law when rendering its decision on this post-trial motion. Consequently, there was no reversible error.

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<sup>3</sup>Wittmer involved a statutory third-party bad faith claim. However, the Court held that the same principles apply to third-party claims as to first-party claims.

Finally, the appellant contends that the trial court erred by failing to permit her to file an amended complaint asserting allegations of bad faith and violations of the Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230. However, Tyler did not file this motion until after the trial court entered judgment in her favor. Thus, this issue is not properly before us as it was not addressed as part of the final judgment from which this appeal was taken.

The court's judgment is affirmed.

ALL CONCUR.

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