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SUPREME COURT

SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY
NO. 2004-SC-000874

GEICO CASUALTY COMPANY — APPELLANT

v.

Appeal from Court of Appeals
Civil Action No. 2003-CA-001134

Meade Circuit Court Civil Action No. 01-CI-195
Honorable Sam H. Monarch, presiding

ROBERT E. HARTLEY, and
BRENDA MITCHUM, Individually and
as Administratrix of the ESTATE OF
DANIEL ROBERT HARTLEY — APPELLEES

APPELLANT'S REPLY BRIEF

Respectfully submitted by:

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Appellant's Reply Brief has been served on this 4th day of October, 2005 upon: George M. Geoghegan III, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Ky. 40601; M. Austin Mehr, AUSTIN MEHR LAW OFFICES, P.S.C., 145 W. Main Street, Suite 300, Lexington, Ky. 40507; J.D. Raine, Jr., FERRERI & FOGLE, 333 Guthrie Green, 203 Speed Building, Louisville, Ky. 40202; A. Campbell Ewen, William P. Carrell, II, Ewen, Kinney & Rosing, Suite 1090, 455 South 4th Street, Louisville, Kentucky 40202-2511; The Honorable Sam H. Monarch, Judge, Meade Circuit Court, First Division, Courthouse, Courthouse Square, P.O. Box 147, Hardinsburg, Ky. 40143-0147; and Clerk, Meade Circuit Court, 516 Fairway Drive, Brandenburg, Ky. 40108.

COUNSEL FOR APPELLANT

STATEMENT OF ISSUES TO WHICH THE REPLY BRIEF IS DIRECTED

This Court should reverse the decision of the Court of Appeals and affirm the decision of the Meade Circuit Court by holding that KRS 304.39-210 and KRS 304.39-220 provide the exclusive remedy for all cases involving payment of basic reparation benefits.

Alternatively, this Court should affirm the decision of the Meade Circuit Court by holding that the trial court properly made a threshold determination that the Appellees, Brenda Mitchum and Robert E. Hartley (hereinafter "Ms. Mitchum and Mr. Hartley"), lacked evidence sufficient to submit the issue of punitive damages to the jury. The trial court unquestionably has the authority to make such a determination, otherwise, every bad faith claim would result in a jury trial, regardless of whether the plaintiff has any evidence at all to support the claim.

Insofar as the allegations contained in the Complaint are concerned, the only issue on appeal is whether there is any evidence that GEICO acted unreasonably in interpreting Brenda Mitchum's April 9, 2001 letter as yet another claim for survivor's benefits. On appeal, Ms. Mitchum and Mr. Hartley have also alleged that certain "post-complaint conduct" supports their claim, however, GEICO acted in good faith at all times and "post complaint conduct" should not be actionable as a matter of law.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

1. THIS COURT SHOULD ADOPT THE HOLDING OF PHOENIX HEALTHCARE AS APPLICABLE TO ALL CASES INVOLVING PAYMENT OF BASIC REPARATION BENEFITS

This Court should adopt the holding of Phoenix Healthcare of Ky. v. Kentucky Farm Bureau, 120 S.W.3d 726 (Ky. App. 2003) as applicable to all cases involving payment of basic reparation benefits. Ms. Mitchum and Mr. Hartley argue that in addition to providing for basic reparation benefits, the Motor Vehicle Reparations Act (hereinafter "MVRA") addresses underinsured motorist coverage (hereinafter "UIM") for which a bad faith claim *may* lie if an insurer violates the provisions of the Unfair Claims Settlement Practices Act (hereinafter "UCSPA") in the negotiation or payment of a UIM claim. See Appellees' Brief at p. 10. However, the MVRA does not provide a remedy for the delayed payment of UIM benefits as it does for basic reparation benefits. In the case at bar, the specific remedy available for the delayed payment of basic reparation benefits is the exclusive remedy and forecloses any claim pursuant to the UCSPA.[1]

Ms. Mitchum and Mr. Hartley also argue that Phoenix Healthcare may be distinguished from the case at bar because "there were absolutely no other facts alleged by Phoenix Healthcare against Kentucky Farm Bureau." Appellees' Brief at pp. 10-11. It is disingenuous for Appellees to make this statement as they well know that Phoenix Healthcare alleged specific violations of the UCSPA in their complaint and further

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[1] Ms. Mitchum and Mr. Hartley continue to cite Kentucky Farm Bureau Mut. Ins. Co. v. Troxell, 959 S.W.2d 82 (Ky. 1997) for the proposition that this Court "implicitly recognized that a claim for lost wages under PIP could support a claim for punitive damages..." See Appellees' Brief at p. 12. Troxell did not even address the issue of whether delay in payment of basic reparation benefits constitutes bad faith. In that case, the plaintiff was not entitled to receive basic reparation benefits in the form of "lost wages" because he failed to put forth proper evidence to substantiate the claim. Id. at 85. Accordingly, the Court held that a jury instruction which permitted the jury to award punitive damages for denial of lost wages was in error. Id.

alleged a pattern and practice of bad faith delay of payments on all claims at the hearing before the Floyd Circuit Court.[2] Phoenix Healthcare unquestionably complained of "conduct behind the delayed payment," nevertheless, the Court of Appeals properly determined that the exclusive remedy was found within KRS 304.39-210 and KRS 304.39-220.

There are also strong public policy reasons for this Court to issue a decision holding that KRS 304.39-210 and KRS 304.39-220 provide the exclusive remedy for delayed payment of basic reparation benefits. The MVRA requires all insurers to provide basic reparation benefits in the amount of $10,000. See KRS 304.39-110 and KRS 304.39.020(2). The legislature provided a specific remedy with a punitive component for the delayed payment of such benefits and, as a public policy matter, the courts should not be burdened with additional litigation for alleged "bad faith" handling of this particular type of claim. Illustrative of this point is the case at bar wherein Ms. Mitchum and Mr. Hartley are seeking punitive damages regarding an offered payment of $9,000.00 which, assuming the facts most favorable to them, was $310.00 (in interest) less than what was allegedly owed. See Appellant's Initial Brief at p. 22 n. 8. Considering the mandatory, no-fault nature of basic reparation benefits, insureds should be limited to the punitive interest and attorneys' fees provisions set out by the MVRA, much like workers' compensation insureds are limited to the exclusive remedy provisions found within the Workers' Compensation Act. See generally Travelers Indemnity Co. v. Reker, 100 S.W.3d 756 (Ky. 2003).

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[2] See Phoenix Healthcare Complaint at ¶11 and Transcript of Hearing of July 12, 2002 at p. 4. There is a pending motion to have the record of Phoenix Healthcare included in the record on appeal for the case at bar and/or to have this Court take judicial notice of the record which is apparently on file with the Clerk of the Floyd Circuit Court. See Motion for Leave to File an Amicus Curiae Brief, filed on or about 7/27/05. PCI tendered a complete copy of the Phoenix Healthcare record to this Court with their motion.

2. MS. MITCHUM AND MR. HARTLEY LACKED EVIDENCE SUFFICIENT TO SUBMIT THE QUESTION OF PUNITIVE DAMAGES TO THE JURY

a. The Trial Court Has the Authority to Make a Threshold Determination Regarding Whether the Plaintiffs Have Sufficient Evidence of Bad Faith

Ms. Mitchum and Mr. Hartley argue that whether a claim is fairly debatable is a "question of fact" for the jury and, in essence, that every allegation of "bad faith" must ultimately be decided by a jury. See Appellees' Brief at pp. 16-17. This is not true as the case relied on by Appellees clearly states that "the appropriate inquiry is whether there is sufficient evidence from which reasonable jurors could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable." Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 376 (Ky. 2000) (Emphasis added). The trial court unquestionably has the authority to make a threshold determination regarding whether there is sufficient evidence of bad faith, otherwise, every bad faith claim would result in a jury trial regardless of whether the plaintiff has any evidence to support the claim. See Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) (holding that "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.").[3]

[3] Ms. Mitchum and Mr. Hartley also cite Dailey v. American Growers Ins., 103 S.W.3d 60 (Ky. 2003) for the proposition that every bad faith claim must be decided by a jury. See Appellees' Brief at p. 17. Ms. Mitchum and Mr. Hartley quote Dailey out of context as the Court never made such a determination. The issue before the Court in Dailey was whether state laws were applicable to an insurance policy which was reinsured by the Federal Crop Insurance Corporation. See Dailey, 103 S.W.3d at pp. 63-64. This Court determined that the Federal Crop Insurance Act does not preempt state law, accordingly it reversed the trial court's award of summary judgment in favor of the insurer. Id. at 64. This Court did not address the threshold showing required to submit a claim for bad faith to a jury, it merely stated that the insurer had not established that it would be "impossible for Dailey to produce the pertinent evidence [to proceed on his claim for bad faith]." Id. at p. 66.

b. The April 9, 2001 Letter Was Ambiguous As a Matter of Law and There is No Evidence That GEICO Acted Unreasonably In Interpreting the Letter As Another Claim for Payment of Survivor's Benefits

It is undisputed that when Ms. Mitchum complained to the Department of Insurance on May 11, 2001 regarding GEICO's handling of the claim, she discussed the April 9, 2001 letter in the context of a claim for survivor's benefits, not a claim for medical expenses. (CR 169-171). After the Complaint was filed, Ms. Mitchum and Mr. Hartley argued that the letter was a "modified" claim for medical expenses. (CR 186). Likewise, the court initially viewed the letter as a "modified" claim for medical expenses (CR 75) but, after reconsideration, opined that it could just as likely have been a claim for survivor's benefits (CR 326-327). These differing interpretations unquestionably establish the ambiguous nature of the letter.

Regardless of whether the letter was a claim for survivor's benefits or medical expenses, there is no evidence to establish that GEICO acted unreasonably in interpreting it as yet another claim for survivor's benefits. It is undisputed that within 2 months of her son's death, Ms. Mitchum directed GEICO to reserve the remaining monies for survivor's benefits. (CR 55). It is undisputed that for the next seven months, she attempted to persuade GEICO to pay the money in the form of survivor's benefits. (CR 155, 157, 159, 161,163-164, 189, 169-171). It is undisputed that by making this early written directive, Ms. Mitchum ensured that she, alone, would receive the proceeds and that her former husband, Robert Hartley (who never made a claim for survivor's benefits) would not share in the money. Had she not issued this directive, the money would have been paid as medical benefits to the Estate and, thus, divided equally between Ms. Mitchum and Mr. Hartley.

Although Ms. Mitchum alleges that she "gave a written directive on April 9, 2001 to pay the balance for medical benefits" (Appellees' Brief at p. 24), the April 9, 2001 letter actually reiterates the earlier directive to reserve for survivor's benefits, cites case law regarding the payment of survivor's benefits, and states that GEICO "also has the responsibility to pay the medical bills." (CR 163-164). Indeed, the letter further states that unless GEICO "does the right thing" and issues payment "in the amount of $9,000," she will file a Complaint with the Department of Insurance. (CR 164). Ms. Mitchum did file a Complaint with the Department of Insurance and complained only about GEICO's denial of her claim for survivor's benefits. (CR 169-171). Pursuant to the undisputed facts, there is no evidence which suggests that GEICO acted unreasonably in interpreting the letter as another claim for payment of survivor's benefits.[4]

c. GEICO Offered to Confess Judgment in the Amount of the Medical Expenses and an Acceptance Would Not Have Extinguished Any Other Claims

Ms. Mitchum and Mr. Hartley argue that GEICO's offer to confess judgment in the amount of $9,000.00 "would have required Appellees to forego statutory interest, statutory attorney's fees and all damages for bad faith." See Appellees' Brief at p. 3, 16. This is simply untrue. The Offer to Confess Judgment clearly states that "GEICO... offers to allow judgment to be taken against it in the sum of $9,000.00 representing medical bills incurred by the Estate of Daniel Robert Hartley..." (CR 25 Emphasis added). A copy of the pleading is attached to the Appendix hereto as Exhibit A. Nothing

[4] Ms. Mitchum and Mr. Hartley reply upon the case of Employers Ins. of Wausau v. Martinez, 54 S.W.3d 142 (Ky. 2001) for the proposition that questions of "intent" (such as whether GEICO believed the April 9, 2001 letter to be a claim for medical expenses) "are usually more appropriately left for the fact-finder and not for disposal in summary judgment." Appellees' Brief at p. 15. That opinion goes on to state that the possibility is not foreclosed and that "summary judgment can be proper on any issue including state of mind and questions such as intent and expectation...when any claim has no substance or controlling facts are not in dispute..." Martinez, 54 S.W.3d at p. 145.

in the Offer to Confess Judgment indicates that it would result in a final order of dismissal. Payment of medical expenses was never "conditioned" upon the execution of a "full release of the bad faith claims" as alleged by Ms. Mitchum and Mr. Hartley. See Appellees' Brief at p. 16. Ms. Mitchum and Mr. Hartley could have accepted the money on July 18, 2001 and thereafter pursued interest, attorneys' fees and their alleged "bad faith" claim.

d. Ms. Mitchum and Mr. Hartley Never Complained of Having Insufficient Time to Conduct Discovery, Accordingly, They Are Foreclosed From Pursuing This Argument On Appeal

In their brief, Ms. Mitchum and Mr. Hartley argue several times that they allegedly had "no opportunity to conduct discovery" and they further suggest that a material question of fact could be "gleaned from GEICO's undisclosed claim file" See Appellees' Brief at pp. 16, 17-18, 23, 25. In response to GEICO's Motion for Summary Judgment, Ms. Mitchum and Mr. Hartley never argued that they needed additional time to conduct discovery (CR 185-197, 251-256), accordingly, the trial court never ruled on this issue and it is not properly before this Court. See Commonwealth of Kentucky v. Lavit, 882 S.W.2d 678, 680 (Ky. 1994) (holding that the Court's "function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review.").

3. POST-COMPLAINT CONDUCT IS NOT ACTIONABLE IN A BAD FAITH CLAIM AS A MATTER OF LAW

For the reasons set out in its initial brief, this Court should decline the request of Ms. Mitchum and Mr. Hartley to create new law and hold that post-complaint conduct may form the basis of a bad faith claim. No Kentucky court has ever recognized this legal concept and, for good reason, because lawyers should not be hindered in their

ability to defend or prosecute a claim for fear of subjecting their client to additional litigation for alleged "bad faith."

Ms. Mitchum and Mr. Hartley argue that this Court has tacitly adopted the concept in Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99 (Ky. 2003) by remanding a case to "allow appellants to proceed in their bad faith breach of contract in violation of the UCSPA, even though all of the conduct occurred during litigation." See Appellees' Brief at p. 20 (Emphasis in original). In Frear, the issue was whether the insured's claim for breach of contract was preempted by Federal Law, and the Court made absolutely no ruling regarding the merits of what it termed the "alleged" bad faith claim.[5]

The case at bar is a fitting example of the reasons the Court should refuse to adopt the new rule of law proposed by Ms. Mitchum and Mr. Hartley. There are essentially four acts of "post-complaint" conduct which Ms. Mitchum and Mr. Hartley argue support their claim for bad faith: 1) the Offer to Confess Judgment; 2) the argument made by GEICO's counsel at a hearing on September 6, 2001 regarding "double recovery" of medical expenses; 3) GEICO's tender of a check in the amount of $9,000 in partial satisfaction of the judgment rendered on November 30, 2001; and 4) GEICO's allegedly inconsistent positions regarding whether the claim for medical expenses was sufficiently documented. See Appellees' Brief at pp. 2, 3, 4, 5, 15-17. None of these acts constitutes

[5] In Frear, the issue was whether the defendant corporation and/or its insurer breached an oral contract to settle a personal injury claim with the Frear family. See Frear, 103 S.W.3d 101. The parties had agreed upon a monetary settlement and general release, but the defendant company attempted to put an indemnification clause into the settlement agreement which the Frears refused to accept. Id. Thereafter, the Frears sued for breach of contract and what the Court termed "alleged" violations of the UCSPA. Id. at 104. The trial court granted summary judgment for the defendant corporation holding that the Frears breached the agreement by failing to sign the settlement agreement as presented. Id. The Court of Appeal affirmed on other grounds, but the Supreme Court reversed, holding that the Frears were not required to sign the release which contained an indemnification clause. Id. at 106-107. The Court made no ruling whatsoever regarding the merits of the Frears "alleged" bad faith claim.

"bad faith," nor should these types of legal steps taken by attorneys be actionable against an insurance company.

First, as pointed out above, the Offer to Confess Judgment in the amount of $9,000.00 did not, any in way, condition acceptance of the offer on a dismissal of any other claim, including the claim for bad faith.[6] The Appellees' request to make a proper use of the rules of civil procedure the foundation for a claim of bad faith should be denied.

Second, at the hearing on Ms. Mitchum and Mr. Hartley's motion for partial summary judgment, GEICO's attorney, J.D. Raine, Jr., correctly stated that Ms. Mitchum reserved the remaining monies for survivor's benefits (CR 263), correctly stated that survivor's benefits were not owed (CR 264), and correctly stated that GEICO received "mixed messages" regarding how the benefits should be paid (CR 266). GEICO's attorney also presented an alternative argument that, even if a claim for medical expenses had been made, it was not payable because it would have resulted in a "double recovery." (CR 266). GEICO's counsel was simply mistaken as to this single legal point. However, this was an alternative legal argument made *after* the Complaint was filed and *after* GEICO had already offered to confess judgment in the full amount of the medical bills. A mistaken argument (which opposing counsel had an opportunity to correct) should not subject the lawyer's client to a claim for punitive damages.

Third, Ms. Mitchum and Mr. Hartley argue that once the trial court issued an Opinion and Order awarding $9,000.00 for "medical expenses" as well as attorneys' fees

[6] Ms. Mitchum and Mr. Hartley erroneously argue that GEICO's letter of April 17, 2001 was "followed by nine months of baseless denials of owing Daniel's medical bills and attempts to condition payment upon a full release of the bad faith claims." Appellees' Brief at p. 16. GEICO offered to confess judgment on July 18, 2001, within 30 days of the date the complaint was filed. (CR 25-26).

and interest, GEICO attempted an "accord and satisfaction" by tendering a check in the amount of $9,000.00. See Appellees' Brief at p. 5. GEICO's counsel had a good faith argument that interest and attorney's fees were not owed, accordingly, he simultaneously filed a motion asking the Court to reconsider its ruling with respect to the award of interest and attorney's fees and tendered a check in the amount of the Judgment which was not disputed.[7] (CR 84-88, 221) Although the attorneys had a disagreement over the effect of a notation on the check, they resolved the dispute and Mr. Raine tendered a new check as requested. Attorneys should be able to disagree about, and resolve, issues such as this without subjecting the client to a punitive damages claim.

Fourth, Ms. Mitchum and Mr. Hartley allege that GEICO's April 17, 2001 letter establishes that GEICO was "fully aware" that the April 9, 2001 letter was a modified claim for medical benefits, yet GEICO continued to deny such benefits were owed. See Appellees' Brief at p. 2, 3, 15-17. Appellees are misrepresenting the documents in the record. GEICO responded to the April 9, 2001 letter by denying, again, the claim for survivor's benefits. (CR 166). GEICO further advised Ms. Mitchum that, had she submitted the medical bills when they were incurred (prior to the written directive to reserve the monies for survivor's benefits), the bills would have been paid. (CR 167). Finally, GEICO stated that Ms. Michum had failed to submit adequate proof of loss *for her claim of survivor's benefits.* (CR 167). This is entirely consistent with GEICO's position throughout the entire course of this claim.

Ms. Mitchum and Mr. Hartley also suggest that GEICO's Answer is somehow proof of "bad faith" because GEICO "admitted an obligation to pay medical expenses in

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[7] Ms. Mitchum and Mr. Hartley argue that the motion was "meritless." See Appellee's Brief at p. 5. GEICO respectfully disagrees with this argument. Nevertheless, their remedy – if they truly believed the motion was "meritless" – is found in Civil Rule 11, not in the Unfair Claims Settlement Practices Act.

cases 'similar to the one at hand,' but denied that it owed... basic reparation benefits, even though it acknowledged that Mitchum had submitted medical bills on April 9, 2001." Appellees' Brief at p. 3. In fact, GEICO's Answer denied that Ms. Mitchum and Mr. Hartley had submitted documentation to establish their claim *in the form of survivor's benefits*, admitted that they submitted medical bills on April 9, 2001, but denied that they had ever made a claim for payment of medical expenses.[8] (CR 23). Again, this is entirely consistent with GEICO's position at all times.

For these reasons, this Court should hold that post-complaint conduct cannot form the basis of a bad faith claim. This holding is necessary to ensure that bad faith claims are not based on a lawyer's decision to 1) utilize the rules of civil procedure (such as filing an offer to confess judgment); 2) make legal arguments on behalf of a client; or 3) appeal portions of a judgment when grounds exist to do so.

CONCLUSION

For the aforementioned reasons and the reasons set out in GEICO's initial brief, this Court should reverse the September 17, 2004 opinion of the Court of Appeals and affirm the decision of the Meade Circuit Court awarding summary judgment in favor of GEICO on the bad faith claims.

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COUNSEL FOR APPELLANT

[8] Ms. Mithcum and Mr. Hartley also allege that GEICO lacked a basis to argue that the amount of medical bills due was in dispute. Appellees' Brief at p. 3. In fact, GEICO had a good faith basis to argue that there was a legal question regarding whether payment of medical expenses was delayed given that KRS 304.39-210 expressly states that payment of basic reparation benefits is not overdue if a reparations obligor has not made payment "due to the request of a secured person when the secured person is directing the payment of benefits among different elements of loss" as provided in KRS 304.39-241. (CR 48).