

2013 PA Super 59

CATHY L. ALBERT, INDIVIDUALLY AND  
ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED,

Appellant

v.

ERIE INSURANCE EXCHANGE,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1780 EDA 2012

Appeal from the Order of May 16, 2012,  
in the Court of Common Pleas of Philadelphia County,  
Civil Division at No. 02260 September Term, 2011

BEFORE: BENDER, LAZARUS and COLVILLE\*, JJ.

CONCURRING AND DISSENTING OPINION BY COLVILLE, J.:

Filed: March 20, 2013

I agree the trial court properly sustained Erie's preliminary objections to Albert's bad faith claim. Albert's second amended complaint does not support a cause of action for bad faith as it does not contain an allegation that Erie denied a claim for benefits under the policy. ***See Terletsky v. Prudential Property & Casualty Ins. Co.***, 649 A.2d 680, 688 (Pa. Super. 1994) ("[T]o recover under a claim of bad faith, the plaintiff must show that the defendant did not have a reasonable basis for denying benefits under the policy and that defendant knew or recklessly disregarded its lack of

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\*Retired Senior Judge assigned to the Superior Court.

reasonable basis in denying the claim.”). Thus, dismissal of this claim was proper.

However, I believe the trial court erred in sustaining Erie’s preliminary objections to Albert’s breach of contract and declaratory judgment claims.

The parties agree that Erie’s policy contains a provision requiring Erie to reimburse policyholders for reasonable expenses incurred in helping Erie investigate or defend a claim or suit. **See** Erie Auto Insurance Policy, Liability Protection, ¶6. Albert argues the policy imposes a duty on Erie to reimburse her when she incurs expenses at Erie’s request and that a demand by the insured for payment is not a prerequisite to expense reimbursement. Erie argues that Albert was required to make a request or demand for reimbursement before Erie could be liable for failing to pay pursuant to the policy.

The Majority and the trial court find that the policy imposes on the policyholder a duty to come forward with a claim for reimbursement expenses, citing to Paragraph 13 of the policy, which requires a policyholder to notify Erie “[w]hen there is an accident or loss.” Erie Auto Insurance Policy, ¶13. A claim for reimbursement for expenses incurred in helping Erie investigate or defend a claim or suit is obviously not a claim of an accident; further, I do not believe it is a loss as that term is used in the insurance

context.<sup>1</sup> In my review, this provision does not impose a duty on the policyholder to notify Erie of a claim for reimbursement.

The policy is silent as to the mechanism triggering Erie's obligation to reimburse a policyholder for expenses incurred at Erie's request. Thus, it is not clear from the record that a demurrer should be sustained with regard to Albert's breach of contract and declaratory judgment claims. ***See Feingold v. Hendrzak***, 15 A.3d 937, 941 (Pa. Super. 2012) (stating, "Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections."). For this reason, I would reverse the trial court's ruling as to those claims and remand for further proceedings.

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<sup>1</sup> Black's Law Dictionary's definition of "loss" as it relates to insurance states, "The amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable." Black's Law Dictionary 963 (8<sup>th</sup> ed. 2004).