RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001420-MR
AND
NO. 2001-CA-001508-MR

GLOBE AMERICAN CASUALTY COMPANY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
ACTION NO. 97-CI-00259

GEORGE B. BOWMAN, CAROLYN BOWMAN, and
CAROLYN BOWMAN as Administratrix of the
Estates of DANIEL BOWMAN,
COURTNEY BOWMAN,
and ASHLEY BOWMAN — APPELLEES/CROSS-APPELLANTS

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

BEFORE: BUCKINGHAM and McANULTY, Judges; and JOHN D. MILLER, Special Judge.[1]

BUCKINGHAM, JUDGE: George and Carolyn Bowman were seriously injured and their three children were killed in a head-on collision in Whitley County, Kentucky, on June 24, 1996. Their claims against the other driver and their claims for

[1] Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

underinsured motorist (UIM) benefits against their insurer, Globe American Casualty Company, were eventually settled. After a jury trial, the circuit court awarded the Bowmans $349,935.02 on their claims against Globe for bad faith and unfair claims practices. This appeal by Globe followed.

At approximately 10:30 p.m. on June 24, 1996, the Bowman vehicle collided head-on with a vehicle driven by Randy Mills. George Bowman was driving the Bowman vehicle, and his passengers were his wife, Carolyn; his son, Daniel Bowman, age 17; his daughter, Courtney Bowman, age 13; and his daughter, Ashley Bowman, age 8. George and Carolyn were seriously injured, and the three children were killed. Mills survived.

The Kentucky State Police investigated the accident, and a three-part report by Trooper William Baker was completed in late October 1996 and was received by a Globe representative on November 1, 1996. The report indicated that the accident was Mills' fault. Criminal charges were not filed.

Globe insured both vehicles involved in the accident. Mills had liability coverage of $25,000 per person/$50,000 per accident. The Bowmans had policies from Globe covering two vehicles, both having $50,000 UIM coverage. The UIM coverages were stacked for a total of $100,000. Thus, there was $150,000 in total insurance proceeds from the Globe policies available to compensate the Bowmans.

Globe assigned separate claims representatives to handle the Mills policy and the Bowman policy. Karen Talmadge was assigned responsibility for the Mills policy, and Leighann Patterson was assigned responsibility for the Bowman policy. The two claims representatives reported to a single supervisor, Ken Leiner.

Globe hired Art Longnaker, an independent adjuster, to assist in processing the claims against the Mills policy. Talmadge, who handled the Mills policy, left Globe before Trooper Baker issued his final report. As a result of Talmadge's departure, Pattylyn Taueg was assigned responsibility for the Mills policy in late December 1996. Patterson, who had responsibility for the Bowman policy, hired Frank McElroy, an independent adjuster, to assist in handling the claims against the Bowman policy.

The Bowmans initially were not represented by an attorney. Instead, Mrs. Bowman dealt directly with Globe. She was assisted by her brother-in-law, Dr. Bruce Broudy, who sought the assistance of his neighbor, Guy Colson, an attorney. Dr. Broudy asked Colson for advice on how to help the Bowmans obtain the maximum amount of insurance proceeds available to them. Colson advised Mrs. Bowman that it was not likely she would need an attorney to recover the available insurance proceeds.

On July 9, 1996, Brad Freeman, an attorney retained by George Bowman to represent him due to Bowman's concern that criminal charges might be filed against him, sent a letter to Globe seeking a copy of the declaration sheet of the Mills policy. Globe never responded to the letter. On September 11, 1996, McElroy reported to Globe that Dr. Broudy was interested in resolving the claims on behalf of his sister-in-law and her family.[2] Further, with Colson's assistance, Dr. Broudy drafted and sent a letter to McElroy on October 26, 1996, demanding payment of the limits of the Mills and Bowman policies. Although McElroy forwarded this letter to Globe with a report dated October 30, 1996, Globe never responded to Dr. Broudy's letter. In early January 1997, Patterson denied Mills' claims against the Bowmans based on the Kentucky State Police report.

On February 12, 1997, the Bowmans retained Colson to represent them in connection with their claims. On February 20, 1997, Carolyn was appointed as administratrix of the estates of the children. On May 7, 1997, the Bowmans filed a civil complaint in the Whitley Circuit Court against Mills and Globe. The complaint included allegations of bad faith and violations of the Kentucky Unfair Claims Settlement Practices Act (KRS[3] 304.12-230 et seq.) against Globe. In its answer to the

[2] The record indicates that McElroy, on behalf of Globe, made initial contact with the Bowmans through Dr. Broudy.

[3] Kentucky Revised Statutes.

Bowmans' complaint, Globe denied owing the limits of the Mills policy "since the question of fault in this accident is severely disputed." Globe finally offered the full $150,000 in October 1998, nearly a year and one-half after litigation had been commenced.

The Bowmans' claims for bad faith and violations of the Kentucky Unfair Claims Settlement Practices Act went to trial in April 2001. The court first instructed the jury that in order to find for the Bowmans, it must first find that Globe was obligated to pay each claim under the terms of the policies, that Globe lacked a reasonable basis in law or in fact for denying the Bowmans' claims, and that Globe either knew there was no reasonable basis to deny the claims or acted with reckless disregard for whether such a basis existed. Further, the court instructed the jury that mere delay in payment does not constitute bad faith, that for Globe to have acted in bad faith it must have acted with an evil motive or with a reckless disregard for the Bowmans' rights, and that Globe's conduct must have been so bad as to be considered outrageous. The court also defined "evil motive," "reckless disregard," and "outrageous."

Following the preliminary instructions, the court posed ten separate interrogatories for the jury's consideration. Each of these interrogatories related to an allegation of bad faith or unfair claims settlement practice against Globe.

Further, each interrogatory was answered by the jury in a manner adverse to Globe. The jury then awarded the Bowmans $24,967.51 for reasonable attorneys' fees and expenses incurred in having to hire an attorney to file suit for the payment of their claims. The jury further awarded the Bowmans $250,000 for mental anguish suffered as a direct result of Globe's bad faith failure to pay their claims and $50,000 for punitive damages. The court also awarded the Bowmans $23,776.37 in interest. This appeal by Globe followed.

Globe does not quarrel with the jury instructions which led to the verdict. Further, Globe does not assert that the court made any errors in connection with the admissibility of evidence or in connection with other trial procedure. Rather, Globe argues that the court erred in not awarding it summary judgment prior to trial or in not awarding it a directed verdict or a judgment notwithstanding the verdict.

Citing Midwest Mut. Ins. Co. v. Wireman, Ky. App., 54 S.W.3d 177 (2001), the Bowmans respond that the failure to grant summary judgment is not reviewable on appeal. They assert that Globe may only appeal from the trial court's denial of Globe's motions for directed verdict and for judgment notwithstanding the verdict. Globe agrees that orders denying summary judgment motions are generally not reviewable on appeal, but it notes

that there is an exception to the rule which it claims exists in this case. See Midwest Mut., 54 S.W.3d at 179.

In reviewing Globe's motion for summary judgment, the trial court was required to view the record in a light most favorable to Globe. See Dossett v. New York Mining and Mfg. Co., Ky., 451 S.W.2d 843, 845 (1970). Similarly, "[a] motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." National Collegiate Athletic Ass'n v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). For reasons which we will state later in this opinion, we conclude that the trial court properly denied Globe's motions for summary judgment, for a directed verdict, and for a judgment notwithstanding the verdict.

In Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), the Kentucky Supreme Court, quoting from Justice Leibson's dissenting opinion in Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844 (1986), described the elements of a bad faith claim:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether

> such a basis existed . . . . [A]n insurer is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer, 864 S.W.2d at 890. "[M]ere delay in payment does not amount to outrageous conduct absent some affirmative act of harassment or deception." Motorist Mut. Ins. Co. v. Glass, Ky. 996 S.W.2d 437, 452 (1997). Further, "there must be proof or evidence supporting a reasonable inference that the purpose of the delay was to extort a more favorable settlement or to deceive the insured with respect to the applicable coverage." Id. at 452-53. Also, in order to prevail in an action for bad faith, a party must show more than mere negligence. Blue Cross & Blue Shield of Kentucky v. Whitaker, Ky. App., 687 S.W.2d 557, 559 (1985). Neither mere errors in judgment nor mere breakdowns in communications are sufficient to establish bad faith. Id.

Although Globe initially asserted a defense to the bad faith claims that the issue of fault was "severely disputed," it has apparently abandoned that defense. Trooper Baker's November 1996 report indicated that Mills was at fault in the accident. After receiving Trooper Baker's report, McElroy, the independent adjuster Globe had hired to assist in processing the claims under the Bowman policy, immediately forwarded it to Globe with his report. Although Patterson, the Globe adjuster responsible for the Bowman policy did not read McElroy's report until

December 2, 1996, she immediately determined that Mills was at fault. Also, Art Longnaker, the independent adjuster Globe had hired to assist in processing the claims against Mills, noted in his November 12, 1996, report to Supervisor Leiner that the evidence indicated the Bowmans were in their lane when the accident occurred. Further, Supervisor Leiner considered Globe's investigation to be complete as of early December 1996 and considered George Bowman to be without fault in the accident. In short, in light of the clear indication that Mills was totally at fault and in light of the obvious extent of damages to which the Bowmans and the children's' estates would be entitled, it was apparent to Globe by no later than early December 1996 that the Bowmans would be entitled to all proceeds under both policies for the full amounts of coverage therein. Therefore, rather than continuing to rely on the issue of fault as the reason for not paying the Bowmans the maximum amounts under the policies, Globe relies on other arguments which we will address below.

Globe's first argument is that the trial court erred in not granting it a directed verdict or a judgment notwithstanding the verdict because no proceeds could be paid for damages due to the wrongful death of the children until February 20, 1997, when the children's' estates were opened by the appointment of Carolyn Bowman as administratrix. Globe

argues that "if the estates could not present a cause of action; there cannot be a claim of bad faith for failure to settle such claims." Globe asserts that it had "already made overtures to plaintiffs to settle claims consistent with recognized liability and UIM procedures" and that "[t]he failure to have a personal representative is fatal to plaintiffs' claims of bad faith." We believe this argument is without merit.

Globe obviously knew that the Bowmans would be acting on behalf of their deceased children's' estates. Had Globe agreed to pay the proceeds from the policies when it determined that Mills was solely at fault and that the damages would exceed the amount of the policies, it should have offered to do so. The appointment of an administrator or administratrix for the estates to receive the proceeds would have been shortly forthcoming,[4] and the failure to have an administratrix in place at that time was not a hindrance to Globe offering a full settlement of the matter. In fact, the estates were set up in February 1997, and Globe did not offer to pay the full amounts under the policies until October 1998.

Globe's second argument is that the trial court erred in not granting a directed verdict or a judgment notwithstanding

[4] In fact, Dr. Broudy stated in his October 26, 1996, letter to McElroy that "[i]t is my understanding that it may be necessary, in order to achieve a release, for Mr. and Mrs. Bowman (or either of them) to be appointed administrator/administratrix of the estates of the children for purposes of settlement which can be accomplished when a settlement is reached."

the verdict because the Bowmans failed to exhaust or accept the limits of the Mills policy before demanding UIM benefits under their policy. Globe asserts that the Bowmans' claim for UIM benefits was "moot as being unripe at the time of presentation" since they had not accepted the limits under the Mills policy. In support of its argument, Globe cites Coots v. Allstate Ins. Co., Ky., 853 S.W.2d 895 (1993). It argues that "it cannot be bad faith to wait until after the tortfeasor tenders his policy limit or the insured wishes to settle for a full release before attempting to settle the underinsured claim to be raised by the insured."

Globe maintains that the Bowmans are attempting to impose liability on it for failing to settle both claims at one time "despite the contrary practice being specifically approved in Kentucky since Coots." Globe maintains that it acted in good faith when it offered the policy limit under the Mills policy and advised the Bowmans that it stood ready to resolve the UIM claim under the Bowman policy once the liability portion was resolved. Further, Globe notes that the Bowman policy had language which stated that it would pay damages under the policy "only after the limits of liability under any other applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

The Bowmans argue in response that this situation was not the typical Coots scenario because Globe insured both vehicles involved in the accident. Thus, they maintain Globe was not in the normal position of an underinsured carrier as contemplated by either Coots or the language of the Bowman policy. We agree.

Furthermore, Supervisor Leiner testified that as of December 3, 1996, he could have offered the Bowmans the maximum limits under both policies ($150,000) provided the Bowmans released Mills from liability and set up the children's' estates to receive the proceeds. In fact, Globe eventually offered the full amounts under both policies in October 1998 without requiring the Bowmans to first exhaust or accept the limits of the Mills policy.

Finally, Globe argues that the trial court erred in not granting it a directed verdict or a judgment notwithstanding the verdict because it was at least a "debatable issue" whether Globe was acting in bad faith for failing to offer a full settlement under both policies rather than first requiring a settlement under the Mills policy. Globe cites the portion of the Wittmer case which holds that an insurer is entitled to challenge a claim that is "debatable on the law or the facts." Wittmer, 864 S.W.2d at 890. Globe also notes that the Bowmans introduced expert testimony that the Mills' policy limits and

the Bowmans' policy limits should have been offered simultaneously but that the testimony also revealed that reasonable minds could differ on the issue.

Globe's argument in this regard is related to its previous argument. The Bowmans respond in much the same way they did to that argument. Further, citing the Coots case, the Bowmans argue that a UIM carrier "cannot refuse to negotiate a one million dollar claim until the UIM insured can process a claim against the tortfeasor covered by a $25,000 limit liability policy to judgment." Coots, 853 S.W.2d at 902. The Bowmans assert that this is particularly true where Globe was the insurer under both policies. We agree.

In addition to the three arguments raised above, Globe maintains that there was simply a lack of evil motive or bad faith on its part in the settlement of the claims. They contend that "[t]here was at best a lack of communication between Globe and the Bowmans after Karen Talmadge left Globe some time after October 23, 1996, and the reassignment of the file to Pattylyn Taueg in late December." Without again reviewing the evidence presented at trial, we conclude there was sufficient evidence to support the jury's verdict on each of the ten interrogatories decided in favor of the Bowmans on their bad faith claims.

The judgment of the Whitley Circuit Court is affirmed.[5]

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

William A. Watson
Middlesboro, Kentucky

Lawrence M. Hansen
Indianapolis, Indiana

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

Barry Miller
Lexington, Kentucky

[5] The cross-appeal by the Bowmans is moot.