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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000152-MR
AND
NO. 2001-CA-000206-MR

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

TINA RODGERS (now JOHNSON) — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 98-CI-00274

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, McANULTY, and SCHRODER, Judges.

COMBS, JUDGE: Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from a judgment of the Lincoln Circuit Court based upon a jury verdict in favor of Tina Johnson. We affirm.

Tina Johnson injured her neck, shoulder, and thumb when her car was hit from the rear by a drunk driver. Johnson's vehicle was a total loss. The tortfeasor had a minimum liability policy with Omni Insurance; Johnson had a policy with Farm Bureau which included $50,000.00 in underinsured motorist benefits. She

submitted an application (including a medical authorization form) for her no-fault coverage including personal injury protection (PIP) benefits at once, and Farm Bureau began paying Johnson's medical bills resulting from the accident. Johnson was advised by a physician's receptionist that she was also entitled to collect PIP wage loss benefits. She accordingly made inquiry of the company, and only then did Farm Bureau also begin to remit those payments.

Medical records were steadily forwarded to Farm Bureau by Johnson's medical care providers. These records tracked Johnson's extensive treatment, her several surgeries, her time off from work for pain and/or recovery; the reports indicated as early as March 30, 1998, that she had sustained a permanent injury as a result of the motor vehicle collision. All of this information was submitted to Farm Bureau as a courtesy and not as a result of any effort undertaken by the insurer to investigate and evaluate Johnson's claim.

On March 31, 1998, Johnson became aware that an upcoming shoulder surgery would exhaust her PIP benefits. On April 6, 1998, Johnson's counsel put Farm Bureau on written notice of her underinsured motorist claim. Counsel recounted that Johnson had been severely injured and that her damages would "far exceed" the tortfeasor's $25,000.00 coverage limits. Additionally, counsel advised Farm Bureau as follows:

> To date, [Johnson] has undergone a surgery to remove a bone from her thumb and a second surgical procedure to repair a torn rotator cuff shoulder injury. She has been undergoing manipulations by a chiropractor in

> Stanford without great success for back injuries.

In correspondence addressed to Gary Montgomery, Farm Bureau's claim adjuster, dated June 22, 1998, Johnson's counsel advised Farm Bureau that Omni Insurance had tendered its $25,000.00 liability limits. The letter formally demanded Johnson's underinsured coverage limits and served to confirm an earlier telephone conversation in which Johnson's counsel had demanded payment of the underinsured motorist coverage. On July 2, 1998, Farm Bureau set up a reserve account of $15,000.00.

Since Farm Bureau had made no attempt to settle Johnson's UIM claim, her counsel telephoned the company on August 3, 1998, to ask whether the company intended to pay those or any benefits under the policy. The telephone call was not answered by Gary Montgomery, the adjuster, but instead by Terry Lester, Farm Bureau's claim supervisor. Lester advised that he was taking over Johnson's file. Although he was unfamiliar with her file, Lester denied that her claim against the UIM coverage warranted any payment whatsoever. Before the telephone call ended, Johnson's counsel had threatened the company with litigation. Lester then relented somewhat and stated, "[w]ell if it will help you any, I can probably get you $10,000."

In mid-September 1998, Johnson filed suit against Farm Bureau to recover her policy benefits. As the action proceeded through discovery and ultimately on to trial, Farm Bureau never increased its settlement offer. Farm Bureau called no witnesses at trial, and it sent no representatives to hear the proof. A

jury awarded Johnson more than $98,000.00, an amount well in excess of the policy limits.

In the bad faith portion of her action against Farm Bureau, Johnson alleged that Farm Bureau had breached its agreement to provide her with UIM benefits and had engaged in unfair claims settlement practices. Johnson testified that while she initially trusted Farm Bureau to honor its obligations, she eventually suffered mental anguish and stress regarding her strained financial situation due to Farm Bureau's mishandling of her claim. Johnson's counsel testified regarding his interaction with Farm Bureau. He testified that the telephone conversation with Terry Lester indicated that Lester was completely unfamiliar with Johnson's claim and that he seemed oblivious to the fact that Johnson had suffered a severe injury as a result of the car accident. In addition, the jury was allowed to consider the training manual utilized to train Farm Bureau's claim adjusters. The training manual proposes many techniques that are not only categorically violative of dealing in good faith but are otherwise utterly repugnant as a matter of public policy.

Farm Bureau defended its position by contending that Johnson's counsel had "deviated from the normal practice [of his profession] as far as negotiating or attempting to negotiate toward a settlement of the underinsured motorist part of the case," presumably by failing to prepare and deliver a settlement package. (Deposition of Paul Hibberd, Farm Bureau's expert witness). The company contended that this alleged failure on the part of Johnson's attorney resulted in Farm Bureau's inability to

adjust the claim fairly. However, Terry Lester conceded that his duties to investigate Johnson's claim would have remained the same regardless of when or whether she had retained counsel.

After hearing the evidence, the jury found that Farm Bureau had been obligated to pay the claim; that the insurer had lacked a reasonable basis in law and in fact for denying the claim; and the company either knew that there was not a reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. See Wittmer v. State Farm Mut. Auto. Ins. Co., Ky., 864 S.W.2d 885 (1993). In addition, the jury made specific factual findings to support six violations of Kentucky's Unfair Claims Settlement Practices Act. The jury found that Farm Bureau: had failed to acknowledge and to act reasonably or promptly upon communication with respect to claims; had summarily refused to pay Johnson's UIM claim without first conducting a reasonable investigation; had failed to attempt in good faith to effectuate a settlement; had compelled Johnson to institute litigation by offering substantially less than her policy limits; had attempted to settle for far less than what its contract provisions set forth; and had failed to provide an explanation for its offer of $10,000.00 in settlement. As a result, the jury awarded Johnson $30,000.00 in compensatory damages; $1,000,000.00 in punitive damages; $16,666.00 in attorney's fees; and $2,704.00 in costs. Farm Bureau's post-judgment motions were denied, and this appeal followed.

On appeal, Farm Bureau presents four issues for our review. The company argues that the trial court permitted

Johnson's expert witnesses to testify without first having laid a proper evidentiary foundation; that it erroneously admitted testimony regarding an unrelated claim against Farm Bureau; that it gave an instruction that essentially directed the jury to find that it had refused to pay Johnson's claim; and finally, that the trial court failed to conduct a proper due-process review of the jury's verdict. We disagree with each of these assertions. In light of our resolution of the appeal, the issue regarding the avowal testimony of Carol Becknell raised on Johnson's cross-appeal need not be addressed by this opinion.

First, Farm Bureau contends that the trial court erred by permitting the expert testimony of David Dunham. Dunham worked as an insurance adjuster for 15 years in Bowling Green, Kentucky. As a supervisor, he was responsible for 22 adjusters in four states — including Kentucky. Dunham testified that while he had not adjusted claims in Lincoln County, he may have supervised claims adjusted in adjoining Casey County. When asked to apply the claims-handling procedures outlined in Farm Bureau's training manual, Dunham indicated that Johnson's claim was clearly worth more than her underinsured motorists coverage limits of $50,000.00, and that Farm Bureau had no reason to refuse to pay the claim in full.

Citing Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437 (1997), Farm Bureau contends that this expert testimony lacked a sufficient foundation to support its admissibility. In Motorists Mut., the Kentucky Supreme Court criticized the trial court's admission of expert testimony

presented by an insurance consultant from San Jose, California. That consultant testified that Motorists Mutual and Farm Bureau had acted in bad faith by failing to pay their policy limits immediately. However, the consultant admitted that he had no knowledge concerning jury verdicts in the community where the case was tried. Instead, he derived his opinion from a computer program that incorporated jury verdicts from all over the country. The court held that the admission of the consultant's testimony was in direct contravention of its holding in Manchester Ins. & Indem. Co v. Grundy, Ky., 531 S.W.2d 493 (1975), cert. denied, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 82 (1976). Grundy, 531 S.W.2d at 501, provided as follows:

> We note that in the trial of this case the two expert witnesses introduced by Grundy testified as to what amount they would consider the case worth for settlement purposes. This is irrelevant. The test of this factor is what in the opinion of the expert a jury in the same community probably would have awarded at the time of the trial on liability.

(Emphasis added).

The application of KRE[1] 702, governing the admission of expert testimony, is addressed to the sound discretion of the trial court. "A trial court's ruling on the qualifications of an expert should not be overturned unless the ruling is clearly erroneous." Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368, 378 (2000). Unlike the consultant described in Motorists Mut., supra, David Dunham did not admit that he lacked a familiarity with jury verdicts in the community where this case

[1]Kentucky Rules of Evidence.

was tried. Moreover, Dunham did not base his expert opinion on statistics gathered from around the country. Instead, he relied on his education, training, and experience and on Farm Bureau's own training manual to evaluate the claim. He cited at least ten factors from the company's manual that would have required a reasonable adjuster to place a high value on the claim. The trial court properly considered Dunham's knowledge and experience. There was no abuse of discretion in allowing his testimony. Nevertheless, if even the testimony had been erroneously admitted, such an arguable error could not have formed a basis for reversal. No objection was raised when essentially the same expert testimony was introduced by Michael McDonald[2]. Therefore, any error with regard to the admission of Dunham's testimony was harmless.

Next, Farm Bureau contends that the trial court erred by permitting Johnson to introduce testimony from Mable Raines regarding her unrelated third-party claim against a Farm Bureau insured. Raines testified that Farm Bureau initially offered her $14,000.00 to settle her personal injury claim against their insured. She indicated that Farm Bureau offered to settle the claim for its $100,000.00 policy limits only after the case had been presented to the jury. Finally, she testified that the jury awarded her more than $200,000.00. Relying on Kentucky Farm Bureau Mut. Ins. Co. v. Troxell, Ky., 959 S.W.2d 82 (1997), and

[2]Michael McDonald (Judge Michael McDonald) had been a claims adjuster for State Farm Insurance. He later served for many years on the Kentucky Court of Appeals. Thus, he had great familiarity with jury verdicts throughout Kentucky from his unique experience.

KRE 404(b), Farm Bureau contends that this testimony was inadmissible.

KRE 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts for the purpose of proving the character of a person (or a corporation in this case) in order to show action in conformity therewith on particular occasion. However, the rule provides that such evidence may be admissible if offered for some other purpose — such as proof of intent, knowledge, or the absence of mistake or accident. KRE 404(b)(1).

It is proper and permissible for a jury to consider other insurance claims in a bad faith case. In Troxell, the Kentucky Supreme Court held that evidence introduced by the plaintiff pertaining to similar litigation and involving a particular adjuster was relevant and admissible in the trial of the bad faith action. The Court observed that the plaintiff's evidence had been offered to prove that Farm Bureau was aware that the adjuster had previously used methods contrary to good-faith claim handling practices and that Farm Bureau had knowledge of and had acquiesced to a pattern of conduct practiced by its agent.

The evidence offered by Raines involved the same adjusters as those who were involved in Johnson's claim; Terry Lester also supervised the adjustment of Raines's claim. Raines's UIM case was tried in the same county, and Farm Bureau was represented by the same defense counsel. The evidence was not introduced to show the Farm Bureau's character in order to prove action in "conformity therewith." KRE 404(b). Instead,

the evidence was relevant and admissible to show that Farm Bureau was aware of the pattern and practice of its adjusters to fail to evaluate claims fairly. The evidence was also relevant and admissible to show the absence of a mistake. Farm Bureau attempted to defend its position and to explain its conduct by admitting that hindsight revealed that it had innocently mis-evaluated Johnson's claim. The disputed evidence of an all too similar "mis-evaluation" was offered to discredit Farm Bureau's theory of hindsight and to support Johnson's contention that the failure to adjust her claim properly as its own insured was rather an intentional ruse to swindle her.

The disputed evidence was also relevant and admissible to establish the necessary factors to be considered by the jury in considering whether to award punitive damages. A plaintiff must have evidence to warrant submitting a claim for punitive damages. Wittmer supra at 885. KRS[3] 411.186(2)(c)(d) provides that a jury may consider both the "profitability" and the "duration" of the misconduct. Additionally, KRS 411.186 allows a jury to consider what actions — if any — that the defendant took to remedy the misconduct. Presenting evidence of other instances of similar types of conduct demonstrated that Farm Bureau did not merely inadvertently fail to settle Johnson's claim fairly but that it had done so intentionally, conduct resulting in a highly profitable business incentive. The evidence also evinced the duration of the ongoing unfair claims settlement practices.

[3]Kentucky Revised Statutes.

Moreover, in order to award punitive damages, the jury is entitled to consider whether the wrongful conduct was part of a larger pattern of trickery, fraud, and deceit. Jansen v. American Nat'l Bank and Trust Co., Ky., 865 S.W.2d 302 (1993). Johnson offered substantial evidence to show that Farm Bureau's adjusters had been trained to disregard good-faith claims handling practices. Raines's testimony ably supported Johnson's contention that the unreasonable handling of her claim was part and parcel of Farm Bureau's systematic failure to abide by its duty of good faith and fair dealing.

We are also persuaded that Raines's testimony was admissible to refute Farm Bureau's contention that the claim would have been handled differently if Johnson's counsel had submitted a properly supported settlement package. Farm Bureau's expert witness, Paul Hibberd, testified that he prepared and submitted settlement packages as a matter of routine. However, in an ironic twist, Hibberd also happened to have represented Raines in her action against Farm Bureau. As her testimony indicated, Hibberd's preparation and submission of a settlement package to Farm Bureau had done nothing to inspire good-faith negotiations in that case. The disputed evidence supported Johnson's contention that her claim was improperly handled because of the company’s deliberate refusal to conduct a proper investigation in order to defraud her of the settlement to which she was entitled.

Next, Farm Bureau contends that an interrogatory included in the trial court's instructions improperly amounted to

directing the jury to find that Farm Bureau had refused to pay Johnson's claim, a contention that the insurer disputed. The first interrogatory submitted to the jury asked: "Did Kentucky Farm Bureau have a reasonable basis to refuse payment of Tina Johnson's claim?"

While it was stipulated that Johnson had made a claim under her policy, Farm Bureau argued to the jury that Johnson had failed to put the claim in such a posture that would have required it to pay or refuse to pay a claim. It contended that by failing to offer "reasonable proof of the fact and amount of loss realized" pursuant to requirements of Kentucky's Motor Vehicle Reparations Act (KRS 304.39-201(1)), Johnson had not triggered Farm Bureau's duty to respond to her. According to Farm Bureau, the disputed instruction unfairly eliminated that theory of its case. We disagree.

We are not persuaded that the language of the disputed interrogatory foreclosed a finding that Farm Bureau's obligation to its insured had not been effectively triggered. While Farm Bureau contends otherwise, the language of the interrogatory required the jury to consider and to evaluate its position even-handedly and fairly. It did not encourage the jury to dismiss Farm Bureau's contention that Johnson had failed to document her claim properly. If the jury had been persuaded by Farm Bureau's contention that its obligation to Johnson had never arisen, it could have found that the insurer indeed had a reasonable basis to refuse payment of her claim. The interrogatory was broadly

enough worded to allow for an appropriate response either way. There was no reversible error.

Finally, Farm Bureau maintains that the jury's punitive damage award did not comply with due process standards. We disagree.

Punitive damages may properly be imposed to further a state's legitimate interest in punishing unlawful conduct in deterring its repetition. BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). However, a decision to punish a tortfeasor by the imposition of exemplary damages is an exercise of power under color of state law that must comply with the Due Process Clause of the Fourteenth Amendment. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). "The Due Process Clause of its own force prohibits the states from imposing "grossly excessive" punishment on tortfeasors." Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 1684, 149 L.Ed.2d 674 (2001). Moreover, appellate courts may not defer to trial courts on questions regarding punitive damages. Id. We must review the amount and nature of a punitive damages award de novo. Sand Hill Energy, Inc., v. Ford Motor Co., Ky. ____ S.W.3d _____ (May 16, 2002).

In BMW, supra, the United State Supreme Court held that "[e]lementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. 559 at 574. Farm Bureau concedes

that Kentucky's Unfair Claims Settlement Practices Act gave it notice of the misconduct that might subject it to punishment. However, it contends that it was not given sufficient notice of the severity of the potential penalty. We disagree.

In Leatherman, supra, the United State Supreme Court reiterated its reliance on the three factors set forth in BMW, supra, to be considered by appellate courts in undertaking de novo review. Leatherman at 1687. In our analysis, we must consider: 1) the degree of reprehensibility of the defendant's misconduct, 2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages awarded, and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. BMW at 574-575.

The BMW Court described the degree of reprehensibility of the defendant's conduct as "perhaps the most important indicium of the reasonableness of a punitive damages award." 517 U.S. 59 at 575. As to the degree of reprehensibility of Farm Bureau's misconduct, we conclude that it was substantial indeed. As the Kentucky Supreme Court observed in Curry v. Fireman's Fund Ins. Co., Ky., 784 S.W.2d 176, 178 (1989):

> From cradle to grave individuals willingly pay premiums to insurance companies to obtain financial protection against property and personal loss. Without a reasonable means to assure prompt and bargained-for compensation when disaster strikes, the peace of mind bought and paid for is illusory.

In light of the jury's specific findings, there is no doubt that Farm Bureau was motivated by self-interest, greed, or

ill-will in the handling of Johnson's UIM claim. Farm Bureau wholly ignored and outrageously undermined the well-being of its insured in clear derogation of its contractual and statutory duties. Johnson's peace of mind was illusory or even non-existent.

Johnson had been a Farm Bureau policyholder for 17 years. By sending advertisements to her, Farm Bureau endeavored to assure that UIM coverage would prevent her from suffering financially if she were ever injured by an irresponsible driver and that Farm Bureau would help her to recover from any loss as quickly as possible since "[h]elping you is what we do best."

In stark contrast to these reassurances were the devious realities of the adjusters' training manual, which was simultaneously inculcating and encouraging Farm Bureau's adjusters to plant uncertainty in the minds of claimants; to "seize upon" any fear, anxiety, and money needs for settlement purposes; to overreach and to take advantage of the delays occasioned by litigation; and to cause intimidation by the fact that Farm Bureau had a stronger base of power in any claims situation because it controlled the money. Because it was obligated to remit Johnson's PIP benefits, Farm Bureau was in a position to evaluate its insured's dwindling financial resources and her mounting financial hardship. Farm Bureau knew that she was vulnerable — and to what an alarming degree. Nevertheless, according to the jury, it failed and refused to communicate with her properly; to investigate and evaluate her claim reasonably;

and to attempt in good faith to reach a fair settlement of her claim.

Farm Bureau caused Johnson to suffer the very fate that it promised she would avoid by purchasing its policy. When her physician advised her not to return to work, Johnson responded: "Well it's like this, I've got to go back to work [or] starve to death. . . ." Farm Bureau's conduct was a text-book example of the despicable behavior defined as the basis for an award of punitive damages. And, according to BMW, supra, "[i]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . or when the target is financially vulnerable, can warrant a substantial penalty." 571 U.S. at 576.

In addition, multiple violations are considered even more reprehensible.

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law.

BMW, supra at 576-577. At least four other juries have examined Farm Bureau's claims settlement practices and have concluded that they were illegal. See Motorists Mut. Ins. Co. supra ; Troxell, supra. Based upon our independent review of this case, we are convinced that there is more than sufficient evidence in the record with respect to the egregiousness of Farm Bureau's misconduct to support the punitive damages awarded under the first BMW criterion.

Nevertheless, the BMW Court provided the least amount of guidance on the application of its second criterion, which requires us to balance the size of the award against the degree of the injury suffered. We must consider the ratio between the size of the punitive damage award and the harm "or potential harm" that was or could have been caused by Farm Bureau's misconduct. The Court has clearly indicated that there is no bright-line test or mathematical formula to be applied in upholding any particular ratio. Higher ratios will be upheld where the aggravating factors considered above are present.

The harm to Johnson arising from Farm Bureau's conduct was considerable. She also urges us to consider the harm she might have suffered if Farm Bureau had succeeded in its wrongful conduct. Johnson argues that if she had failed to resist or to challenge Farm Bureau's bad faith effort to settle her claim,[4] she would have suffered an additional loss of more than $40,000.00. The jury found that Johnson suffered nearly $50,000.00 in actual damages, coupled with Johnson's calculations of the potential harm that she was facing. The ratio between the award of punitive damages to her actual damages was eleven to one. While the United States Supreme Court has expressly declined to set a fixed maximum ratio of punitive to actual damages, it is helpful to note that a majority of the Kentucky Supreme Court recently upheld an award of punitive damages arguably more than fifteen times greater than the actual damages

[4]To reiterate, the final offer of Farm Bureau was phrased as follows: "[I]f it will help you any, I can probably get you $10,000.00"

as being consistent with due process standards. See Sand Hill, supra. Based upon our independent review, we are satisfied and convinced that there is sufficient evidence in the record with respect to the actual harm and the potential harm caused by Farm Bureau's misconduct to support the punitive damages awarded.

The third factor to be considered is the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases. Farm Bureau argues that Kentucky statutory penalties for misconduct of the type at issue here do not authorize the award returned by the jury in this case. It also contends that previous jury verdicts failed to provide it with adequate warning that it might be subjected to a million-dollar penalty.

Farm Bureau is aware that Kentucky has a great interest in its claims-handling practices. Kentucky has enacted the Unfair Claims Settlement Practices Act, it has designated a Commissioner of Insurance to enforce the Act's provisions, and it has adopted numerous administrative regulations regarding unfair claims settlement practices. The Kentucky Supreme Court has recognized a private cause of action for damages arising from a violation of these provisions. State Farm Mut. Auto. Ins. Co. v. Reeder, Ky., 763 S.W.2d 116 (1988).

Farm Bureau is keenly aware that it risks substantial civil penalties and fines when it engages in unfair claims settlement practices. Its license to sell insurance may even be jeopardized by suspension or revocation for engaging in this sort of misconduct. It is also aware that Kentucky has not enacted

statutory limits on the imposition of punitive damages and that its courts have shown no particular reluctance or squeamishness in upholding substantial punitive damage awards where the evidence justified them. See Sand Hill, supra. In light of these factors, Farm Bureau's argument that it lacked adequate notice of the potentially severe consequences of its misconduct is simply lacking in credibility. We hold that there was more than sufficient evidence to support the jury's punitive damage award under the final criterion of the BMW factors.

The judgment of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

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