

FILED

July 26, 2005

released at 3:00 p.m.

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Davis, J., concurring:

I believe the majority opinion is legally sound and the result reached was necessitated by the facts under review. Consequently, I fully concur in the decision reached. I have chosen to write separately in order to express my disagreement with the view set out in the dissenting opinion. The dissent in this case correctly notes that the defendant did not object to an amendment to the complaint.¹ Consequently, the dissent asserts that an amendment should have been allowed. I disagree.

The critical point that is missed by the dissent is that prior to denying the plaintiff's motion to amend, the circuit court had already concluded that the plaintiff had *not* substantially prevailed in the case.² *See* slip op. at 6 ("The court then found that because

¹I pause briefly to note that the dissent incorrectly states that "[i]n the instant case (as the majority opinion notably omits mentioning), the defendant *agreed* to the amendment." Dissent Slip. op. at 1. In fact, the majority opinion did not omit this detail. *See* slip op. at 6 ("During that hearing, State Farm stated that, under the standard that leave to amend should be freely given, it had no objection to Jones amending the complaint.").

²The dissenting opinion does not take issue with the trial court and this Court's determination that the plaintiff did not substantially prevail. Indeed, the dissenting opinion could not contest this finding in light of the well-settled principal of law governing the issue. This Court has made it abundantly clear that "[a]n insured 'substantially prevails' in a property damage action against his or her insurer when the action is settled for an amount

Jones had not substantially prevailed in the case, the claims which he sought to assert in an amended complaint were moot.”). This Court has previously held that “[i]n order for a policyholder to bring a common law bad faith claim against his insurer, according to *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986) and its progeny, the policyholder *must first substantially prevail against his insurer on the underlying contract action.*” Syl. pt. 5, *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 204 W. Va. 465, 513 S.E.2d 692 (1998) (emphasis added).

I recognize that this court has observed an exception to this rule where the policyholder asserts a claim under the Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 *et seq.* (hereinafter referred to as “the UTPA”). *See Jordache*, 204 W. Va. at 485, 513 S.E.2d at 712 (“We note, however, that the appellants also brought a claim for the violation of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9)(b), (c), (d), (e), and (f). This is not a claim . . . that rests on substantially prevailing on the underlying contract action.”). However, I do not believe that this exception applies in the instant case.

equal to or approximating the amount claimed by the insured immediately prior to the commencement of the action[.]” Syl. pt. 1, in part, *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990). In the instant case, the plaintiff’s initial demand was \$250,000. However, the plaintiff eventually settled the case for \$76,500. Clearly, the plaintiff did not substantially prevail. The dissenting opinion could not disagree with this fact, so it omitted any discussion of the matter.

With respect to his motion for leave to amend his complaint,³ the plaintiff merely asserted that he wished to amend his complaint to:

1. Assert claims for consequential damages, such as annoyance, aggravation, inconvenience as enumerated in *Hayseeds v. State Farm Fire & Casualty Company*;
2. Assert claims for unfair claims settlement practices; and
3. Assert claims for breach of the duty of good faith and fair dealing.

The plaintiff, in his motion for leave to amend his complaint, indicated that he wished to assert common law claims by referring to *Hayseeds v. State Farm Fire & Casualty Co.*, 177 W. Va. 323, 352 S.E.2d 173 (1986), as *Hayseeds* dealt with a common law cause of action. *See, e.g., Jordache*, 204 W. Va. at 484, 513 S.E.2d at 711 (“Our case law is clear that in order for a policyholder to bring a *common law bad faith claim* against his insurer, according to *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) and its progeny, the policyholder must first substantially prevail against his insurer on the underlying contract action.” (emphasis added)). Moreover, the motion did not further elaborate on the claims, but rather relied solely on the text quoted above. Finally, another possible source for further detail about the nature of the plaintiff’s proposed claims was absent as there was no proposed amended complaint attached to the motion. Therefore, in the absence of a defined

³This motion was included as part of a motion titled “PLAINTIFF’S MOTION FOR AWARD OF ATTORNEY FEES AND PLAINTIFF’S MOTION FOR LEAVE TO AMEND THE COMPLAINT.” The bulk of the motion addressed the plaintiff’s request for attorney’s fees.

claim under the UTPA, I find no fault in the circuit court's treatment of the plaintiff's claims as being brought under the common law. Thus, because Mr. Jones did not substantially prevail in his action against State Farm, the circuit court did not abuse its discretion in denying his motion to amend his complaint.

In view of the foregoing, I concur.