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Kolenich

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

THOMAS D. LOUDIN and
ALICE M. LOUDIN,

Plaintiffs,

v.

Civil Action No.: 08-C-100
(Judge Keadle)

NATIONAL LIABILITY & FIRE
INSURANCE COMPANY, JACK SERGENT,
D.L. THOMPSON and CONSOLIDATED
CLAIM SERVICES, INC.,

Defendants.

ORDER

On Wednesday, May 5, 2010, this matter came before Judge Thomas H. Keadle for a hearing on a Rule 56 Motion for Summary Judgment by Defendants National Liability & Fire Insurance Company, Jack Sergent, D.L. Thompson, and Consolidated Claim Service, Inc. (collectively described as the "Insurance Defendants").

Present at the hearing were:

- Erika Klie Kolenich, Esq., counsel for Plaintiffs Thomas and Alice Loudin
- Don C.A. Parker, Esq., counsel for the Insurance Defendants

Upon review and consideration of the memoranda submitted by the parties, the evidence presented by the parties with their memoranda, and the arguments of counsel at the hearing, and finding good cause, the Court hereby makes the following findings of fact, conclusions of law, and ruling on the Motion for Summary Judgment:

FINDINGS OF FACT

The Court finds that there is no genuine issue of material fact regarding the following:

1. Plaintiff Thomas Loudin owns a 1993 International truck (Original Complaint, p. 6, attached as Exhibit 2 to the Insurance Defendants' Motion for Summary Judgment).
2. Plaintiff Thomas Loudin insured his 1993 International truck through Defendant National Liability & Fire Insurance Company ("National") under Policy Number 73TRN410540 (National Policy, Schedule of Covered Autos, attached as Exhibit 1 to the Insurance Defendants' Motion for Summary Judgment).
3. On September 4, 2006, Plaintiff Thomas Loudin was performing maintenance on his 1993 International truck with the assistance of his brother, William Loudin. At some point, the truck moved, and Plaintiff Thomas Loudin was injured as a result (Original Complaint, p. 6, attached as Exhibit 2 to the Insurance Defendants' Motion for Summary Judgment).
4. The National Policy contains a form of coverage described as Auto Medical Payments Coverage (Insurance Policy, Exhibit 1 to the Insurance Defendants' Motion for Summary Judgment). This insurance coverage has a \$5,000.00 limit of liability (Insurance Policy, Exhibit 1 to the Insurance Defendants' Motion for Summary Judgment).
5. On or about October 12, 2006, National paid Thomas Loudin \$5,000.00 under the Auto Medical Payments form of coverage (Response to Request for Admissions, Request No. 5, attached as Exhibit 3 to the Insurance Defendants' Motion for Summary Judgment).
6. In addition to the Auto Medical Payments claim referenced above, Plaintiffs Thomas and Alice Loudin also made a pre-lawsuit negligence claim against William Loudin under the liability portion of the National Policy (Demand Letter, attached as Exhibit 4 to the Insurance Defendants' Motion for Summary Judgment).

7. Thomas and Alice Loudin later filed the instant lawsuit against William Loudin for personal injury, claiming that William Loudin negligently operated the truck and caused Plaintiff Thomas Loudin's injuries (Original Complaint, p.6, Exhibit 2 to the Insurance Defendants' Motion for Summary Judgment).

8. Pursuant to the terms of the National Policy, Defendant National hired attorney James Wilson to defend William Loudin in the personal injury lawsuit that had been filed against him by Thomas and Alice Loudin (William Loudin's Answer to the Complaint, attached as Exhibit 5 to the Insurance Defendants' Motion for Summary Judgment).

9. National paid a monetary settlement to Thomas and Alice Loudin to resolve their personal injury lawsuit against William Loudin (Release, attached as Exhibit 6 to the Insurance Defendants' Motion for Summary Judgment, and Settlement Check, attached as Exhibit 7 to the Insurance Defendants' Motion for Summary Judgment).

10. Plaintiffs base their current claims against the Insurance Defendants on the manner in which the Insurance Defendants handled the Plaintiffs' liability claim against William Loudin (Original Complaint, attached as Exhibit 2 to the Insurance Defendants' Motion for Summary Judgment, and Amended Complaint, attached as Exhibit 8 to the Insurance Defendants' Motion for Summary Judgment).

11. The Plaintiffs do not base their current claims against the Insurance Defendants on the manner in which the Insurance Defendants handled Thomas Loudin's \$5,000.00 Auto Medical Payments claim (Original Complaint, attached as Exhibit 2 to the Insurance Defendants' Motion for Summary Judgment, and Amended Complaint, attached as Exhibit 8 to the Insurance Defendants' Motion for Summary Judgment).

CONCLUSIONS OF LAW

1. The central legal issue raised in the Insurance Defendants' Motion for Summary Judgment is this:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant or is the claimant a third party claimant?

2. A first party claimant under an insurance policy may sue his/her own insurance company for common law bad faith, breach of the insurance contract, or breach of the implied duty of good faith and fair dealing, for the manner in which the insurance company handles his/her claim, but a third party claimant has no such right under West Virginia law. See Elmore v. State Farm, 504 S.E.2d 893 (W. Va. 1998).

3. A first party claimant under an insurance policy may sue his/her own insurance company for alleged violations of the West Virginia Unfair Trade Practices Act ("UTPA") for the manner in which the insurance company handles his/her claim, but a third party claimant has no such right under West Virginia law. Such claims by third party claimants may only be filed as administrative proceedings before the West Virginia Insurance Commissioner. See W. Va. Code § 33-11-4a(a).

4. Section 114-14-2.3 of the West Virginia Code of State Rules defines the term "first-party claimant":

2.3. "First-party claimant" or "Insured" means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.

5. Section 114-14-2.8 of the West Virginia Code of State Rules defines the term "third-party claimant":

2.8. "Third-party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.

6. According to the definitions contained in Sections 114-14-2.3 and 114-14-2.8 of the West Virginia Code of State Rules as applied to the Findings of Fact shown above, Thomas and Alice Loudin were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy.

7. At least six courts from other jurisdictions have addressed the question of whether a named insured under a liability insurance policy bringing a liability claim against another insured under that same liability insurance policy is a first party claimant or a third party claimant. All six courts have determined that such a claimant is a third party claimant, not a first party claimant. Those six other courts are:

- The Tenth Circuit Court of Appeals of Ohio in Gillette v. Gillette, 837 N.E. 2d 1283 (Ohio App. 2005)
- The United States District Court for the District of Arizona in Smith v. Allstate Ins. Co., 202 F. Supp. 2d 1061 (D. Ariz. 2002)
- The Supreme Court of Utah in Sperry v. Sperry, 990 P. 2d 381 (Utah 1999)
- The Supreme Court of Wyoming in Herrig v. Herrig, 844 P. 2d 487 (Wy. 1992)
- The Court of Appeals of Texas in Rumley v. Allstate Indem. Co., 924 S.W. 2d 448 (Tex. 1996)
- The Court of Appeals of North Carolina in Wilson v. Wilson, 468 S.E. 2d 495 (N.C. 1996)

8. While the West Virginia Supreme Court of Appeals has never addressed the question of whether a named insured under a liability insurance policy bringing a liability claim against another insured under that same liability insurance policy is a first party claimant or a third party claimant, this Court finds the analysis and conclusions regarding that question contained in the six opinions cited above from other courts to be consistent with West Virginia jurisprudence and the definitions contained in Sections 114-14-2.3 and 114-14-2.8 of the West

Virginia Code of State Rules.

9. According to West Virginia law, Thomas and Alice Loudin were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy.

10. Because they were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy, Thomas and Alice Loudin have no legal right under West Virginia law to sue the Insurance Defendants for common law bad faith, breach of the insurance contract, or breach of the implied duty of good faith and fair dealing, for the manner in which the Insurance Defendants handled their liability claim against William Loudin. See Elmore v. State Farm, 504 S.E.2d 893 (W. Va. 1998).

11. Because they were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy, Thomas and Alice Loudin have no legal right under West Virginia law to sue the Insurance Defendants for alleged violations of the UTPA for the manner in which the Insurance Defendants handled their liability claim against William Loudin. See W. Va. Code § 33-11-4a(a).

12. The Court finds as a matter of law from a review of the facts in this matter, as demonstrated by the memoranda submitted by the parties, the evidence presented by the parties with their memoranda, and the arguments of counsel at the hearing, that the Insurance Defendants' conduct in the handling of Thomas and Alice Loudin's liability claim against William Loudin may not reasonably be regarded as so extreme and outrageous as to constitute intentional or reckless infliction of emotional distress, otherwise known as the tort of outrage. Therefore, Thomas and Alice Loudin have no legal right under West Virginia law to sue the Insurance Defendants for the tort of outrage based on the manner in which the Insurance

Defendants handled Thomas and Alice Loudin's liability claim against William Loudin. See Travis v. Alcon Laboratories, Inc., 504 S.E. 2d 419 (W. Va. 1998).

13. Since Plaintiffs Thomas and Alice Loudin have no legal right to sue the Insurance Defendants for common law bad faith, breach of the insurance contract, breach of the implied duty of good faith and fair dealing, alleged violations of the UTPA, or the tort of outrage, for the manner in which the Insurance Defendants handled their liability claim against William Loudin, the Insurance Defendants are entitled to a judgment as a matter of law in this matter.

RULING ON THE MOTION FOR SUMMARY JUDGMENT

Because there is no genuine issue of material fact regarding the facts recited above, and because the Court finds that the Insurance Defendants are entitled to a judgment as a matter of law, the Court hereby **GRANTS** the Insurance Defendants' Motion for Summary Judgment.

The Court notes the objections of Plaintiffs to this grant of summary judgment, and notes the preservation of such for all purposes.

It is hereby **ORDERED** that this case shall be **DISMISSED** from the Court's docket.

The Clerk is further directed to forward copies of this Order to all counsel of record.

ENTERED this 27 day of May, 2010.



THOMAS H. KEADLE
Circuit Court of Upshur County, West Virginia

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 5/27/10

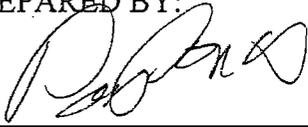
BRIAN P. GAUDIN, CLERK

By Melissa Stumeling
Deputy Clerk

ENTERED 5/27/10
CIVIL BOOK 51
PAGE 178-185

cc 5/27/10
D. Parkol
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