RENDERED: JANUARY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000679-MR

CLARK JUSTICE — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 02-CI-01260

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

GUIDUGLI, JUDGE. In this bad faith action, Clark Justice (hereinafter "Justice") has appealed from the Pike Circuit Court's March 19, 2003, Order and Judgment granting Allstate Insurance Company's (hereinafter "Allstate") motion for a judgment on the pleadings and dismissing the complaint with prejudice. The sole issue on appeal is whether a secondary insurer has a duty to attempt to settle with a plaintiff in a case where it was reasonable to expect a judgment in excess of

the coverage of both the primary and secondary insurers. Having considered the arguments in the parties' briefs, the record, and the applicable case law, we affirm.

On September 5, 2002, Justice filed a complaint in Pike Circuit Court alleging a bad faith claim against Allstate in that Allstate violated the Unfair Claims Settlement Practices Act[1] by refusing to make any type of settlement offer in his uninsured motorist (hereinafter "UM") action. Justice was involved in a motor vehicle accident on April 10, 2001, while a passenger in a car driven by Joey Branham, who was insured by Kentucky National Insurance Company (hereinafter "Kentucky National"). Allstate provided insurance for Justice. An uninsured motorist hit the car Branham was driving, causing injury to Justice, and there was no dispute that the uninsured motorist was solely at fault. The policy limit of both Branham's and Justice's UM coverage was $50,000. Justice filed suit in Pike Circuit Court[2] to recover UM benefits both from Kentucky National, as the primary insurer, and from Allstate, the secondary insurer. Justice attempted to settle with both insurers prior to trial for their respective policy limits. Kentucky National apparently offered to settle for an amount below the policy limits, but Allstate did not reply to Justice's

[1] KRS 304.12-230.
[2] Justice v. Allstate Insurance Company and Kentucky National Insurance Company, Pike Circuit Court case No. 01-CI-00600.

request for a settlement offer. Following a trial, the jury returned a verdict for Justice in the amount of $214,419.71, and the circuit court entered a final judgment on August 28, 2002, allowing him to recover $204,419.71[3] from Allstate and Kentucky National, or the extent of each insurer's policy limits for UM coverage, whichever was less. Upon the entry of the final judgment, both insurers paid their policy limits of $50,000. Kentucky National also paid an additional $25,000 to prevent an unfair claims settlement practices act claim from being brought. In the present action, Justice claimed that Allstate violated the act by failing to offer to settle the UM action even though its liability was reasonably clear pursuant to KRS 304.12-230(6).

Allstate filed an answer, asserting that Justice failed to state a cause of action upon which relief could be granted and that his failure to exhaust Kentucky National's policy limits prior to the entry of the final judgment in the underlying claim obviated its obligation to offer any excess coverage. Allstate then filed a motion for a judgment on the pleadings pursuant to CR 12.02(f) and CR 12.03, arguing that as it was the secondary excess insurer, it did not owe any coverage until Kentucky National's primary coverage was exhausted, citing the Supreme Court of Kentucky's decision in Motorists Mut. Ins.

[3] The circuit court deducted $10,000 from the total amount of the jury verdict for the PIP benefits previously paid.

Co. v. Glass, Ky., 996 S.W.2d 437 (1999). Justice responded that because liability was reasonably clear, Allstate had an obligation to respond to his request for a settlement offer.

On March 19, 2003, the circuit court entered an Order and Judgment as follows:

> This matter is before the Court on the Defendant's Motion for Judgment on the Pleadings. The Court has reviewed the Motion and the Responses and Replies filed thereto.
>
> The Plaintiff's "bad faith" claim is based upon the Defendant's failure to pay its excess uninsured motorist coverage before the primary uninsured carrier, Kentucky National Insurance Company, had paid its policy limits.
>
> *Curry v. Fireman's Fund Insurance Co.*, Ky., 784 S.W.2d 176, 178 (1989), adopted the elements of proving bad faith from Justice Leibson's dissent in *Federal Kemper Insurance Co. v. Hornback*, Ky., 711 S.W.2d 844, 846 (1986):
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> > An 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. . . . An insurer is . . . entitled to challenge a claim

> and litigate it if the claim is debatable on the law or the facts.
>
> An "excess" insurer does not owe any coverage until primary coverage is exhausted. *Motorist Mutual Insurance Co. v. Glass*, Ky., 996 S.W.2d 437, 453 (1999). The Plaintiff argues that this case is distinguishable from *Glass*, because *Glass* dealt with underinsured ("UIM") coverage while this case deals with uninsured ("UM") coverage. UIM coverage serves the same purpose and follows the same pattern as UM coverage. While the wording of the UIM statute is different from that of the UM statute, there is no fundamentally different insurance arrangement from that provided for under the UM statute. *Coots v. Allstate Insurance Co.*, Ky., 853 S.W.2d 895, 898 (1993).
>
> For the foregoing reasons, IT IS HEREBY ORDERED that the Defendant's Motion for Judgment on the Pleadings is GRANTED, and the Plaintiff's Complaint against the Defendant is DISMISSED WITH PREJUDICE. Due to this ruling, the trial scheduled for April 23, 2003, is CANCELED.
>
> There being no just cause for delay, this is a final and appealable Order, and this cause is STRICKEN from the docket.

On appeal, Justice continues to argue that Allstate violated KRS 304.12-230(6) by refusing to attempt a settlement of his claim for which its liability was reasonably clear. In support, he points out that the jury's verdict well exceeded $100,000, the combination of the two UM insurers' policy limits. Justice also makes a brief argument that the circuit court's dismissal pursuant to CR 12.03 was inappropriate because there

were never any matters presented outside of the pleadings. On the other hand, Allstate argues that the circuit court properly applied the three-part test for bad faith claims as set forth by the Supreme Court of Kentucky in Curry, supra, and Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), and held that Justice could not establish that Allstate had violated the prong requiring that the insurer lack a reasonable basis in law or fact in denying the claim. Justice could not show any lack of a reasonable basis because Allstate's obligation to pay any excess coverage did not arise until Kentucky National had paid its policy limits pursuant to Glass, supra.

Pursuant to CR 12.02(f), a defendant may assert a defense, either in the answer or by motion, that a plaintiff has failed to state a claim upon which relief can be granted. CR 12.03 also permits any party to move for a judgment on the pleadings after the pleadings are closed. In the present matter, the parties did not present, nor did the circuit court accept, any matters outside of the pleadings. Therefore, the circuit court properly and appropriately considered the motion purely on the pleadings.

In Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), the Supreme Court addressed the degree of proof necessary to establish a bad faith claim. Quoting Justice Leibson's dissent from Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844

(1986), Wittmer provided for a three-prong test, which included a requirement that the insurer lack a reasonable basis for denying the claim. In Glass, the Supreme Court made it clear that an excess insurer did not owe any coverage until the primary insurer's coverage was exhausted. Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d at 453. Although Justice claims that Glass is inapplicable because it deals with UIM coverage rather than UM coverage, this argument is without merit. In Coots v. Allstate Insurance Co., Ky., 853 S.W.2d 895, 898 (1993), the Supreme Court clearly held that "UIM coverage serves the same purpose and follows the same pattern as UM coverage. While the wording of the UIM statute is different from that of the UM statute, we can discern no fundamentally different insurance arrangement from that provided under the UM statute."

Under the applicable law of the case, Justice failed to state a claim upon which relief could be granted. As the secondary insurer, which Justice admitted Allstate to be in his complaint, Allstate had no obligation to pay any excess coverage until Kentucky National had paid its policy limits. Glass, supra. Although Kentucky National extended a settlement offer prior to trial for less than its policy limits, Justice did not accept this offer and the matter proceeded to trial, after which the jury returned a verdict in Justice's favor. Kentucky National did not pay out any of its benefits until AFTER the

final judgment had been entered. Once Kentucky National paid the limits of its policy, Allstate then followed by paying out its policy limits pursuant to the final judgment. Allstate was under no obligation to pay any benefits until Kentucky National had paid its policy limits, and there is no dispute that Allstate fulfilled this obligation. This is not to say that Allstate, as an excess insurer, would have been precluded from offering a settlement prior to trial even if Kentucky National had opted not to do so. However, there was no legal requirement that Allstate do so because its liability had not yet arisen. Because Justice could not state a claim for bad faith upon which relief could be granted, the circuit court properly granted Allstate's motion for a judgment on the pleadings and dismissed the complaint.

For the foregoing reasons, the Pike Circuit Court's Order and Judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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