RENDERED: APRIL 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000155-MR

CINCINNATI INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 12-CI-00795

HALEY BELT, INDIVIDUALLY AND AS ASSIGNEE OF K-2 CATERING, LLC; MELISSA KERSNICK; PATRICK KERSNICK; AND ZACHARY KERSNICK — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This is a bad faith insurance case in which a jury awarded Haley Belt $4,583,472.39 in compensatory and punitive damages against Cincinnati Insurance Company (CIC) related to its handling of her claim for

benefits after she was injured while riding on a Polaris Ranger utility task vehicle (UTV). CIC has appealed from the trial verdict and judgment entered September 9, 2016, and from the order denying its post-trial motions entered January 6, 2017. We reverse and remand.

The circuit court record in this case is extensive, and we shall only refer to it as is necessary to set forth the factual and procedural background of this appeal. On August 6, 2011, Belt attended an event at the Shepherdsville, Kentucky, residence of Melissa and Patrick (Chuck) Kersnick. The Kersnicks had a son, Zachary, and he and Belt were minors in 2011. The day before the event, the Kersnicks had purchased the UTV from John Hill's Auto Center. They stated the UTV would be used in conjunction with their catering business, K-2 Catering, LLC. Zachary and other workers or volunteers for K-2 Catering attended the August 6th event, which was a surprise party for Melissa. During the event, Zachary received permission to give people rides on the UTV in the yard. Without permission and with more passengers than he was permitted, Zachary drove off the property onto a roadway and was involved in a wreck, flipping the UTV. Belt and another passenger were injured in the wreck.

At the time of the accident, K-2 Catering had a policy of commercial liability insurance in place with CIC (Policy No. 05ENP0067989), which was effective from April 12, 2011, through April 12, 2014, and which had a

$1,000,000.00 per occurrence liability limit and an annual aggregate limit of $2,000,000.00. The policy covered K-2 Catering, its members "with respect to the conduct of your business[,]" its managers "only with respect to their duties as your managers[,]" volunteer workers "only while performing duties related to the conduct of your business," and employees "for acts within the scope of their employment by you or while performing duties related to the conduct of your business." Hamilton Mutual Insurance Company/Employers Mutual Casualty Company (EMC) had issued a homeowners' policy to the Kersnicks (Policy No. 72H-93-44) for their residence.

After the August 6, 2011, incident, CIC and EMC were both put on notice of claims that Belt and the other injured passenger were asserting. EMC denied coverage, and CIC filed a declaration of rights action with the Bullitt Circuit Court on December 1, 2011, to determine whether coverage for the claims existed based on the coverage opinion of attorney Michael Risley.[1] In the complaint, CIC stated:

> 34. The claims asserted on behalf of Haley Belt and Luke Sivori raise a number of issues relevant to whether, and to who [sic], coverage may be provided by The CIC Policy and the Hamilton Mutual Insurance Company/Employers Mutual Casualty Company Policy, including who owned the Polaris Ranger, whether the Polaris Ranger is an auto vehicle or motor vehicle as that term is defined in either policy, whether the Polaris

[1] Action No. 11-CI-01465.

> Ranger was being used for the business of K-2 Catering, LLC at the time of the incident, whether any person or entity other than K-2 Catering, LLC qualifies as an insured under The CIC Policy, whether any of the policies' exclusions apply, and, if more than one policy provides coverage to any insured, how these coverages are to be applied vis-à-vis each other.
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> 35. A genuine and justifiable controversy exists as to whether coverage exists under The CIC Policy and/or the Hamilton Mutual Insurance Company/Employers Mutual Casualty Company policy for the claims of Haley Belt and Luke Sivori; if coverage exists, to whom that coverage is provided; and, if both policies provide coverage to any insured, how those coverages are to be reconciled.

EMC filed a counterclaim and cross-claims, also seeking a declaration of rights as to its coverage.

On July 12, 2012, Belt filed a personal injury action against K-2 Catering, the Kersnicks, and Zachary, seeking damages related to the injuries she sustained in the accident.[2] She "suffered severe crush and degloving injuries to her right foot, ankle, and leg" requiring multiple surgeries and treatment for her permanent injuries. She alleged that Zachary had been negligently operating the UTV and that the Kersnicks had negligently entrusted him with the vehicle. She sought both compensatory and punitive damages. The two matters were consolidated by order entered September 26, 2012, and United Food and

[2] Because Belt was a minor at the time, her parents as next friends were named as the plaintiffs. When Belt reached the age of majority, she was substituted as the plaintiff.

Commercial Workers Union Local 227 and Employers Health and Welfare Plan were permitted to file an intervening subrogation complaint to recover Belt's medical expenses.

In April 2013, Belt moved the circuit court to file a first amended complaint to add claims against CIC and EMC for bad faith and for violations of the Kentucky Unfair Claims Settlement Practices Act (KUCSPA), Kentucky Revised Statutes (KRS) 304.12-230; and the Kentucky Consumer Protection Act (KCPA), KRS 367.170. This motion was granted on April 12, 2013. Belt claimed the insurance companies failed to reasonably investigate her claims, failed to respond to her claims in a reasonable and timely fashion, failed to make a fair and equitable offer to settle her claims, and acted recklessly with regard to whether a basis to contest coverage existed. Belt claimed that the companies violated six subsections of the KUCSPA and that their business practices were unfair, false, misleading, and deceptive in violation of the KCPA.[3] Belt sought compensatory damages for her mental anguish, humiliation, mortification, and substantial pecuniary loss; punitive damages for the insurance companies' reckless disregard of her rights; and attorney fees. The court later bifurcated Belt's bad faith claims from the tort claims.

[3] Belt later conceded that a bad faith claim under the KCPA was not applicable and agreed not to pursue that claim against CIC.

The circuit court held a three-day bench trial on the coverage issues in January 2014, and entered its findings of fact and conclusions of law on February 28, 2014. The court found that coverage existed for Belt's claims against the Kersnicks and Zachary as to CIC and EMC, as well as her claims against K-2 Catering as to CIC. Thereafter, Belt reached a settlement agreement with K-2 Catering, the Kersnicks, and Zachary. She moved to amend her complaint to dismiss those parties. She also stated that those parties had assigned to her their first-party claims for bad faith and for violations of the KUCSPA and the KCPA, and she moved the court to amend her complaint to add those claims against both CIC and EMC. Her motion was granted. On July 21, 2014, the court entered an agreed order of partial dismissal related to Belt's tort claims as those claims had been settled, while her claims against CIC and EMC remained pending. Belt later settled her claims against EMC, and her claims against that company were dismissed. By agreed order entered in September 2015, CIC's declaration of rights case was declared to be fully adjudicated as no appeal had been taken, and it was severed from Belt's bad faith claims. The bad faith claims against CIC continued to be prosecuted.

The matter proceeded to a jury trial in June and July 2016. The jury found in favor of Belt on CIC's violations of the KUSCPA and awarded her $1,040,000.00 in compensatory damages for emotional pain and suffering and

mental anguish (including $20,000.00 to both Melissa and Chuck), $43,472.39 in litigation costs for CIC's bad faith, and $3,500,000.00 in punitive damages based on its finding that CIC had acted in reckless or wanton disregard for their (Belt's, K-2 Catering's, the Kersnicks', and Zachary's) rights. On September 9, 2016, the circuit court granted Belt a judgment in the amount of $4,583,472.39 with interest to accrue at 12% per annum. The same day, the court denied CIC's motion for a judgment credit from EMC, holding that CIC's actions and omissions were independent from EMC's actions and omissions, and the two companies' investigations were independent from each other.

CIC moved the court to alter, amend, or vacate its judgment pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 related to the punitive damages award, credit for EMC's settlement, and the post-judgment interest rate. CIC also moved the court for a new trial pursuant to CR 59.01, alleging various errors, and for a judgment notwithstanding the verdict. The circuit court denied these motions in an order entered January 6, 2017, and this appeal from the trial judgment and the order denying the post-trial motions now follows.[4]

[4] In her brief, Belt argues that CIC's brief is non-compliant with CR 76.12(4)(a)(ii) in that the font (Arial Narrow) permitted it to circumvent the 25-page limitation after its motion to file a brief in excess of the page limit was denied. We decline Belt's request to strike the brief pursuant to CR 76.12(8)(a), but we strongly caution counsel to comply with the Rule in future appellate briefs to avoid a different result.

For its first argument, CIC contends that the circuit court erred in denying its motion for a directed verdict because Belt failed to establish any part of the test for bad faith set out by the Supreme Court of Kentucky in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). Our standard of review is as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky., 743, 184 S.W.2d 111 (1944), and *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *NCAA v. Hornung*, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Lewis v. Bledsoe Surface Min. Co., 798 S.W.2d 459, 461-62 (Ky. 1990).

The Supreme Court of Kentucky recently addressed the claim of bad faith in *Hollaway v. Direct General Ins. Co. of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016), explaining:

> A bad faith claim under Kentucky law is, essentially, a punitive action. The tort of bad faith is non-existent under our law, unless the underlying conduct is sufficient to warrant punitive damages. Absent evidence of punitive conduct, an insurer is entitled to a directed verdict for any bad-faith claim levied against it. This explains why KUCSPA requires plaintiffs to prove that an insurer's actions during resolution of the claim were outrageous, or because of the defendant's reckless indifference to the rights of others.

Id. at 739 (citing *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997)). In *Wittmer*, the Supreme Court of Kentucky set forth a three-part test to determine whether in insurer acted in bad faith in refusing to pay an insured's 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."
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> This is a quote from Leibson, J., in dissent, in [*Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846-47 (Ky. 1986)], stating views which were incorporated by reference in this Court's Majority Opinion in *Curry v. Fireman's Fund*, 784 S.W.2d at 178. It applies to a claim

> of bad faith made by an insured against his own insurer, and a fortiori to a third-party's claim of bad faith against an insurance company.

Wittmer, 864 S.W.2d at 890. "Proof of this third element requires evidence that the insurer's conduct was outrageous, or because of his reckless indifference to the rights of others." *Hollaway*, 497 S.W.3d at 738 (Ky. 2016) (citing *Glass*, 996 S.W.2d at 452)).

In *Hollaway*, the Supreme Court also confirmed that "[u]se of the conjunctive 'and' in our *Wittmer* test is quite revealing – it combines the individual items of *Wittmer*, creating a prerequisite that all elements of the test must be established to prevail on a third-party claim for bad faith under the KUCSPA." *Hollaway*, 497 S.W.3d at 738. Therefore, in order for Belt to prevail on her claim for insurance bad faith, she must prove all three elements. CIC has argued that Belt failed to establish any of the three arguments. Belt has disputed these arguments in her brief.

First, CIC argues under the first prong of the *Wittmer* test that it was not obligated to pay Belt's claim because its liability and the amount of damages had not been established. In support of this argument, CIC cites to the Supreme Court's statement of the law in *Hollaway* that a bad faith claim cannot be established under *Wittmer* until the insurance company's "absolute duty to pay [the] claim is . . . clearly established[.]" *Hollaway*, 497 S.W.3d at 739. It asserts

that it was not obligated to pay the claim until the circuit court made a decision as to Zachary's use of the UTV at the time of the accident. This decision, it argued, determined both coverage and liability issues, and CIC paid its policy limits shortly thereafter, precluding a claim for bad faith.

Second, CIC argues that it had a reasonable basis for contesting coverage in this case. "[F]or purposes of Kentucky law, a tort claim for a bad faith refusal to pay must first be tested to determine whether the insurer's refusal to pay involved a claim which was fairly debatable as to either the law or the facts." *Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Service, Inc.*, 880 S.W.2d 886, 890 (Ky. App. 1994).

> We are of the opinion that the refusal [to pay prior to this court's final determination that coverage existed for the loss] was not made in bad faith, and that to conclude otherwise would effectively deprive every insurer of its right either to raise lack of coverage as a defense to an action on a policy or to file an action seeking a declaration of rights respecting coverage issues.

Id. at 888.

Here, CIC argues that questions remained as to coverage for both Zachary and the Kersnicks based on the information it had and as presented in attorney Risley's coverage opinion letter. In the Kersnicks' joint recorded interview by CIC's Jennifer Hawkins in September 2011, shortly after the accident, Chuck stated, "I handed [Zachary] the key [to the UTV] when some guests

arrived[. H]e asked if he could give them a ride around the yard and I handed him the key[.]" Chuck later agreed that the August 6th event was a "social event" and a "birthday party" for Melissa and that no business for K-2 Catering took place during the event. He also discussed the purchase of the UTV. A note in CIC's claims file dated September 8, 2011, the day after the recorded statement, summarized a conversation with Melissa in which she stated that she had spoken with several people during the party about working during the upcoming weeks and insurance certificates and that K-2 Catering purchased the meat for the party. K-2 Catering also owned the tents, grill, tables, and covers, which were set up by boys who were seasonal workers.

The following day, CIC sought a coverage opinion from attorney Risley, seeking his opinion on various issues, including ownership of the UTV, who was an insured, whether there was a duty to defend or indemnify, whether an examination under oath would be appropriate, and for assistance with the drafting of the reservation of rights letter. Attorney Risley's letter dated October 7, 2011, contained his opinion. Regarding K-2 Catering, attorney Risley concluded that the company was an insured under CIC's policy but "the fact that K-2 Catering may not own the vehicle may provide it with a defense to any claim which may be asserted against K-2 Catering." Regarding Zachary, attorney Risley did "not believe [he could] be considered an insured under the policy" because his "purely

recreational use of the vehicle was not within the scope of any employment he may have had with K-2 Catering and was not related to the conduct of K-2 Catering's business." Regarding the Kersnicks, attorney Risley noted that they could be considered as insureds under the policy "only if the claims which may be asserted against them relate to the conduct of the insured's business." This involved the question of the ownership of the UTV, which Risley believed to be a factual issue based on the documentation, although he did state that based on their recorded statements, a fact-finder would "more likely than not" conclude that K-2 Catering was the intended owner of the UTV. If the UTV was owned by K-2 Catering, the next question was "whether their entrustment of the vehicle to Zachary constitutes conducting the business of K-2 Catering." Therefore, factual issues existed regarding coverage for the Kersnicks. Attorney Risley agreed that the taking of an examination under oath would be appropriate and suggested CIC consider filing a declaratory judgment action to resolve the coverage issue.

Attorney Risley testified similarly during the bad faith trial and specifically stated that he had never concluded that coverage was not an issue. He went on to testify about the testimony at the coverage trial, which was inconsistent with the information he had received. Chuck had testified at the coverage trial that the party had a dual purpose (a birthday party for Melissa and a "thank you" for K-2 Catering's employees) and that was how the UTV rides came about. Mike

Kleinert, another attorney with the same firm, testified at the bad faith trial about his role in the coverage action. He deposed Zachary about the purpose of the ride, and Zachary agreed that it was a joy ride. He also attended the coverage trial and noted the changes in testimony from the earlier statements. At the coverage trial, the testimony had changed to the party also being an event to thank the K-2 Catering employees and that Zachary had been instructed to give the guests joy rides on the UTV.

Based upon our review of the extensive record in this case, we must hold that the circuit court erred as a matter of law in failing to grant CIC a directed verdict on the issue of coverage as the verdict was "palpably or flagrantly" against the evidence so as to have been reached by passion or prejudice. Belt failed to establish that CIC was obligated to pay her claim because coverage remained an issue to be decided and because CIC had a reasonable basis to contest coverage due to the fairly debatable factual disputes related to Zachary (whether he was in the course and scope of his employment as a volunteer for K-2 Catering) and the Kersnicks (whether they were performing duties as managers of K-2 Catering). CIC's obligation to pay the claim did not arise with any certainty until the circuit court issued its opinion in the coverage action, after which it paid Belt the policy limits. We reject Belt's arguments that CIC's obligation was clear in 2011.

Accordingly, we must hold that the circuit court should have granted a directed verdict to CIC on the issue of coverage under *Wittmer* and dismissed Belt's claim for bad faith. Based upon this holding, we do not need to address the remaining arguments CIC raised in its brief, including whether it acted in disregard of whether a reasonable basis for coverage existed, whether a demand was made within CIC's policy limits, the jury instructions, the testimony of Belt's witness, Britta Moss, and apportionment or a credit for funds EMC paid, among others.

For the foregoing reasons, the trial verdict and judgment and the order denying the post-trial motions are reversed, and this matter is remanded for dismissal of Belt's bad faith claim.

ALL CONCUR.

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