IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

FILED
July 2, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31372

DAVID M. JACKSON,
Plaintiff Below, Appellee

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant Below, Appellant

Appeal from the Circuit Court of Brooke County
Honorable Arthur M. Recht, Judge
Civil Action No. 98-C-76REC

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

No. 31643

DAVID M. JACKSON,
Plaintiff Below, Appellee

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant Below, Appellant

Appeal from the Circuit Court of Brooke County
Honorable Arthur M. Recht, Judge
Civil Action No. 98-C-76REC

REVERSED AND REMANDED

Submitted: March 30, 2004
Filed: July 2, 2004

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE MAYNARD concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

JUSTICE DAVIS concurs and reserves the right to file a separate opinion.

JUSTICE MCGRAW concurs and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 1, *Miners in Gen. Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982).

2. Liability is "reasonably clear," as stated in *W.Va. Code*, 33-11-4(9)(f) [2002], when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff.

3. Whether an insurer refused to pay a claim without conducting a reasonable investigation based on all available information under *W.Va. Code*, 33-11-4(9)(d) [2002], and whether liability is reasonably clear under *W.Va. Code*, 33-11-4(9)(f) [2002] ordinarily are questions of fact for the jury.

4. A trial verdict in which a defendant is found liable to a plaintiff for personal injuries or property damage suffered by the plaintiff is not dispositive of the issues raised in an unfair settlement practices claim brought by the plaintiff against the defendant's liability insurer pursuant to *W.Va. Code*, 33-11-4(9) [2002], in which the plaintiff alleges that the defendant's liability insurer unreasonably failed to settle the plaintiff's claims against the defendant.

5. As a general rule, an expert witness may not give his or her opinion on the interpretation of the law as set forth in *W.Va. Code*, 33-11-4(9)(a) - (o) (2002), which defines unfair claim settlement practices; the legal meaning of terms within that code section; or whether a party committed an unfair claim settlement practice as defined in that code section. Rather, it is the role of the trial judge to instruct the jury on the law.

6. "The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice." Syllabus Point 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956).

7. "The right of cross-examination is not an unlimited one and it is subject to the discretionary power of the trial court to restrict or limit such cross-examination where it is justified." Syllabus Point 5, *State v. Hankish*, 147 W.Va. 123, 126 S.E.2d 42 (1962).

8. "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Starcher, Justice:

This opinion addresses two separate appeals from the Circuit Court of Brooke County, from the same case. The two appeals have been consolidated for review. In the first case, appellant State Farm Mutual Automobile Insurance Company ("State Farm") appeals an April 24, 2002 order that granted summary judgment to the appellee, David M. Jackson, on two issues in Mr. Jackson's third-party statutory unfair claim settlement practices lawsuit against State Farm, and that denied State Farm's motion for summary judgment. For the reasons which follow, we affirm the circuit court's decision to deny State Farm's motion for summary judgment, reverse the circuit court's decision to grant Mr. Jackson's motion for summary judgment, and remand the case for further proceedings.

In the second case, appellant State Farm appeals a January 29, 2003 order that denied State Farm's motion for a new trial, in connection with Mr. Jackson's jury verdict against State Farm on the issue of whether State Farm's alleged unfair settlement practices constituted a general business practice. For the reasons that follow, we reverse and remand the case for a new trial.

I.
Facts & Background

On May 16, 1996, a vehicle driven by the appellee and plaintiff below, David M. Jackson, was struck in the rear by a vehicle driven by Teri Smoot. At the time of the

accident, Mr. Jackson either had substantially slowed or stopped his vehicle on the roadway, or partially on the roadway, on the other side of a crest or rise in the road in order to offer a ride to a pedestrian, Joseph Gonzales. Mr. Jackson was seriously injured in the collision, and his car was severely damaged. Mr. Jackson immediately filed a claim with Ms. Smoot's liability insurance company, the appellant and defendant below, State Farm.

State Farm, through a claims representative, Jim Kays, conducted an investigation of Mr. Jackson's claim. During the course of the investigation, Mr. Kays drove over the crest of the hill where the accident occurred a number of times and attempted to recreate the accident. However, Mr. Kays did not take any measurements of the accident scene, other than to approximate the length of skid marks made by Ms. Smoot's vehicle. Further, State Farm did not obtain a copy of the police report of the accident, and did not retain the services of an expert to examine the accident scene or to otherwise determine the cause of the accident. State Farm also did not take a recorded statement of the independent witness to the accident, Mr. Gonzales.

Based upon his investigation, State Farm's investigator, Mr. Kays concluded that Mr. Jackson was 100% at fault, and that State Farm's insured, Ms. Smoot, was not liable for the collision. Mr. Kays determined that Mr. Jackson had improperly stopped his vehicle on a public highway, and that his stopped vehicle was not visible to Ms. Smoot as she approached the crest of the hill. Accordingly, on May 21, 1996, five days after the accident, State Farm notified Mr. Jackson that it was denying his claims arising from the accident.

On April 30, 1998, Mr. Jackson filed a negligence action against Ms. Smoot. Contemporaneously, Mr. Jackson filed lawsuit against State Farm, alleging that State Farm had illegally engaged in unfair claim settlement practices in violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-4(9)(f), which prohibits "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

Prior to the suit being filed, State Farm had calculated that the appellee's fault for the collision was 100%, and Ms. Smoot's fault was 0%. Subsequent to the suit's filing, a claims manager for State Farm, Mary Adkins, calculated that Ms. Smoot's fault was as high as 49%. A writing reflecting this assessment is contained in the claim file.

On August 3, 1999, Mr. Jackson offered to settle his claims for $35,000.00, but State Farm rejected the offer. Then, by a letter dated August 11, 1999, from the defense attorneys employed by State Farm to represent Ms. Smoot, State Farm learned that at the time of the accident, a portion of Mr. Jackson's vehicle was visible to Ms. Smoot prior to her arrival at the rise in the road. This assessment was contrary to the assessment made by Mr. Kay.

It was not until November 15, 1999, that a State Farm section manager, Don Dooley – who was also the boss of claims manager Mary Adkins – examined the claim file. Mr. Dooley assessed the relative degrees of fault of the parties, and handwritten notes in the claim file indicate that he believed that Ms. Smoot's fault was as high as 60%; that the appellee's damages were between $12,500.00 and $17,500.00; and that State Farm should

make an offer as high as $10,500.00. Ms. Adkins later testified that, despite Mr. Dooley's assessment, she had no intentions of making any settlement offers to the appellee.

On January 30, 2001, State Farm made two separate offers of settlement – $10,500.00 and $15,000.00, both of which Mr. Jackson rejected. As a result, the personal injury action was tried before a jury between February 5 and 7, 2001. The jury assessed 90% of the negligence against Ms. Smoot, and 10% against Mr. Jackson and awarded Mr. Jackson $73,288.36 in damages.

Subsequently, Mr. Jackson amended his complaint against State Farm to include allegations of additional unfair claim settlement practices in violation of *W.Va. Code*, 33-11-4(9)(d) which prohibits "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information."[1]

After substantial discovery, the parties filed motions for summary judgment. By an order dated April 24, 2002, the circuit court granted Mr. Jackson's motion for summary judgment on the issues of State Farm's alleged violation of *W.Va. Code*, 33-11-4(9)(d) and (f). The circuit court concluded, as a matter of law, that State Farm had failed to conduct a reasonable investigation based upon all available information, and that State Farm did not attempt in good faith to effectuate a prompt, fair, and equitable settlement after

[1]Mr. Jackson also alleged a violation of *W.Va. Code*, 33-11-4(9)(g), but the circuit court dismissed this claim after finding that subpart (g) applies only to first-party claims.

liability became reasonably clear. In the same order, the circuit court denied State Farm's motion for summary judgment.[2]

Mr. Jackson's unfair settlement practices claims against State Farm ultimately went to trial on the questions of whether State Farm's violations of *W.Va. Code*, 33-11-4(9) constituted a general business practice[3] under the statute, and whether punitive damages should be awarded. At the conclusion of the trial, which was conducted from May 28, 2002 through May 31, 2002, and June 4, 2002 through June 6, 2002, the jury answered both questions in the affirmative. The jury awarded Mr. Jackson $39,000.00 in damages for attorney fees and costs and $50,000.00 in damages for annoyance and inconvenience. The jury also assessed punitive damages against State Farm in the amount of $1,250,000.00. In an order dated January 29, 2003, the circuit court denied State Farm's motions for a new trial.

State Farm now appeals the circuit court's April 24, 2002 order granting summary judgment on Mr. Jackson's behalf. State Farm also appeals the circuit court's January 29, 2003 order denying State Farm's post-trial motions.

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[2]On May 13, 2002, State Farm filed a petition for appeal of the circuit court's summary judgment order with this Court, and moved to stay the underlying proceedings pending resolution of the appellate proceedings. By an order dated May 23, 2002, this Court refused the motion for a stay of proceedings with leave to appeal the circuit court's April 24, 2002 order, incident to any petition for appeal of a final judgment once entered.

[3]This Court has held that "[m]ore than a single isolated violation of W.Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of 'a general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action." Syllabus Point 3, *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).

II.
Standard of Review

State Farm asserts that the circuit court erred both in denying its motion for summary judgment and in granting Mr. Jackson's motion for summary judgment. Our review of these issues is *de novo.* Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo.*").

III.
Discussion
A.
Summary Judgment Order

Critical to the circuit court's summary judgment on behalf of Mr. Jackson was its conclusion of law as to the definition of the words "reasonably clear" contained in *W.Va. Code*, 33-11-4(9)(f), which states:

> No person shall commit or perform with such frequency as to indicate a general business practice any of the following . . . Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]

According to the circuit court, "[l]iability is reasonably clear when a reasonable person with knowledge of the relevant facts and law would have concluded[,] that it was more likely than not that the insured . . . was more than 50% at fault for the accident."

This Court has not previously addressed the meaning of "reasonably clear" as used in *W.Va. Code*, 33-11-9(f). Concerning our construction of statutory terms, we have said that "[i]n the absence of any definition of the intended meaning of words or terms used

in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 1, *Miners in Gen. Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982).

Based upon our determination of the commonly accepted meaning of "reasonably clear," we believe that it means something more than the circuit court's definition of "more likely than not." The word "clear" ordinarily is defined as "evident" or "plain." *Random House Webster's Unabridged Dictionary* 383 (2nd ed. 1998). According to *Black's Law Dictionary* 227 (5th ed.1979), "clear" means "[o]bvious. . . [p]lain, evident, free from doubt or conjecture[.]" Consistent with this definition of "clear" is its meaning in our standard of proof known as "clear and convincing evidence." This standard means "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence[.]" *Black's Law Dictionary* 457.

The circuit court's construction of "clear," however, conforms to the commonly accepted meaning of "preponderance of the evidence" which is "more likely than not." As indicated above, this is a lesser standard than "clear and convincing." *See Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (stating that "[p]roof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.").

In addition, other courts have construed the words "reasonably clear" in an unfair trade practice statute to demand some degree of certainty. In *American Universal Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 1993 WL 818614 *22 (Mass.Super. 1993), the court reasoned:

> "Reasonably *clear*" seems to call for a higher level of certainty than "reasonably *likely*" would. The legislative choice of the word "clear" seems to suggest that the matter has reached a point where reasonable minds could not honestly differ. Liability need not be absolutely certain, or beyond reasonable doubt, but it must be "clear" enough that reasonable people would agree about it. Put conversely, if there is room for objectively reasonable debate about whether liability exists, then it is not "reasonably clear."

In *Demeo v. State Farm Mut. Auto. Ins. Co.*, 38 Mass.App.Ct. 955, 649 N.E.2d 803 (1995), the court found that "reasonably clear" means that a "reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff."

Based on the reasoning above, we now hold that liability is "reasonably clear," as stated in *W.Va. Code*, 33-11-4(9)(f) [2002], when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff.

We have thus far determined that the circuit court used the wrong legal standard in determining whether liability was reasonably clear pursuant to *W.Va. Code*, 33-11-4(9)(f). We also believe that the circuit court erred in determining as a matter of law an issue that is generally a jury question. *See Pena v. State Farm Lloyds*, 980 S.W.2d 949, 955

(Tex.Ct.App. 1998) (holding that "[w]hether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is . . . a question for the fact finder"); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (ruling that "whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder"); *Financial Review Services, Inc. v. Prudential*, 50 S.W.3d 495, 504 n. 6 (Tex.Ct.App. 1998), *affirmed by* 29 S.W.3d 74 (Tex. 2000) (noting that "[w]hether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a fact question" (citation omitted)). In Syllabus Point 2 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), we held, in part, that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party[.]" We explained in *Williams* that:

> In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson [v. Liberty Lobby, Inc.*, 477 U.S. [242] at 255, 106 S.Ct. [2505] at 2513, 91 L.Ed.2d [202] at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom" *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951).

194 W.Va. at 59, 459 S.E.2d at 336. In the instant case, we believe that a reasonable jury could draw different conclusions on the issue of whether State Farm's insured's liability was reasonably clear.

For the same reason, we find that the circuit court erred in ruling as a matter of law that State Farm failed to conduct a reasonable investigation pursuant to *W.Va. Code*, 33-11-4(9)(d). Again, the reasonableness of an insurer's investigation is a jury question because jurors can often draw different conclusions from the evidence. *See Bobick v. U.S. Fidelity & Guar. Ins. Co.*, 57 Mass.App.Ct. 1, 3-4, 781 N.E.2d 8, 10 (2003), *affirmed by* 439 Mass. 652, 790 N.E.2d 653 (Mass. 2003) (determining that "[w]hether an insurer has conducted an adequate investigation before denying a claim, whether liability has become reasonably clear, and whether a settlement offer is reasonable are factual determinations" (citations omitted)). Accordingly, we hold that whether an insurer refused to pay a claim without conducting a reasonable investigation based upon all available information under *W.Va. Code*, 33-11-4(9)(d) [2002] and whether liability is reasonably clear under *W.Va. Code*, 33-11-4(9)(f) [2002] ordinarily are questions of fact for the jury.

We further find that the circuit court's conclusion that "[l]iability against State Farm's insured was reasonably clear at least as of the time the jury returned its verdict on February 7, 2001" was error. The fact that a jury finds an insured liable after the insurer contested liability simply is not dispositive of the question whether liability was reasonably clear. We agree with the reasoning of the Massachusetts appellate court in *Bolden v. O'Conner Café of Worchester, Inc.*, 50 Mass.App.Ct. 56, 734 N.E.2d 726 (2000). In *Bolden*, the plaintiff in a dramshop case obtained a jury verdict in her favor. She then settled with the defendant dram shop and received an assignment of the defendant's claim against its liability insurer. The plaintiff and defendant then sought to dismiss the defendant's appeal

in the dram shop trial verdict, but the defendant's liability insurer sought to intervene to prosecute the appeal, arguing that in a separate unfair claims practices suit, it would be unable to reopen the issue of the defendant-insured's liability. The appellate court affirmed the trial judge's denial of the insurer's motion to intervene.

The appellate court first characterized the insurer's argument as follows:

> Were the [insurer] able to appeal successfully, the argument goes, with the result that [insured] was no longer liable, then the [insurer] would be home free in the . . . lawsuit it faces for unfair settlement practices. The [insurer] explains it thus: it could not be faulted in the [unfair settlement practices] case for not having made fair offers in the tort case once [insured's] liability became reasonably clear because [insured] never was liable at all and its liability, accordingly, could never have been reasonably clear.

50 Mass.App.Ct. at 63, 734 N.E.2d at 732 (footnote and citation omitted). In rejecting this argument, the court explained:

> The issues to be determined in the [unfair settlement practices] claim do not in fact concern [defendant-insured's] actual liability. The [insurer's] settlement practices could be entirely without fault and the [insurer] accordingly immune from [unfair settlement practices] liability, yet the dramshop jury could still have found [defendant-insureds] liable for dramshop liability. The [insurer] need not show at the [unfair settlement practices] trial that [defendant-insured] was without fault. What the [insurer] must instead do there is show that its settlement offers in the dramshop case were reasonable and made in good faith, given its own knowledge at the time of the relevant facts and law concerning the [plaintiffs'] claim. The resolution of the [unfair settlement practices] claim, including the issue of bad faith, will depend upon a factual determination of the [insurer's] knowledge and intent. Accordingly, the [insurer] will not need to attack collaterally the dramshop liability judgment in order to prove in the [unfair settlement practices] case that [defendant-insured] was not actually liable and therefore that the [insurer]

> is also not liable for unfair settlement practices. Rather, the [insurer] need only demonstrate that [defendant-insured's] liability was not "reasonably clear" to the [insured], *not* to the jury that heard the dramshop liability case.
>
> Otherwise put, notwithstanding what the dramshop liability jury concluded about [defendant-insured's] liability, what matters in the [unfair settlement practices] case is whether the [insured] reasonably believed that [defendant-insured's] liability was not clear, or was unreasonable in holding that belief. "So long as the insurer acts in good faith, the insurer is not held to standards of omniscience or perfection; it has leeway to use, and should consistently employ, its honest business judgment." *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990). Because [defendant-insured's] actual liability will not be "retried" in the [unfair settlement practices] suit, we conclude that the [insurer] will be able to defend itself without impairment on the relevant issues in the [unfair settlement practices] suit.

50 Mass.App.Ct. at 66-67, 734 N.E.2d at 734-35 (footnotes and citations omitted).

Accordingly, we hold that a trial verdict in which a defendant is found liable to a plaintiff for personal injuries or property damage suffered by the plaintiff is not dispositive of the issues raised in an unfair settlement practices claim brought by the plaintiff against the defendant's liability insurer pursuant to the *W.Va. Code*, 33-11-4(9) [2002], in which the plaintiff alleges that the defendant's liability insurer unreasonably failed to settle the plaintiff's claims against the defendant.

In sum, in the instant case, the circuit court used the wrong legal standard and improperly decided as a matter of law that liability was reasonably clear when this was an issue for the jury. The circuit court also improperly decided as a matter of law the issue of whether State Farm failed to conduct a reasonable investigation. Finally, the circuit court

erred in placing too much weight on Mr. Jackson's jury verdict against Ms. Smoot in the underlying negligence action in determining that liability was reasonably clear. Therefore, we find that the circuit court erred in granting summary judgment to Mr. Jackson on his claims under *W.Va. Code*, 33-11-4(9)(d) and (f), and we reverse and remand that portion of the circuit court's April 24, 2002 order.

However, we find that the circuit court properly denied State Farm's motion for summary judgment. Again, the facts of this case indicate that it is not susceptible to a summary judgment on behalf of either party on the issues of whether State Farm conducted a reasonable investigation and whether liability was reasonably clear. Instead, these are issues which must be decided by a jury under the specific facts of this case. Accordingly, we affirm the circuit court's April 24, 2002 order to the extent that it denied State Farm's motion for summary judgment.

B. *Trial Issues*

State Farm raises several alleged errors in the unfair settlement practices trial which may again become issues on remand, and we find it necessary to address these alleged errors.

First, State Farm alleges error concerning the testimony of Mr. Jackson's expert witness, Roger Diaz. Initially, we note that "[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the circuit court, and the circuit court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991).

The circuit court qualified Mr. Diaz as an expert in the areas of claims handling, adjustment, and management, and State Farm has no objection to these qualifications. However, Mr. Diaz also was qualified by the circuit court to testify on the application of the Unfair Claim Settlement Practices Act, what constitutes a general business practice under the Act, and actual malice. As a result of his qualification in the latter three areas, Mr. Diaz was permitted to testify that State Farm committed multiple violations of the Act and that it did so maliciously. To this State Farm objects.

We agree with State Farm that the circuit court abused its discretion in permitting Mr. Diaz to testify as an expert on the application of the Unfair Claim Settlement Practices Act, what constitutes a general business practice under the Act, and actual malice.

> As a general rule, an expert witness may not give his [or her] opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. So an expert may not testify as to such questions of law as the interpretation of a statute . . . or case law . . . or the meaning of terms in a statute . . . or the legality of conduct.

32 C.J.S. *Evidence* § 634, at 503-04 (1996) (footnotes omitted). *See also* John W.Strong, *McCormick On Evidence*, Vol. 1 §12, p. 53 (1999) (stating that "[r]egardless of the rule concerning admissibility of opinion upon ultimate facts, at common law[,] courts do not allow opinion on a question of law, unless the issue concerns foreign law." (Footnotes omitted.)).

However, the statement in 32 C.J.S. *Evidence* § 634, that the general rule provides that an expert witness is not permitted to state a legal conclusion, it is modified somewhat if the legal issue is raised in such a way as to become a necessary operative fact. *See Terrell v. Reinecker*, 482 N.W.2d 428, 430 (1992). Furthermore, an expert witness "may properly state an opinion on an issue of fact, and may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." 32 C.J.S. *Evidence* § 634, at 506.

Also, according to Rule 704 of the West Virginia Rules of Evidence, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." This Court has stated that "[t]his rule is applicable both to lay and expert witnesses. Based on the clear import of this rule, a motion made solely on the basis that such testimony involves the ultimate issue is meritless. Instead, the point to focus on is whether an opinion is 'otherwise admissible.'" *Jones v. Garnes*, 183 W.Va. 304, 306, 395 S.E.2d 548, 550 (1990). Testimony concerning the applicable law would not be otherwise admissible under W.Va.R.Evid. 702 which permits expert testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue." This is because testimony on the applicable law does not assist the jury in determining a *fact* in issue nor does it assist the jury in understanding the evidence.

Finally, expert testimony concerning the applicable law is not otherwise admissible because it is superfluous. "It is a general rule of law that it is the duty of the jury

to take the law from the court and to apply that law to the facts as it finds them from the evidence. The [jury] instructions are the law of the case." *Nesbitt v. Flaccus*, 149 W.Va. 65, 77, 138 S.E.2d 859, 867 (1964) (citation omitted).

> The trial judge is the "sole source of the law," and witnesses should not be allowed to testify on the status of the law, just as counsel are forbidden to argue law to jurors. Hearing statements of "the law" from several sources would not be helpful to jurors.
> . . .
> . . . [A]n expert's testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.
>
> Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the "expert" in the particular branch of the law knows more than the judge – surely an impermissible inference in our system of law.
>
> Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702[.]

2 Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers* § 7-4(B), pp. 7-78 - 7-79 (2000).

Accordingly, we now hold that as a general rule, an expert witness may not give his or her opinion on the interpretation of the law as set forth in *W.Va. Code*, 33-11-4(9)(a) - (o) [2002], which defines unfair claim settlement practices; the legal meaning of

terms within that code section; or whether a party committed an unfair claim settlement practice as defined in that *Code* section. Rather, it is the role of the trial judge to instruct the jury on the law. Based on this rule, we believe that it was clearly wrong for the circuit court to permit Mr. Diaz to testify that State Farm's actions violated the Unfair Claim Settlement Practices Act or that its actions constituted a "general business practice" under the Act. While Mr. Diaz may testify to ordinary practices of claims adjustment and settlement within the insurance industry, and whether State Farm's conduct in the instant case conformed to those ordinary practices, he may not testify as to the legal consequences of that conduct.

We also find that it was improper for Mr. Diaz to testify that the conduct of State Farm's agents and employees indicated the existence of actual malice. Again, this testimony is not necessarily inadmissible under Rule 704 which permits testimony on an ultimate issue to be decided by the jury. However, the testimony *is* inadmissible under Rule 702 simply because it does not assist the trier of fact to understand the evidence or to determine a fact in issue. After the jurors are informed of industry practices of claims adjustment and settlement, the nature of State Farm's conduct in the instant case, and the applicable law concerning malice, they are as capable as Mr. Diaz to determine whether State Farm's conduct indicates the existence of malice. Therefore, Mr. Diaz's opinion on this issue does not assist the jury but rather is merely cumulative. Further, because Mr. Diaz has been recognized as an expert, there is a danger that jurors may consider him more qualified to determine the issue of malice than they are.

The second issue raised by State Farm is that the circuit court erred in refusing to allow State Farm's counsel to make full inquiry of Mr. Diaz regarding his lack of statistical data to support his opinion that State Farm violated the Unfair Claim Settlement Practices Act as a general business practice. We find no merit to this alleged error.

A rule of this Court is that "[t]he extent of the cross-examination of a witness is a matter within the sound discretion of the circuit court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice." Syllabus Point 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956). Moreover, "[t]he right of cross-examination is not an unlimited one and it is subject to the discretionary power of a circuit court to restrict or limit such cross-examination where it is justified." Syllabus Point 5, *State v. Hankish*, 147 W.Va. 123, 126 S.E.2d 42 (1962). In its decision to restrict or limit cross-examination, the circuit court may consider such factors as "the importance of the evidence to the [party's] case, [its] relevance . . . and the danger of prejudice, confusion, or delay raised by the evidence sought to be adduced." *State v. Bradshaw*, 193 W.Va. 519, 541, 457 S.E.2d 456, 478 (1995).

During the direct examination of Mr. Diaz, he testified of several specific cases to show that State Farm's alleged unfair settlement practices in Mr. Jackson's claim constituted a general business practice. On cross-examination, State Farm's counsel elicited testimony from Mr. Diaz that he did not know how many claims State Farm handles in a year in its Wheeling office, its Maryland office, in West Virginia, in the Eastern Seaboard region, and in the entire United States. State Farm's counsel also elicited testimony from Mr. Diaz

that he had not conducted a statistical analysis to determine how many "number of claims it would take to be measured against the number of violations of an act before it becomes statistically valid."

This Court has not indicated that a statistical analysis is necessary to prove a general business practice under *W.Va. Code*, 33-11-4(9). In *Dodrill v. Nationwide Mutual Ins. Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996), we discussed the evidence necessary to show a general business practice as follows:

> We perceive that the discussion of a "general business practice" in our past cases has generally addressed the question in terms of numbers, e.g., the number of claims in which the same practice has been used, the number of violations of *W.Va. Code*, 33-11-4(9) shown by the evidence, and the number of scenarios. . . . [T]hose cases make clear that the employment of a single, particular forbidden practice in the handling of several claims can define a general business practice[.]

201 W.Va. at 13, 491 S.E.2d at 13. In addition, in *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), we indicated that "proof of several breaches by an insurance company of W.Va. Code, 33-11-4(9), would be sufficient to establish . . . a general business practice[,]" and we further suggested that,

> Proof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claims agents, or from any person who is familiar with the company's general business practice in regard to claim settlement. Such information is, of course, subject to discovery, and it appears that the Legislature intended under W.Va. Code, 33-11-4(10), to require insurance companies to maintain records on complaints filed against it.

167 W.Va. at 610, 280 S.E.2d at 260 (footnote omitted).[4]

Therefore, in view of our applicable law on the establishment of a general business practice under *W.Va. Code*, 33-11-4(9), we do not believe that the circuit court abused its discretion in limiting State Farm's cross-examination on the issue of statistical analysis. We also believe that State Farm's cross-examination of Mr. Diaz was sufficient to challenge Mr. Diaz's factual support for his assertion that State Farm had engaged in a general business practice of unfair settlement practices.[5]

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[4]We also have made clear that a plaintiff can prove a general business practice by showing several unfair settlement practices in the same claim. We held in Syllabus Point 4 of *Dodrill* that:

> To maintain a private action based upon alleged violations of *W.Va. Code*, 33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of *W.Va. Code*, 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event.

[5]State Farm also complains that the circuit court erred in prohibiting State Farm's expert, Don Kelley, from testifying as to whether State Farm violated the Unfair Claim Settlement Practices Act as a general business practice. The record shows that in a pre-trial ruling, the circuit court said that Mr. Kelley would not be permitted to testify that State Farm's agents and employees did not act with malice because State Farm could bring in such evidence through the testimony of its agents and employees. The circuit court indicated that it would revisit this issue after Mr. Diaz testified. However, State Farm did not proffer Mr. Kelley as a witness at trial. In light of our decision above that expert witnesses should not offer testimony on the absence or presence of malice, we do not find it necessary to address this alleged error.

State Farm next contends that the circuit court erred in permitting Mr. Diaz to offer testimony of other actions filed against State Farm. According to State Farm, the admission of this evidence invited the jury to punish State Farm based on the conduct described in the other cases in violation of the due process clause of the Fourteenth Amendment, and the value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. State Farm also asserts that under *Jenkins* and its progeny, the only subsections of the Unfair Claim Settlement Practices Act under which Jackson should have been permitted to introduce evidence relating to a general business practice of handling claims of other insureds would have been violations under subsections (d) and (f).

The record shows that Mr. Diaz testified to four cases in West Virginia involving State Farm in which, in his opinion, the same type of unfair conduct was involved. We do not believe that the circuit court abused its discretion in permitting this evidence to be admitted. As mentioned above, in *Jenkins* this Court indicated that a plaintiff may show a general business practice by presenting proof of other violations by the same insurance company obtained by other claimants and attorneys or through discovery from the defendant insurance company. This appears to be what Mr. Jackson did in this case in order to prove a general business practice.

We have held that "[r]ulings on the admissibility of evidence are largely within a circuit court's sound discretion and should not be disturbed unless there has been an abuse

of discretion." Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983). In addition,

> [a]lthough Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

Syllabus Point 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). In the instant case, the circuit court carefully instructed the jury that evidence relating to other cases against State Farm was offered for the sole purpose of proving the general business practice of State Farm and should not be considered to determine whether State Farm committed unfair settlement practices against Mr. Jackson. Therefore, we do not believe that the circuit court abused its discretion in its admission of four other cases in West Virginia involving State Farm.[6]

Next, State Farm avers that the circuit court erred in admitting evidence of conduct by the insured's defense counsel in the underlying tort case in support of the

[6]State Farm also alleges error in the admission of evidence of the Utah case of *Campbell v. State Farm*, 65 P.2d 1134 (2001), *reversed and remanded by* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), which was introduced by Mr. Jackson during trial as evidence of State Farm's general business practice. However, the circuit court subsequently instructed the jury that the United States Supreme Court had agreed to review that case and because its judgment was not final, the jury should not consider that case on the issue of a general business practice.

argument that defense counsel was the agent of State Farm for the purpose of imputing bad faith conduct to State Farm. Mr. Jackson denies that litigation conduct was admitted at trial as evidence of State Farm's bad faith. Rather, says Mr. Jackson, all such evidence was for the sole purpose of allowing him to convey to the jury how State Farm's denial of his claims and the resulting litigation caused annoyance, inconvenience, distress, anguish, and worry.

Without having to decide whether or not the litigation conduct of an attorney was improperly admitted below, we note that recent decisions of this Court address this very issue and their principles should be applied in a retrial. In the recent case of *Rose v. St. Paul Fire and Marine Ins. Co.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31317, June 25, 2004), we held in Syllabus Point 5 that "[a] defense attorney who is employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance. The defense attorney is therefore not directly subject to the provisions of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to - 10." Also, "[w]hen an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney's ethical obligations are owed to the insured and not to the insurance company that pays for the attorney's services." Syllabus Point 7, *Barefield v. DPIC Companies, Inc.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31226, June 25, 2004). Therefore, generally the lawyer for the insured is not subject to the Unfair Trades Practices Act, of which the Unfair Claim Settlement Practices Act is a part, and he or she is not an agent of the insurer so that his or her conduct may be imputed to the insurer. We made clear in Syllabus Point 10 of *Barefield*:

> An insurance company cannot be held liable under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to 10, for the actions of a defense attorney retained to defend an insured, when the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured, and are not otherwise relied upon or ratified by the insurance company in a manner contrary to the Act.

However, we also held that "[t]he conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10." Syllabus Point 9, *Barefield*. Further, we stated in *Rose*, *supra*, in Syllabus Point 6, that:

> A claimant can establish a violation of the West Virginia Unfair Trade Practices Act, *W.Va. Code*, 33-11-1 to -10, by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.

We believe that this law adequately addresses any issue of litigation conduct which may arise in a retrial.

Finally, State Farm alleges several errors in connection with the award to Mr. Jackson of punitive damages. We decline to address these alleged errors. However, on remand, should the issue of punitive damages again arise the circuit court should assess any punitive damage award in light of this Court's holdings in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366, (1993) and *Garnes v. Fleming Landfill*, 186 W.Va. 656, 413 S.E.2d

897 (1991), and the holdings of the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (which was decided since the unfair settlement practices trial below).[7]

IV.
Conclusion

For the foregoing reasons, we affirm the April 24, 2002 order of the Circuit Court of Brooke County to the extent that it denied State Farm's motion for summary judgment on the issues of State Farm's violation of *W.Va. Code*, 33-11-4(9)(d) and (f) and punitive damages. However, we reverse the circuit court's order to the extent that it granted summary judgment to David M. Jackson on the issues of State Farm's violation of *W.Va. Code*, 33-11-4(9)(d) and (f).

Likewise, we reverse the January 29, 2003 order of the Circuit Court of Brooke County that denied State Farm's motion for a new trial.

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[7]Other issues raised by State Farm are that the circuit court erred in refusing to strike a prospective juror for cause in light of his comments of potential bias in favor of Mr. Jackson; the circuit court erred in denying State Farm's motion for a mistrial where State Farm was prohibited from conducting a meaningful *voir dire*; and the circuit court erred in refusing to grant a mistrial based on Mr. Jackson's counsel's use of the "golden rule" argument in his closing argument. Finally, State Farm urges application of the cumulative error doctrine. Because we reverse the trial verdict on other grounds and remand for a new trial, we find it unnecessary to address these issues. Finally, State Farm alleges several errors in the circuit court's refusal to give numerous jury instructions proposed by State Farm. These alleged errors are raised absent supporting arguments and case law and will not be addressed by the Court.

We remand this matter for proceedings not inconsistent with this opinion.

No. 31372 – Affirmed, in part, reversed, in part, and remanded.

No. 31643 – Reversed and remanded.