Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00178-CV

IN RE PROGRESSIVE COUNTY MUTUAL INSURANCE COMPANY

Original Mandamus Proceeding[1]

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 8, 2020

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Relator, Progressive County Mutual Insurance Co. ("Progressive"), asserts the trial court abused its discretion by refusing to sever and abate the real party in interest's bad faith claims and related discovery pending disposition of her underinsured motorist claim. We agree and conditionally grant the petition for writ of mandamus.

BACKGROUND

In September 2018, Rebecca Sanchez was injured in an automobile collision with another driver, Raymudo Estrada. Estrada's policy limits were $30,000. Sanchez was the insured under a policy issued by Progressive that provided underinsured motorist ("UIM") coverage. On July 9,

[1] This proceeding arises out of Cause No. 2019CI21744, styled *Rebeca Sanchez v. Progressive County Mutual Insurance Company*, pending in the 166th Judicial District Court, Bexar County, Texas, the Honorable Johnny Gabriel, Jr. presiding.

2019, Sanchez settled her lawsuit with Estrada for $30,000. On July 11, 2019, Progressive sent a $250 settlement to Sanchez that acknowledged the claim but stated Progressive did not believe her damages would exceed her underlying policy limits.

Sanchez sued Progressive asking for a declaratory judgment for recovery under the insurance policy (her "UIM claim") and alleging violations of the Texas Insurance Code and breach of duty of good faith and fair dealing (her "extra-contractual claims"). Her petition included discovery requests. Progressive filed a motion to sever and abate Sanchez's UIM claim from her extra-contractual claims. Progressive also responded to Sanchez's discovery requests raising objections to certain requests as not relevant to Sanchez's UIM claim. Sanchez filed a motion to compel. On December 12, 2019, the trial court conducted a hearing on both motions, after which it denied Progressive's motion to sever and abate and granted Sanchez's motion to compel. Progressive filed a motion for reconsideration, which the trial court denied. Progressive filed a petition for writ of mandamus and Sanchez filed a response.

STANDARD OF REVIEW

Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion when there is no other adequate remedy at law. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). To satisfy the clear abuse of discretion standard, the relator must show "the trial court could reasonably have reached only one decision." *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). Mandamus relief is appropriate when a trial court abuses its discretion in denying a motion to sever and abate extra-contractual claims in an underinsured motorist case. *See, e.g., In re United Fire Lloyds*, 327 S.W.3d 250, 257 (Tex. App.—San Antonio 2010, orig. proceeding).

SEVERANCE

The Texas Insurance Code provides as follows:

> In this section, "uninsured or underinsured motorist coverage" means the provisions of an automobile liability insurance policy that provide for coverage in at least the limits prescribed by Chapter 601, Transportation Code, that protects *insureds who are legally entitled to recover* from owners or operators of uninsured or underinsured motor vehicles damages for bodily injury, sickness, disease, or death, or property damage resulting from the ownership, maintenance, or use of any motor vehicle.

TEX. INS. CODE § 1952.101(a) (emphasis added).

The Texas Supreme Court interpreted this language to mean "the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist." *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006) (interpreting prior version of statute). The *Brainard* Court rejected the plaintiff's argument that a "UIM policy is to be treated like other contracts, for which damages are liquidated in a judicial proceeding and attorney's fees incurred are recoverable":

> The UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, UIM insurance utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined.

Id.

Therefore, to recover benefits under a UIM policy, an insured must show (1) the insured has underinsured motorist coverage, (2) the underinsured motorist negligently caused the accident that resulted in the covered damages, (3) the amount of the insured's damages, and (4) the underinsured motorist's insurance coverage is deficient. *In re Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d 214, 220 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding); *see also Brainard*, 216 S.W.3d at 818; *United Fire Lloyds*, 327 S.W.3d at 255. Accordingly, "a claim for [UIM] benefits

is not presented until the trial court signs a judgment" resolving these issues. *Brainard*, 216 S.W.3d at 818; *see also State Farm Mut. Auto. Ins. Co. v. Nickerson*, 216 S.W.3d 823, 824 (Tex. 2006) (holding, "State Farm had no contractual duty to pay benefits until the trial court rendered judgment for Nickerson").

Here, Sanchez has not received a judgment from the trial court resolving her UIM claim. However, she advances several arguments as to why severance is not required in this case. First, Sanchez relies on *Akin* for her argument that the trial court properly exercised its discretion to deny severance because her two actions are so interwoven that they involve the same facts and issues. The *Akin* Court held a "trial court properly exercises its discretion in severing claims when: (1) the controversy involves more than one cause of action; (2) the severed claim is one that could be asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues." *Akin*, 927 S.W.2d at 629.

Sanchez contends, without elaboration, that the amount of her damages is key to her UIM claim and her bad-faith claims because she must prove the same damages in both cases. She asserts the amount of damages and Progressive's investigation of the claim and reasons for disagreeing are "also the linchpin for liability in the bad-faith case." Although there may be some overlap of facts and issues, Sanchez's UIM and extra-contractual claims do not involve the *same* facts and issues. Therefore, her claims are not so interwoven as to defeat Progressive's motion to sever. *See In re Reynolds*, 369 S.W.3d 638, 652 (Tex. App.—Tyler 2012, orig. proceeding) (concluding claims properly severable because "whether Sharp had UIM coverage and whether Reynolds and Pelhams had insurance coverage in at least the amount of the damages recovered—are unrelated to the facts and issues pertaining to [Sharp's] negligence claims. Thus, the two causes of action have some overlapping facts and issues, but do not involve 'the same facts and issues.' Therefore, they are not 'interwoven.'").

The *Akin* Court recognized that severance of extra-contractual claims from contractual claims may be necessary in certain insurance cases. *Akin*, 927 S.W.2d at 630. The Court noted a trial court may encounter instances in which evidence admissible only on the extra-contractual claim would prejudice the insurer to such an extent that a fair trial on the contract claim would become unlikely. *Id.* One example is where the insurer has made a settlement offer on the disputed contract claim. *See id.* Without a severance of the contractual and extra-contractual claims, the dilemma presented where an insurer has made an offer to settle a disputed contract claim has been explained as follows:

> Either a trial court refuses to admit evidence of settlement offers, thereby acknowledging [a] defendant's right under [Texas] Rule [of Civil Procedure] 408 to exclude such evidence but denying a plaintiff the right to use it to establish essential elements of a bad faith claim; or the trial court admits evidence of settlement offers, satisfying [a] plaintiff's proof requirements but abrogating [a] defendant's right to exclude such evidence.

In re Allstate Cty. Mut. Ins. Co., 209 S.W.3d 742, 746 (Tex. App.—Tyler 2006, orig. proceeding) (quoting *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding)). Under these circumstances, only one decision can protect all interests involved, and that is to order severance of the two types of claims. *Id.*

Sanchez next asserts a settlement offer does not create prejudice as a matter of law and Progressive failed to present evidence of prejudice. Sanchez relies on *Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189, 194 (Tex. App.—Corpus Christi 1993, orig. proceeding), which held, "[n]o presumption exists that the mere joining of contract and bad faith claims creates a conflict requiring severance." However, the *Hunter* court recognized

> [t]he real problem in trying all of these claims together is an internal conflict which may unfairly force the insurer to choose between 1) insisting on its right to exclude evidence of settlement negotiations and coverage determinations (thereby losing the advantage of showing that it was attempting to be reasonable in defense of the bad faith claims) and 2) putting on such evidence and risking a prejudicial inference that it has admitted liability on the contract action.

Id. at 193-94; *see also In re Am. Nat'l Cty. Mut. Ins. Co.*, 384 S.W.3d 429, 435 (Tex. App.—Austin 2012, orig. proceeding) (same); TEX. R. EVID. 408(a)(1) (prohibiting use of settlement offers as evidence "to prove or disprove the validity or amount of a disputed claim").

The *Hunter* court concluded "Allstate's motion [to sever and abate,] failed to allege any specific settlement negotiations or offers and further failed to present what specific advice it had received from its attorney or how such advice might be both prejudicial to its defense against the contract claim and beneficial to its defense against the bad faith claims." 384 S.W.3d at 194. Here, the trial court was aware of Progressive's $250 offer to settle Sanchez's entire UIM claim.

"[W]hen an insurer moves to sever an insured's extra-contractual claims from a contract claim following its offer to settle the insured's *entire* contract claim, the trial court must sever the insured's extra-contractual claims from the contract claim because evidence of a settlement offer creates prejudice." *In re State Farm Mut. Auto. Ins. Co.*, 395 S.W.3d 229, 234 (Tex. App.—El Paso 2012, orig. proceeding) (emphasis added); *see also Akin*, 927 S.W.2d at 630 (doubting "evidence of Liberty National's payment of the *uncontested* portion of Brodrick's claim will unduly prejudice its defense of the coverage claim. As we understand it, the insurer has paid the portion of the claim it does not dispute, and the jury will decide whether the policy covers another *disputed* portion of Brodrick's claim.") (emphasis added). "Under such a scenario, the trial court has no choice but to sever in order to protect the fairness of the proceedings and the interests of the parties." *State Farm Mut. Auto. Ins.*, 395 S.W.3d at 234; *see also In re Republic Lloyds*, 104 S.W.3d 354, 358 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) ("Thus, pursuant to *Akin*, a severance is required when the insurer has made a settlement offer on the entire breach of contract claim.").

Finally, Sanchez argues this court's opinion in *State Farm Mutual Automobile Association v. Cook*, 591 S.W.3d 677 (Tex. App.—San Antonio 2019, orig. proceeding), supports the trial

court's denial of both severance and abatement. According to Sanchez, under *Cook* her bad-faith claims are ripe for consideration prior to her obtaining a judgment on her UIM claim. We do not believe *Cook* supports her argument. *Cook* was a permissive appeal from the denial of a motion for summary judgment that presented two controlling questions of law, one of which is relevant to this original proceeding. The trial court's order stated the following controlling law and then asked the following question:

> In [*Brainard*], the Texas Supreme Court explained that an uninsured motorist (UM) insurer "is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist."
>
> Can a[ ] UM insured nonetheless sustain a common law or statutory bad faith claim against a UM insurer that withholds payment of UM benefits until such a judgment is obtained?

Id. at 679.

Cook had sued State Farm, alleging claims for breach of contract, bad faith, and prompt payment violations. Cook's extra-contractual claims were severed and abated pending a judgment establishing her entitlement to uninsured motorist benefits. After the jury returned a verdict in favor of Cook, State Farm paid the judgment in full. State Farm then moved for summary judgment arguing it was entitled to a take-nothing judgment on Cook's extra-contractual claims because it was not liable for those claims as a matter of law. The trial court denied the motion, but found an immediate appeal of the controlling questions of law would materially advance the ultimate termination of the litigation. This court granted State Farm's petition for permission to appeal. On appeal, State Farm asserted its liability for the UIM claim was not "reasonably clear" until such a judgment was obtained; therefore, no bad faith claim arises as a matter of law until its liability becomes "reasonably clear." *Id.* The *Cook* court disagreed with State Farm, concluding that "to hold . . . a UM/UIM claim is not 'reasonably clear' until the conclusion of the legal

proceeding 'would effectively eliminate the [bad faith] cause of action, with no indication that such a result was intended.'" *Id.* at 683.

Contrary to Sanchez's interpretation of *Cook*, the opinion does not stand for the proposition that an insured may pursue a bad-faith claim *before* obtaining a judgment on a UIM claim. Instead, *Cook* rejected the argument that an insurer is not liable on a bad-faith claim "as a matter of law" merely because the insured obtained a judgment on her breach of contract claim. The *Cook* court held, "[o]nce a legal proceeding establishes that the insured is entitled to UM/UIM coverage and resolves the damages amounts, the bad-faith claim is ripe for consideration." *Id.*

For these reasons, we conclude the trial court could only reach one decision that adequately protected the parties' rights and that was to order severance of the two types of claims. A second reason justifying severance is that Sanchez's bad-faith claims depend upon the outcome of her UIM claim. Her bad-faith claims may be rendered moot upon a determination that Progressive is not contractually obligated to pay her UIM claim. *See In re Farmers Tex. Cty. Mut. Ins. Co.*, 509 S.W.3d 463, 467 (Tex. App.—Austin 2015, orig. proceeding); *United Fire Lloyds*, 327 S.W.3d at 256; *Millard*, 847 S.W.2d at 673. Therefore, the trial court abused its discretion by denying Progressive's motion to sever the claims. The next question is whether the court abused its discretion by denying Progressive's motion to abate.

ABATEMENT

Sanchez asserts severance does not automatically support abatement of discovery. She contends her bad-faith claims are ripe for consideration without waiting for a judgment on her UIM claim because she pled facts that, if true, would establish Estrada was liable for the accident, is underinsured, and Progressive refused to pay UIM benefits. Sanchez does not elaborate on why the alleged "ripeness" of her bad-faith claim supports the trial court's denial of Progressive's motion to abate and the cases she relies on do not support her argument. *See Reynolds*, 369 S.W.3d

at 648 (considering whether insured's claim against insurer was ripe for adjudication for the purpose of fixing venue); *In re Perry*, 13-18-00676-CV, 2019 WL 1723509, at *5-8 (Tex. App.—Corpus Christi Apr. 18, 2019, orig. proceeding) (mem. op.) (considering whether it was premature for insured to depose insurer's representative because there was no judicial determination on UIM claim; concluding insured could conduct deposition but limiting topics to whether other driver caused the accident, the amount of insured's damages, and whether other driver's insurance coverage was deficient).

"UIM claims are not straight-forward insurer-insured first-party claims because UIM 'benefits are conditioned upon the insured's legal entitlement to receive damages from a third party.'" *In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557, 564 (Tex. App.—San Antonio 2018, orig. proceeding) (quoting *Brainard*, 216 S.W.3d at 818). "The right to recover UIM damages is governed by statute." *Id.*; *see also* TEX. INS. CODE § 1952.101(a). Thus, "[a]n insured's claim for breach of an insurance contract is 'distinct' and 'independent' from claims that the insurer violated its extra-contractual common-law and statutory duties." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018); *see also Millard*, 847 S.W.2d at 672 ("Uninsured motorist claims and bad faith claims have been recognized as separate and distinct causes of action which might each constitute a complete lawsuit within itself."). Therefore, the scope of discovery in UIM cases "differs from other insurance disputes because, unlike most first-party cases in which the terms of the policy alone dictate the outcome, uninsured motorist coverage hinges on the liability of the alleged uninsured, at-fault third-party motorist, under applicable tort law." *State Farm Mut. Auto. Ins.*, 553 S.W.3d at 564 (citation omitted); *see also Liberty Cty. Mut. Ins.*, 537 S.W.3d at 220 (same).

Sanchez does not state what specific evidence relevant to her UIM claim is also relevant to her extra-contractual claims or what specific evidence relevant to her UIM claim she would be

prevented from obtaining if the extra-contractual claims were abated. On the other hand, relator points to Sanchez's discovery requests that seek information irrelevant to her UIM claim. Sanchez's four interrogatories all request information about the people who evaluated or reviewed the evaluation of her UIM claim, the basis and evaluation of the $250 settlement offer, and the dates of certain events surrounding Sanchez's demand for UIM benefits and the settlement offer. Ten of Sanchez's twenty-nine requests for production seek voluminous records pertinent to Progressive's handling and evaluation of Sanchez's UIM claim. *See In re Allstate Fire & Cas. Ins. Co.*, 04-18-00676-CV, 2018 WL 6624885, at *3 (Tex. App.—San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.) (holding abatement proper because "relators point to plaintiff's discovery requests in which he seeks information regarding, among other things, the identity of Allstate's claims personnel, information related to Allstate's investigation and evaluation of plaintiff's claim, information about the existence and identity of any review committees, the history of complaints filed with Allstate and any denial logs, and Allstate's net worth"); *In re Luna*, 13-16-00467-CV, 2016 WL 6576879, at *7-8 (Tex. App.—Corpus Christi Nov. 7, 2016, orig. proceeding) (mem. op.) (holding trial court abused its discretion by quashing deposition because topics encompassed by deposition notice corresponded to State Farm's defenses and theories or had a direct bearing on the damages in the insured's breach of contract claim); *In re Garcia*, 04-07-00173-CV, 2007 WL 1481897, at *2 (Tex. App.—San Antonio May 23, 2007, orig. proceeding) (mem. op.) (same).

"Here, liability for the UIM claim has not been judicially determined in [Sanchez's UIM] case, the extra-contractual claims are not yet ripe, and the extra-contractual claims could be rendered moot by the underlying liability determination in the [UIM] case." *Allstate Fire & Cas. Ins.*, 2018 WL 6624885, at *3. Accordingly, we conclude abatement of Sanchez's extra-contractual claims is necessary to avoid unnecessary litigation expenses, conserve judicial

resources, and to "do justice, avoid prejudice, and further convenience." *United Fire Lloyds*, 327 S.W.3d at 254, 256. "Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial." *Millard*, 847 S.W.2d at 673. For these reasons we conclude the trial court abused its discretion by denying Progressive's motion to abate.

CONCLUSION

We conclude the trial court abused its discretion by denying Progressive's motion to sever and abate Sanchez's bad-faith claims and related discovery pending disposition of her UIM claim. Therefore, we conditionally grant the petition for writ of mandamus and direct the trial court to, no later than fifteen days from the date of this opinion, (A) vacate (1) its order denying Progressive's motion for severance and abatement and (2) its December 19, 2019 order on Sanchez's motion to compel, and (B) issue an order granting Progressive's motion for severance and abatement.

Rebeca C. Martinez, Justice