

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA 07-1277

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY

APPELLANT

V.

CHRISTOPHER JONES

APPELLEE

**Opinion Delivered** September 17, 2008

APPEAL FROM THE NEVADA  
COUNTY CIRCUIT COURT,  
[NO. CV2006-12-1]

HONORABLE RANDY WRIGHT,  
JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

State Farm Mutual Automobile Insurance Company has appealed from a judgment entered against it in favor of its insured, appellee Christopher Jones, who sued it for underinsured motorist (UIM) benefits. State Farm later paid the UIM benefits. It appeals from the circuit court's award of a penalty, interest, and attorney's fees totaling \$12,545.91 for its failure to timely pay benefits. Arkansas Code Annotated § 23-79-208(a)(1) (Supp. 2007) provides that if an insurer wrongfully refuses to pay benefits under an insurance policy, the insured may recover the overdue benefits, twelve-percent damages upon the amount of the loss, and reasonable attorney's fees. *Northwestern Nat'l Life Ins. Co. v. Heslip*, 309 Ark. 319, 832 S.W.2d 463 (1992). Appellant challenges the award in its entirety, and in the alternative, the reasonableness of the attorney's fees awarded. We affirm the circuit court's decision.

Appellee and his wife were involved in an accident with a vehicle driven by Bobbie Jones on February 12, 2005. They sued Ms. Jones in the Nevada County Circuit Court on March 13, 2006. Ms. Jones's insurance carrier offered to pay appellee its liability limits of \$25,000. On March 22, 2006, appellee notified appellant that Ms. Jones's insurer had made this offer and requested that appellant let him know within thirty days if it would pay his UIM limits of \$25,000.

On April 26, 2006, appellee amended his complaint to include appellant as a defendant, claiming UIM motorist benefits. Appellee accepted Ms. Jones's offer on May 11, 2006, and signed the release two weeks later. In its answer to the amended complaint, appellant admitted that appellee was insured with it at the time of the collision and that the policy provided UIM motorist benefits of \$25,000, but denied that Ms. Jones was an underinsured motorist, pending further discovery.

Appellee answered appellant's interrogatories and requests for production of documents in July 2006. After many delays in scheduling, appellant deposed appellee in June 2007. On July 24, 2007, appellant offered its UIM limits to appellee. On August 1, 2007, appellee filed a motion for a penalty, interest, and attorneys' fees pursuant to Ark. Code Ann. § 23-79-208. Appellant responded that it had not denied appellee's claim; that it had not engaged in unwarranted delaying tactics in paying it; and that, after it had obtained additional information, it had promptly paid the available benefits.

On September 4, 2007, the circuit court entered judgment for appellee in the amount of \$5,045.91 in interest and a statutory penalty plus \$7,500 in attorneys' fees, for a total judgment of \$12,545.91. The court stated:

[T]his Court finds that Bobbie Jones had liability policy limits of \$25,000 and that she offered those policy limits to [appellee] on or about March 22, 2006. The Court further finds that [appellee] submitted documentation of his injuries that included over \$30,000 in medical bills to State Farm pursuant to the Arkansas Underinsured Motorist Statute, A.C.A. § 23-89-203. Also on March 22, 2006 [appellee] submitted a demand for payment of his \$25,000 underinsured motorist coverage. State Farm failed to pay those limits within thirty (30) days of receipt of that information. The Court further finds that [appellee] sued State Farm for those limits on April 26, 2006 and that State Farm filed an answer asking that the case be dismissed on May 17, 2006. The Court further finds that State Farm offered its limits on July 22, 2007 and paid them on July 31, 2007.

The Court finds that [appellee] is entitled to prejudgment interest, twelve per cent (12%) penalty and attorneys' fees pursuant to A.C.A. § 23-79-208.

A final order of dismissal was entered on October 9, 2007, from which appellant filed this appeal.

A trial court's decision on whether to award attorney's fees, a twelve-percent penalty, and interest due to an insurer's failure to timely pay benefits will not be reversed on appeal unless the trial court's decision is clearly erroneous. *Nationwide Mut. Ins. Co. v. Cumbie*, 92 Ark. App. 448, 215 S.W.3d 694 (2005).

Appellant first challenges the trial court's award of a penalty, interest, and attorney's fees under Ark. Code Ann. § 23-79-208 on the basis of its finding that it did not pay appellee the UIM limits within thirty days after appellee made his demand. Appellant first argues that it had no duty to pay UIM benefits – or to investigate appellee's claim – until the liability benefits were actually *paid*, on May 16, 2006, which was after appellee had sued appellant and

appellant had filed its answer. Appellant asserts that neither the trial court nor appellee could have expected it to pay appellee UIM benefits before his right to receive them accrued.

Arkansas Code Annotated section 23-79-208(a)(1) is not triggered *every time* a claimant has to file suit to recover the insurance proceeds, regardless of the factual circumstances. *Primerica Life Ins. Co. v. Watson*, 362 Ark. 54, 207 S.W.3d 443 (2004). The allowance of the statutory penalty and attorney's fees when an insurer, after demand, fails to pay for an insured loss within the time specified in the policy is punitive in nature and is directed against the unwarranted delaying tactics of insurers. *Cumbie, supra*. Where an agreement does not specify a time period in which action is to be taken, the losses must be paid within a reasonable time. *Id.* Appellee concedes that, because his policy with appellant did not expressly set forth the time within which it must pay claims, appellant had a reasonable time within which to do so.

The purpose of UIM coverage in this state is to supplement benefits recovered from a tortfeasor's liability carrier so as to provide compensation to the extent of the injury, subject to the policy limit. *Cumbie, supra*. Arkansas Code Annotated § 23-89-209(a)(3) (Repl. 2004) provides that its purpose is to:

enable the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injuries to or death of an insured which the insured is legally entitled to recover from the owner or operator of another motor vehicle whenever the liability insurance limits of the other owner or operator are less than the amount of the damages incurred by the insured.

Appellant contends that the policy expressly provided that it had no duty to pay until Ms. Jones's liability limits had been paid. In subheading "Coverage W" under "Limits of Liability," it provided:

4. The most we pay is the lesser of:
  - a. the difference between the amount of the *insured's* damages for *bodily injury* and amount paid to the *insured* by or for any *person* or organization who is or may be held legally liable for the *bodily injury*; or
  - b. the limit of liability of this coverage.

The policy provided that appellee had no right of action against appellant until all the terms of the policy had been met and thirty days had passed since the notice.

We agree with appellant that the policy's provision limiting its liability for UIM benefits to the lesser of the difference between the amount of the insured's damages and "the amount paid to the insured" demonstrated that an insured could not recover UIM benefits until after the tortfeasor had paid. Appellant's position is supported by case law. See *Birchfield v. Nationwide Ins.*, 317 Ark. 38, 875 S.W.2d 502 (1994); *State Farm Mut. Auto. Ins. Co. v. Thomas*, 316 Ark. 345, 871 S.W.2d 571 (1994); *Hartford Ins. Co. of the Midwest v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812 (1999); *State Auto. Ins. Co. v. Lawrence*, 358 F.3d 982 (8th Cir. 2004). We need not, however, decide this question because, as explained below, appellant took more than a reasonable amount of time to investigate the loss and pay appellee even after Ms. Jones had paid.

In appellant's next three arguments, it contends that the award was unwarranted because it did not deny appellee's claim; it conducted a reasonable investigation; and, after appellee filed suit, it legitimately defended itself. According to appellant, it never expressed, even in its answer, an intent to not pay appellee some amount of UIM benefits but simply made it clear that it lacked information necessary to determine its obligation to appellee. Appellant also argues that, because it could not determine whether the at-fault party was

underinsured until it deposited appellee, its settlement with appellee within thirty days after his deposition was reasonable. It further contends that, as in bad-faith cases, it should not be penalized for its actions taken in defending itself, and that only its pre-lawsuit actions should be considered. In such cases, none of the conduct occurring after the filing of the complaint can serve as a basis for the bad-faith claim. See *Parker v. S. Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 935 S.W.2d 556 (1996). Even if its post-suit actions could be taken into consideration, appellant contends that its attorney acted diligently in propounding discovery and moving the case to resolution. We disagree with all of these arguments.

Clearly, appellant's answer, filed two months after appellee's notice of his claim, denied liability. We have also found no support for appellant's contention that the filing of suit suspends the insurer's obligation to investigate and settle an UIM claim. The remedy provided by Ark. Code Ann. § 23-79-208 is different from a bad faith tort action. A good faith denial of liability is no defense to a claim for a penalty and attorney's fee under Ark. Code Ann. § 23-79-208. *Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 237 S.W.3d 32 (2006). Through the tort of bad faith, an insurer may be held accountable for failing to investigate and settle a claim. *Id.* The tort of bad faith does not, however, arise from a mere denial of a claim; there must be affirmative misconduct. *Selmon v. Metropolitan Life Ins. Co.*, 372 Ark. 420, \_\_\_ S.W.3d \_\_\_ (2008). To hold that an insurer could avoid a penalty by refusing to promptly pay a claim if the insured has resorted to filing suit would be contrary to the General Assembly's intent in section 23-79-208 to prevent delaying tactics by insurers.

The controlling question is whether appellant took more than a reasonable amount of time to investigate the loss and pay appellee. Arkansas Code Annotated § 23-79-208(a)(1) contemplates that the insurer shall have a reasonable time to make necessary investigation in reference to the loss and the circumstances thereof after demand. *Cumbie, supra*. In our view, the interval of time between appellee's receipt of the settlement and appellant's payment was unreasonably long. Thus, even if appellant had no obligation to pay appellee until he was paid by Ms. Jones's liability insurer, we need not reverse because fourteen months passed between the time appellee received the settlement and appellant paid him UIM benefits. This court will affirm the trial court's judgment if it reached the right result, even though it may have announced the wrong reason. *State Farm Fire & Cas. Co. v. Andrews*, 363 Ark. 67, 210 S.W.3d 896 (2005). Even the inherent delay in the discovery process does not adequately explain why it took so long for appellant to decide whether to pay the claim. Appellant's explanations for waiting so long to depose appellee and for receiving the social security records are unpersuasive. Concurrent with the discovery process, appellant had the duty to make an independent investigation of the claim based on the authorizations appellee provided. *Cumbie, supra*. With his March 22, 2006 notice to appellant, appellee sent copies of his medical records, medical bills exceeding \$30,000, a medical authorization, and proof of the liability offer and Ms. Jones's policy limits.

Additionally, appellee answered appellant's interrogatories in July 2006. In those answers, he informed appellant that he had been unable to work from February 2005 until July 2006, giving the name and location of his former employer; that he had previously earned

\$15,000 a year; that he had never made a claim for workers' compensation; that, except for this accident, he had never left his employment because of an accident or his health; that, other than this accident, he had never suffered a personal injury; and that, because of this accident, he had applied for disability benefits in August 2005. He listed the names and addresses of all of the medical practitioners he had seen as a result of this accident, and he submitted a driver's history authorization. It is true that appellee failed to submit an authorization for release of his social security records, as appellant requested in Interrogatory and Request for Production No. 31. However, appellant's attorney waited several months before making another request that he supply that authorization. Additionally, appellant has pointed to no testimony in appellee's deposition that was not cumulative to the information that it had possessed since July 2006. We therefore affirm the court's decision awarding appellee judgment under Ark. Code Ann. § 23-79-208 as not clearly erroneous.

Appellant argues in the alternative that, if this court affirms appellee's right to an award under Ark. Code Ann. § 23-79-208, the amount of attorney's fees awarded was not reasonable. It points out that the only proof on this issue consisted of appellee's attorney's testimony that he had spent approximately forty-four hours on the UIM benefits issue and that he normally billed his time at \$250 per hour. Citing no authority, appellant argues that, without supporting time slips or other verification, the attorney's testimony "is not proof . . . ." We disagree.

Our supreme court has held that attorney's fees are not allowed except where expressly provided for by statute. *Running M Farms, Inc. v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 371

Ark. 308, \_\_ S.W.3d \_\_ (2007). An award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. Given the trial judge's close familiarity with the trial proceedings and the quality of service rendered by the prevailing party's counsel, appellate courts usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Id.* The reasonableness of the attorney's fee is determined by examining the following factors: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Id.* While courts should be guided by the foregoing factors, there is no fixed formula in determining the reasonableness of an award of attorney's fees. *Id.*

The trial court did not award appellee's attorney all of the fees he requested, and it is apparent that it considered the value of his representation in light of the relevant facts. We cannot say that appellant has demonstrated an abuse of discretion in this award.

Affirmed.

GLADWIN and BIRD, JJ., agree.