

RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001174-MR

MOTORISTS MUTUAL INSURANCE COMPANY

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 92-CI-00444

CORLISS R. HOWARD;
AND DOCTROW-RICH INSURANCE AGENCY, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

BARBER, JUDGE: Appellant, Motorists Mutual Insurance Company (Motorists Mutual), appeals from a Shelby Circuit Court judgment awarding the Appellee, Corliss R. Howard (Howard), \$175,000 in compensatory damages, and \$250,000 in punitive damages on a claim of insurance bad faith. We affirm the jury's verdict.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Howard was insured through Motorists Mutual. Her policy lapsed due to nonpayment of premium. Howard sent a check to Motorists Mutual to continue the policy. Howard testified that she mailed the check on the advice of her local insurance agent. That agent testified he had not told Howard to mail the check. The premium check was received and cashed by Motorists Mutual. Howard testified that once she noted that the check had cleared, she assumed that her insurance coverage was continued. Howard stated that she operated her vehicle based on that belief. After a period of twelve weeks Motorists Mutual sent a check to Howard's local insurance agent identifying that sum as a refund of the premium payment and included a notice to the agent that Howard was not insured. Motorists Mutual did not notify Howard independently at any time relevant to the claim underlying this action that she was not insured, nor did Motorists Mutual provide Howard personally with a refund of sums paid by her for insurance. Prior to receipt by Howard of the funds or the letter sent to the insurance agent, Howard was involved in a motor vehicle accident. Motorists Mutual denied coverage and refused to provide Howard with a defense, or to pay damages incurred by Howard or the other parties to the accident. Howard underwent years of litigation due to the accident.

Howard sued Motorists Mutual for bad faith, claiming that she had been covered by insurance at the time of the

accident and that Motorists Mutual was in error in failing to provide coverage and a defense. The circuit court ruled that Howard was covered by a policy issued by Motorists Mutual. Motorists Mutual appealed that finding to the Kentucky Court of Appeals. This Court reversed the circuit court, permitting Motorists Mutual's denial of coverage. On discretionary review the Kentucky Supreme Court found that Howard was covered by insurance issued by Motorists Mutual. Our Supreme Court held that Motorists Mutual was estopped from denying coverage to Howard. The Supreme Court further held the denial of coverage wrongful and barred by law. That case is final and the determination therein binding on all parties.

Howard's claims for damages resulting from Motorists Mutual's bad faith were remanded to circuit court. After a jury trial the jury awarded Howard compensatory and punitive damages. Motorists Mutual appeals from the judgment and the circuit court's denial of its motion to set aside the jury verdict.

On appeal Motorists Mutual claims that Howard failed to prove all the elements necessary to recover on a claim of insurer bad faith. Motorists Mutual asserts Howard did not prove intentional or reckless disregard of Howard's rights by the insurer, and for this reason, the Shelby Circuit Court should have granted the insurer a directed verdict. Motorists Mutual admits that Howard tendered a check, and that the check

was cashed on February 7, 1991. Motorists Mutual admits that it did not mail notice to Howard that there was not a policy in force. Motorists Mutual admits that it did not notify Howard that she was not insured. Motorists Mutual claims that on February 19, 1991 it mailed a letter and a refund of the payment made for coverage to the local insurance agent who had sold Howard the policy. In the letter Motorists Mutual claimed that there was no policy in effect. The record is devoid of any showing that Motorists Mutual attempted to ensure that Howard knew that there was not a policy in effect, or that Howard received the letter or funds sent to the local insurance agent prior to being involved in the accident. There was no showing that Howard knew she was not insured at the time she was involved in the accident.

Motorists Mutual cashed the premium check on or after February 7, 1991. Motorists Mutual then issued a receipt and policy number that the check would be applied to. Twelve days later, on February 19, 1991, Motorists Mutual returned a draft in the sum of the premium payment to the local insurance agent, rather than to the insured, claiming they could no longer insure Howard. The local agent claims he mailed the draft to Howard on February 22, 1991. On February 22, 1991 Howard was involved in an automobile accident. Motorists Mutual denied coverage. Howard did not receive the draft until several days after she

notified her local insurance agent of her automobile accident. Motorists Mutual did not provide Howard with a defense to the action against her by the injured motorists, did not provide PIP coverage, and refused to communicate with Howard's local counsel regarding the case during the six years following the denial of coverage.

As before stated, after years of litigation the Kentucky Supreme Court determined that Howard had insurance coverage at the time she was injured. Where an insurer delays in notifying the insured that she is not covered or delays in refunding premium payments made, and the insured relies on that delay to her detriment, denial of coverage is not proper. American Life & Accident Insurance Co. v. Clark, 407 S.W.2d 433, 435 (Ky. 1966). The record supports Howard's claim that she went through six years of damages and six years of litigation due to the wrongful denial of coverage by Motorists Mutual.

On remand after our Supreme Court rendered its Opinion requiring coverage, Howard testified before the circuit court that she believed she was covered by insurance issued by Motorists Mutual because the insurer had cashed her check. At trial Howard's expert witness testified that bad faith occurred when Motorists Mutual denied coverage, and when the insurer failed to mail the payment back to Howard directly. Motorists Mutual made a motion for directed verdict claiming that no

showing of bad faith had been made. The court denied that motion. Contrary to Motorists Mutual's assertions, the trial court did not grant Howard a directed verdict on the issue of bad faith.

Howard provided evidence showing the damages she had suffered as a result of the denial of her claim by Motorists Mutual. At the close of Howard's proof, the trial court denied Motorists Mutual's motion for directed verdict. The court met with counsel in chambers. At that time, the judge stated that the Kentucky Supreme Court's ruling holding that Howard had insurance coverage was binding. The court observed that Howard was entitled to jury instructions on the issue of all damages asserted. The court did not grant a directed verdict for Howard on the issue of punitive damages. Trial resumed, and Motorists Mutual presented its defense to the bad faith claims.

The jury instructions given included Instruction #3, which detailed the duties of the insurer, Instruction #5, which asked whether the jury believed that Motorists Mutual had acted with reckless disregard for whether Howard had a reasonable basis for her claim, and verdict forms providing for an award of consequential and punitive damages. The judgment entered by the trial court did not break down the damages awarded; merely stating that Howard had judgment against the insurer for \$425,000.00. Motorists Mutual entered a motion asking for a new

trial on the grounds that the damages were excessive and unsupported by the evidence. The court overruled the motion, but amended the judgment to show that Howard received \$175,000 in compensatory damages, and \$250,000 in punitive damages.

Motorists Mutual complains that punitive damages were granted in error. Motorists Mutual argues that a damage award for insurance bad faith requires more than a showing of mere negligence or a breakdown in communications. Howard contends that Motorists Mutual's actions supported the jury award. The record shows intentional or reckless actions on the part of Motorists Mutual which directly resulted in harm to Howard. That action constitutes bad faith on the part of the insurer. Blue Cross & Blue Shield of Ky., Inc. v. Whitaker, 687 S.W.2d 557, 559 (Ky.App. 1985). These facts were apparent in the case before the Supreme Court. Bad faith was demonstrated by the uncontroverted facts in the record.

In ruling on the motions before it, the trial court properly relied on that uncontroverted evidence and the Supreme Court decision. The trial court did not improperly determine the weight and credibility of the evidence, but left such factual issues for the jury to determine. USAA Cas. Ins. Co. v. Kramer, 987 S.W.2d 779, 781 (Ky. 1999). The case was submitted to the jury on the issue of damages. Motorists Mutual contends that there was insufficient evidence upon which to submit the

case to the jury on the issue of bad faith or to claim punitive damages. We find this contention to be in error.

As Howard notes on appeal, Motorists Mutual spends more than five pages of its brief discussing facts related solely to the issue of whether Motorists Mutual insured Howard at the time she was injured. This issue has been conclusively determined by the Kentucky Supreme Court which held that Howard had insurance with Motorists Mutual at the time of the accident. Howard v. Motorists Mut. Ins. Co., 955 S.W.2d 525, 526 (Ky. 1997). Our Supreme Court found that Motorists Mutual's failure to promptly deny coverage to Howard, and the company's failure to notify Howard that they might deny coverage, coupled with the cashing and retention of the premium check, estopped Motorists Mutual from denying coverage. Id., at 528. Motorists Mutual forced Howard to undergo years of litigation in an attempt to obtain the coverage she was owed. Such conduct constitutes bad faith and exposes the insurer to the risk of punitive damages. Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 382 (Ky. 2000). The assertion by Motorists Mutual that it was not estopped to deny coverage is without merit. Motorists Mutual fails to show that the finding that it was liable for the damages suffered by Howard was reversible error.

Kentucky law provides that "an insurer who denies coverage does so at its own risk and although its position may

not have been entirely groundless, if the denial is found to be wrongful, it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract."

Eskridge v. Educator and Executive Insurers, 677 S.W.2d 887, 889 (Ky. 1984). An insurer owes its insured a duty to defend claims against the insured up to the point that it can establish that there is no coverage. Brown Foundation v. St. Paul Ins. Co., 814 S.W.2d 273 (Ky. 1991). Motorists Mutual's failure to provide such a defense to Howard is a violation of that precedent. Howard properly claimed damages as a result of Motorists Mutual's wrongful denial.

The Kentucky Unfair Claims Settlement Practices Act (KUCSPA), KRS 304.12.230-235, imposes clear and specific duties upon an insurer. Even where the issue of whether an insured is covered under the policy is fairly debatable, the insurer is not relieved of its duty to comply with the KUCSPA. Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368, 375 (Ky. 2001). The jury was presented with Howard's claim of bad faith on the part of the insurer at trial. Howard claimed that Motorists Mutual failed to acknowledge her communications or to act reasonably in a prompt manner upon those communications in violation of KRS 304.12-230(2). Howard argued that Motorists Mutual failed to affirm or deny coverage within a reasonable time as required by

KRS 304.12-230(5). Lastly, Howard asserted that Motorists Mutual failed to conduct a reasonable investigation based upon all available information as mandated by KRS 304.12-230(4). The jury found that Motorists had failed to comply with the requirements of the KUCSPA, as detailed in jury instructions 3-5. They awarded Howard punitive damages for the harm she suffered due to Motorist's improper actions. Such an award is permissible.

Where an insurer delays payment of a claim, or fails to provide coverage without a reasonable basis, the insurer is acting in bad faith. Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 452 (Ky. 1997). Where an insurer knows, or should have known, that there was no reasonable basis for denial of the claim, bad faith on the part of that insurer has occurred. Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993). Motorists Mutual admits on appeal that our Supreme Court found that they had no reasonable basis to deny Howard's claim. Motorists Mutual asserts that since it paid Howard's claim and provided her with a defense after the Kentucky Supreme Court rendered its final decision in 1997, she cannot properly claim bad faith on the part of the insurer. This argument ignores the six years of litigation that went before the Supreme Court decision. Six years elapsed in which Howard had to pay legal expenses, defend against claims, and fight her insurer for the coverage she was

owed. Punitive and compensatory damages for this unwarranted delay in coverage were properly claimed and awarded at trial.

There is no reversible error in the jury's award. For this reason, the judgment is affirmed.

MILLER, SENIOR JUDGE: CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN RESULT: I concur in the result reached by the Majority Opinion, but choose to write separately because of problems in the manner this case was practiced and tried. In its brief Motorists Mutual attempts to set out three separate arguments, but in essence it is only arguing insufficiency of evidence to support the verdict. After watching the video tapes of this three-day trial, I conclude that when the evidence is viewed in the light most favorable to the prevailing party, as we are required to do, there was clearly sufficient evidence to support the verdict in favor of Howard.

Unfortunately, there is considerable confusion in Motorists Mutual's brief concerning whether the trial court granted a directed verdict to Howard on Motorist Mutual's liability on Howard's claim of bad faith. Curiously, at the close of the plaintiff's case before Motorists Mutual had even presented any evidence, the trial court granted Howard's motion

for a directed verdict of liability on the issue of bad faith. When Motorists Mutual asked the trial court to allow it to submit by avowal the evidence it intended to present in defense of its liability, which included testimony from its own insurance expert, Howard's counsel then appeared to realize that the trial court's granting a directed verdict for the plaintiff before the defendant had presented its case would be erroneous. Thus, Howard's counsel suggested that Motorists Mutual put on its evidence in defense of its liability in its case-in-chief.

During the remainder of the trial, including the arguments on the jury instructions, there appeared to be continued confusion over whether the trial court had in fact granted Howard a directed verdict as to Motorists Mutual's liability on her bad faith claim. This confusion is evidenced in the jury instructions which required the jury in order to find in favor of Howard to find that Motorists Mutual had violated at least one of four delineated duties.² Since the

² Instruction No. 3 stated as follows:

Duties of Motorists Mutual Insurance Company:

1. Acknowledge and act reasonably promptly upon communications with respect to Plaintiff's claims.
2. Conduct a reasonable investigation, based upon all available information.
3. Affirm or deny coverage of Plaintiff's claims within a reasonable time after receiving notice of the claims.

fourth duty from Instruction No. 3 stated that Motorists Mutual was required "[t]o provide a defense to the claims asserted against Plaintiff Corliss Howard[,]" without any requirement that its failure to do so be unreasonable, and since it was undisputed that Motorists Mutual did not provide a defense until after the Supreme Court's Opinion holding that there was coverage, it appears that the jury instructions had the effect of granting Howard a directed verdict on the issue of Motorists Mutual's liability for bad faith. While I doubt the correctness of the jury instructions, that issue is not before us on appeal.³

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, MOTORISTS MUTUAL
INSURANCE COMPANY:

George R. Carter
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, DOCTROW-RICH
INSURANCE AGENCY, INC.

Todd S. Page
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, CORLISS HOWARD:

Samuel B. Carl
Jack Richardson, IV
Louisville, Kentucky

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4. To provide a defense to the claims asserted against Plaintiff Corliss Howard.

³ See Palmore, Kentucky Instructions to Juries § 44.09.2 (4th ed., 1989 and Supp. 2005).