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 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 Brief has been served on this 13th day of July, 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; 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

INTRODUCTION

Appellant, GEICO Casualty Company (hereinafter "GEICO"), appeals from a Court of Appeals Opinion reversing the trial court's summary judgment in its favor on a claim for violation of the Unfair Claims Settlement Practices Act.

STATEMENT CONCERNING ORAL ARGUMENT

GEICO believes that an oral argument would be helpful to the Court in deciding the issues presented because this case concerns, among other things, an issue of law about which the Court of Appeals has rendered conflicting opinions.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

1. Facts of the Loss and Claim.

On June 29, 2000, Daniel Robert Hartley, the 15-year-old son of the appellees, Robert E. Hartley and Brenda Mitchum, was struck and killed by GEICO's insured, Joy B. Barr. Ms. Mitchum (a claims adjuster for Grange Insurance Company) was appointed Administratrix of her son's Estate and participated in all negotiations with GEICO and other insurers concerning her son's death. Ms. Barr's insurance policy with GEICO provided $25,000.00 in liability coverage which GEICO promptly tendered to the Estate of Daniel Robert Hartley (hereinafter "the Estate").[1] (CR 57).

Since Daniel was a pedestrian at the time of the accident, Ms. Barr's policy also provided, subject to its terms and applicable law, basic reparation benefits in amounts up to $10,000.00. According to Kentucky law, basic reparation benefits are available to compensate the insured for economic loss including "medical expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss." See KRS §304.39-020(5). The statute also provides that "[n]oneconomic detriment is not loss." Id.

By letter on August 29, 2000, Ms. Mitchum requested that GEICO use a portion of the available basic reparation benefits to pay Daniel's funeral expenses

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[1] Ms. Mitchum negotiated a settlement with Daniel's medical insurer, Aetna US Healthcare ("Aetna"), whereby the Estate would pay Aetna the reduced sum of $4,700.00 to settle a portion of Daniel's outstanding medical bills which totaled $7,325.00. (CR 61). Accordingly, Ms. Mitchum directed GEICO to pay the liability benefits in two payments -- $20,300.00 to the Estate of Daniel Robert Hartley and $4,700.00 to Aetna for the payment of a portion of Daniel's medical bills. (CR 59, 65).

in the amount of $1,000.00. (CR 55). GEICO promptly complied. (CR 161). By the same letter, Ms. Mitchum expressly directed that "the balance of $9,000.00 be reserved for survivor's benefits." (CR 55). Kentucky law required GEICO to abide by this directive. KRS §304.39-241 states: "A reparations obligor shall honor the written direction of benefits provided by an insured on a prospective basis." (Emphasis added). The ability of an insured to direct basic reparation benefits toward the payment of survivor's benefits or, alternatively, medical expenses is important because it facilitates the coordination of insurance benefits in a manner most advantageous to the insured. For example, an insured can direct all monies for "survivor's benefits" so as to avoid healthcare provider liens. In this case, by reserving the remaining monies for "survivor's benefits," Ms. Mitchum seemingly wanted the benefits payable solely to herself as Daniel's father did not make a corresponding claim as a survivor.[2] Had the money been paid as medical expenses, it would have be paid to the Estate and thus equally payable to Ms. Mitchum and Mr. Hartley.

On September 7, 2000, GEICO responded to the claim for survivor's benefits and requested that Ms. Mitchum provide documentation to substantiate the claim. (CR 155). On September 22, 2000, Ms. Mitchum sent a letter of behalf of the "Estate of Daniel Hartley" which described the various household activities her son performed prior to his death, such as mowing the lawn, taking out the trash and washing the dishes, and requested that GEICO compensate the Estate for these lost services. (CR 159). The letter further stated that Daniel

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[2] Ms. Mitchum and Daniel's father, Robert Hartley, were divorced at the time of Daniel's death.

was never paid for performing these services and that no expenses had been incurred to obtain replacement services. (CR 159).

On October 9, 2000, GEICO denied the claim for survivor's benefits based upon the advice of its counsel, J.D. Raine, Jr., and because Ms. Mitchum had not incurred any out of pocket expenses as a result of Daniel's death. (CR 161).

On April 9, 2001, Ms. Mitchum sent another letter to GEICO. (CR 163-164). A copy of the letter is attached to the Appendix as Exhibit 3. The letter begins by referring to the written directive that GEICO reserve the remaining monies for survivor's benefits: "The estate had requested that the monies be reserved for survivor's benefits." (CR 163). The letter then cites to KRS §304.39-020 which defines survivor's replacement services loss as "expenses reasonably incurred by survivors after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit...." (CR 163). The letter reiterates that Ms. Mitchum's September 22, 2000 letter outlined the household chores Daniel performed prior to his death and states: "I believe you would agree that these items are reasonable, ordinary, and necessary in the maintenance of a household." (CR 163). Ms. Mitchum also attached Daniel's medical bills to the letter and pointed out that GEICO also had an obligation to pay the medical bills. (CR 163). It is important to note, however, that the letter did not remove the prior written directive that the money be reserved for "survivor's benefits." Further, the letter did not make a claim for medical expenses; it merely stated that medical expenses were also owed in addition to the survivor's benefits which were claimed by the Estate. The clear

implication of the letter was that GEICO should pay survivor's benefits (which were being claimed solely by Ms. Mitchum and which were not subject to the claims of healthcare service providers) since it owed the same amount of money in medical benefits. On April 17, 2001, GEICO responded to the letter by denying, again, the claim for survivor's benefits because Ms. Mitchum had not established any out-of-pocket loss for the household services which were performed by Daniel. (CR 166-167). A copy of the April 17, 2001 letter is attached to the Appendix as Exhibit 4. After setting out that Ms. Mitchum had not submitted any evidence that her son was paid for his services prior to his death, Mr. Raine concluded the letter by stating: "Please advise."

Ms. Mitchum now claims that the April 9, 2001 letter removed the prior written directive to reserve the monies for survivor's benefits and made a "modified" claim for medical expenses. (CR 186). Her bad faith claim is based upon GEICO's "denial" of this alleged claim for medical expenses. However, GEICO's response makes clear that GEICO did not interpret the April 9, 2001 letter as a removal of the previous written directive to reserve the remaining money for "survivor's benefits." Considering the ambiguity of the letter, it would have been improper for GEICO to ignore Ms. Mitchum's prior written directive and treat the April 9, 2001 letter as a claim for medical benefits.

Below, Ms. Mitchum and Mr. Hartley admitted that GEICO's response to the April 9, 2001 letter "obviously still revolved around [Ms. Mitchum's] prior claim for survivor's replacement services..." (CR 186). Neither Ms. Mitchum nor her

attorney ever contacted Mr. Raine or GEICO to further discuss the issue or the apparent misunderstanding regarding the April 9, 2001 letter.

2. The Kentucky Department of Insurance Determined that GEICO Acted Appropriately.

On or about May 11, 2001, Ms. Mitchum filed a complaint with the Kentucky Department of Insurance ("KDI") based upon GEICO's denial of her claim for "survivor's benefits." (CR 169-171). A copy of the complaint to the KDI is attached to the Appendix as Exhibit 5. The complaint to the KDI outlines the events set out above. Significantly, it makes no mention of any claim for medical expenses even though the KDI complaint was filed more than a month after the April 9, 2001 letter in which Ms Mitchum asserts that she made a claim for medical expenses.[3] The complaint describes the April 9, 2001 letter as "one last...effort to settle the PIP claim with what I believed to be sufficient documentation." (CR 170). As evidence of alleged "bad faith," Ms. Mitchum cited Kentucky case law regarding payment of survivor's benefits. (CR 170).

On June 1, 2001, KDI issued an opinion stating that survivor's benefits were not owed and that GEICO had "not violated any insurance laws and has taken the appropriate action under the terms of your policy." (CR 175). A copy of the KDI opinion is attached to the Appendix as Exhibit 6. The KDI found that GEICO acted reasonably:

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[3] As a claims adjuster, Ms. Mitchum knew that medical benefits were clearly owed. Moreover, she knew that, had she made a claim for medical benefits on April 9, 2001, the denial of that claim would have been improper. However, the complaint to the KDI refers only to GEICO's denial of the claim for survivor's benefits and makes no mention whatsoever of the alleged "denial" of the claim for medical benefits which is at issue in this appeal. (CR 169-171).

> The facts indicate the insurance company has not violated any insurance laws and has taken the appropriate action under the terms of your policy.

(CR 175). Ultimately, the Meade Circuit Court agreed with GEICO and the KDI and opined that survivor's benefits were not properly payable. (CR 323-324). Ms. Mitchum and Mr. Hartley did not appeal that decision.

3. Ms. Mitchum and Mr. Hartley Filed a Complaint in Meade Circuit Court For Contractual Liability and "Bad Faith".

Although the KDI found that GEICO took "appropriate action," Ms. Mitchum (Individually and as the Administratrix of the Estate) and Mr. Hartley filed a complaint on June 28, 2001 in Meade Circuit Court claiming breach of contract and bad faith on the part of GEICO. (CR 2-4). The complaint alleged that GEICO had an obligation to pay $9,000.00 in basic reparation benefits for survivor's benefits or medical expenses. (CR 3). Since the complaint seemingly made a claim for medical expenses, and medical expenses were unquestionably owed, GEICO offered to confess judgment on July 17, 2001, less than 30 days after the complaint was filed. (CR 25-26). The Offer to Confess Judgment was not accepted. Instead, Ms. Mitchum and Mr. Hartley filed a motion for summary judgment on their claim for medical expenses and sought additional damages pursuant to KRS §304-39.210 and KRS §304-39.220 which provide for attorneys' fees and 18% interest if the payment is delayed "without reasonable foundation." (CR 27-35). They apparently abandoned the claim for "survivor's benefits" because the motion for summary judgment focused exclusively on the claim for medical benefits.

On November 30, 2001, the Court entered an Opinion and Order awarding $9,000.00 in basic reparation benefits for "medical expenses" as well as attorneys' fees and 18% interest from May 9, 2001 (30 days after the April 9, 2001 letter). (CR 77-82). On December 6, 2001, GEICO simultaneously tendered a check in the amount of $9,000.00 to the Estate and moved the trial court to reconsider its ruling with respect to the award of 18% interest and attorney's fees. (CR 221, 84-88). On February 15, 2001, the trial court denied the motion to reconsider. (CR 121-122). At that point, the contract claim was resolved and the only remaining claim was for alleged "bad faith."

4. After Resolving the Contract Claim, the Trial Court Granted Summary Judgment in Favor of GEICO on the "Bad Faith" Claims.

On May 29, 2002, GEICO filed a motion for summary judgment on the bad faith claim. (CR 183-184). GEICO's motion was based upon the following undisputed facts: 1) Ms. Mitchum expressly directed that the remaining $9,000.00 in basic reparation benefits be reserved for survivor's benefits; 2) GEICO was bound to abide by the written directive; 3) the April 9, 2001 letter from Ms. Mitchum did not remove the written directive to reserve the monies for "survivor's benefits" and, further, was not a claim for medical expenses; 4) even if the April 9, 2001 letter was a claim for medical expenses, GEICO offered to confess judgment in the amount of $9,000.00 about 11 weeks after the money would have been payable and mere delay in payment does not rise to the level of bad faith as a matter of law; and 5) Ms. Mitchum and Mr. Hartley had no sustainable claim for punitive damages as a matter of law. (CR 129-181). On

April 30, 2003, the Meade Circuit Court granted GEICO's motion for summary judgment. (CR 319-330, 331-332).

The Meade Circuit Court held that 1) the claim for "survivor's benefits" was made on behalf of the Estate (rather than a survivor), and therefore not payable; 2) the law is unsettled regarding whether survivor's benefits are payable absent out of pocket expenses and GEICO's denial of the claim had a basis in law and was reasonable; 3) the April 9, 2001 letter was ambiguous and GEICO acted reasonably in interpreting the letter as yet another claim for survivor's benefits; 4) Ms. Mitchum never removed the written directive to reserve the monies for survivor's benefits; and 5) even if the April 9, 2001 letter was a claim for medical expenses, GEICO offered to confess judgment approximately 11 weeks after the money would have been payable and a cause of action for bad faith does not arise from the mere delay in payment of basic reparation benefits. (CR 323-330).

5. The Court of Appeals Reversed the Award of Summary Judgment in Favor of GEICO.

Ms. Mitchum and Mr. Hartley appealed the April 30, 2003 decision of the Meade Circuit Court awarding summary judgment in favor of GEICO on the bad faith claims.[4] They did not appeal the portion of the decision holding that GEICO had a reasonable basis in law to deny the claim for survivor's benefits. Accordingly, the only issue on appeal was whether GEICO acted in bad faith by failing to interpret the April 9, 2001 letter as a claim for medical expenses.

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[4] Ms. Mitchum and Mr. Hartley also appealed the February 15, 2002 decision of the Meade Circuit Court awarding them $1000 in attorneys' fees (rather than the $7,323.75 they requested). The Court of Appeals affirmed the award of attorneys' fees and this portion of the decision has not been appealed.

After the appeal was filed, but before a decision had been rendered, the Court of Appeals published an opinion in an unrelated case which held that KRS §304.39-210 and KRS §304.39-220 provide the exclusive remedy for delayed payment of basic reparation benefits, accordingly, an insured may not recover "bad faith" damages for delayed payment of such benefits. See Phoenix Healthcare of Ky. v. Kentucky Farm Bureau, 120 S.W.3d 726 (Ky. App. 2003). Since the holding of Phoenix Healthcare was dispositive of the issues in the case, the parties were granted leave to file supplemental briefs addressing the impact of the case.[5]

After an oral argument, the Court of Appeals reversed the award of summary judgment in favor of GEICO on the bad faith claims and remanded the case to the Meade Circuit Court. Specifically, the Court of Appeals found that 1) a claimant may have a cause of action for bad faith arising from the late payment of basic reparation benefits if there is "conduct...behind the delay in payment;" and 2) the Meade Circuit Court erred by deciding a question of fact as to "when Hartley and Mitchum made their claim for medical expenses". See 9/17/04 Court of Appeals Opinion at pp. 12, 15. The Court of Appeals' decision was ordered to be published and directly contradicts the holding of Phoenix Healthcare. The Court of Appeals erred by failing to follow the law of Gryzb v. Evans, 700 S.W.2d 399 (Ky. 1985) and the terms of the Motor Vehicle Reparations Act. Further, the Court of Appeals erred by holding that the Meade Circuit Court decided an "issue

[5] Although filed before the rendition of Phoenix Healthcare, GEICO's motion for summary judgment was based, in part, on the argument that KRS §304.39-210 and §304.39-220 provide the exclusive remedy for the delayed payment of basic reparation benefits. (CR 140).

of fact" and erred by overlooking several grounds upon which the decision should have been affirmed.

This Court should reverse the decision of the Court of Appeals and affirm the award of summary judgment in favor of GEICO because Ms. Mitchum and Mr. Hartley cannot establish a claim for bad faith as a matter of law.

ARGUMENT

The opinion of the Court of Appeals should be reversed and summary judgment in favor of GEICO should be affirmed based on four separate and distinct grounds: 1) the Court of Appeals erred by holding that a civil cause of action exists for delayed payment of basic reparation benefits; 2) even if a civil cause of action does exist, there is no "conduct...behind the delayed payment" of medical expenses which would warrant reversing and remanding the award of summary judgment, i.e., the allegations (even if true) do not rise to the level of actionable bad faith as a matter of law; 3) the question of whether the April 9, 2001 letter was a claim for medical benefits is an issue of law which may be resolved by the Court; and 4) Ms. Mitchum and Mr. Hartley had insufficient evidence of damage, a prerequisite to a claim for bad faith. Each ground will be discussed below.

1. The Court of Appeals Erred By Holding That a Civil Cause of Action Exists For Delayed Payment of Basic Reparation Benefits.

a. The Kentucky Motor Vehicle Reparations Act Provides a Remedy for the Delayed Payment of BRBs. Accordingly, Additional Damages Are Not Available Pursuant to the UCSPA.

The law governing the payment of basic reparation benefits is set out in the Kentucky Motor Vehicle Reparations Act ("MVRA") which became effective

in 1975. See KRS §304.39-010 et seq. The MVRA is a comprehensive body of statutory law which governs all aspects of basic reparation benefits. This Court has described the act as follows:

> We recognize that the Motor Vehicle Reparations Act is a comprehensive legislation covering much more than just no-fault insurance... we have consistently recognized that the purview of the MVRA was automobile insurance reform, not just to make the no-fault option available... the primary purpose of the MVRA is to benefit motor vehicle accident victims by reforming, and in some areas, broadening, their ability to make a collect claims.

Crenshaw v. Weinberg, 805 S.W.2d 129, 131 (Ky. 1991) (Emphasis added). The legislature specifically set forth remedies for the delayed payment of basic reparation benefits, including a punitive remedy for delayed payment caused "without reasonable foundation." See KRS §304.39-210 and KRS §304.39-220. Pursuant to KRS §304.39-210 and §304.39-220, if an insurance company fails to pay a claim for basic reparation benefits within 30 days, the insured may recover attorneys' fees and 12% interest or, if the delay was without reasonable foundation, 18% interest. The MVRA contains the complete body of law related to basic reparation benefits and the remedies set forth therein are the exclusive remedies available to Ms. Mitchum and Mr. Hartley.

Nine (9) years after enacting the MVRA, the legislature enacted the UCSPA which prohibits certain enumerated claims practices. The UCSPA as set out in KRS §304.12-230 does not provide for a civil remedy, therefore, any claim for a violation of the statute must be brought pursuant to KRS §446.070, the enabling statute which provides a civil cause of action for violations of

statutes which do not, in themselves, create a remedy for the aggrieved party. KRS §446.070 states:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

KRS §446.070. It is well settled that a claim may be brought pursuant to KRS §446.070 only if the underlying statute "does not provide a remedy for its violation." See Gryzb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). In Gryzb, this Court held:

> Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.

See Id. In the case at bar, KRS §304.39-210 and KRS §304.39-220 (of the MVRA) provide a specific remedy for delayed payment of basic reparation benefits, accordingly, no civil cause of action exists pursuant to the UCSPA.

When the UCSPA was enacted, the MVRA already provided a specific remedy (with a punitive component) for the delayed payment of basic reparation benefits. The UCSPA addresses claims practices generally, but does not specifically address basic reparation benefits. Because the legislature chose not to carve out any exceptions in the UCSPA providing for a civil cause of action for delayed payment of basic reparation benefits, the exclusive remedy for delayed payment remains within the specific provisions of the MVRA. See generally Haven Point Enter. v. United Ky. Bank, Inc., 690 S.W.2d 393, 395 (Ky.

1985) (holding that "[i]t is always assumed that the General Assembly had knowledge of the existence of the earlier statute"). In the earlier opinion of Phoenix Healthcare, the Court of Appeals followed the directive of Gryzb and recognized the exclusivity of the MVRA with regard to basic reparation benefits. In the case at bar, the Court of Appeals erred by issuing a contradictory opinion and attempting to create a cause of action where the legislature has declared none exists.

b. The Court of Appeals Correctly Decided the Issue in Phoenix Healthcare.

In Phoenix Healthcare, the insured, Phyllis Jones, made a claim to her insurer, Kentucky Farm Bureau, for payment of a medical expense pursuant to her policy which provided basic reparation benefits. See Phoenix Healthcare, 120 S.W.3d at 727. Kentucky Farm Bureau was required to pay or deny her claim within 30 days pursuant to the requirements of the MVRA. See KRS §304.39-210(1). Although Ms. Jones' claim was submitted on March 14, 2002, Kentucky Farm Bureau did not pay the claim until May 1, 2002 – about 2 weeks after the statutory deadline. Id. Ms. Jones assigned her rights to Phoenix Healthcare and Phoenix Healthcare filed a claim against Kentucky Farm Bureau pursuant to the UCSPA for alleged bad faith delay in the payment of basic reparation benefits. Id.

The Floyd Circuit Court dismissed Phoenix Healthcare's claim for bad faith pursuant to the UCSPA because it held that KRS §304.39-210 and §304.39-220 (contained in the MVRA) provided the "exclusive remedy" for the

late payment of basic reparation benefits. Id. The Court of Appeals affirmed the decision and said:

> We agree with the lower court that [KRS 304.39-210 and 304.39-220] provide the exclusive remedy under the facts of this case.... Because KRS 304.39-210 specifically applies to late payments of basic reparation benefits, as opposed to the more general language of KRS 304.12-230 and –235, we hold that it governs the matter at hand. Therefore, Phoenix cannot recover under the Unfair Claims Settlement Practices Act or for punitive damages.

Id. at 727-728 (Emphasis added). The Court of Appeals recognized that since the MVRA provides a specific remedy for the delayed payment of basic reparation benefits, the specific remedy therein applies to the exclusion of the more general remedy provided by the UCSPA. Id. at 727 (holding "where one statute deals with a subject matter in a general way and another in a specific way, the more specific provision prevails."). Like the claimant in Phoenix Healthcare, Ms. Mitchum and Mr. Hartley do not have a cause of action pursuant to the UCSPA because they have already been compensated for the "delayed" payment of medical expenses.

c. The Court of Appeals Erred by Trying to Create a Distinction From Phoenix Healthcare Where None Exists.

In the case at bar, the Court of Appeals erred by trying to create a distinction between Phoenix Healthcare and the case at bar where none exists. At the oral argument, the attorney for Ms. Mitchum and Mr. Hartley conceded that a distinction could not be made. Nevertheless, the Court of Appeals held that Phoenix Healthcare is not applicable because KRS §304.39-210 and KRS

§304.39-220 are meant to serve as a "'prod to prevent laxity in the adjustment of claims,' while the injured party is free to seek relief from 'more egregious behavior' by pleading a private cause of action through KRS 446.070." See 9/17/04 Court of Appeals Opinion at p. 11. In support of this position, the Court of Appeals relies upon FB Insurance Co. v. Jones, 864 S.W.2d 926 (Ky. App. 1993) which held that an insured may recover punitive damages pursuant to the UCSPA for "intentional tortious acts" even if the insured has recovered damages pursuant to KRS §304.12-235 for delayed settlement of insurance claims. Id. at 929.

The Court of Appeals reliance on FB Insurance is misplaced. FB Insurance dealt with property insurance and fire loss, not the delayed payment of basic reparation benefits as in the case at bar. In FB Insurance, the issue was whether the insureds could assert a claim pursuant to the UCSPA for delayed payment of property insurance proceeds even though they could obtain 12% interest for the delay pursuant to the general insurance statute set out in KRS 304.12-235. That general insurance statute provides for 12% interest if an insurer fails to make a good faith attempt to settle a claim within 30 days. See KRS §304.12-235. It also provides for attorneys' fees if the delay is without reasonable foundation. Id. It does not contain a "punitive" interest component. Id.

To the contrary, KRS §304.39-210(2) is contained with the MVRA, the "comprehensive" statutory law applicable to all issues concerning basic reparation benefits. See generally Crenshaw v. Weinberg, 805 S.W.2d 129, 131

(Ky. 1991). This more specific body of law provides for 12% interest for delayed payment of basic reparation benefits (the prod to prevent laxity) as well as punitive interest in the amount of 18% if the delay is "without reasonable foundation." See KRS §304.39-210(2) (Emphasis added). In order to award 18% interest for delayed payment of basic reparation benefits, the court must find that the insurer was obligated to pay the claim and its delay was without reasonable foundation. Id. The same finding is required in order to establish a claim for bad faith pursuant to the UCSPA. See Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993). Since the MVRA provides a specific remedy for the delayed payment of basic reparation benefits which is punitive in nature, a claimant may not also seek a similar remedy under the more general provisions of the UCSPA. See Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 763 (Ky. 2003) (holding that "when two statutes are in conflict, one of which deals with the subject matter in a general way and the other in a specific way, the more specific provision prevails.").

For the aforementioned reasons, the decision of the Court of Appeals should be reversed and the summary judgment granted in favor of GEICO should be affirmed.

2. Even If a Civil Cause of Action Does Exist, There Is No "Conduct... Behind the Delayed Payment" of Medical Expenses Which Would Warrant Reversing and Remanding the Bad Faith Claim.

Even if a civil cause of action for bad faith is not foreclosed, there is no evidence of "bad conduct" on the part of GEICO, accordingly, the decision of the Court of Appeals should be reversed. In distinguishing Phoenix Healthcare, the

Court of Appeals noted that a "plaintiff alleging the late payment of basic reparation benefits is still permitted to bring a private cause of action under KRS §446.070 for bad faith under the Unfair Claims Settlement Practices Act and for punitive damages *when alleging bad conduct on the part of the insurance carrier.*" See 9/17/04 Court of Appeals Opinion at p. 12 (Emphasis added). In the case at bar, there is no evidence of "bad conduct" on the part of GEICO other than the mere delay in payment of "medical expenses," accordingly, the Court of Appeals erroneously reversed the decision of the Meade Circuit Court.

a. Mere Delay In Payment Does Not Rise to the Level of Actionable Bad Faith as a Matter of Law.

It is well settled that mere delay in the payment of basic reparation benefits does not give rise to a cause of action for bad faith as a matter of law. See Motorist Mut. Ins. Co. v. Glass, 996 S.W.2d 437 (Ky. 1997) (holding that delay in payment of medical benefits does not rise to the level of actionable bad faith as a matter of law) and Allstate Ins. Co. v. Coffey, 796 F. Supp. 1017, 1018 (E.D.Ky. 1992) ("Kentucky law is clear that defendants cannot sustain [a bad faith] cause of action merely because of a dispute in payment or delay in payment.").

The bad faith allegations on appeal concern only the allegedly delayed payment of basic reparation benefits in the form of medical expenses.[6] Assuming the facts most favorable to Ms. Mitchum and Mr. Hartley, they made a

[6] The Meade Circuit Court ultimately found that survivor's benefits were not owed and Ms. Hartley and Mr. Mitchum did not appeal that ruling. Accordingly, it has been conclusively determined that GEICO acted properly as to the denial of survivor's benefits, and the bad faith claim relates solely to the alleged delay in payment of medical expenses.

claim for medical expenses on April 9, 2001 and GEICO offered to confess judgment on July 18, 2001, about 11 weeks after the benefits would have been payable. (CR 25-26). This mere delay does not rise to the level of actionable bad faith as a matter of law.

There are simply no additional facts in the record which would support an argument that there was "bad conduct" behind the delayed payment of medical expenses.[7] Accordingly, even if this Court determines that a cause of action pursuant to the UCSPA is not foreclosed by the exclusive remedies set out in the MVRA, the decision of the Court of Appeals should be reversed because there is no evidence of "bad conduct...behind the delay" which would warrant submitting the issue of bad faith to the jury.

b. GEICO Acted in Good Faith At All Times and Post-Complaint Conduct Is Not Actionable As a Matter of Law.

Because Ms. Mitchum and Mr. Hartley lacked any evidence that the delay in payment of medical expenses was "outrageous," "reckless" or "evil," a prerequisite necessary to assert a bad faith claim, they attempted to shift the focus of the case to conduct which took place *after* the complaint was filed, specifically claiming that GEICO acted in bad faith by offering to confess judgment in the amount of $9,000.00 within 30 days of the filing of the complaint. (CR 187) and See generally Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993)

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[7] At the trial court level, Ms. Mitchum and Mr. Hartley did not argue that they needed additional time to take discovery, despite the fact that they did not depose any GEICO representatives. (CR 185-196, CR 251-256). Because they did not make the argument below, the Court of Appeal properly declined to address the issue on appeal. See 9/17/04 Court of Appeals Opinion at pp. 15-16 and Commonwealth of Kentucky v. Lavit, 882 S.W.2d 678, 680 (Ky. 1994) (holding that if the trial court "has had no opportunity to rule on a question, there is no alleged error... to review").

(holding that there must be evidence of "conduct that is outrageous, because of the [insurer's] evil motive or [its] reckless indifference..."). Ms. Mitchum and Mr. Hartley claim that this action constituted "bad faith" because the "offer, if accepted, would have required [Ms. Hartley and Mr. Mitchum] to forego interest, attorney's fees, and damages for bad faith." (CR 187).

Evidence of the offer to confess judgment is not admissible as a matter of law. Civil Rule 68 expressly states that an offer to confess judgment which is not accepted "shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs." See Kentucky Rule of Civil Procedure 68(3) (Emphasis added). In any event, this action does not constitute "bad faith" because the offer was made within 30 days of the filing of the complaint at a time when Ms. Mitchum and Mr. Hartley were not entitled to interest, attorneys' fees or bad faith damages. [8]

In addition, post-complaint conduct is not actionable as a matter of law. Ms. Mitchum and Mr. Hartley argued that the Court of Appeals should adopt a new rule of law similar to the opinion issued in White v. Western Title Ins. Co.,

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[8] The first demand for medical expenses was on June 28, 2001, the date the Complaint was filed. (CR 2). GEICO's offer to confess judgment within 30 days of the claim was entirely proper and no interest, attorneys' fees bad faith damages owed. See KRS 304-39.210.

Assuming the facts most favorable to Ms. Mitchum and Mr. Hartley, if the April 9, 2001 letter was a claim for medical benefits, the claim was offered to be paid approximately 70 days after it became payable and a bad faith claim may not be based upon mere delay in payment of benefits. See Glass, 996 S.W.2d 437. Although the offer to confess judgment did not contain an interest component, the maximum interest available under KRS 304.39-210 for "unreasonable denial" would have been approximately $310.00. See KRS 304-39.210(2). This constitutes interest on a claim for medical bills which had long since been paid. Ms. Mitchum and Mr. Hartley cannot seriously contend that the offer to confess judgment in the full amount of their claim for medical benefits constitutes bad faith because it did not contain an additional $310.00 in interest. The Court may properly determine that the exclusion of little more than $300.00 does not constitute "outrageous conduct" and does not warrant submission of the case to the jury. See Wittmer, 864 S.W.2d at 890.

710 P.2d 309 (Cal. 1985) that "post-complaint conduct of an insurer is subject to scrutiny in a bad faith case." See Appellants' Court of Appeals Brief, pp. 16-19. The only Kentucky court which has addressed the issue noted that the White opinion has been "consistently limited" since it was issued and that other states have held that post-complaint conduct is "as best marginally probative." Graham v. Gallant Ins. Group, 60 F.Supp.2d 632, 634 (W.D.Ky. 1999). After considering the issue, the Western District of Kentucky held that a broad application of White "could expand the tort of bad faith beyond its intended scope and impair the right of the insurer to defend itself." Id. at 635. The court also held that "the weight of authority recognizes the need to restrict the introduction of evidence regarding litigation tactics after a suit has been filed." Id.[9] The Court of Appeals agreed with this contention and stated that "we are not persuaded by Mitchum and Hartley's argument that GEICO's conduct following the filing of the complaint litigation is relevant." See 9/17/04 Court of Appeals Opinion at p. 16.

Significantly, Ms. Mitchum and Mr. Hartley never amended their initial complaint; therefore, it seems impossible for them to assert as grounds for a cause of action conduct which did not exist at the time the original complaint was filed and for which they never formally complained to the trial court. According to Ms. Mitchum and Mr. Hartley's theory, a bad faith case may morph at any time, without notice to the insurer, and may encompass the insurers' proper litigation strategy regardless of whether such actions are related to the grounds set out in

[9] The court held that since there was not an "absolute barrier" to the introduction of post-litigation conduct, the plaintiff could conduct discovery, however, the court noted that the evidence "may ultimately be found inadmissible." Graham, 60 F.Supp.2d at 635.

the underlying complaint. This is not, and should not be, the state of Kentucky law. The underlying complaint was based upon certain actions taken by GEICO which the trial court ultimately determined were proper and made in good faith. If Ms. Mitchum and Mr. Hartley wished to place GEICO's post-complaint acts at issue, then they should have amended their complaint and given GEICO proper notice. At a minimum, the complaint should be supported by sufficient facts to sustain the claim at the time it is filed. In this case, the initial complaint was never amended and the trial court properly entered summary judgment in favor of GEICO.

For the aforementioned reasons, the decision of the Court of Appeals should be reversed and summary judgment in favor of GEICO should be affirmed.

3. The Question of Whether the April 9, 2001 Letter Was a Claim For Medical Benefits Is an Issue of Law Which May Be Resolved By the Court.

a. The Judge Properly Determined that the April 9, 2001 Letter Was Ambiguous and that GEICO Did Not Act Unreasonably By Interpreting the Letter as a Claim for Survivor's Benefits.

The Court of Appeals overlooked the real issue and, instead, focused on whether Ms. Mitchum actually made a claim for medical benefits on April 9, 2001. The Court of Appeals framed the issue as follows:

> The critical issue in this case relates to when Mitchum and Hartley actually made their claim for medical expenses.... the date of the claim must be established before any allegation of bad faith can be decided as to the timeliness of GEICO's payment... [and] the circuit court erred in deciding this contested factual issue...

See 9/17/04 Court of Appeals Opinion at p. 14- 15. The date the claim for medical expenses was made may be relevant to resolution of the contract claim and determination of the amount of interest owned pursuant to §304.39-210 and §304.39-220. However, the real issue on appeal concerns only whether GEICO acted reasonably in interpreting the April 9, 2001 letter as yet another claim for survivor's benefits which were clearly not owed. The Meade Circuit Court properly decided this issue as a matter of law.

The Meade Circuit Court held that the April 9, 2001 letter was "ambiguous" and that GEICO's interpretation of the letter as a claim for survivor's benefits "does not constitute 'outrageous conduct' sufficient to support an award of punitive damages." (CR 328). This determination was proper and the circuit court's decision should be affirmed upon this ground. Kentucky law is clear that if there is no evidence of outrageous behavior, a bad faith claim may not proceed to the jury as a matter of law. See Wittmer, 864 S.W.2d 885, 890 (Ky. 1993). In Wittmer, the Kentucky Supreme Court held that the trial court must make a threshold determination regarding whether or not there is sufficient evidence of outrageous behavior to warrant submitting the bad faith claim to the jury:

> Before the [bad faith] cause of action exists in the first place, there must be evidence sufficient to warrant punitive damages:
>
> "The essence of the question as to whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages depends first on whether there is proof of bad faith and next whether the proof is sufficient for the jury to conclude that there was 'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'"

> This means 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.

Id. at 890 (emphasis added). See also Glass, 996 S.W.2d at 448 ("[B]efore a cause of action for a violation of the UCSPA exists, there must be evidence sufficient to warrant punitive damages."). In the case at bar, the Meade Circuit Court properly performed its gatekeeping function and determined that GEICO's interpretation of the April 9, 2001 letter as another claim for survivor's benefits was not "outrageous" as a matter of law; therefore, it issued summary judgment in favor of GEICO.

The trial court's substantive finding is supported by Kentucky case law. See Combs v. International Ins. Co., 163 F. Supp. 2d 686 (E.D.Ky. 2001). In Combs, the court addressed a similar issue and held that the insurer's "misreading" of an insurance policy exclusion did not rise above mere negligence as a matter of law, therefore, the court granted summary judgment in favor of the insurer on the bad faith claims. Id. at 696. The insured, Combs, was covered under a Director and Officer's (D&O) insurance policy for "wrongful acts" committed while acting as a director or officer of his thoroughbred farm. Id. at 688. Combs was sued in connection with a private placement deal for the farm and sought coverage under the D&O policy. Id. at 688-689. The insurer read the definition of "wrongful acts" to encompass only acts which were committed by the insured "solely by reason of their being an director or officer." Id. at 689. Combs' alleged "wrongful conduct" was committed in both his capacity as a

director and his individual capacity, therefore, the insurer denied the claim. Id. Combs sued for bad faith denial of the claim.

The court granted the defendant's motion for summary judgment on the bad faith claim because the insurer's denial was due to a "misreading" of the D&O policy. Id. at 696. The court held that, pursuant to Kentucky law, the plaintiff's claim failed as a matter of law because "misreading" an insurance policy constitutes mere negligence and does not rise to the level of actionable bad faith as a matter of law. Id. at 696-697. The court said:

> Under Kentucky law, bad faith in the insurance context 'requires something more than mere negligence. The term itself implies some intentional wrongful conduct...Mere errors in judgment should not be sufficient to establish bad faith.' The Plaintiff's allegations of 'misreadings' by the Defendant do not rise beyond mere negligence.

Id. (Emphasis added). In the case at bar, GEICO's interpretation of the April 9, 2001 letter does not rise to the level of "outrageous" conduct required to sustain a bad faith case.

For the aforementioned reasons, the decision of the Court of Appeals should be reversed and summary judgment in favor of GEICO should be affirmed.

b. Because Ms. Mitchum Never Removed the Written Directive to Reserve the Monies for Survivor's Benefits, GEICO Could Not Pay Medical Expenses as a Matter of Law.

It is undisputed that the April 9, 2001 letter does not expressly remove the prior written directive that the remaining monies be reserved for "survivor's benefits." As a result, GEICO was prohibited from paying the remaining monies for medical expenses as a matter of law. See KRS §304.39-241. (CR 55). Ms.

Mitchum's own actions prior to filing the complaint further demonstrate that she did not intend the April 9, 2001 letter to be a claim for medical expenses (and further establish that GEICO's interpretation of the letter was reasonable).

In her complaint to the KDI, her only allegation of "bad faith" is that GEICO wrongfully denied payment of "survivor's benefits." (CR 169-171). She made absolutely no reference to any alleged claim for the payment of medical expenses. Had GEICO paid the medical expenses in April of 2001 over Ms. Mitchum's prior written directive, the monies would have been payable to the Estate and, thus, equally shared by Ms. Mitchum and her ex-husband, Robert Hartley. In that circumstance, Ms. Mitchum could have claimed that GEICO acted in "bad faith" by making a payment in violation of her prior written directive to reserve the monies for survivor's benefits.

The Meade Circuit Court properly determined that the April 9, 2001 letter did not remove the written directive to reserve the monies. (CR 327). Because Ms. Mitchum never rescinded the written directive, GEICO could not have paid the monies in medical expenses as a matter of law. For the aforementioned reasons, the decision of the Court of Appeals should be reversed.

4. The Court of Appeals Erred By Reversing the Award of Summary Judgment Because Ms. Mitchum and Mr. Hartley Had Insufficient Evidence of Damage.

The Court of Appeals erred by reversing the award of summary judgment because there was insufficient evidence of "damage," a prerequisite to a claim for bad faith. See Motorist Mut. Ins. Co. v Glass, 996 S.W.2d at 452 (holding that "a condition precedent to bringing a statutory bad faith claim is that the claimant was damaged by reason of the violation of the statute.") (Emphasis added). Ms.

Mitchum and Mr. Hartley failed to put forth sufficient evidence that they were damaged as a result of GEICO's interpretation of the April 9, 2001 letter or any other action (or inaction) at issue in this case.

Assuming the facts most favorable to Ms. Mitchum and Mr. Hartley, they did not make a claim for medical expenses until April 9, 2001. Since they filed their complaint on June 28, 2001 and GEICO offered to confess judgment on July 17, 2001, the time period during which to establish "damage" for bad faith delay in payment is very brief. It is undisputed that as of April 9, 2001, all of the medical bills had been paid.[10] (CR 163). Although the fact that the Daniel's medical bills were paid by collateral source does not affect GEICO's duty as the reparations obligor - it does establish that neither Ms. Mitchum nor Mr. Hartley were financially impacted as a result of GEICO's alleged delay in payment of the medical expenses.

In the trial court, Ms. Mitchum filed a bare affidavit stating that "As a result of the conduct of GEICO in its handling of my PIP claim and its dealings with me, I have suffered anxiety, inconvenience and mental anguish that I would not have incurred otherwise." (CR 249). A copy of the affidavit is attached to the Appendix as Exhibit 7. Ms. Mitchum's Affidavit is insufficient to establish that she is entitled to punitive damages because it does not differentiate between 1) the emotional distress allegedly suffered for the approximate 10 months during which she unsuccessfully made a claim for survivor's benefits which were not owed and

[10] In fact, Ms. Mitchum had negotiated a settlement with Aetna to pay the reduced sum of $4,700.00 to settle a portion of Daniel's medical bills which totaled $7,325.00. (CR 61).

2) the 11 week delay between the time she alleged she made a claim for medical expenses and the time GEICO offered to confess judgment in the amount of the medical expenses. Of course, Ms. Hartley has no claim as a matter of law for any emotional distress suffered due to the denial of her claim for survivor's benefits because the trial court held that the denial was reasonable and Ms. Mitchum did not appeal the ruling. Mr. Hartley has never submitted any evidence of damage and the trial court properly awarded summary judgment in favor of GEICO as to his claim.

The Court should hold as a matter of law that the threshold showing to submit a claim for punitive damages to the jury requires more than a bare affidavit claiming "anxiety, inconvenience and mental anguish" caused by an alleged 11 week delay in an offer to pay basic reparation benefits. This Court has held that:

> While damage for anxiety and mental anguish are recoverable in an action for statutory bad faith, entitlement to such damages requires either direct or circumstantial evidence from which they jury could infer that anxiety or mental anguish in fact occurred. The proof must be clear and satisfactory; and evidence based on conjecture will not support a recovery for such damages.

Id. at 454. (Emphasis added). Ms. Mitchum's affidavit does not satisfy the standard set forth by this Court as it is purely conjecture and contradicted by the actual evidence in the case. Simply put, there was no "anxiety, inconvenience or mental anguish" associated with the "delay" in the payment of medical expenses because the medical bills were either: 1) not incurred; 2) paid by a health insurer; or 3) paid by GEICO pursuant to the negotiated settlement. Moreover, there was

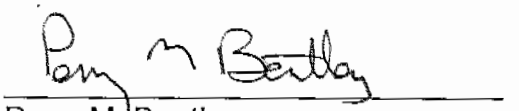
no associated inconvenience by the "delay" because Ms. Mitchum and Mr. Hartley were awarded their attorneys' fees and eighteen percent (18%) interest in addition to $9,000.00 in medical benefits. (CR 77-82).

For the aforementioned reasons, the decision of the Court of Appeals should be reversed and summary judgment in favor of GEICO should be affirmed.

CONCLUSION

For the aforementioned reasons, the 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.

Respectfully submitted by:



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