

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

DONEGAL MUTUAL INSURANCE  
COMPANY,

Appellant

v.

ROBERT E. KELLY, JR., ESQUIRE AND  
KELLY, HOFFMAN & GODUTO, LLP,

Appellees

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 995 MDA 2012

Appeal from the Order of May 11, 2012,  
in the Court of Common Pleas of Berks County,  
Civil Division at No. 07-4763

BEFORE: FORD ELLIOTT, P.J.E., WECHT and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

**FILED AUGUST 05, 2013**

This is an appeal from an order entered on May 11, 2012. Appellant challenges the trial court's order granting Appellees' motion for partial summary judgment. We reverse the order granting Appellees' motion for partial summary judgment and remand for further proceedings.

Appellant filed a complaint against Appellees wherein Appellant made the following relevant averments.

Appellant is an insurance company. Appellant insured Gerald Decker under a commercial policy. Mr. Decker sustained personal injuries in a motor vehicle accident on August 22, 2003. Mr. Decker sought underinsured

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\*Retired Senior Judge assigned to the Superior Court.

motorist ("UIM") benefits under his policy ("the UIM Claim"). Mr. Decker demanded arbitration on the UIM Claim.

Appellee Kelly, Hoffman & Goduto, LLP ("Law Firm") is a law firm, and Appellee Robert E. Kelly was an attorney at the Law Firm. Appellant retained Appellees to advise it with respect to its legal rights and obligations concerning the UIM claim and to represent it in the arbitration proceedings.

Mr. Decker's policy provided a single limit of UIM coverage in the sum of \$500,000.00 per occurrence for each of three vehicles, unstacked. Mr. Decker, however, sought to stack the UIM coverage for three vehicles so that the total available UIM coverage would be \$1,500,000.00. The issue of Mr. Decker's entitlement to stack UIM coverage was never resolved during the course of litigation.

Arbitration hearings were held on November 16, 2005, and January 12, 2006. On January 14, 2006, the arbitrators entered an award in favor of Mr. Decker and against Appellant in the amount of \$2,200,000.00. On February 14, 2006, Mr. Decker's counsel filed a petition in the Court of Common Pleas of Luzerne County seeking confirmation of the arbitration award. The court then issued an order directing Appellant to file an answer to the petition within twenty days, fixing a discovery schedule, and scheduling a hearing on the petition for May 8, 2006. On May 16, 2007, the court entered an order confirming the arbitration award in the net amount of \$1,351,152.70, after allowing a credit for Mr. Decker's third party liability recovery. The court entered judgment in favor of Mr. Decker and against

Appellant in that amount. On July 13, 2006, Mr. Decker's counsel transferred the judgment to Allegheny County.

Appellant first learned of the entry of judgment upon receiving notice of the filing of the judgment in Allegheny County on July 18, 2006. In order to avoid execution proceedings, Appellant had no choice but to pay the judgment, plus interest. Appellees never informed Appellant that an arbitration hearing had occurred, that Mr. Decker had sought confirmation of the arbitration award, or that the court had confirmed the award and entered judgment against Appellant.

On July 12, 2006, Mr. Decker filed a civil action in the Court of Common Pleas of Luzerne County, naming Appellant and Donegal Group, Inc. as defendants. Mr. Decker brought a number of causes of action against Appellant, including a bad faith claim pursuant to 42 Pa.C.S.A. § 8371 ("the Bad Faith Action"). Appellees were joined as additional defendants.

Subsequent to the close of the pleadings in the Bad Faith Action, a non-binding mediation conference was held, which resulted in a settlement. Appellant agreed to settle the Bad Faith Action by paying Mr. Decker and his counsel \$2,875,000.00. Appellees did not contribute to the settlement. In the defense of the Bad Faith Action, Appellant incurred significant counsel fees and costs. The Bad Faith Action was discontinued, without prejudice, on April 20, 2007.

Appellant's complaint against Appellees contained three counts: Professional Negligence, Breach of Contract and Breach of Fiduciary Duty,

and Action for Contribution and/or Indemnification. Under its Professional Negligence count, Appellant claimed that Appellees' negligent representation of Appellant regarding the UIM Claim resulted in an excessive judgment being entered in favor of Mr. Decker and against Appellant. Appellant sought liquidated damages in the amount of \$2,911,752.87, as well as unliquidated damages, delay damages, interest, counsel fees, and costs. The figure of \$2,911,752.87 represents the sum of the settlement of the Bad Faith Action (\$2,875,000.00), the amount Appellant paid to defend the Bad Faith Action (\$27,655.26), and the amount Appellant paid Appellees to defend the UIM Claim (\$9,097.61). Preliminary Objections, 06/15/07, at ¶2.

Under its Breach of Contract and Breach of Fiduciary Duty claim, Appellant contended that, in representing Appellant in connection to the UIM Claim, Appellees breached the parties' contract and Appellees' fiduciary duty to Appellant, resulting in an excessive judgment being entered in favor of Mr. Decker and against Appellant. Appellant sought the same damages under this count as it did under its first count. Under its Action for Contribution and/or Indemnification count, Appellant sought a judgment against Appellees "holding them liable over to [Appellant] for indemnification and/or contribution for all or part of the sums paid by [Appellant] to Decker in the UIM Claim, together with the sum paid by [Appellant] in settlement of the Bad Faith Action . . . ." Complaint, 05/11/07, at 13.

Appellees eventually filed a Motion for Partial Summary Judgment and a brief in support thereof. Appellees took the position that, as a matter of law, Appellant could not recover from Appellees the amount of damages

Appellant paid to Mr. Decker in settling the Bad Faith Action or the amount of fees and costs Appellant incurred in defending against that action. Regarding Appellant's legal malpractice claim, Appellees argued, in relevant part, as follows:

Even assuming for the sake of argument that [Appellees'] representation of [Appellant] in the UIM Claim was negligent, Mr. Decker's Bad Faith Claim can only be established through the improper action or inactions of [Appellant] toward Mr. Decker as its insured. [Appellant], as an insurer, may not shift its statutory exposure and/or responsibility for its bad faith conduct toward its insured to its outside attorneys upon theories that those attorneys were allegedly negligent or allegedly breached a contract of professional representation. The exposure of [Appellant] to its insured resulted only from its "bad faith toward the insured" and not from another's alleged acts or omissions.

Motion for Partial Summary Judgment, 08/06/08, at ¶7 (citation omitted).

Appellant responded, in part, as follows:

It is denied that this action is an attempt by [Appellant] to "shift its statutory exposure and/or responsibility for its bad faith conduct toward its insured to its outside attorneys". To the contrary, this action is not an attempt by [Appellant] to shift any statutory exposure for bad faith to its attorneys. In this action, [Appellant] seeks to recover from [Appellees] the damages caused by their negligent conduct, such damages including the sums expended by [Appellant] to extricate itself from a claim for extra-contractual damages. [Appellees] cannot engage in negligent conduct which exposes the client to the risk of imposition of liability to third parties, and then claim absolute immunity from the consequences of their conduct. [Appellant] resolved Decker's extra-contractual damages claim by settlement rather than running the risk of exposure to even greater liability in a hostile forum. By way of further answer, it is averred that there has never been any judicial determination that [Appellant] engaged in any "bad faith toward the insured", or that it was liable to Decker on any theory. The issue of whether or not the negligent conduct of [Appellees] was a

substantial factor in causing [Appellant] to expend substantial sums to settle the extra-contractual damages claim is a substantial issue of material fact which precludes the grant of partial summary judgment.

Answer to Partial Motion for Summary Judgment, 09/02/08, at ¶7.

The trial court granted Appellees' motion. In support its decision, the court first concluded that Appellant's decision to settle with Mr. Decker only can be viewed as reasonable if Mr. Decker's case was legally sufficient. The court then highlighted that Mr. Decker's bad faith claim was rooted in 42 Pa.C.S.A. § 8371. The court then offered the following reasoning:

The Bad Faith Statute applies only to insurance companies who have assumed the liability of others by the issuance of an insurance policy. This means that if Decker's claim is to succeed, it must be established that [Appellant] committed bad faith, as [Appellees] do not qualify as an "insurer" and could not be held directly responsible to Decker. The question then becomes whether [Appellant] can be found to have committed bad faith solely through actions committed by its attorneys in the defense of Decker's UIM Claim. In other words, [Appellees'] actions would have to be imputable to [Appellant], such as through a principal/agent relationship.

In Pennsylvania, an attorney acting on behalf of his client, acts in the capacity of an independent contractor, not an employee or agent. . . . Accordingly, any negligent actions committed by a lawyer acting on behalf of his client cannot be imputed to the client.

Secondly, an insurer cannot use its attorney's actions as a basis to shift blame or as a defense to its own bad faith conduct. The Bad Faith Statute was promulgated to protect an insured from its insurer's unreasonable conduct, whether intentional or reckless, in denying or unduly delaying proper resolution of a claim. The insurer's conduct must be such as to "import a dishonest purpose" and requires a showing that the insurer breached its duty of good faith through some motive of self-interest or ill will. The remedies under the statute are punitive, sanctioning the

insurer for its wrongful conduct. The nature of the claim and its remedy is specific to the insurer and cannot be delegated or shifted to its attorneys acting in a representative capacity.

. . . Under the Bad Faith Statute, [Appellant] has duties to its insured which must be met. Decker's claim alleges a breach of those duties. Since [Appellees'] conduct cannot be imputed to [Appellant], Decker would not be able to establish that [Appellant] breached its duties solely by that conduct. Accordingly, [Appellant] cannot recover damages for the settlement payout. . . .

Trial Court Opinion, 10/10/08, at 9-11 (citations and footnote omitted).

In its order granting the motion, the court "entered judgment in favor of [Appellees] and against [Appellant] on [Appellant's] claim to recover its settlement of Gerald G. Decker's Bad Faith Claim for Two Million Eight Hundred Seventy-Five Thousand Dollars (\$2,875,000.00) and legal expenses of Twenty-Seven Thousand Six Hundred Fifty-Five Dollars and Twenty-Six cents (\$27,655.26) related to the defense of said claim." Trial Court Order, 10/10/08.

After engaging in more procedural tactics, the parties entered into stipulations on May 10, 2012. The parties agreed that Appellant would discontinue its claims against Appellees wherein Appellant sought damages associated with the UIM Claim. The parties further agreed that Appellant would not discontinue its claims against Appellees wherein Appellant sought to recover damages from its settlement of the Bad Faith Action and related expenses. The parties lastly agreed that the stipulation was intended to finalize the litigation in order to render the order granting the motion for partial summary judgment appealable.

On May 11, 2012, the trial court entered an order approving the stipulations. Because the May 11<sup>th</sup> order disposed of all parties and of all claims, this order is a final order and thus constitutes the appealable event in this case. **See** Pa.R.A.P. 341(b)(1) (defining “final order” as an order that disposes of all claims and of all parties). Appellant timely filed a notice of appeal.

In its brief to this Court, Appellant asks us to consider one question, namely:

Did the lower court err when it granted [Appellees’] Motion for Partial Summary Judgment and held that [Appellant] is barred, as a matter of law, from collecting, in a legal malpractice action arising out of [Appellees’] negligent defense of [a UIM] claim brought against [Appellant] by one of its insureds, the amount paid by [Appellant] to settle a subsequent lawsuit brought by the insured with sought to recover extra-contractual damages, including “bad faith” damages under 42 Pa. C.S. §8371, and arose out of the UIM claim.

Appellant’s Brief at 5.

Generally speaking, Appellant challenges the trial court’s decision to grant partial summary judgment in favor of Appellees. The principles governing our review of orders granting summary judgment can be summarized in the following manner:

The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a

court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt. An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. . . .

***Swords v. Harleysville Insurance Companies***, 883 A.2d 562, 566-67 (Pa. 2005) (citations omitted).

Appellant raises a number of arguments in support of its claim that the trial court erred by granting Appellees' motion for partial summary judgment. Appellant summarizes its most persuasive argument, which is the argument upon which we dispose of this matter, as follows:

[T]he lower court incorrectly used an agency analysis to circumscribe [Appellees'] liability in this malpractice case and misapplied inapposite and irrelevant cases to conclude that [Appellant] could not recover the amount it paid to settle the [Bad Faith Action] because only insurers can be sued for bad faith under 42 Pa. C.S. §8371 and any negligence on the part of [Appellees] in defending the insured's UIM claim could not be imputed to [Appellant] for purposes of establishing its liability under this statute. Since an attorney hired to defend a client can never be sued or directly liable to a plaintiff on any claim or theory asserted in any lawsuit, the fact that only insurers can be sued under 42 Pa. C.S. §8371 is irrelevant to the issue of the damages properly recoverable by [Appellant] in this legal malpractice claim, not the policies and principles which governed the underlying action where the alleged malpractice occurred. . . .

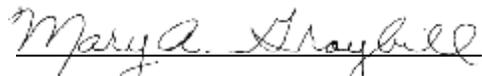
Appellant's Brief at 13-14.

Under its Professional Negligence claim, Appellant does not contend that Appellees violated 42 Pa.C.S.A. § 8371. Appellant's legal malpractice

claim has nothing to do with this statute. Instead, Appellant claims that, but for the negligent manner in which Appellees represented Appellant in connection to the UIM Claim, Appellant would not have been placed in a position to settle the Bad Faith Action and, thus, would not have suffered the damages and expenses related to that action.<sup>1</sup> Because genuine issues of material fact remain as to whether this claim is viable, the trial court erred by granting Appellees' motion for partial summary judgment.

Order granting partial summary judgment reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

  
Deputy Prothonotary

Date: 8/5/2013

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<sup>1</sup> "The elements of a legal malpractice action, sounding in negligence, include: (1) employment of the attorney or other basis for a duty; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of the harm to the plaintiff." **Wachovia Bank, N.A. v. Ferretti**, 935 A.2d 565, 570-71 (Pa. Super. 2007) (citation omitted).