

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

No. 33091

FILED
February 21, 2007
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DANIEL R. STRAHIN,
Plaintiff Below, Appellant

v.

EARL SULLIVAN AND
FARMERS & MECHANICS MUTUAL INSURANCE COMPANY,
Defendants Below, Appellees

Appeal from the Circuit Court of Barbour County
Honorable Alan D. Moats, Judge
Civil Action No. 99-C-7

AFFIRMED

Submitted: January 10, 2007
Filed: February 21, 2007

Paul T. Farrell, Jr., Esq.
Greene, Ketchum, Bailey, Walker, Farrell & Tweel
Huntington, West Virginia
and
Stephen D. Annand, Esq.
The Cochran Firm
Washington, D.C.
and
Leonard T. Kelley, Esq.
Kelley Legal Services
Philippi, West Virginia
Attorneys for Daniel R. Strahin

James A. Varner, Sr., Esq.
Tiffany R. Durst, Esq.
Debra Tedeschi Herron, Esq.
McNeer, Highland, McMunn & Varner, L.C.
Clarksburg, West Virginia
Attorneys for Farmers & Mechanics Mut. Ins. Co.

JUSTICE MAYNARD delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS and JUSTICE BENJAMIN concur and reserve the right to file concurring opinions.

JUSTICES STARCHER and ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. “Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review.” Syllabus Point 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

4. “Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured’s best interest and such failure to so settle prima facie constitutes bad faith toward its insured.” Syllabus Point 2, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

5. “It will be the insurer’s burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect

as its own.” Syllabus Point 3, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

6. “In assessing whether an insurer is liable to its insured for personal liability in excess of policy limits, the proper test to be applied is whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured. Further, in determining whether the efforts of the insurer to reach settlement and to secure a release for its insured as to personal liability are reasonable, the trial court should consider whether there was appropriate investigation and evaluation of the claim based upon objective and cogent evidence; whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and whether there was potential for substantial recovery of an excess verdict against its insured. Not one of these factors may be considered to the exclusion of the others.” Syllabus Point 4, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

7. “In the matters of negligence, liability attaches to a wrongdoer . . . because of a breach of duty which results in an injury to others.” Syllabus Point 2, in part, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

8. “‘A chose in action may be validly assigned.’ Syl. pt. 2, *Harman v. Corpening*, 116 W.Va. 31, 178 S.E. 430 (1935).” Syllabus Point 3, *Boarman v. Boarman*, 210 W.Va. 155, 556 S.E.2d 800 (2001).

9. In order for an insured or an assignee of an insured to recover the amount of a verdict in excess of the applicable insurance policy limits from an insurer pursuant to this Court's decision in *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), the insured must be actually exposed to personal liability in excess of the policy limits at the time the excess verdict is rendered.

10. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Maynard, Justice:

This case is before this Court for a second time. The initial complaint was filed in February 1999 after Daniel R. Strahin, the appellant and plaintiff below, was shot in the arm by Robert Cleavenger in 1998 while he was a guest on property owned by Earl Sullivan. In *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004) (hereinafter “*Strahin I*”), this Court upheld a jury verdict in favor of Mr. Strahin against Mr. Cleavenger and Mr. Sullivan in the amount of \$1,060,556.00. Following the jury verdict but prior to the issuance of this Court’s opinion in *Strahin I*, Mr. Strahin amended his complaint to assert, *inter alia*, a claim against Farmers & Mechanics Mutual Insurance Company (hereinafter “Farmers & Mechanics”), the appellee and defendant below, pursuant to this Court’s decision in *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), which had been assigned to him by Mr. Sullivan before trial. At the time of the incident, Mr. Sullivan had a homeowners’ policy issued by Farmers & Mechanics with liability limits of \$100,000.00. Farmers & Mechanics answered the amended complaint and moved for summary judgment with regard to the *Shamblin* claim. The circuit court granted the motion for summary judgment by order dated June 17, 2005, which Mr. Strahin now appeals.

Mr. Strahin contends that the circuit court erred by finding that his *Shamblin* claim was barred because Mr. Sullivan’s personal assets were not at risk as a result of a Covenant Not to Execute signed by Mr. Strahin and Mr. Sullivan prior to trial. This Court

has before it the petition for appeal, the designated record, and the briefs and argument of counsel. For the reasons set forth below, the final order is affirmed.

I.

FACTS

In February 1999, Daniel R. Strahin and his parents, James and Willa Strahin, filed suit against Robert Cleavenger, his parents, Larry and Mary Cleavenger, and Earl Sullivan as a result of a shooting incident which occurred in Barbour County on May 31, 1998. Daniel Strahin was shot in the arm by Robert Cleavenger while he was a passenger in a car owned and operated by Earl Sullivan. Daniel Strahin's sister, Marissa Strahin, was also a passenger in the car. Ms. Strahin was living with Mr. Sullivan but was pregnant with Mr. Cleavenger's child. Mr. Cleavenger was jealous of the relationship between Ms. Strahin and Mr. Sullivan, and there had been previous physical confrontations between Mr. Cleavenger and Mr. Sullivan. Mr. Cleavenger shot at the car with a high-powered rifle as it was leaving property owned by Mr. Sullivan.¹

The complaint filed by the Strahins alleged, *inter alia*, that Mr. Cleavenger's actions were foreseeable by Mr. Sullivan, and therefore, Daniel Strahin's injuries were

¹Mr. Cleavenger pled guilty to two counts of malicious assault and served a sentence in the state penitentiary.

proximately caused by Mr. Sullivan's negligence. As noted above, at the time of the incident, Mr. Sullivan was insured by a homeowners' policy issued by Farmers & Mechanics with policy limits of \$100,000.00. On April 5, 2000, and September 19, 2000, the Strahins, by counsel, made formal demands for the policy limits in exchange for a full and final release of Mr. Sullivan. Farmers & Mechanics refused both offers of settlement.

Prior to trial, the Strahins, Mr. Sullivan and Mr. Sullivan's automobile insurer, Erie Insurance Company, entered into an Assignment and Covenant Not to Execute (hereinafter referred to as "Assignment" or "Covenant"). Pursuant to the Assignment, the Strahins received \$25,000.00 which represented the limits of the bodily injury liability coverage under the Erie policy of insurance issued to Mr. Sullivan. In addition, Mr. Sullivan assigned to

Plaintiffs, their heirs, all representatives and assigns, all of his rights, presently existing or which might hereafter arise, whether in contract or tort, to seek compensation indemnity, defense, compensatory damages, punitive damages, relating to or arising from the Farmers & Mechanics Policy, including but not limited to all claims based on unfair settlement practices, Bad Faith, or refusal to provide defense and/or indemnity.

In exchange, the Assignment stated that,

Plaintiffs, their heirs, legal representatives and assigns, promise, covenant and agree to not execute upon any of the personal assets of Earl Sullivan to recover payments to satisfy any judgment which may hereinafter be acquired by them against Earl Sullivan; and Plaintiffs release and discharge for themselves, their heirs, legal representatives and assigns, Erie Insurance Company and its assigns, from any and all further

liability or obligations, claims and demands, or executions whatsoever, in law or in equity, which Plaintiffs ever had or might now have by virtue of any after acquired judgment against Earl Sullivan.

The Assignment further provided that, “Any judgment which may hereinafter be acquired by plaintiffs against Earl Sullivan, shall not be at any time recordable by any party nor at any time become recordable in any county clerk’s office in West Virginia or in any other place where it would become a public document[.]” The Assignment was approved by the circuit court by order dated February 26, 2001.

The case proceeded to trial in March 2002, and resulted in a verdict in favor of the Strahins in the amount of \$1,060,556.00. The jury found Mr. Cleavenger 70 percent liable based on his intentional act and Mr. Sullivan 30 percent liable based on negligence. In its judgment order, the circuit court found that Mr. Sullivan was jointly and severally liable for the entire verdict. Subsequently, Mr. Sullivan appealed the circuit court’s order which this Court affirmed in *Strahin I*.

Following the verdict but prior to the issuance of this Court’s June 2004 opinion, Mr. Strahin moved to amend the complaint to add claims against Farmers & Mechanics. Specifically, the amended complaint included a claim for payment of the verdict in excess of Mr. Sullivan’s homeowners’ policy limits pursuant to *Shamblin, supra*, as well as claims for statutory and/or common law bad faith. Action on the amended complaint was

stayed until this Court ruled upon the appeal of the underlying jury verdict. Upon the publication of this Court's opinion, Farmers & Mechanics tendered payment to the Strahins in the amount of \$100,000.00, the liability limits of Mr. Sullivan's policy.

Thereafter, Farmers & Mechanics filed a motion for summary judgment with regard to Mr. Strahin's *Shamblin* claim. Following a hearing on April 8, 2005, the circuit court granted Farmers & Mechanics' motion for summary judgment. The final order was entered on June 17, 2005, and this appeal followed.

II.

STANDARD OF REVIEW

This Court has held that, "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). In Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), this Court further held that, "A circuit court's entry of summary judgment is reviewed *de novo*." This Court has also held that, "Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review." Syllabus Point 1,

in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Accordingly, with this standard in mind, we now consider whether the circuit court erred by granting summary judgment.

III.

DISCUSSION

The issue in this case is whether Mr. Strahin, having been assigned Mr. Sullivan's right to collect against Farmers & Mechanics, has a claim for the amount of the verdict in excess of the policy limits of Mr. Sullivan's homeowners' policy based upon this Court's decision in *Shamblin, supra*. In that case, the plaintiff, Clarence Shamblin, brought suit against Nationwide to recover an excess verdict rendered against him in a previous lawsuit arising out of an automobile accident after Nationwide, his insurer, refused to settle the liability claim against him within his Nationwide liability insurance policy limits. This Court held in Syllabus Point 2 of *Shamblin* that,

Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured.

In this case, Mr. Strahin argues that since Farmers & Mechanics refused to settle the claim against Mr. Sullivan on two occasions for the policy limits of \$100,000.00, he, as assignee of Mr. Sullivan's rights, may pursue the *Shamblin* claim.

“[I]t is beyond cavil that the original *Shamblin* doctrine was created to protect policyholders who purchase insurance to safeguard their hard-won personal estates and then find these estates needlessly at risk because of the intransigence of an insurance carrier.” *Charles v. State Farm Mutual Automobile Ins. Co.*, 192 W.Va. 293, 298, 452 S.E.2d 384, 389 (1994). To that end, this Court adopted a “hybrid negligence-strict liability” standard of proof in *Shamblin* to be used in actions by insureds against their insurers for failure to settle third-party liability claims against them within their policy limits. 183 W.Va. at 595, 396 S.E.2d at 776. Accordingly, this Court held in Syllabus Points 3 and 4, respectively, of *Shamblin* that:

It will be the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect as its own.

In assessing whether an insurer is liable to its insured for personal liability in excess of policy limits, the proper test to be applied is whether the reasonably prudent insurer would have refused to settle within policy limits under the facts and circumstances, bearing in mind always its duty of good faith and fair dealing with the insured. Further, in determining whether the efforts of the insurer to reach settlement and to secure a release for its insured as to personal liability are reasonable, the

trial court should consider whether there was appropriate investigation and evaluation of the claim based upon objective and cogent evidence; whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and whether there was potential for substantial recovery of an excess verdict against its insured. Not one of these factors may be considered to the exclusion of the others.

In granting summary judgment in favor of Farmers & Mechanics, the circuit court reasoned as follows,

[T]he [c]ourt concludes that Strahin's Amended Complaint clearly demonstrates that he, Sullivan and Erie, as part of the settlement between plaintiff and Sullivan, executed an Assignment, under which Sullivan assigned to plaintiff all of his rights against Farmers & Mechanics, including any claims for bad faith. In return for this Assignment, among other things, Strahin agreed not to execute on the personal assets of Sullivan to satisfy any judgment that might be obtained against Sullivan. Therefore, as Sullivan, Farmers & Mechanics' insured, was released from personal liability in that his personal assets were not at stake in any judgment rendered against him by the plaintiff, Farmers & Mechanics could not have breached its duty of good faith and fair dealing to him, or to the plaintiff, to the extent that the plaintiff possesses Sullivan's rights, as its insured was fully protected from personal liability exposure. In that regard, there is no prima facie bad faith as contemplated by *Shamblin* as Sullivan possessed no personal liability exposure. As there is no personal liability exposure to Farmers & Mechanics' insured, there cannot be a breach of the duty owed to its insured, and the plaintiff's assigned claim for a *Shamblin* cause of action against Farmers & Mechanics lacks merit, thereby requiring summary judgment in favor of Farmers & Mechanics, as a matter of law.

Having carefully reviewed the Assignment executed by Mr. Strahin and Mr. Sullivan, we find no error in the circuit court's conclusion.

In *Shamblin*, this Court declined to adopt a strict liability standard whereby an insurer would have been liable any time it refused to settle within policy limits and an excess verdict was later obtained against the insured. Instead, this Court chose to add a negligence component creating the “hybrid negligence-strict liability” standard discussed above. “An action in negligence is based in tort law and is brought to recover damages from a party whose acts or omissions constitute the proximate cause of a claimant’s injury.” *Strahin I*, 216 W.Va. at 183, 603 S.E.2d at 205. “In the matters of negligence, liability attaches to a wrongdoer . . . because of a breach of duty which results in an injury to others.” Syllabus Point 2, in part, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988). Accordingly, to recover under *Shamblin*, there must not only be a negligent refusal to accept a settlement offer by the insurer, but also subsequent harm to the insured. In other words, the insured’s personal assets must be at risk. In the case *sub judice*, Mr. Sullivan was not personally liable for the excess verdict at the time it was rendered.

The Covenant executed by Mr. Strahin, Mr. Sullivan, and Mr. Sullivan’s automobile insurer prior to trial repeatedly provided that Mr. Sullivan’s personal assets would never be at risk. Not only did Mr. Strahin agree not to execute upon the personal assets of Mr. Sullivan, he also agreed to never record any judgment against him. As a result, Mr. Sullivan was not “injured” when the jury returned a verdict against him in excess of his homeowners’ policy limits. His personal assets were already protected by the Covenant.

Consequently, an essential element of the *Shamblin* claim, i.e., damage to the insured, does not exist in this case.

In support of his contention that his *Shamblin* claim is not barred, Mr. Strahin cites a number of cases dealing with covenants not to execute in the context of consent judgments. In particular, Mr. Strahin relies upon the decision in *Red Giant Oil Company v. Lawlor*, 528 N.W.2d 524 (Iowa 1995). In that case, the insured entered into a consent judgment and assignment of rights in exchange for a covenant not to execute in order to limit his personal liability after his insurer refused to defend him in the underlying litigation. The court found that the covenant was a contract as opposed to a release and concluded that the legal liability of the insured remained if there was insurance coverage. Based upon that decision, Mr. Strahin argues that Farmers & Mechanics remains liable for the excess verdict.

Mr. Strahin's reliance upon *Red Giant* is misplaced, however, as it is easily distinguishable from the case at bar. Here, unlike the insurer in *Red Giant*, Farmers & Mechanics never refused to defend Mr. Sullivan. Farmers & Mechanics provided a defense throughout the trial. Furthermore, after the verdict was upheld on appeal, Farmers & Mechanics promptly paid the policy limits of \$100,000.00 to Mr. Strahin. The issue in this case is whether Farmers & Mechanics is liable for the excess verdict pursuant to *Shamblin*. Our review of relevant case law shows that even where there is a failure to defend as in *Red*

Giant, insurers have not been held liable in excess of policy limits when the judgment includes an assignment of rights coupled with a covenant not to execute.

In *In re Tutu Water Wells Contamination Litigation*, 78 F.Supp.2d 423 (D.Virgin Islands 1999), an oil company, Texaco, as the assignee of a service station owner's claims, sued the service station's garage liability insurer for bad faith failure to defend and indemnify in connection with lawsuits arising out of gasoline leaks. Texaco sought to enforce a consent judgment it had entered into with the service station owner which was in excess of the policy limits. The consent judgment included an assignment of rights coupled with a covenant not to execute. The Court held that Texaco was not entitled to recover in excess of the policy limits.

In finding that the insurer was not liable for the judgment in excess of the policy limits, the Court explained that,

Numerous jurisdictions in the United States have held insurers liable to the insured for amounts in excess of policy limits when the insurer's breach of its duty to defend has resulted in an excess verdict rendered against the insured. *See, e.g., Newhouse Citizens v. Security Mut. Ins. Co.*, 176 Wis.2d 824, 501 N.W.2d 1, 7 (1993); *Safeway Moving & Storage Corp. v. Aetna Ins. Co.*, 317 F.Supp. 238, 246 (E.D.Va.1970); *Miller v. Elite Ins. Co.*, 100 Cal.App.3d 739, 161 Cal.Rptr. 322, 331 (1980). Research, however, has revealed only a handful of cases in which third parties, seeking to enforce a consent judgment which included a covenant not to execute against the insured, have been entitled to recover against an insurer in excess of

policy limits. *See, e.g., Greater New York Mut. Ins. Co. v. North River Ins. Co.*, 85 F.3d 1088 (3d Cir.1996).

It is important to note that, while the above mentioned cases allowed an injured third party to recover in excess of policy limits, *all of these cases involved a post-verdict assignment of rights by the insured.* Thus at some point *prior to* the insured's assignment, the insured was faced with the harsh reality that it was financially accountable to the judgment creditor for an outstanding verdict in excess of policy limits. This represents an important distinction from the instant matter, where the insured's liability was effectively extinguished at the very moment it was acknowledged.

Id. at 432. The court in *Tutu* further observed that:

An examination of the relevant caselaw reveals not one instance in which a third party has been entitled to recover against an insurer in excess of policy limits pursuant to a pretrial consent judgment which included an assignment coupled with a covenant not to execute. Moreover, the jurisdictions that have considered these types of arrangements have expressly declined to enforce them, reasoning that “[t]o recover more than the policy limits from the insurer, the judgment creditor must assert the insured’s injury. If the judgment cannot be enforced against the insured, no such injury exists.” *Willcox v. American Home Assurance Co.*, 900 F.Supp. 850, 857 (S.D.Tex.1995) (quoting *Whatley v. Dallas*, 758 S.W.2d 301, 310 (Tex.App.--Dallas 1988)).

Id.

Tutu supports our earlier conclusion that absent personal liability on the part of the insured for the excess verdict, there can be no *Shamblin* claim. Since the Covenant at issue here was executed before the jury rendered its verdict, the resulting judgment was not enforceable against Mr. Sullivan. In fact, as previously noted, it could not even be

recorded. Therefore, since Mr. Strahin “stands in Mr. Sullivan’s shoes” as his assignee, he simply cannot satisfy the essential legal elements of a *Shamblin* claim. See Syllabus Point 10, in part, *Lightner v. Lightner*, 146 W.Va. 1024, 124 S.E.2d 355 (1962) (“[A]n assignee acquires no greater right than that possessed by his assignor, and he stands in his shoes[.]”).

We note that assignment of a *Shamblin* claim is clearly permissible. This Court has long held that “[a] chose in action may be validly assigned.” Syl. pt. 2, *Harman v. Corpening*, 116 W.Va. 31, 178 S.E. 430 (1935).” Syllabus Point 3, *Boarman v. Boarman*, 210 W.Va. 155, 556 S.E.2d 800 (2001).² However, the mere assignment of rights does not translate into automatic recovery. Rather, the assignee must still satisfy all of the essential elements of the cause of action. By coupling the assignment in this case with a covenant not to execute prior to trial and thus prior to an excess verdict, the *Shamblin* claim was automatically extinguished.

Mr. Strahin contends that by precluding the assignment of *Shamblin* claims prior to trial, insureds will be deprived of the ability to protect their assets. However, we believe that holding an insurer liable for a judgment even when the insured is not legally liable for the same only encourages collusion between the insured and the plaintiff to raid the

²See generally *Aluise v. Nationwide Mutual Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260 (2005) (assignment of a first party bad faith claim); *Hubbard v. State Farm Indemnity Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003) (declaratory judgment action against automobile liability insurer filed by assignee of the insured).

insurance proceeds. Obviously, an insured who is protected by a covenant not to execute loses the incentive to contest his or her liability. While there was no allegation of collusion between Mr. Strahin and Mr. Sullivan in this case, we believe that public policy as well as case law dictate that when an insured's personal assets are not at stake at the time a verdict in excess of the applicable insurance policy limits is rendered, there is no cause of action pursuant to *Shamblin*. Accordingly, we now hold that in order for an insured or an assignee of an insured to recover the amount of a verdict in excess of the applicable insurance policy limits from an insurer pursuant to this Court's decision in *Shamblin*, the insured must be actually exposed to personal liability in excess of the policy limits at the time the excess verdict is rendered.

This Court held in Syllabus Point 4 of *Painter, supra*, that,

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Having found that Mr. Strahin is not able to satisfy all the elements of a *Shamblin* claim, we affirm the decision of the circuit court granting summary judgment in favor of Farmer & Mechanics.³

³Our decision today has no effect upon Mr. Strahin's statutory and/or common law bad faith claims against Farmers & Mechanics which remain pending in the circuit court.

IV.
CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Barbour County entered on June 17, 2005, is affirmed.

Affirmed.