[Cite as *Calich v. Allstate Ins. Co.*, 2004-Ohio-1619.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

REBECCA CALICH

Appellee

v.

ALLSTATE INSURANCE COMPANY

Appellant
C.A. No. 21500

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2001-03-1400

DECISION AND JOURNAL ENTRY

Dated: March 31, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Allstate Insurance Company ("Allstate"), appeals from the judgment of the Summit County Court of Common Pleas that found in favor of Appellee, Rebecca Calich. We reverse.

I.

{¶2} On March 26, 2001, Ms. Calich filed a complaint against Allstate asserting that it acted in bad faith in regard to an alleged "excess judgment" against the tortfeasor insured by Allstate. Thereafter, Allstate moved to dismiss, and Ms. Calich moved for summary judgment. The trial court denied Allstate's motion to dismiss and Ms. Calich's motion for summary judgment. Allstate then moved for summary judgment, and the trial court denied this motion. As such, the cause of action proceeded to a jury trial. During the trial, Allstate moved for a directed verdict at the close of Ms. Calich's case and after the close of all of the evidence. The trial court denied Allstate's motion for a directed verdict in both instances. The jury returned a verdict in favor of Ms. Calich, and it awarded compensatory and punitive damages. Allstate timely appeals, and it raises three assignments of error for review.

II.

A.

First Assignment of Error

"[MS. CALICH'S] BAD FAITH CLAIM IS WITHOUT MERIT AS A MATTER OF LAW[.]"

{¶3} In its first assignment of error, Allstate avers that Ms. Calich's bad faith claim lacks merit. In particular, Allstate supports this averment by articulating various rationales to discredit Ms. Calich's claim: (1) an insurance company need not settle with a party if the amount sought is unreasonable; (2) an insurance company need not settle until its liability is clear; (3) a claim of bad faith does not arise solely from an insurance company's failure to comply with an arbitrarily and unilaterally imposed deadline; and (4) an *adjudicated* excess judgment against the insurance company must exist before a claim of bad faith arises. Allstate additionally avers that the trial court erred when it failed to grant its motions for a directed verdict. We find that Allstate's averment, that, an adjudicated excess judgment against an insurance company must exist before a claim of bad faith arises, is dispositive of this assignment of error. As such, we need not discuss Allstate's other bases included within its assignment of error.

{¶4} When determining whether an insurer has breached its duty to its insured to act in good faith, the courts must utilize the "reasonable justification" standard. *Zoppo v. Homestead Ins. Co*. (1994), 71 Ohio St.3d 552, 554. Under this standard, "'an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.'" Id. at 554-555, quoting *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 303. Furthermore, a cause of action only arises against an insurer for failing or refusing to settle a claim brought against the insured for an amount within the policy limits,

"so as to entitle the insured to recover for the excess of the judgment over the policy limit[, if the insurer has] been [found] guilty of *** bad faith." *Hart v. Republic Mut. Ins. Co*. (1949), 152 Ohio St. 185, 187-188. Accordingly, "implicit in bringing an action against an insurer for bad faith with respect to settling a claim within policy limits, is a requirement that there be an excess judgment against the insured." *Romstadt v. Allstate Ins. Co.* (C.A.6., 1995), 59 F.3d 608, 611, citing *Hart*, 152 Ohio St. at 187-188; *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276; *Marginian v. Allstate Ins. Co*. (1985), 18 Ohio St.3d 345, 348.

{¶5} In cases where an excess judgment has not been adjudicated, an agreed judgment between the insured and a third party is unenforceable against an insurer. See *Chitlik v. Allstate Ins. Co*. (1973), 34 Ohio App.2d 193, 198 (finding that despite a settlement between the tortfeasor and the claimant, "the value of the injuries suffered by [the claimant] would still need to be determined in an action against the alleged tortfeasor"); *D.H. Overmyer Telecasting Co. v. Am. Home Assur. Co*. (1986), 29 Ohio App.3d 31, 34 (stating that "[a]ny claims of bad faith negotiations by third-party claimants cannot be based on speculation, but must arise from *adjudicated* liability" (Emphasis added.)), citing *Chitlik*, 34 Ohio App.2d at 198. Therefore, it follows, that "where the insurer has *** refused to settle [a] case, an injured third party cannot sue the insurer directly, or via assignment, for bad faith refusal to settle in the absence of an adjudicated excess judgment against the insured." (Emphasis omitted.) *Romstadt*, 59 F.3d at 615.

{¶6} In the present case, Ms. Calich's counsel demanded a settlement from Allstate valued at the policy limits; the policy at issue had limits of $50,000 per person/$100,000 per accident. Specifically, he wrote, "I will provide you 30 days from today to offer the totality of your policy limits. *** I do not intend to extend the 30 day time frame under any circumstance." Allstate did not offer Ms. Calich an amount equal to its policy limits within the time frame imposed by her counsel; consequently, Ms. Calich filed suit against the tortfeasor. Ultimately, Ms. Calich offered to settle with the tortfeasor by having the tortfeasor enter into a consent judgment for $1,060,000.00 and an assignment from the tortfeasor to Ms. Calich of all his claims against Allstate. Subsequently, the trial court accepted the consent judgment that was signed by Ms. Calich, her attorney, and the tortfeasor.

{¶7} Although the record appears to indicate that Allstate may have possibly reviewed preliminary drafts and the final draft of the consent judgment, we find it necessary to note that the record does not indicate that Allstate participated in any way in the creation of the final consent judgment, in the derivation of the figure which Ms. Calich assigned to her claim, or in the ultimate approval of the consent judgment by the trial court. Ironically, the record does reveal that the parties that reaped a benefit from this manufactured consent judgment, namely, Ms. Calich, her attorney, the tortfeasor, and the tortfeasor's parents, participated in the creation of the final draft of the consent judgment and in the derivation of the figure to attach to Ms. Calich's alleged claim, as evidenced by their signatures on the entry.

{¶8} Following the consent judgment and the assignment, Ms. Calich filed a complaint against Allstate and alleged it had acted in bad faith. However, the record reveals that at no time was an excess judgment adjudicated against Allstate. See *Romstadt*, 59 F.3d at 615. See, also, *Chitlik*, 34 Ohio App.2d at 198; *D.H. Overmyer Telecasting Co.*, 29 Ohio App.3d at 34. Consequently, without such an adjudicated excess judgment, Ms. Calich was unable to file a bad faith cause of action either directly, or via assignment, against Allstate. See *Romstadt*, 59 F.3d at 615. Allowing the filing of such a bad faith claim can potentially encourage a judgment-proof tortfeasor to conspire with the plaintiff and enter an agreement for an astronomical sum with a full release to the tortfeasor. Even if the tortfeasor is not judgment-proof, he still escapes liability as a result of the full release. This result is extremely beneficial to the tortfeasor, who escapes liability, and to the plaintiff, who has the potential to gain a sum of money that greatly exceeds his or her actual injuries. Such a "manufacturing" of these bad faith claims, as between the tortfeasor and the plaintiff, puts an insurance company in a precarious situation, without a legitimate opportunity to properly protect itself from a bad faith claim. This Court will not promote the manufacturing of these bad faith claims. More importantly, an adjudicated excess judgment must exist, which evinces that an insurance company has been given a reasonable opportunity to protect its interests and rights. As such, we conclude that the trial court erred when it rendered its judgment in favor of Ms. Calich on her bad faith claim. Accordingly, Allstate's first assignment of error is sustained.

B.

Second Assignment of Error

"THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON PUNITIVE DAMAGES[.]"

Third Assignment of Error

"THE TRIAL COURT SHOULD NOT HAVE ALLOWED JODEE MULL TO PROVIDE HEARSAY TESTIMONY ABOUT HER SON'S ALLEGED DAMAGES[.]"

{¶9} In light of our disposition in the first assignment of error, we need not address Allstate's second and third assignments of error, as these assignments of error are now rendered moot. See App.R. 12(A)(1)(c).

III.

{¶10} Allstate's first assignment of error is sustained, and its second and third assignments of error are not addressed. The judgment of the Summit County Court of Common Pleas is reversed.

Judgment reversed.

WILLIAM G. BATCHELDER
FOR THE COURT

SLABY, P. J.
CONCURS

CARR, J.
DISSENTS SAYING:

{¶11} I respectfully dissent. The issue in the case is the following: Where an insurer has refused to settle a case, may an injured party, either directly or by

assignment sue the insurer for bad-faith refusal to settle if the insured consents to a judgment in excess of the policy limits but is not released from personal liability for the excess amount?

{¶12} This is an issue of first impression for this district. Moreover, the exact issue has not been addressed by the Supreme Court of Ohio either.

{¶13} The leading case in Ohio, *Carter v. Pioneer Mutual Cas. Co.* (1981), 67 Ohio St. 2d 146, on the subject of bad-faith refusal to settle claims is over 20 years old but provides an excellent stating point for analysis of the issue.

{¶14} In *Carter* the Supreme Court of Ohio explained:

> "Traditionally, there have been two schools of thought concerning the imposition of liability upon an insurer for failing to exercise good faith which results in an excess judgment against the insured.
>
> "An increasing majority of jurisdictions have adopted the 'judgment rule,' which advocates the reasoning that an entry of judgment in excess alone is sufficient damage to sustain a recovery from an insurer for its breach of duty to act in good faith in defending the insured's case." (Citations omitted.) Id. at 148-149.

{¶15} The Court proceeded to explain at footnote 2:

> "*Wolfberg*, infra, at page 196:
>
> "A review of the authorities persuades us to the view that the cases relied on by appellee constitute the earlier and minority view on this issue. These cases were considered in *Wooten v. Central Mut. Ins. Co.* (La.1966), 182 So.2d 146, which noted that these cases were not persuasive, had been severely criticized, and were expressly refused or failed to be followed in other federal circuits.
>
> "The majority view in this country is represented by *Jenkins v. General Acc. Fire & Life Assur. Corp.*, 349 Mass. 699, 212 N.E.2d 464, 465, 467 (Sup. Ct. Mass. 1965), which stated:

"'*** Despite some conflict in earlier cases, the weight of authority is that it is not necessary for the insured to allege that he has paid or will pay a judgment in excess of the policy limits in an action against the insurer for breach of its duty to act in good faith ***.' (Citations omitted.) Id. at 149.

{¶16} The Court went on to say:

"A decreasing minority of jurisdictions adopt the 'payment rule,' which advocates the reasoning that, if an insured did not and cannot pay out any money in satisfaction of an excess judgment, the insured was not harmed, and, therefore, the insurer is not to be held responsible for its bad faith in defending the insured's case.

"We adopt the rationale of a majority of jurisdictions, which espouse the 'judgment rule.'

"The seminal case law authority in this area is *Wolfberg v. Prudence Mut. Cas. Co.*, supra (98 Ill.App.2d 190). The court, in *Wolfberg*, succinctly gave the rationale for the adoption of the 'judgment rule,' when it stated, at page 197:

"'We are persuaded that the majority view is the sounder one both in justice and logic. The very fact of the entry of judgment itself constitutes damage and harm sufficient to permit recovery. *** The rule of damages is that incurrence is equivalent to outlay.

"* * *

"'Were payment or showing of ability to pay the rule, encouragement would be given to an insurer with an insolvent insured to unreasonably refuse to settle. Such a course would impair the use of insurance for the poor man. Further, the fullness or the emptiness of an insured's purse would be an irrelevant and poor measure of liability and performance of duty by the insurer under his contract.'

"* * *

"In *Farmers Ins. Exchange v. Schropp* (1977), 222 Kan. 612, 567 P.2d 1359, the court, when presented with an identical factual situation as herein, at pages 623-624, stated:

> "'*** The court observed that virtually everything that has been written on this subject in the past fifteen years has favored the judgment rule over the prepayment rule.
>
> "'* * *
>
> "We do not think that the prepayment rule serves the ends of justice, and decline to adopt it." Id. at 150-152.

{¶17} In *Carter*, the Supreme Court of Ohio also determined that a cause of action could be maintained against an insurer for a bad-faith refusal to settle a claim where an excess judgment was rendered against an insolvent estate as the insured. The Court reasoned:

> "A living insured with no assets suffers injury when an excess judgment is obtained against him because such a judgment will potentially impair his credit, place a cloud on the title to his exempt estate, impair his ability to successfully apply for loans, diminish his reputation and future prospects and the like.
>
> "A solvent estate may also pursue an excess judgment against the insurer since the interests of the estate are involved and a full and fair recovery enables the fiduciary of the estate to distribute assets free from the claim of the holder of the excess judgment." (Citations omitted.) *Carter*, 67 Ohio St.2d at 149-150.

{¶18} The Court then rejected the theory that an exception should be carved out for an excess judgment against an insolvent estate:

> "Because of theoretical and practical considerations, we find no reason to carve this exception.
>
> "Theoretically, it would be a windfall to the insurer and 'such a course would impair the use of insurance for the poor man.'
>
> "As to a practical aspect, it is also improper to relieve an insurer from its contractual duty to act in good faith simply because the insured is deceased and insolvent." (Citation omitted.) Id. at 151.

{¶19} The majority in reaching its conclusion does not mention *Carter*, but relies on the 1995 Sixth Circuit Court of Appeals case of *Romstadt v. Allstate Insurance Co.*, 59 F.3d 608 (C.A.6, 1995). The *Romstadt* case is obviously not controlling and is also distinguishable since the consent judgment involved in that case released the insured from all personal financial obligation. The same is not true here.

{¶20} In *Romstadt*, the insured did not contact her insurer and settled the case for five times the policy limit. Here, Allstate was specifically notified of the claim and provided representation to McCoy and the Mulls in the lawsuit. The attorney Allstate retained participated in the negotiations and represented the insureds in the consent judgment entry.

{¶21} Although in the present case the insured did enter into a consent judgment in excess of the policy limits of insurance, the insured was not released of personal, financial liability for this excess amount as the insured was in *Romstadt*. In *Romstadt*, the insured was completely released. The plaintiff agreed to seek recovery solely from the insurer and not pursue the insured whereas here the insured is not released.

{¶22} The most recent case in Ohio on this issue is from the Second Appellate District last year. In *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381, discretionary appeal not allowed by Sub nomine at *Pollard v. Hunt*, 99 Ohio St.3d 1468, 2003-Ohio-3669, the insured entered into a consent judgment where he paid a nominal amount in exchange for him assigning any bad-

faith claim against the insurer, Ohio Bar Liability Insurance Co. or OBLIC. The court stated:

> "OBLIC claims that the trial court nevertheless properly rendered summary judgment in its favor on the bad-faith claim, because Hunt was never exposed to excess liability, as required by law to assert a successful bad-faith claim. With respect to this argument, OBLIC argues that unless the insured has been exposed to an excess judgment by the unreasonable actions of the insurance company, the insured has no claim for bad faith. In support of this contention, the insurance company directs our attention to *Romstadt v. Allstate Ins. Co.* (N.D. Ohio 1994), 844 F.Supp. 361, *Doser v. Middlesex Mut. Ins. Co.*, 101 Cal.App.3d 883, 162 Cal.Rptr.115 (Cal.App.2d1980), and *Smith v. State Farm Mut. Auto. Ins. Co.* (Cal.App. 1st1992), 5 Cal.App.4th 1104, 7 Cal.Rptr.2d 131.
>
> "We disagree. Under Ohio law an insurer has a duty to act in good faith in processing and paying valid claims. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276, 6 Ohio B. 337, 452 N.E.2d 1315. Therefore, an insured may bring a cause of action in tort against the insurer for breach of that duty. Id. To successfully assert a bad-faith claim, the insured must show that the insurer failed to exercise good faith in processing a claim by refusing to pay or to defend the claim, when not based upon 'circumstances that furnish reasonable justification therefore.' *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994 Ohio 461, N.E.2d 397. OBLIC has not cited any Ohio authority, nor have we found any, requiring the existence of an excess judgment as a predicate for a cause of action for bad faith.
>
> "It is true that some courts have concluded that an excess judgment must be in existence before a bad faith cause of action can be stated. OBLIC cites *Romstadt*, *Doser*, and *Smith*, which each stand for the proposition that an insured may not be sued for bad faith refusal to settle unless an excess judgment has been entered. But each presupposes that the insurer's breach of implied duties of good faith and fair dealing are not complete until an excess judgment has been entered.
>
> "We disagree with this proposition. The Ohio Supreme Court has not restricted bad-faith claims in this manner, and we conclude that it would be unwise to do so. Cf. *Camlot by the Bay Condo.*

> *Owners' Assn. v. Scottsdale Ins. Co.* (Cal.App.2d 1994), 27 Cal.App.4th 33, 32 Cal. Rptr.2d 354. By applying this logic, insurers could, with impunity, act as unreasonably as they choose, leaving an insured to cover the costs of defense, so long as no excess judgment is ultimately recovered. This would do little to facilitate settlement, since an insured would often be without the means to offer what the tort victim reasonably demands in settlement. Permitting an insurer to act unreasonable with impunity would also lead to further inequality in the bargaining power that an insurer holds over its insured, by virtue of superior resources.
>
> "The potential for a bad-faith claims acts as an incentive for insurers to act in a reasonable manner in defending and settling claims. Those insurers who fail to do so act at their own peril and will not be protected simply because an insured, forced unreasonably to provide for his own defense, avoids a judgment in excess of policy limits." *Hunt*, at ¶¶27-31.

{¶23} Obviously, the law is not settled in Ohio, as the Supreme Court has yet to rule on the exact issue before this Court. However, *Carter* and *Hunt*, appear to be at odds with the reasoning of the majority.

{¶24} Clearly, there are critical concerns that come into play when an insured settles with a plaintiff and assigns its rights to a bad-faith claim against the insured. The most obvious problem "is the potential for fraud or collusion on the part of the plaintiff and the insured directed against the carrier."

> "If the assignment and covenant not to execute are exchanged before a judgment, there is no incentive for either party to engage in the kind of adversarial process which normally ensures that a settlement or judgment accurately reflects the value of the case. The plaintiff will always strive for a judgment admitting liability and a large amount of damages. The usual check in this situation is the position of the insured, who has his own incentive to minimize loss. But since the covenant not to execute relieves the insured of personal liability, his only incentive is to agree to whatever terms will persuade the plaintiff to abandon his suit. The correlative incentive for the plaintiff to agree is the potential for increased recovery by

> pursuing the insured's bad faith claim against the carrier. The final result is that neither party is motivated to seriously negotiate over issues of damages and liability because the end goal is to structure the deal so that the carrier, a nonparty to the agreement, pays.
>
> "The possible forms that fraud or collusion between plaintiff and insured may take are, as one court has suggested, limited only by 'the ingenious assistance of counsel.' Obvious examples are cases in which the plaintiff and insured agree to a highly inflated damage figure which is then entered by the court. Increasingly, default judgments or uncontested trials are preferred to straight settlement agreements, but in either case, there is no real opposition to the damage figure named by the plaintiff. In a similar vain, certain facts or admissions may be stipulated to show liability and coverage. This is most dangerous when the plaintiff has a weak case because the carrier typically has no right to later contest an admission of liability.
>
> "Carriers also frequently complain of 'set-up' settlement offers, which the plaintiff makes after coverage is denied in an attempt to manipulate the carrier into acts that can later be cited as evidence of bad faith. A settlement offer may be made early in the discovery process, when the carrier has not had adequate time to ascertain the value of the claim or fully establish facts concerning the insured's liability. Settlement offers may remain open for an unreasonably limited time. While a plaintiff has the power to control the terms and conditions of a settlement offer, when these tactics are combined with a subsequent refusal to accept the same settlement later in negotiations and with an assignment of the insured's rights to the plaintiff, the situation looks less like a bargaining tactic than an attempt to lay the groundwork for a future bad faith suit." Note, Assignments of Rights and Covenants Not to Execute in Insurance Litigation (1997), 75 Tex.L.Rev. 1373, 1385-1386.

{¶25} Obviously, some of these concerns could be lessened by the use of safeguards in the system. In a bad-faith suit resulting from a settlement or consent judgment, the insurer must be allowed to contest the amount of the agreed upon damages in the bad faith suit. Id. The burden of proof should be placed on the plaintiff-assignee to prove the reasonableness of the damages. Id. Also, the

insurer should be allowed to raise the affirmative defense of fraud and/or collusion.

{¶26} However, without further guidance from the Ohio Supreme Court, an insured in Ohio may assign its bad-faith claim against an insurer based on an excess consent judgment as long as the insured remains personally financially liable under the consent judgment. Since, in my opinion, appellee was not prevented as a matter of law from filing suit, I would affirm.

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