

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000356-MR

EUGENE CLARK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 04-CI-02631

CINCINNATI INSURANCE COMPANY;  
DASHER EXPRESS, INC.,  
D/B/A DASHER EXPRESS & AIRFREIGHT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Eugene Clark (Clark), appeals the Fayette Circuit Court's dismissal of his claim against his employer, Appellee, Dasher Express, Inc. d/b/a Dasher Express and Airfreight, and his employer's insurer, Appellee, Cincinnati Insurance Company (CIC). We affirm the dismissal of Clark's claims.

Clark was an employee of Dasher Express, Inc., hereinafter "Dasher Express." On November 3, 1998, Clark was

operating his own personal car on a roadway in Scott County, Kentucky. Clark was returning keys to Dasher in the course and scope of his employment. Clark fell asleep, and crashed the vehicle into an oncoming car. The Hofmeisters, the occupants of the vehicle struck by Clark's car, filed an action against Clark and Dasher Express. CIC was the insurer for Dasher Express. Clark asserts that CIC provided a defense for Dasher Express, but did not defend or agree to indemnify Clark. As the trial court noted in its findings of fact, conclusions of law, and judgment, Clark did not request that CIC provide him with a defense. Clark was represented by an attorney hired by Travelers, the insurer who provided coverage for Clark's personal vehicle.

In May, 2000, Dasher Express filed a cross-claim against Clark in the suit brought by the Hofmeisters. The cross-claim denied any negligence by Clark during the course and scope of his employment, but stated that should Clark be found negligent, and such negligence be imputed to Dasher, Dasher was entitled to indemnification from Clark. Clark asserts that these proceedings were an attempt by Dasher Express and CIC to force him to mislead the Hofmeisters that the collision occurred outside the course and scope of his employment. Clark does not provide any documentary evidence supporting his position, other

than statements showing that the insurance company researched employer liability issues.

In September, 2002, the Scott Circuit Court ruled that the accident occurred while Clark was acting in the course and scope of his employment with Dasher Express. Dasher then voluntarily dismissed the cross-claim against Clark. Counsel for Dasher assumed Clark's defense at that time. The action against Dasher Express and Clark by the Hofmeisters was settled by CIC in December, 2002. Hofmeister then sued CIC for a bad faith claim. In May, 2004, a jury trial was held on the Hofmeisters' bad faith claims against CIC. The jury found bad faith and awarded the Hofmeisters in excess of 28 million dollars. That verdict is presently on appeal.

Clark then filed a Fayette Circuit Court action against Dasher Express and CIC, asserting bad faith, fraud, wrongful use of civil proceedings and outrage. The complaint asserted, in relevant part, that Clark was an employee of Dasher and acting within the course and scope of his employment when the accident occurred. The complaint also stated that Dasher and CIC knew or should have known that he was acting in the course and scope of his employment by 1999, but failed to inform the court, Clark or the Hofmeisters of that fact for several years. Clark asserted that he was fraudulently induced to believe that he would be found liable for the million dollar

claim filed by the Hofmeisters when, in fact, CIC had coverage available to him. He contends that Dasher's filing of a cross-claim against him was a wrongful use of legal proceedings.

Clark filed discovery requests against Dasher and CIC. Dasher Express and CIC requested a stay of discovery so that they could file a motion to dismiss. The circuit court granted the stay. CIC filed a motion to dismiss, and attached supporting evidence. Dasher Express then filed a motion for summary judgment against Clark, with supporting evidence. The court re-titled the CIC motion a "motion to dismiss." After briefing by all parties, the circuit court dismissed the action. Clark contends that the motions were for summary judgment, as evidence beyond the pleadings was provided. He argues that the court effectively denied him the right to respond to the motions made by Dasher and CIC by reviewing only his complaint as opposition to the motions, and by not permitting him to take discovery to support his claims.

After entry of the court's Findings of Fact, Conclusions of Law, and Judgment, Clark filed responses and replies to the motions, a motion to vacate the order of dismissal, and a motion to amend his complaint. The court granted him leave to amend the complaint on February 11, 2005. The court then held that the amended complaint did not cure the deficiencies, and dismissed Clark's claims with prejudice.

Clark asserts that the circuit court denied him the opportunity to take discovery, and then dismissed the action for insufficient evidence. He argues that the court prevented him from introducing any evidence in support of his claims. The court denied Clark's motion for discovery, holding that:

It is undisputed that the only basis for Clark's entire Complaint in the within cause of action against either Cincinnati or Dasher is the filing of Dasher's Cross-Claim against Clark in the Scott action. . . . No amount of discovery could have assisted the Court in its consideration of the issues. Every Finding of Fact, Conclusion of Law or ultimate decision reached by the Court in its Opinion was based upon the undisputed matters of record and case authorities cited herein. . . . The Court simply does not believe that any additional information that may develop in discovery would be significant in consideration in these pending Motions.

We believe that the trial court adequately addressed whether discovery would have been helpful to it, and found that it would not. Under the circumstances, dismissing the action prior to the taking of discovery was not in error. The trial court's opinion clearly states that the court believed no additional evidence or discovery would aid it in resolution of the matter. Therefore, Clark has failed to show reversible error in this regard.

Clark argues that the trial court must take every assertion in a complaint as true when considering a motion to

dismiss. He claims that the court did not do so. The trial court's order stated that the court "fully accepted as true the allegations and claims of Clark in the Complaint." The court's order of dismissal stated that "Clark has not produced sufficient evidence to support a common law bad faith action against CCI in this case." The court further held that Clark's allegations of bad faith "are controverted by the Record in that there is no evidence that Clark demanded that CCI provide a defense to him, that CCI denied a defense to him, or that CCI refused to provide coverage to him in the underlying Scott [County] action."

Clark asserts that the trial court did not have sufficient evidence upon which to make such a determination, since the record at that point consisted solely of the parties' pleadings. Before this Court, Clark alleges that he was, at all times, an insured of CIC by virtue of his employment, and that CIC's failure to provide a defense unasked constitutes bad faith.

Clark complains that the matters treated by the court as motions to dismiss were actually motions for summary judgment, and argues that he was entitled to file responses thereto. As Clark argues before this Court, CR 12.02 holds that where matters outside the pleadings are presented to the court, the motion shall be treated as one for summary judgment. See

Kreate v. Disabled American Veterans, 33 S.W.3d 176, 178

(Ky.App. 2000).

Dasher argues that Clark's complaint failed to state a claim upon which relief could be granted, and thus that the dismissal was proper. Dasher also shows this Court that CR 12 requires that the trial court accept as true all facts in the complaint when reviewing a motion to dismiss, but shall strip the complaint of its conclusory statements. Moss v. Robertson, 712 S.W.2d 351, 352 (Ky.App. 1986). Dasher argues that this is what the trial court did.

In the express language of the order, the court notes that various parties had filed documents and motions other than the pleadings, but that those were moot in light of his review of the motion to dismiss on the pleadings. Clark has shown no abuse of discretion in the trial court's ruling sufficient to reverse the dismissal.

Clark claims that CIC and Dasher acted in bad faith in denying him coverage and a defense and in filing a cross-claim against him. Clark contends that CIC knew or should have known that the accident occurred while he was acting in the course and scope of his employment. In memoranda of law attached as exhibits to the Appellant's brief, Clark argues that CIC acted in bad faith by failing to file a declaratory judgment action to

allow the court to determine whether Clark was acting in the course and scope of his employment.

Clark also argues that counsel for Dasher researched whether the employer had vicarious liability for Clark's actions, but never made that research known to Clark. He contends that these documents show that both CIC and Dasher knew he should have been covered by the CIC policy. Clark contends that the failure of Dasher and CIC to communicate this to him resulted in his lack of knowledge that he was covered by the CIC policy. Clark claims that the several years of worry he went through as a result of this lack of knowledge is actionable.

Clark was driving his own personal vehicle at the time of the accident. The accident occurred outside of regular work hours. Although Clark was later found to have been acting within the course and scope of his employment at the time of the accident, we cannot find bad faith in the failure of Dasher and CIC to immediately realize that based on the facts before them.

An actionable claim for bad faith requires a showing that the insurer had a duty to pay, that the insurer lacked a reasonable basis to deny coverage, and that the insurer knew or should have known of both the duty to pay, and the lack of reasonable basis to deny coverage. Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993). Where bad faith is shown, damages for failure to defend include "all damages rationally flowing from"

the failure. Eskridge v. Eduator and Executive Insurers Inc., 677 S.W.2d 887, 889 (Ky. 1984), (holding such recoverable damages to include the insured's costs and attorney fees for providing a defense, and any judgment against the insured.) Clark has not shown that such damages would include the claims he has made for emotional distress and worry. CIC did eventually provide Clark with a defense and settled the claims against him. Clark does not appear entitled to any further damages from CIC or Dasher. For this reason, the motion to dismiss his claim was properly granted.

As the court noted in its judgment, Clark did not request coverage from CIC. Further, it is uncontroverted that CIC provided Clark with a defense once the court determined that he had been acting in the course and scope of his employment. The court also held that CIC's settlement of all claims against Clark by the Hofmeisters eliminated any cause of action Clark could have had against CIC for bad faith.

Clark argues that CIC improperly scheduled his deposition after the cross-claim was filed. Clark contends that this notice of deposition was wrongful and that setting the deposition is actionable on the part of CIC and Dasher. Clark claims:

The notice to take the deposition of Eugene Clark was an intimidation tactic designed to serve two potential functions. First,

Eugene Clark had one last chance to bring his future sworn testimony into conformity with the facts that CIC desired, thereby negating any possibility of punitive damages to the Plaintiffs. Secondly, the notice to take the deposition of Eugene Clark was a warning that if Mr. Clark did not desire to be cooperative with CIC's theory of the case, that he would be sued by CIC's insured and that he would have to spend the next two and a half years living with the fact that he was a defendant in a case where the plaintiff was claiming millions of dollars in damages. . . .

Clark then claims that "if Eugene Clark gave testimony favorable to the Plaintiffs . . . CIC would be looking for repayment of any damages directly from Eugene Clark." No support for these claims was ever provided.

Clark claims that he properly pleaded all elements of fraud. He argues that dismissal of the action was premature. The trial court held that as the cross-claim was proper and permissible under Kentucky law, statements which are material, pertinent and relevant to a judicial proceeding could not form the basis of a fraud claim. Schmitt v. Mann, 163 S.W.2d 281 (Ky. 1942). No reversible error in the court's ruling has been shown.

Clark asserts that the circuit court erred in dismissing his wrongful use of civil proceedings claims. The court relied on a one year statute of limitations found in KRS 413.140 (c), which provides a one year statute of limitations

for malicious prosecution actions. Clark contends that the record is devoid of evidence as to whether or not he knew that the cause of action had accrued. Clark also asserts that the concealment of the cause of action by the insurer should be found to toll any applicable limitations period. The actions by Dasher that Clark complained of occurred in 2002. The underlying action here was not filed for more than two years after that date.

An injury occurs when the injured party knew or should have known that he was harmed. McLain v. Dana Corp., 16 S.W.3d 320, 326 (Ky.App. 1999). Despite the fact that additional evidence of the reasons behind CIC's decisions came to light during the bad faith trial, Clark was or should have been aware of any injury he claims by the time the case was settled. There is no concealment sufficient to toll the applicable limitations period.

Clark argues that the trial court was in error in holding that probable cause supported Dasher's cross-claim against him for any damages resulting from his negligence in the course and scope of his employment. Kentucky law permits the filing of such a claim for indemnity prior to a judgment being entered in the action. Degener v. Hall Contracting Corporation, 27 S.W.3d 775, 780 (Ky. 2000). An employee's negligence may be imputed to the employer. Cohen v. Alliant Enterprises, Inc., 60

S.W.3d 536, 538 (Ky. 2001). There was no reversible error in the trial court's grant of a motion to dismiss Clark's bad faith claims on this issue.

Lastly, Clark contends that the court was in error in dismissing his claim for outrage. The court held that the tort of outrage requires a showing of behavior that is outrageous and truly offends the standards of morality and decency. Actionable outrage requires "a deviation from all reasonable bounds of decency and is utterly intolerable in a civilized community." Craft v. Rice, 671 S.W.2d 247, 250 (Ky. 1984). As the court had previously found the filing of the cross-claim to be permissible under law, the court held that the filing could not support a claim for outrage. We affirm the dismissal of those claims.

TACKETT, JUDGE, CONCURS.

MINTON, JUDGE, CONCURS IN RESULT.

BRIEFS FOR APPELLANT:

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