RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

ORDERED NOT PUBLISHED BY SUPREME COURT:
APRIL 15, 2009
(FILE NO. 2008-SC-0766-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000911-MR
AND
NO. 2007-CA-001006-MR

TENNESSEE FARMERS MUTUAL
INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 02-CI-00581

PENNY RAE JONES — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Tennessee Farmers Mutual Insurance Company appeals the circuit court's finding of personal jurisdiction against it, and also the award of attorney's fees and prejudgment interest to the plaintiff below. Penny Rae Jones

cross-appeals several of the court's evidentiary rulings. For the reasons stated herein, we affirm the circuit court's decision in all respects.

The accident giving rise to this action was a two-car collision which occurred on April 9, 2001, in Whitley County, Kentucky. Reba Broyles, one of the defendants below, was responsible for the crash which caused Jones serious injury. Broyles was driving a vehicle owned by Ben Malicoat, a resident of Tennessee. Malicoat's vehicle was insured by Tennessee Farmers Mutual Insurance Company (hereinafter "Tennessee Farmers"), a Tennessee corporation.

Jones attempted to contact Tennessee Farmers regarding settlement of a negligence claim to be brought against Malicoat. After some difficulty, she hired counsel to engage in further correspondence on her behalf. When her counsel's discussions with Tennessee Farmers were similarly fruitless, Jones filed a complaint in Whitley County Circuit Court on September 4, 2002, alleging a violation of Kentucky's Unfair Claims Settlement Practices Act (KRS 304.12-230) by Tennessee Farmers.[1]

Tennessee Farmers proceeded to its defense, arguing that its actions did not constitute unfair claims settlement practices as provided in the Act. Additionally, Tennessee Farmers twice filed motions to dismiss asserting that the

[1] Additional claims, including a negligence claim by Jones against both Broyles and Malicoat, an underinsured motorist claim by Jones against her insurer, and a subrogation claim filed by Jones' employer's worker's compensation carrier against Broyles and Malicoat, were all settled and dismissed with prejudice leaving only the UCSPA claim by Jones against Tennessee Farmers.

Whitley Circuit Court lacked personal jurisdiction against it.[2] Attached to each motion was an affidavit by Steve Lowry, claims manager of Tennessee Farmers, stating Tennessee Farmers' and Malicoat's ties to Tennessee and lack of ties to Kentucky. After being briefed by both parties, the trial court denied the motions by court orders dated June 27, 2005, and September 14, 2006, respectively.

The case proceeded to trial. The jury found multiple violations of the Kentucky UCSPA and awarded Jones a verdict of $30,000.[3] Jones additionally sought attorney's fees and prejudgment interest pursuant to KRS 304.12-235. As this is a question of law for the court, both parties filed briefs with the court to be reviewed after the jury verdict. The trial court awarded the attorney's fees requested by Jones and prejudgment interest at the statutory rate of twelve percent.[4]

Tennessee Farmers raises two issues on appeal. First, it argues that neither KRS 304.12-230 nor any other statute gives Kentucky courts jurisdiction over Tennessee Farmers. Second, it alleges that KRS 304.12-235 allows recovery of attorney fees and prejudgment interest only as against one's own insurer.

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[2] Motion for Summary Judgment filed on May 2, 2005, and Motion to Dismiss for Lack of Jurisdiction filed on September 1, 2006.

[3] Of this figure, $5,000 was awarded to Jones to compensate for her anxiety, emotional distress and mental anguish, and inconvenience. Four thousand, five hundred dollars was awarded to Jones' employer's worker's compensation carrier. This left Jones with a net final settlement of $20,500.

[4] Attorney's fees were awarded per KRS 304.12-235(3). Interest was calculated per KRS 304.12-235(2). Twelve percent interest on the final settlement amount of $20,500 was due from the time period of February 6, 2002 until the time Tennessee Farmers offered its policy limits, which occurred on February 16, 2004.

Tennessee Farmers first argues that the trial court erred in finding that personal jurisdiction existed between itself and the forum state. "The decision to exercise personal jurisdiction is a question of law based on the Due Process Clause of the Constitution." *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528 (6th Cir. 1993) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 2181, 85 L.Ed.2d 528 (1985)). Consequently, this Court reviews *de novo* the lower court's finding of personal jurisdiction. *See id*.

Jones does not specifically contend, nor does she have to, that the UCSPA alone confers jurisdiction. Rather, Jones argues that Kentucky has *in personam* jurisdiction over Tennessee Farmers through Kentucky's long-arm statute, KRS 454.210. The relevant portion of this statute provides as follows:

> (2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> . . .
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;

Tennessee Farmers is a "person" under this statute. Under KRS 454.210(1), a "person" includes a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this Commonwealth. The Lowry affidavit states that Tennessee Farmers is a Tennessee corporation. Furthermore, the statute which provides for the tortious injury, KRS 304.12-230, was specifically intended to apply to entities such as Tennessee Farmers. In *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988), the Kentucky

Supreme Court noted that KRS 304.12-230 was designed to protect the public from the unfair practices in the business of insurance. Consequently, "[i]t should be liberally construed so as to effectuate its purpose." *Id*. at 118.

Tennessee Farmers was "act[ing] directly or by an agent" with respect to Jones' claim. Through its claims representatives, Tennessee Farmers investigated and adjusted Jones' claim, which are acts that are considered doing insurance business in Kentucky. *See* KRS 304.11-030(2)(f). Indeed, claims filed with Tennessee Farmers based on accidents which occurred in Kentucky have been made in the past. Depositions of claims representative Brandon Campbell, former claims manager Dennis Hinkle, and Lowry reveal that Tennessee Farmers typically hires independent adjusters to handle car wreck claims against their Tennessee insureds. The work done by its claims representatives and independent adjusters constitute actions of Tennessee Farmers.

In spite of KRS 304.11-030(2)(f), Tennessee Farmers cites *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (Ariz. 1987), for the proposition that the investigation and adjustment of a claim are not acts sufficient to confer jurisdiction over an out-of-state insurer. While *Batton* could otherwise serve as persuasive authority, its facts are distinguishable from those of this case.[5]

Batton involved a claim by a first-party insured who purchased a policy from Tennessee Farmers in Tennessee, had an accident in Arizona, and was

[5] Whether personal jurisdiction may be exercised over a defendant is a fact-specific determination, and "[e]ach case involving the issue of personal jurisdiction over a nonresident defendant must be decided on its own facts." *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

a resident of Florida at the time of the suit, which was filed in Arizona. The court suggested that jurisdiction would be appropriate in Tennessee, where the contract was formed, or in Florida, where the emotional trauma (resulting from Tennessee Farmers' bad faith conduct) was likely felt. *Id.* at 274. The present action involves a third-party claim filed in Kentucky by a Kentucky resident. As there is no privity of contract between Jones and Tennessee Farmers in any state, jurisdiction can *only* be appropriate where Jones lived and where the trauma was felt. Specific jurisdiction is therefore appropriate in Kentucky through its long-arm statute and under the facts particular to this case.

Additionally, Tennessee Farmers "caus[ed] tortious injury by an act or omission in this Commonwealth." Tennessee Farmers argues vigorously that it has transacted no business in Kentucky, either related to Jones' claim or otherwise, and that all its acts occurred within Tennessee. Tennessee Farmers has cited several cases which have held that the mere issuance of an insurance policy in Tennessee to Tennessee residents who happened to sustain a loss under the policy in Kentucky is not sufficient to confer jurisdiction under KRS 454.210(2)(a)(1). *See, e.g., Tennessee Farmers Mut. Ins. Co. v. Harris*, 833 S.W.2d 850, 852 (Ky.App. 1992). However, such arguments are misplaced because jurisdiction is appropriate under KRS 454.210(2)(a)(3). As Jones has not sought jurisdiction based on KRS 454.210(2)(a)(1) exclusively,[6] it is unnecessary for this Court to find that

[6] KRS 454.210(2)(a)(1) reads: "A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's [] transacting any business in this Commonwealth."

Tennessee Farmers transacted business in Kentucky based on its adjustment and investigation of Jones' claim.

The U.S. Supreme Court has recognized that where the brunt of a harm (including emotional harm) is felt in a foreign state, jurisdiction over a non-resident may be appropriate in that foreign state. *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984) (internal citations omitted). Here, Jones is a Kentucky resident who at all relevant times lived in and interacted with Tennessee Farmers within the Commonwealth. Assuming *arguendo* that Tennessee Farmers acted from Tennessee alone, the effects of these interactions constituted the tort of unfair claims settlement felt by Jones in Kentucky. Indeed, the jury below found that Tennessee Farmers violated several provisions of Kentucky's UCSPA,[7] and Tennessee Farmers has not appealed the verdict on the merits.

Tennessee Farmers finally argues that minimum contacts between itself and Kentucky were not present, thereby invoking the constitutional due process doctrine established by the United States Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Because we find the Whitley Circuit Court maintained personal jurisdiction over Tennessee Farmers based on Kentucky's long-arm statute, we need not address this issue. Nevertheless, we note that Kentucky's enactment of the UCSPA evinces a legislative desire to ensure interactions with insurers are reasonably satisfying. If

[7] Including KRS 304.12-230(2), KRS 304.12-230(6), and KRS 304.12-230(14).

an insurer is able to defeat a minimum contacts challenge merely by ignoring a legitimate claimant, this would wholly undermine the intent behind the Act.[8]

Upon review, we find that Kentucky held personal jurisdiction over Tennessee Farmers based on Kentucky's long-arm statute, specifically KRS 454.210(2)(a)(3). As the action arose based on a car accident occurring in Whitley County, the Whitley Circuit Court was an appropriate venue for suit under KRS 454.210(4).[9]

Tennessee Farmers next contends that the trial court improperly awarded Jones with attorney's fees and prejudgment interest under KRS 304.12-235. That statute further delineates the bad faith cause of action and provides for additional penalties, namely attorney's fees and prejudgment interest, if payment is not made within thirty days of proof of claim. Tennessee Farmers' argument is primarily based on the plain wording of KRS 304.12-235, which reads in full:

> (1) All claims arising under the terms of any contract of insurance shall be paid to the named insured person or health care provider not more than thirty (30) days from the date upon which notice and proof of claim, in the substance and form required by the terms of the policy, are furnished the insurer.
>
> (2) If an insurer fails to make a good faith attempt to settle a claim within the time prescribed in subsection (1) of this section, the value of the final settlement shall bear interest at the rate of twelve percent

[8] The record indicates that Jones and her attorneys made many attempts to contact Tennessee Farmers and its agents regarding her claim, generally through mail and telephone. Tennessee Farmers' failure to adequately respond and subsequent violations of the UCSPA constitute "act(s) or omission(s)" which confer jurisdiction under KRS 454.210(2)(a)(3).

[9] KRS 454.210(4) provides: "When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose."

(12%) per annum from and after the expiration of the thirty (30) day period.

(3) If an insurer fails to settle a claim within the time prescribed in subsection (1) of this section and the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney's fees incurred. No part of the fee for representing the claimant in connection with this claim shall be charged against benefits otherwise due the claimant.

It is undisputed that Jones does not have a contract of insurance with Tennessee Farmers and thus she is not a "named insured person" under subsection one. Tennessee Farmers argues that subsections two and three, which were used by the trial court to award interest and attorney's fees, respectively, reference and are modified by subsection one. Consequently, it asserts, subsections two and three are only available to first-party insureds.

We find KRS 304.12-235 to be ambiguous on this issue.[10] While the statutory language facially seems to favor Tennessee Farmers' interpretation, the legislative intent suggests a more expansive reading. Undoubtedly, KRS 304.12-235 must be read in light of KRS 304.12-230, its statutory companion, which has been consistently held to apply to third-party claimants. *See, e.g., Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512 (Ky. 2006). KRS 304.12-230 was enacted by the legislature "to make certain that insurance companies deal fairly with their insureds and third party claimants throughout the claim handling process." *Id*. at 528 (Justice Wintersheimer, dissenting). Jones argues, in effect, that the lower court

[10] The Kentucky Supreme Court previously noted this ambiguity in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). It wrote, "[w]hether the General Assembly intended the obligations of KRS 304.12-235 to apply to claims due to third parties as well as to the 'named insured' is an issue of statutory construction which we leave for another day . . ." *Id.* at 891.

properly considered this legislative intent in applying KRS 304.12-235 to her situation as a third-party claimant. In light of this ambiguity, we must consider how other courts have interpreted KRS 304.12-235.

Tennessee Farmers cites one case which, on its face, appears to negate the award of attorney's fees. In *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997), the Kentucky Supreme Court considered KRS 304.12-235(3) and a 4-3 majority found that "[t]his section applies only to an insurer's negotiations with its own policyholder . . ." *Id.* at 455. However, this case primarily concerned underinsured motorist benefits. Additionally, the Supreme Court reversed the lower court's finding that the insurer had acted in bad faith. As there was no violation of the UCSPA, attorney's fees awarded based on KRS 304.12-235(3) were no longer available. Thus, this interpretation of KRS 304.12-235(3) was unnecessary in light of the Supreme Court's judgment.

In dissent, Chief Justice Lambert specifically noted that portions of the majority opinion were dicta that had the potential to modify Kentucky law. *Id.* at 456 (Lambert, dissenting). In considering KRS 304.12-235(3) anew, he wrote, "[h]aving already held that the UCSPA (KRS 304.12-230) applies to third party claimants, we perceive no logical basis for granting to such insured claimants the right to pursue a bad faith cause of action under KRS 304.12-230, but not under KRS 304.12-235." *Id.* at 460. We agree with Chief Justice Lambert that the majority opinion in *Motorists Mutual* should not be used to prevent the award of attorney's fees to third-party claimants.

Regarding prejudgment interest, case law supports the general principle that interest shall be awarded on a claim or at minimum that portion of a claim that constitutes an uncontested "liquidated" amount. "Precisely when the amount involved qualifies as 'liquidated' is not always clear, but in general 'liquidated' means '[m]ade certain or fixed by agreement of parties or by operation of law.' *Black's Law Dictionary* 930 (6th ed. 1990)." *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991).

In the insurance context, a liquidated claim is one "not in dispute and should have been paid." *Wittmer v. Jones*, 864 S.W.2d 885, 891 (Ky. 1993). In the present case, it was clear that liability rested on Tennessee Farmers' insureds and that expenses exceeding Malicoat's policy limits of $25,000 were due by early 2002. Pursuant to KRS 304.12-235(2), interest began to accrue 30 days after Tennessee Farmers was informed by Jones of her entitlement and stopped accruing over two years later, when Tennessee Farmers finally offered Jones its policy limits. Prejudgment interest under KRS 304.12-235(2) is mandatory; the only issue is if this provision also applies to third-party claimants.

Prejudgment interest under the UCSPA for a third-party claimant was specifically considered in *Reeder*. The court stated, "[i]f an item of damages is fixed or ascertainable with reasonable certainty and is not contested and the defendant fails or refuses to timely pay it unconditionally . . . he should be charged with interest on that item in the judgment." *Reeder*, 763 S.W.2d at 119. The

general liquidated damages principle was applied, and no distinction was made between first and third-party claimants.

In *Wittmer*, the Court also considered an allegation of bad faith made by a third-party claimant under the UCSPA. The *Wittmer* Court announced three elements required to prevail on a bad faith claim, and held that these elements apply both to "an insured against his own insurer, and *a fortiori* to a third-party's claim of bad faith against an insurance company." *Id.* at 890. The Court then stated that "if there was proof here to sustain a cause of action against the insurer for tortious misconduct in failing to pay this claim at the outset, the trial court should have allowed prejudgment interest on such amount as was not in dispute and should have been paid." *Id.* at 891.

We find these two cases persuasive on the applicability of the liquidated damages principle to third-party UCSPA actions. Therefore, the trial court properly awarded Jones with prejudgment interest, determined at the statutory rate. We have found no case, and parties have cited none (other than *Motorists Mutual*, supra), that speaks to the award of attorney's fees under KRS 304.12-235 for third-party claimants.[11] Nevertheless, we agree with Jones that if prejudgment interest is appropriate, an award of attorney's fees under the same

[11] Jones cites *Eskridge v. Educator and Executive Insurers, Inc.*, 677 S.W.2d 887 (Ky. 1984) for the principle that the party aggrieved by an insurer's bad faith breach of contract is entitled to recover all damages flowing from the breach. *Id.* at 889. We find the factual circumstances between *Eskridge* and the present action to be too distinct to award Jones with attorney's fees based on that principle.

statute is also appropriate. The trial court did not err in awarding Jones with her reasonable attorney's fees under KRS 304.12-235(3).

In her cross-appeal, Jones contends that the trial court made three improper evidentiary rulings. Consequently, Jones alleges that the damages she received were insufficient. Jones requests, in effect, that this Court remand the action for a new trial on damages alone and prays that the lower court reverse its three prior evidentiary rulings that allegedly reduced her damages.

It is well established that where there has been no motion for a new trial, the only question on appeal is whether the pleadings sustain the judgment. *See, e.g., Greyhound Corp. v. Leadman*, 285 S.W.2d 177 (Ky. 1955); *Wood v. Corman*, 211 S.W.2d 424 (Ky. 1948); and *Johnson v. Hall Hotel Co.*, 206 S.W.2d 490 (Ky. 1947). The purpose of a motion for a new trial is "to give the trial court an opportunity to review and correct its errors, if any, as complained of in the motion," and thereby prevent the costs and delays inherent in appellate review. *Hickey v. Glass*, 149 S.W.2d 535, 536 (Ky. 1941).

In *Dutton v. Peacock*, 424 S.W.2d 812 (Ky. 1968), plaintiffs injured in an automobile accident were similarly dissatisfied with the damages awarded to them by the trial court. Like Jones in the present matter, the plaintiffs in *Dutton* had not raised the question of inadequacy of damages in the trial court by a motion there for a new trial. The court clearly stated that because of this failure, they could not raise the question on appeal as a basis for a new trial. *Id.* at 813.

Jones cites *Minnesota Life Ins. Co. v. Vire*, 94 S.W.2d 667 (Ky. 1936) as proof that Kentucky courts have awarded new trials when inadmissible evidence was heard by the jury. The appellant in that case filed an appeal to specifically contest the trial court's evidentiary rulings. On appeal, the court noted that a great deal of the lay testimony was clearly inadmissible. *Id.* at 668. Ultimately, a new trial was awarded to the appellant.

Without considering Jones' specific evidentiary challenges, we note that our standard for reviewing a trial court's evidentiary ruling is abuse of discretion. *See Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). The appellate court in *Minnesota Life* seemingly found an abuse of discretion in the evidentiary rulings before granting a new trial. We undertake no such review here.

Because Jones failed to make a motion for a new trial before the trial court, she may not do so on appeal. The pleadings undoubtedly sustain the judgment of bad faith settlement in this case, and Tennessee Farmers has not sought appellate review on the merits.

For the foregoing reasons, we affirm the trial court's finding of personal jurisdiction and award of attorney's fees and prejudgment interest. Additionally, the jury award as to damages is affirmed.

ALL CONCUR.

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