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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000461-MR

LEANN EASTRIDGE — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 12-CI-00419

USAA CASUALTY
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from the Taylor Circuit Court granting a motion for summary judgment by the Appellee, USAA Casualty Insurance ("USAA"). Appellant, Leann Eastridge, argues that the trial court erred in granting summary judgment because there are facts showing that USAA acted in bad faith in its handling of an investigation regarding a motor vehicle accident involving

Eastridge. After a careful review of the record, we find that summary judgment was proper because Eastridge failed to present affirmative evidence that bad faith could be established under the facts of this case.

Background

The trial court granted USAA's motion for summary judgment on the bad faith claim brought by Eastridge against the insurer for its handling of an investigation into the motor vehicle accident in which she was involved. The accident occurred on Sunday, May 20, 2012, when two men, Scott Boutwell and Byron Hash, engaged in a "road rage" incident on Highway 210 in Campbellsville, Kentucky. Boutwell was insured by USAA, and Hash was insured by Kentucky Farm Bureau ("KFB").

The two men were each driving their trucks westbound on Highway 210 on a downhill grade. The incident began when Hash passed Boutwell in the right lane and cut in front of him in the left. In response, Boutwell "flipped off" Hash, who then slammed on his brakes. When Boutwell accelerated to pass, Hash responded by ramming his truck into the side of Boutwell's truck as the two vehicles continued downhill at a high rate of speed. At the bottom of the hill, the right lane ended. Boutwell tried to merge into the left lane but was blocked by Hash. Both drivers lost control of their trucks and Boutwell crashed into Eastridge's vehicle traveling in the eastbound lane. All three vehicles suffered extensive damage. Eastridge suffered minor injuries.

Later that day, Boutwell reported the incident to USAA. Based on his statements, USAA determined that Hash was totally at fault. On June 18, 2012, Hash contacted USAA about a potential liability claim but he refused to provide a statement.

Eastridge filed a claim with her insurance company, State Farm, which subsequently paid Personal Injury Protection (PIP) benefits under its policy. On July 19, 2012, USAA received a PIP subrogation demand from State Farm. In response, USAA set up a reserve of $3,000 in order to settle any claim Eastridge may have brought. A week later, on July 26, State Farm advised Eastridge to contact USAA about a claim against Boutwell's policy.

On September 11, 2012, Eastridge reached out to USAA for the first time, leaving a voicemail. The next day, a USAA representative, Robyn Owens, returned her call. Owens notified Eastridge that KFB had only accepted 25% fault in the accident and that USAA was not willing to accept the other 75%. Additionally, Owens requested Eastridge's accident medical records and bills for USAA's investigation.

Eastridge followed up with Owens on September 13 to ask if USAA had received documentation from State Farm regarding the accident. Owens stated that USAA had received certain files from State Farm, but those records did not include the requested medical records. During these conversations with USAA over the three days in September, Eastridge never communicated any information regarding her injuries or property damage, nor did she provide the medical records

requested by USAA. More importantly, Eastridge never made a demand of any type to USAA, a fact which she acknowledges in the record.

In late September, Eastridge hired counsel. USAA, once again, requested access to Eastridge's medical records from the incident, but were not provided the documents by Eastridge or her attorney. On September 28, her USAA file was transferred to a new adjuster, Jackie Richardson. Richardson reached out to State Farm for a statement from Eastridge but did not receive a response. Richardson also asked State Farm for a basis for its assessment of 50-50 liability. State Farm responded that its basis was unknown.

Ultimately, Richardson concluded that no fault could be assessed to Boutwell under his policy with USAA. Richardson made this determination after learning that Boutwell had been charged with wanton endangerment related to the accident. Boutwell notified Richardson that he expected the charges to be dismissed based on the statements of a witness. Subsequently, the charges were, indeed, dismissed. Hash, however, was indicted on four counts of wanton endangerment. After this dismissal of claims against Boutwell and indictment of Hash, Richardson re-evaluated the liability assessment. She updated the assessment to place all liability on KFB vis à vis Hash.

On November 15, 2012, Eastridge filed this action against Boutwell and Hash. On April 3, 2013, she filed a Second Amended Complaint against USAA and KFB for bad faith. Eastridge later settled her claims with Boutwell, Hash, and KFB. After discovery, USAA moved for summary judgment, claiming

that there was no genuine issue of material fact and that Eastridge could not establish the elements for the tort of bad faith as a matter of law. The trial court agreed and granted the motion. This appeal follows.

Standard of Review

The standard of review on appeal of a summary judgment is whether the trial court correctly found no genuine issue of material fact that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996); CR[1] 56.03. The moving party bears the initial burden of showing that no genuine issue of material fact exists. *Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476, 482 (Ky. 1991). Upon making that showing, the burden then shifts to the party opposing summary judgment to present affirmative evidence that there does exist a genuine issue of material fact for trial. *Id.*

On appeal, this Court is tasked with determining, from the evidence, if any facts exist that are genuinely disputed that would make it possible for the non-moving party to prevail. All factual ambiguities are viewed in a light most favorable to the nonmoving party. We will review all legal conclusions *de novo.* *Lewis v. B&R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001).

Analysis

Common Law and Statutory Bad Faith

[1] Kentucky Rules of Civil Procedure.

In Kentucky, bad faith claims are analyzed under both a common law and statutory basis. The Unfair Claims Settlement Practices Act ("UCSPA"), codified as KRS 304.12-230 in 1999, creates a cause of action for an insurance policy holder or a third-party claimant if the insurance company engages in one of the listed actions or omissions of the statute. A relevant portion of the Act reads:

> It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:
>
> (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
> (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
> (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
> (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

In 1989, the Kentucky Supreme Court extended protection under the UCSPA to third-party claimants. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1989). In *Reeder,* the Court held that third-party claimants had a private cause of action against an insurer who acted against them in bad faith. *Id.* Third-party claimants are afforded the same protections under the act as policy holders. *Id.*

Subsequently, in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993), the Kentucky Supreme Court explained the mechanics of common-law and statutory

bad faith claims. To prevail on either a common-law or a statutory bad faith claim against an insurer, *Wittmer* requires the insured or a third-party claimant to establish the following three elements:

> (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 claim existed.

Id. at 890. (*Citing Curry v. Fireman's Fund, Ins. Co.,* 784 S.W.2d 176, 178 (Ky. 1989)).

The *Wittmer* Court noted that there is no such thing as a "technical violation" with respect to an insurer's duties under the UCSPA. *Id.* But since bad faith is a threshold for liability either under the common law or the UCSPA, the Court added that a mere technical violation of UCSPA does not meet the threshold for liability. Rather, "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*.

In the current case, there are three key essential elements which Eastridge was required to show to establish a bad faith claim against USAA. First, Eastridge must have made a demand for settlement upon USAA. Second, Eastridge must show that USAA was obligated to pay the claim under the terms of the policy. And third, Eastridge must show that USAA either knew that there was no reasonable basis to deny the claim or that it acted with reckless disregard for

whether a basis existed. Although we conclude that Eastridge failed to make any of these showings, we will address each element separately.

Demand

First, we must look to whether Eastridge made a settlement demand upon USAA. Eastridge argues that "demand" and "claim" ought to be construed broadly. She argues that "claim" should be construed according to its common usage. That is, a claim is "an assertion of a right to something." *II Oxford English Dictionary* 451 (1970). We agree that these terms can be construed broadly.

Nevertheless, an insurer is not obligated to initiate a discussion with a plaintiff. *Nagel v. Allstate Ins. Co.,* 72 Fed. App'x 307 (6th Cir. 2003). Rather, the insurance company has a duty to respond reasonably to a demand by the plaintiff. *Id.* Therefore, an insurer is not required to provide a settlement offer if there is no demand for one. *Am. Physicians Assur. Corp. v. Schmidt,* 187 S.W.3d 313, 316 (Ky. 2006). In *Knotts v. Zurich Ins. Co*., 197 S.W.3d 512 (Ky. 2006), the Kentucky Supreme Court noted that a demand is "usually done by making the claim directly to the insurance company, which then engages in the claim adjustment process." *Id.* at 516.

There is no evidence in this case that Eastridge made a formal demand on USAA. Eastridge asserts that she was attempting to make a claim demand when she called USAA on September 11, 2012. However, this call came four months after the original accident and nearly two months after State Farm had advised her to contact USAA. Up until this point, USAA was under the

assumption that State Farm was handling Eastridge's claim through subrogation. According to the record and Eastridge's own testimony, when USAA returned her call the next day, she put the insurer on notice of a potential claim but there was no formal settlement demand.

Still, however, USAA began to investigate the potential claim by requesting her medical records and other documents to assess liability and a potential settlement. Eastridge and her counsel failed to respond to numerous requests for this information. Their failure to cooperate with the investigation implies that she did not seriously consider her "claim" to be a formal one for USAA to assess.

Obligation to Pay Claim

Next, Eastridge must present affirmative evidence that USAA was obligated to compensate her for the damages she incurred because of the accident. That is, to defeat summary judgment, Eastridge must show that there was no dispute as to liability and that USAA was definitively obligated to compensate her for her damages. We agree with the trial court that Eastridge failed to show that USAA was labile for her damages.

An insurance company is obligated to act in good faith with respect to claims that it is *actually obligated* to pay. *Davidson v. American Freightways, Inc.,* 25 S.W.3d 94, 100 (Ky. 2000). Absent this obligation, there is no bad faith cause of action for a plaintiff. *Id.* In this case, the allocation of liability was still disputed. Eastridge and her expert, Donald Lamb, have acknowledged this fact on

the record. Eastridge said in her deposition that she made it evident to KFB that she disputed the liability assessment they had made and that she had no way of stating with any certainty how a jury may have apportioned fault between Boutwell and Hash. Likewise, Lamb did not offer any affirmative facts showing that USAA's liability was clearly established.

Eastridge contends that Boutwell's liability was clearly established at the time she made the initial contact with USAA because he had been charged with wanton endangerment arising out of the road rage incident. However, Eastridge fails to acknowledge that the grand jury chose not to indict Boutwell on this charge. The grand jury, instead, only indicted Hash, with wanton endangerment regarding the accident. Therefore, USAA's decision to contest the degree of Boutwell's liability was not unreasonable at that point in time. We recognize that, even though Boutwell was not indicted on the criminal charge, he could still have some degree of liability in this civil suit.

But while Eastridge has shown that USAA had some potential liability under Boutwell's policy, she has not provided any affirmative facts to conclusively establish USAA's liability at the time Eastridge brought the claim to its attention. The record clearly demonstrates a dispute between all the parties on the parties' respective liability in the matter. Thus, USAA's liability has not been shown to be beyond dispute.

Bad Faith

Finally, as noted above, a mere technical violation of KRS 304.12-230 is not sufficient to impose liability upon an insurer under the UCSPA. Rather, "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." *Wittmer,* 864 S.W.2d at 890. To succeed on a bad faith claim against an insurer, the claimant must show evidence that the insurer "has engaged in outrageous conduct" that was "driven by evil motives or by an indifference to its insured's rights. Absent such evidence . . . the tort claim predicated on bad faith may not proceed to a jury." *United States Auto Ass'n v. Bult*, 183 S.W.3d 181, 186 (Ky. App. 2003). Evidence of mere negligence, tardiness, or sloppiness in investigating a claim is not enough to support an action for bad faith. *Id.* There is nothing in the record to suggest intentional misconduct or reckless disregard of Eastridge's rights on behalf of USAA, nor was USAA's conduct outrageous.

Eastridge contends that USAA committed flagrant misconduct and disregarded her rights because it did not begin its investigation until mid-September. But as discussed above, Eastridge did not directly contact USAA until early September. When finally notified of a potential claim, USAA began a good faith investigation into the incident. Eastridge and her counsel chose not to cooperate by refusing to give USAA access to the medical documents and statements needed to assess a claim. And even without such evidence, there

remained significant issues concerning the extent of USAA's liability under Boutwell's policy.

We acknowledge Eastridge's point that USAA made mistakes in its investigative process. Most notably, USAA erroneously documented that Eastridge's vehicle had suffered little or no damage when, in fact, the vehicle had been totaled. While this error may amount to negligence, alone it does not rise to the level of bad faith. In light of Eastridge's failure to fully cooperate with the investigation and the reasonable dispute concerning the extent of USAA's liability, we must agree with the trial court that Eastridge failed to make her required showing on any of the elements necessary to establish her bad-faith claim. Therefore, the trial court properly granted USAA's motion for summary judgment.

Conclusion

For the reasons stated herein, we affirm the decision of the Taylor Circuit Court granting summary judgment to USAA.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bradley D. Harville Louisville, Kentucky	Timothy B. Schenkel Cincinnati, Ohio