

# Commonwealth of Kentucky

## Court of Appeals

NO. 2004-CA-002239-MR

DAVID L. MITCHELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 02-CI-008769

STATE AUTO PROPERTY & CASUALTY INS. CO.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant, David L. Mitchell, appeals from an order of the Jefferson Circuit Court granting partial summary judgment in favor of Appellee, State Auto Property & Casualty Company, on his claim of bad faith under the Kentucky Unfair Claims Settlement Practices Act (UCSPA). Finding no error, we affirm.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Mitchell was injured in an automobile accident on January 4, 1999. At the time, he was insured under a policy of insurance with State Auto that provided coverage for no-fault benefits. Mitchell thereafter received chiropractic treatment and was also treated by Dr. Gary Reasor for pain management. Medical bills from the Crosby Chiropractic Center and from Dr. Reasor were submitted to State Auto for payment as basic reparations benefit.

In 2000, State Auto filed a petition in the Jefferson Circuit Court seeking an order requiring Mitchell to submit to an independent chiropractic examination. The trial court granted the petition and Mitchell was examined by Dr. Steven Carter. After receiving Dr. Carter's report, as well as a report from Dr. Lawrence Peters, a pain management specialist who reviewed Mitchell's medical records, State Auto advised Mitchell that it would not pay any further medical expenses under its no fault coverage relating to the January 4th accident. State Auto claimed that the ongoing medical charges were not reasonable or necessary as a result of the accident as mandated by the Kentucky Motor Vehicle Reparations Act (MVRA), KRS 304.39-010. et seq.

In November 2002, Mitchell filed the instant action complaining that State Auto had violated its duties under Kentucky's UCSPA and had failed to pay no-fault benefits under the MVRA. Mitchell sought not only payment for past benefits and future medical bills, but also punitive damages.

State Auto thereafter filed a motion for partial summary judgment with respect to the punitive damages claim. The trial court initially denied the motion.

However, following the rendition of this Court's opinion in *Phoenix Healthcare of Kentucky, LLC v. Kentucky Farm Bureau Mutual Insurance Company*, 120 S.W.3d 726 (Ky. App. 2003), State Auto renewed its motion which the trial court granted by order entered October 22, 2004. This appeal ensued.

Mitchell argues that the trial court erred in ruling that under the *Phoenix Healthcare* decision, he is limited to the exclusive remedy provided by the Kentucky MVRA. He contends that although the Court in *Phoenix Healthcare* declared that where the MVRA provides a remedy for an unlawful act, the UCSPA and punitive damages do not apply, the opinion therein only addressed the failure to pay benefits, not the conduct of the parties. Relying on *FB Insurance v. Jones*, 864 S.W.2d 926 (Ky. 1993), as well as two unpublished state and federal decisions,<sup>2</sup> Mitchell maintains that the MVRA and the UCSPA address different kinds of culpable conduct and that an aggrieved party should be free to seek remedy for both types of behavior. We are compelled to disagree.

The current state of the law was recently enunciated by our Supreme Court in *Foster v. Kentucky Farm Bureau Mutual Insurance Company*, 189 S.W.3d 553, 557 (Ky. 2006):

The Kentucky Motor Vehicle Reparation Act, KRS 304.39, et seq., provides an exclusive remedy where an

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<sup>2</sup> Mitchell cites to a 2004 decision in *Hartley v. Geico Casualty Company*, 2003-CA-001134-MR, wherein a panel of this Court held that in cases arising under the Kentucky MVRA, a plaintiff alleging bad conduct on the part of the insurance carrier for the late payment of basic reparation benefits is permitted to bring a cause of action under the UCSPA. The U.S. District Court thereafter agreed with such argument in *Allstate Insurance Co. v. Blankenship*, U.S. Dist. LEXIS 26274 (2005). However, by order entered July 20, 2006, the Kentucky Supreme Court vacated the opinion in *Hartley* and remanded the case for reconsideration in light of *Foster v. Kentucky Farm Bureau Mutual Insurance Company*, 189 S.W.3d 553 (Ky. 2006).

insurance company wrongfully delays or denies payment of no-fault benefits. There is no other Kentucky statute, regulation or case law which permits Foster to claim work loss for BRB. The MVRA is the exclusive remedy. *Grzyb v. Evans*, 700 S.W.2d 399 (Ky.1985), provides that where a statute both declares the unlawful act and specifies the civil remedy available, the aggrieved party is limited to the remedy provided by the statute. General damages are not available when a specific remedy is provided such as in this case. KRS 304.39-210 states that the penalty for any delay in payment of basic reparation benefits is payment of interest at the rate of 12% per annum on the delayed benefits, or 18% per annum if the delay was without reasonable foundation. Interest, which is set out in certain situations in KRS 304.39-220, and the award of attorney fees are the remedies provided to an insured if an insurance company fails to pay basic reparation benefits in a timely manner and/or without reasonable foundation.

*Grzyb, supra*, involves a special body of law, the Kentucky Civil Rights Act, KRS 344 et seq. *FB Ins. Co. v. Jones*, 864 S.W.2d 926 (Ky.App.1993), does not control because it relates to general insurance law questions. The Kentucky MVRA preempts general insurance law where an insurance claim arises as a result of physical injury caused by a motor vehicle accident and establishes remedies for violations of the statute. This can be compared to the civil rights provision of *Grzyb*. MVRA is a comprehensive act which not only relates to certain tort remedies, but also establishes the terms under which insurers pay no-fault benefits, and provides for the penalties to which insurers are subjected if they fail to properly pay no-fault benefits.

Here, the circuit judge dismissed the claim of Foster seeking punitive damages under the Unfair Claims Settlement Practices Act, but allowed the suit based on the MVRA to proceed to a jury trial. Because the MVRA is the exclusive remedy, the decision of the circuit judge was correct.

Without question, *Foster* is directly on point and controls the disposition of the case herein. Nevertheless, Mitchell argues that Justice Scott's concurrence in *Foster*

clearly indicates that the Court did not intend for the MVRA to provide an exclusive remedy:

Nor do I adopt the statement in this opinion that declares ‘[t]he Kentucky Motor Vehicle Reparation Act . . . provides an exclusive remedy where an insurance company wrongfully delays or denies payment of no-fault benefits.’ Insurance companies are subject to the same rules of conduct as others. To date, we have not declared they are ‘statutorily free’ from common law claims of ‘bad faith’ and I do not believe this to be the intent of this statement in this case.”

*Id.* at 558.

We are of the opinion that Justice Scott's “concurrence” is actually contrary to the law of the case. *Foster* notes that “the Kentucky MVRA preempts general insurance law where an insurance claim arises as a result of physical injury caused by a motor vehicle accident and establishes remedies for violation of the statute.” *Id.* at 557. Thus, the majority's holding that the MVRA affords the exclusive remedy for an insurance company's bad faith delay or denial of claims for basic reparation benefits controls the matter herein.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances. *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). *See also Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). “The trial court must view the evidence in the light most favorable to the nonmoving party, and summary

judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Lewis v. B &R Construction*, 56 S.W.3d 432, 436 (Ky. App. 2001).

There is no dispute of fact in the case herein. And under the law at the time of the summary judgment as stated in *Phoenix Healthcare of Kentucky, LLC v. Kentucky Farm Bureau Mutual Insurance Company*, *supra*, Mitchell was precluded from maintaining a private cause of action under the UCSPA for State Auto's failure to pay no-fault benefits. Further, the Supreme Court's subsequent decision in *Foster v. Kentucky Farm Bureau Mutual Insurance Company*, *supra*, unequivocally and conclusively holds that the Kentucky's MVRA “provides an exclusive remedy wherein an insurance company wrongfully delays or denied payment of no-fault benefits.” *Id.* at 557. As such, the trial court did not err in granting partial summary judgment in favor of State Auto.

The decision of the Jefferson Circuit Court is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS BY SEPARATE OPINION.

THOMPSON, CONCURRING: I agree with the majority's result but disagree as to its application of the law. I do not believe that that *Foster v. Kentucky Farm Bureau Mutual Insurance Company*, 189 S.W.3d 553 (Ky. 2006) and *Phoenix Healthcare of Kentucky, L.L.C. v. Kentucky Farm Bureau Mutual Insurance Company*, 120 S.W.3d 726 (Ky.App. 2003) hold that the Kentucky Motor Vehicle Repairs Act

(MVRA), KRS 304.39-010. et seq. is the exclusive remedy where the insurer's conduct is sufficiently egregious to constitute bad faith.

Based on the Supreme Court's holding in *Foster*, the majority holds that regardless of the egregiousness of the insurance company's conduct, the MVRA provides the exclusive remedy; that the Kentucky Unfair Claims Settlement Practices Act (UCSPA) and punitive damages do not apply. If that holding is correct, then there is no deterrent to an insurance carrier's bad faith in the payment of BRB benefits leaving the insured with only the remedy of seeking nominal statutory damages.

The fallacy in the majority's reasoning is that there is a distinction between those cases when the insurer merely fails to pay benefits based on what later is determined to be an unreasonable basis and those when the insurer engages in conduct which amounts to bad faith.

The MVRA was intended as a “prod to prevent laxity.” *FB Insurance v. Jones*, 864 S.W.2d 926, at 929 (Ky. 1993). I do not believe that its intent was to provide the exclusive remedy when a insurer engages in bad faith. Thus, I am in total agreement with the sound analysis provided by Justice Scott in his concurring opinion in *Foster* and with his distinction between a claim for damages under the MVRA and one for punitive damages:

Nor do I adopt the statement in this opinion that declares, “[t]he Kentucky Motor Vehicle Reparation Act . . . provides an exclusive remedy where an insurance company wrongfully delays or denies payment of no-fault benefits.” Insurance companies are subject to the same rules of conduct as others. To date, we have not declared the are “statutorily free” from

common law claims of “bad faith” and I do not believe this to be the intent of this statement in this case. *Foster*, at 557.

Likewise, I do not believe it was the intent of the legislature or of the Supreme Court in *Foster*, that an insured be denied the remedy of punitive damages when the insurer has engaged in conduct properly considered to constitute bad faith.

In this case, there is no evidence to indicate that State Auto acted with bad faith and, in fact, the the record demonstrates that State Auto's circuit court action in which it sought to obtain permission for an independent medical evaluation was both cautious and prudent. Thus, I agree that the summary judgment was proper.

BRIEF FOR APPELLANT:

John Longmeyer  
Louisville, Kentucky

BRIEF FOR APPELLEE:

John R. Martin, Jr.  
Michael K. Nisbet  
Louisville, Kentucky