RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000801-MR

LINDA COOK — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 99-CI-00051

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, AND VANMETER, JUDGES.

McANULTY, JUDGE: Appellant, Linda Cook (Cook), appeals the trial court's order granting summary judgment in favor of State Farm Mutual Automobile Insurance Company (State Farm). Cook's complaint in the circuit court, as amended, alleged violations of the Kentucky Consumer Protection Act, the Kentucky Insurance Code, the insurance contract and the covenants of good faith and fair dealing. For the reasons set forth below, we affirm in part and vacate and remand in part.

Cook had an automobile insurance policy with State Farm. By the terms of the policy, in the event Cook's vehicle hit or was hit by another vehicle, State Farm was obligated to pay for the loss to her car caused by the collision but only for the amount of each such loss in excess of the deductible amount. Further, the limit of State Farm's liability for loss to property or any part of the property was the lower of:

> 1. the actual cash value; or
> 2. the cost of repair or replacement.
>
> Actual cash value is determined by the market value, age and condition at the time the loss occurred. Any deductible amount that applies is then subtracted. The cost of repair or replacement is based upon:
>
> 1. the cost of repair agreed upon by you and us; or
> 2. the lower of:
>   a. a competitive bid approved by us; or
>   b. an estimate written based upon the prevailing competitive price. The prevailing competitive price means labor rates, parts prices and material prices charged by a substantial number of repair facilities in the area where the car is to be repaired as determined by a survey made by us. If you ask, we will identify some facilities that will perform the repairs at the prevailing competitive price.

The provisions listed above were in effect in 1996. In July of 1996, Cook's 1994 Saturn was involved in a collision. Performance Body Repair, Inc. (Performance) completed the repairs, and State Farm paid for the repairs pursuant to the car

insurance policy. In October of 1996, Cook's 1994 Saturn was involved in another collision. Performance completed the repairs, and, pursuant to the car insurance policy, State Farm paid for the cost of repairs that exceeded Cook's deductible. Cook picked up her car on November 8, 1996.

At the time she picked up her car, she was aware of the following: (1) the door on the left side of her car had a visibly larger gap between the door and the quarter panel than the door on the right side did; (2) the left molding around the windshield was loose and rattling; and (3) the door was rattling. She took the car back to Performance within a couple of days and had them fix the molding problem. With the gap in the door, however, Cook alleges that Performance told her replacement parts do not fit the same as when the car was manufactured. In addition, shortly after she got her car back from Performance, Cook noticed that the car did not steer correctly. At that time, she believed that the steering problem was a result of the October 1996 accident. Although Cook could not be certain, she believed that she took it to a Saturn repair shop to have the front end aligned.

In 1998, Cook noticed uneven wear on her front tires. Feeling that the car still may not have been properly aligned, she had her vehicle inspected by David Williams, an independent automotive consumer protection specialist, in November of 1998.

Williams opined that the following necessary repairs were not completed by Performance after the October 1996 collision: (1) no frame measurement was performed after the pull; (2) there was pinch weld damage on the bottom of the rocker panels due to the frame repair; (3) the electric door locks worked sporadically; (4) State Farm should have authorized front and rear alignment; however, this procedure was not indicated on the repair invoice; (5) no undercoating or rustproofing was found on metal parts that were repaired; (6) there were visible flaws and defects in the paint finish which could have been removed using the sand and buff process; and (7) seam sealer was placed around the left door hinges where none was required and there was an improper seal in one spot.

Cook filed a class action complaint against State Farm in January of 1999. In her complaint, Cook set out the following five causes of action against State Farm: (1) State Farm violated Kentucky's Consumer Protection Act, KRS 367.170, et. seq.; (2) State Farm violated the provisions of KRS 304.12-010, et. seq., in engaging in unfair or deceptive practices in the insurance business and in disseminating false or misleading advertisements, information and statements; (3) State Farm breached its contract with Linda Cook; (4) State Farm breached the covenant of good faith and fair dealing; and (5) State Farm violated its obligation to pay its policyholders the loss they

sustain as a result of the "Inherent Diminished Value" of repaired automobiles.

On March 27, 2001, the trial court dismissed Count V, the inherent diminished value claim, with prejudice. The record does not indicate that Cook appealed from the dismissal of this claim. On March 21, 2002, the trial court granted State Farm's motion for summary judgment, thereby dismissing all remaining claims with prejudice and precipitating this appeal.

The trial court succinctly stated its reasons in dismissing the counts and claims in the complaint, as amended, as follows:

> Plaintiff's claim in Count I, under the Kentucky Consumer Protection Act, is barred by the absolute two-year statute of limitations of KRS Section 367.220(5). Plaintiff's breach of contract claim, Count III, fails since all of the repair procedures identified by Plaintiff, for the first time two years after her car was repaired: (a) were in fact performed by the body shop that repaired her car and were paid for by Defendant; (b) would have been authorized by Defendant, if necessary and a result of her covered claim; or (c) were the result of omissions by or actions of the body shop. Count II, for violation of KRS Section 304.12-010, *et seq*., and Count IV, for breach of the covenant of good faith and fair dealing, are legally deficient since Defendant at all times acted with a reasonable basis and in good faith, and because Defendant never denied payment of any portion of Plaintiff's claim.

We will address Cook's arguments in the same order the trial court disposed of them above. Cook argues that the trial court erred in holding that her claim under the Kentucky Consumer Protection Act (KYCPA) was barred by the two-year statute of limitations in KRS 367.220(5). KRS 367.220(5) is as follows:

> Any person bringing an action under this section must bring such action within one (1) year after any action of the Attorney General has been terminated or within two (2) years after the violation of KRS 367.170, whichever is later.

Moreover, KRS 367.170 is as follows:

> (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
> (2) For the purposes of this section, unfair shall be construed to mean unconscionable.

Finally, Cook's cause of action against State Farm for unlawful acts under KRS 367.170 is cognizable under KRS 367.220(1), which provides that:

> Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action under the Rules of Civil Procedure in the Circuit Court in which the seller or lessor resides or has his principal place of business or is doing business, or in the Circuit Court in which the purchaser or lessee of goods or services

> resides, or where the transaction in question occurred, to recover actual damages. The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

See Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819, 820 (1988).

Cook argues that strict application of KRS 367.220(5) is at odds with the intentions of the Kentucky legislature in enacting the KYCPA. Cook urges this Court to apply a "discovery rule" to her KYCPA claim by allowing the statute of limitation to commence from the date a plaintiff knew or should have discovered the deceptive act.

Application of the "discovery rule" to a case under the KYCPA is one of first impression in Kentucky courts; however, State Farm points out that the United States District Court for the Eastern District of Kentucky, has weighed in on the issue in an unpublished opinion, Sanderson v. Reassure Am. Life Ins. Co, 1997 U.S. Dist. LEXIS 18250 (1997). In Sanderson, the federal district court relied on Coslow v. General Elec. Co., Ky., 877 S.W.2d 611 (1994) and Wright v. Oberle-Jordre Co., Inc., Ky., 910 S.W.2d 241 (1995) and held that the KYCPA gave rise to "a new statutory cause of action derived from legislative largess, not common law." As such, the Sanderson

court declined to graft the discovery rule onto the two-year statute of limitation on KYCPA claims and dismissed the plaintiff's claim as time-barred. Id. at 9-12.

Considering the plain language of KRS 367.220(5) and KRS 367.170, we are persuaded that the Sanderson court reached the correct conclusion. In enacting KRS 367.220(5), the Kentucky legislature did not state "[a]ny person bringing an action under this section must bring such action within . . . two (2) years from the date of the violation of KRS 367.170 or from the date when the cause of action was, or reasonably should have been, discovered." Cf. KRS 413.245 ("[A] civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.")

Cook argues that in enacting the KYCPA, the Kentucky legislature clearly "created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." Stevens, 759 S.W.2d at 821. While the KYCPA may have a broad application to afford broad protection, it is also specific as to when the action must be brought. In this case, the act or practice about

which Cook complains occurred and her cause of action accrued, at the very latest, on November 8, 1996, the date she picked up the car. Cook did not file her complaint until January of 1999, more than two years later; therefore, her cause of action under the KYCPA is time-barred.

We move to the trial court's dismissal of Count III of Cook's complaint, the breach of contract claim. Cook argues that the existence of issues of fact preclude summary judgment on this claim. At this point, we will set out the legal standard for summary judgment. The standard of review on appeal of a summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact, and the moving party was entitled to judgment as a matter of law. See Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Additionally,

> [T]he summary judgment procedure is not a substitute for trial. The circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances.

City of Florence, Kentucky v. Chipman, Ky., 38 S.W.3d 387, 390 (2001).

The heart of Cook's case is that State Farm knowingly violates the terms of its car insurance policies because State Farm writes estimates that understate the cost of repair. Cook alleges that, as a matter of common practice, State Farm fails to include certain procedures and/or materials necessary to restore damaged automobiles to their pre-loss condition. The trial court took Cook's breach of contract claim full circle and concluded that State Farm established its right to judgment with such clarity that there was no room left for controversy, and Cook could not prevail under any circumstances. We are not so certain.

While State Farm and James R. Fultz, Jr. of Performance had an answer for every contention raised by Cook, there are genuine issues of material fact on some procedures and repairs that Cook alleges were not included on the estimate, but were necessary to return her car to its pre-loss condition. First, there is a genuine issue of material fact as to whether a front and/or rear-end alignment was required. State Farm had the final word on those repairs that it would and would not pay for, not Performance or any other body shop. State Farm did not pay for an alignment on Cook's vehicle after the 1996 collision.

Cook retained an expert that stated an alignment check and an actual alignment as part of the repair work were necessary; State Farm's estimator and Performance assert that an

alignment was not necessary to restore her vehicle to its pre-loss condition.

This is a classic battle of the experts, in which case, it is for the jury to determine the weight and credibility to be assigned their testimony. Moreover, Cook's counsel should be afforded wide latitude to explore witness bias, as should the attorney for State Farm. Finally, it is not for the trial court to say whether State Farm would have authorized the alignment if necessary and a result of her covered claim. This is an impermissible decision as to fact.

Cook contends that her automobile sustained frame damage in the October 1996 accident. Performance's visual damage report indicates that State Farm paid for frame time repair in the amount of 4.0 hours labor. Fultz clarified that, judging by the actual pull time, it probably wasn't the unibody that had to be repaired, but the hinge pillar on the door that had to be pulled back to factory specs. After reviewing Fultz's deposition and Hicks's deposition (the State Farm estimator who originated Cook's estimate), we find no evidence that Performance measured the frame after it completed the pull, nor that a frame measurement after the pull was an "included operation."

"Included operations" are those specifications for various auto repair procedures provided in standardized

guidelines, the performance of which are necessary for completing a specific repair. They are done as part of a procedure and are not specifically listed on the estimate as a separate line item. Contrary to State Farm's assertions on appeal, we find no proof that an after-pull frame measurement was an "included operation" in this repair.

On the frame issue, Cook's expert stated in an affidavit that Cook complained of her vehicle "pulling" and not driving properly. He believed that the likely cause was a "bent frame," and there was no frame measurement to determine if the unibody was correctly straightened after the pull. We conclude there is a genuine issue of material fact on whether State Farm failed to authorize this necessary procedure to restore her vehicle to its pre-loss condition.

Similar factual circumstances as those outlined above preclude summary judgment on the repair matters of (1) whether a wet sand and buff was a necessary procedure to restore Cook's vehicle to its pre-loss condition in spite of Performance's paint process; (2) whether some type of rust prevention treatment was necessary to restore her vehicle to its pre-loss condition in spite of Cook's lack of proof that she had rust protection prior to the collision; (3) whether the pinch weld repair was an "included operation" that Performance neglected to do or whether the pinch weld repair was one that State Farm did

not pay for; and (4) whether the electric door lock was not repaired or whether its sporadic performance made it impossible for State Farm and Performance to know there was a problem. As to the improper seam sealing, however, summary judgment was in order as it pertained to the quality of the repair as opposed to a necessary repair to restore Cook's vehicle to its pre-loss condition.

We move to Count II of Cook's complaint alleging violations of KRS Section 304.12-010, *et seq,* relating to trade practices and frauds in the insurance business. In dismissing this count, the trial court stated that this claim was legally deficient since State Farm never denied payment of any portion of Cook's claim. Throughout the proceedings in the circuit court, State Farm and the trial court operated under the assumption that Cook brought her second cause of action under Kentucky's Unfair Claims Settlement Practices Act, KRS 304.12-230 (UCSPA). The pertinent language of Cook's second cause of action is as follows:

> Pursuant to the provisions of KRS § 304.12, et. seq., unfair or deceptive acts or practices in the business of insurance are prohibited. *Likewise, false or misleading advertisements, information, statements, etc. are prohibited with respect to the terms of any policy or the benefits or advantages thereof.*

(Emphasis ours).

In pertinent part, KRS 304.12-020 is as follows:

> No person shall make or disseminate orally or in other manner any advertisement, information, matter, statement, or thing: (1) Misrepresenting the terms of any policy or the benefits or advantages thereof or dividends or share of surplus to be received thereon, or setting forth false or misleading information or estimates as to dividends or share of surplus previously paid on similar policies.

State Farm is correct in asserting that KRS 304.12-010 is an introductory section to Subtitle 12 of the Insurance Code, but in her complaint, Cook also alleges a violation of KRS 304.12-020 as shown above. KRS 304.12-020 provides a statutory cause of action separate from the UCSPA. The remedy for violation of KRS 304.12-020 is created by KRS 446.070. See State Farm Mut. Auto Ins. Co. v. Reeder, Ky., 763 S.W.2d 116, 117 (1988); Int'l Resources, Inc. v. New York Life Ins. Co., 950 F.2d 294, 300 (6th Cir. 1991) (applying Kentucky law).

State Farm presented no facts in support of its assertion that it was entitled to summary judgment on this count of Cook's complaint. Instead, it turned her allegation into a cause of action under the UCSPA. As the moving party, State Farm bore the burden of producing evidence that there was no violation of KRS 304.12-020. See CR 56.03; Smith v. Higgins, Ky., 819 S.W.2d 710, 712 (1991). Only then was Cook required to come forward with evidence to defeat the motion. See Smith, 819

S.W.2d at 712. As State Farm presented no evidence on this issue, summary judgment was improper. Accordingly, the trial court's issuance of summary judgment on Count II of Cook's complaint is vacated and remanded to the trial court for further proceedings consistent with this opinion.

Finally, we address Count IV of Cook's complaint alleging breach of the covenant of good faith and fair dealing. In dismissing this count, the trial court stated that this claim was legally deficient since State Farm at all times acted with a reasonable basis and in good faith, and because State Farm never denied payment of any portion of Cook's claim. Cook argues that this was not a bad faith claim brought under the UCSPA. Instead, Cook contends that State Farm had a duty to exercise good faith and fair dealing in fulfilling its contractual obligations to restore Cook's vehicle to its pre-loss condition. Moreover, the issues of whether State Farm acted with a reasonable basis and in good faith are necessarily questions for the jury.

Under Curry v. Fireman's Fund Ins. Co., Ky., 784 S.W.2d 176, 178 (1989), the Kentucky Supreme Court recognized the tort of bad faith by an insurer in dealing with its own insured. In so doing, the court overruled Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844 (1989), which abolished tort liability to a policyholder, regardless of the conduct of

the insurance carrier. See Curry, 784 S.W.2d at 178. The Curry court characterized the abolition of tort liability as permitting

> an insurance carrier to deny payment without any justification, attempt unfair compromise by exploiting the policyholder's economic circumstance, and delay payment by litigation with no greater possible detriment than payment of the amount justly owed plus interest.
>
> In this society, first party insurance coverage against a host of risks is recognized as essential. 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. The rule in Federal Kemper is unjust and, despite its recency, should not be perpetuated.

Id. at 178.

The majority in Curry did not go so far as to set out the elements of a bad faith claim, although Chief Justice Stephens authored a concurring opinion in which he cautioned as follows:

> [C]auses of action for tortious breach of contract must be carefully circumscribed, as set forth in Justice Leibson's dissent in Federal Kemper. An insured does not avail himself of this cause of action by merely alleging bad faith due to an insurance company's disputing or delaying payment on a claim. An insured must prove that the insurer is obligated to pay under the policy, that the insurer lacks a reasonable

> basis for denying the claim, and that the insurer either knew there was no reasonable basis to deny the claim or acted with reckless disregard for whether such a basis existed. An insurer's refusal to pay on a claim, alone, should not be sufficient to trigger the firing of this new tort.

Id. at 178.

In an opinion rendered after Curry, the Kentucky Supreme Court incorporated the above elements in an attempt to explain the mechanics involved in applying Stevens, supra. (KYCPA), Reeder, supra. (UCSPA) and Curry, supra. (bad faith in breach of insurance policy based on common law principles). See Wittmer v. Jones, Ky., 864 S.W.2d 885, 886 and 890 (1993). Moreover, the Wittmer court went one step further and specified that before a bad faith cause of action exists in the first place, "there must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury." Id. at 890.

In short, while Kentucky's highest court has recognized that an insurer's conduct in some circumstances may move beyond breach of contract to tortious breach of contract, it has also prescribed specific parameters to define a party's burden in establishing this cause of action. In arguing that the trial court erred in

dismissing her bad faith cause of action, Cook reiterates State Farm's failure in her case to write an estimate that would include all repairs necessary to return her vehicle to its pre-loss condition. Cook makes no attempt to address the line of Kentucky cases discussed at length above. Instead, she relies on an Arizona Court of Appeals case, Olson v. State Farm Mut. Auto Ins. Co., 1 CA-CV 99-0172 (March 26, 2000).

Kentucky requires a denial of a claim as a prerequisite to bringing a common law bad faith claim against an insurer. See Wittmer, 864 S.W.2d at 890. In this case, State Farm did not delay or deny Cook's claim. While Cook may argue that failing to restore her car to its pre-loss condition or "low-balling" the estimate is a denial of a claim on some level, she has made no attempt to do so, and we decline to make that argument for her. See CR 76.12(4)(c)(v).

Further, it is undisputed that upon learning of the remaining damage to her vehicle, allegedly as a result of the October 1996 accident, Cook did not contact State Farm to seek additional payment or repair. Further, Cook did not contact State Farm in the days following the accident after she noticed that her car did not steer correctly. In other words, Cook made no attempt to

negotiate with State Farm on those repairs that she now deems are necessary, such that State Farm would have either agreed to pay for the repairs or denied payment. As to the dismissal of Count IV of Cook's complaint, we affirm the trial court's grant of summary judgment in favor of State Farm.

For the foregoing reasons, the Boone Circuit Court's Order granting summary judgment in favor of State Farm is affirmed in part and vacated and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald R. Parry
David A. Futscher
Parry, Deering, Futscher & Sparks PSC
Covington, Kentucky

BRIEF FOR APPELLEE:

Mark A. Johnson
Baker & Hostetler LLP
Columbus, Ohio

Larry C. West
Mark W. Howard
Covington, Kentucky