IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

No. 24487

DONALD C. McCORMICK,
Appellant

v.

ALLSTATE INSURANCE COMPANY,
Appellee

Appeal from the Circuit Court of Kanawha County
Honorable Paul Zakaib, Jr., Judge
Civil Action No. 88-C-3965

AFFIRMED

Submitted: February 17, 1998
Filed: July 10, 1998

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JUSTICE McCUSKEY delivered the Opinion of the Court.

JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

JUSTICE STARCHER concurs in part and dissents in part and reserves the right to file separate 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 Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. Where an insured asserts a first-party claim against his or her insurance carrier for unfair claim settlement practices under *W.Va. Code* § 33-11-4(9) [1985], punitive damages shall not be awarded against the insurer unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured’s claim.

McCuskey, Justice:

This is an insurance dispute from the Circuit Court of Kanawha County. The appellant, Donald C. McCormick, asks this Court to reverse the lower court's April 10, 1997 order granting summary judgment in favor of the appellee, Allstate Insurance Company, on the appellant's punitive damages claim. The questions presented by this appeal are: (1) what standard is appropriate for recovery of punitive damages where an insured brings a claim against his or her insurance carrier for unfair claim settlement practices under *W.Va. Code* § 33-11-4(9) [1985], and (2) does the evidence in this case meet or fail to meet that standard. For the reasons stated below, we conclude that the trial court did not err in granting summary judgment for the appellee. Accordingly, we affirm.

I.

FACTUAL BACKGROUND

This has been a protracted and arduous litigation. Indeed, the instant appeal makes the fourth time that relief has been sought from this Court during the course of the proceedings below. In our last opinion, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996), the factual and procedural background of this case is comprehensively detailed. Consequently, we set forth herein only the salient facts pertinent to the narrow issues now before us.

On August 28, 1988, a 1984 Ford Escort owned by the appellant was severely damaged in a collision. The vehicle was insured by the appellee, Allstate Insurance Company (hereinafter "Allstate"). On August 29, 1988, the appellant notified Allstate of the damage to his automobile.

On August 30, 1988, David Dailey, the Allstate adjuster who handled the claim, inspected the vehicle and determined that it was a "total loss." In a total loss case, the appellant's insurance contract with Allstate required Allstate to pay the "actual cash value" of the appellant's vehicle prior to the loss. By the appellant's own account, his car was in poor condition before the accident. For example, two of the tires were "fairly worn out;" the lock cylinder on the hatchback had "rusted out;" and there were paint scratches on the hood, doors, and quarter panels.

In accordance with *W. Va. Code of State Regulations* § 114-14-7.4(a)(1),[1]

[1] *W. Va. Code of State Regulations* § 114-14-7.4(a)(1) is an insurance regulation which provides:

> 7.4 Adjustment of total losses. -- The following subdivisions shall govern the conduct of insurers in the adjustment of total losses:
>
> (a) If the insurer elects to make a cash settlement:
>
> (1) It must use the most recent publication of an "Official Used Car Guide" approved by the Commissioner and uniformly and regularly used by the company, as a guide for setting the minimum value of the motor vehicle which is the

Mr. Dailey utilized the National Automobile Dealer's Association Used Car Guide (NADA) in estimating the value of the appellant's vehicle. Mr. Dailey determined the loss payable under the appellant's policy to be $1,429.50. To arrive at that figure, Mr. Dailey began with the average retail value of the vehicle, which was $3,100.00. He then deducted $940.00 for high mileage, $595.00 for the car's condition prior to the loss,[2] and $250.00 for the appellant's deductible and added $25.00 for an AM/FM stereo, $79.50 for taxes, and $10.00 for the license fee.

On September 6, 1988, Mr. Dailey and the appellant had a telephone conversation. During the phone call, Mr. Dailey first offered to pay the appellant $1,100 and to allow him to keep his car. The appellant rejected that offer. Mr. Dailey then offered the appellant the $1429.50 total loss figure based upon the NADA guide book.

On September 9, 1988, Mr. Dailey and the appellant had another

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> subject of the claim. Any deviation downward from the guide's retail valuation must be supported by documentation that gives detailed information about the vehicle's condition, and any deductions must be measurable, discernible, itemized and specified concerning dollar amount, and they shall be appropriate in amount.

[2] Based upon the record, including the C2308 inspection form, contemporaneous photographs of the vehicle, and Mr. Dailey's trial testimony, the breakdown of deductions in this category was as follows: $525.00 for damage to 16 separate parts of the car, including body rust, a corroded tailgate, two tires which were below state inspection guidelines, stained upholstery, and scratches and chips in the exterior paint; $50.00 for what Mr. Dailey believed was a problem with the power steering; and $20 for cleaning the vehicle's interior and engine.

conversation regarding the appellant's claim. There is some disagreement as to whether the appellant accepted Mr. Dailey's previous offer of $1,429.50 during that conversation. However, it is undisputed that the appellant never made a counteroffer to Mr. Dailey for the amount which the appellant thought would be sufficient to compensate him. Moreover, after speaking with the appellant on September 9, Mr. Dailey mailed a check in the amount of $1,429.50 to the appellant's bank, which held a lien on the insured vehicle.

On November 4, 1988, the appellant filed a complaint against Allstate and Mr. Dailey, who was later dismissed from the case. The complaint contained five counts, only two of which survived and are relevant to this appeal. In one count, the appellant claimed that Allstate failed to pay reasonable compensation on his property damage claim. In that count, he sought damages under the principles articulated in *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986). In a second count, the appellant claimed that Allstate violated the unfair settlement practice provisions of *W. Va. Code* § 33-11-4(9) [1985], and sought damages, including attorneys fees and punitive damages, under the principles of *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d 252 (1981).

On July 31, 1992, the circuit court entered an order bifurcating the two counts of the appellant's complaint for trial purposes, with the first phase of the trial to be

limited to the *Hayseeds* claim, and the second phase to be reserved for the statutory *Jenkins* claim. In addition, the parties and the trial court apparently agreed to bifurcate the issues within phase one, so that the issues of whether the appellant was entitled to compensatory damages and economic loss would be tried first, and after a verdict on those matters, the remaining damage questions under *Hayseeds* would be presented.

Beginning on May 2, 1994, a jury trial was conducted on the issues designated for the first portion of phase one (the *Hayseeds* claim), as explained above. At the conclusion of the trial, the jury returned a verdict of $995.00 for the appellant. This award consisted of $595.00 for Allstate's underpayment of damages to the appellant's vehicle and $400.00 for loss of use of the vehicle. The $400.00 loss of use award was later set aside by this Court on appeal.

After the verdict, the parties made several post-trial motions and presented various issues to the circuit court. Of those issues, only one is relevant to this appeal: whether the appellant was entitled to present his punitive damages claim to the jury. The circuit court ruled against the appellant on this issue, finding that he had not "substantially prevailed" on his underlying contract claim and that he had failed to establish the initial threshold of malice necessary to justify pursuit of punitive damages. Although the trial, as bifurcated, did not involve the appellant's *Jenkins* claim, the circuit court's post-trial order was more broad and precluded the appellant from pursuing

punitive damages on both the *Hayseeds* count and the *Jenkins* count.

The appellant appealed from the circuit court's post-trial order, and this Court decided in *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996), that the trial court's order was erroneous insofar as it precluded the appellant from proceeding to a trial of his *Jenkins* claim. We reasoned that it was contradictory for the trial court to preclude a trial of the appellant's statutory claim because he had failed to introduce evidence of malice in the portion of the *Hayseeds* claim tried, when punitive damages were not an issue in that trial. We further reasoned that there is no predicate that an insured "substantially prevail" on an underlying action in order to seek relief under *Jenkins*, and *Jenkins* allows a party to seek punitive damages under certain conditions. *Id.* at 427-28, 475 S.E.2d at 519-20. Thus, we reversed the judgment of the trial court denying a phase two trial and remanded the matter on the appellant's *Jenkins* claim for further proceedings.

On April 10, 1997 the circuit court entered an order granting a motion by Allstate for summary judgment on the issue of punitive damages under the appellant's *Jenkins* claim. In its order, the circuit court concluded that the standard for recovering punitive damages on a *Jenkins* claim is "actual malice."

II.

STANDARD OF REVIEW

The standard for granting summary judgment was established in Syllabus Point 3 of *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), where this Court held:

> 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.

Moreover, on appeal, we review the circuit court's entry of summary judgment *de novo*. Syllabus Point 1, *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997); Syllabus Point 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995); Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

III.

DISCUSSION

As indicated above, this appeal causes us to determine the proper standard for the imposition of punitive damages where an insured brings a first-party claim against his or her insurance carrier for unfair settlement practices under *W.Va. Code* § 33-11-4(9) [1985], as permitted by *Jenkins v. J.C. Penney*, *supra*.[3]

The appellant argues that an insured's entitlement to an award of punitive

[3] A claim for unfair claim settlement practices under *W.Va. Code* § 33-11-4(9) [1985] will hereinafter be referred to as a "*Jenkins* claim" or "statutory bad faith claim."

damages under a *Jenkins* claim should be determined by applying the standard for punitives enunciated by this Court in *Stevens v. Friedman*, 51 S.E. 132 (1905). The standard set forth in *Stevens* is as follows:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others, appears, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages, these terms being synonymous.

Id. at Syl. Pt. 3 (citation omitted).

Unlike the present case, which involves the highly specialized area of property insurance, *Stevens* was an action to recover damages for assault and battery. Furthermore, the appellant offers no rationale, and we can conceive of none, for transposing the rule in *Stevens* to the recovery of punitive damages under a *Jenkins* claim. Hence, we decline to do so.

Allstate contends

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> [P]unitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim. We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant, such as exists in the law of libel and slander, or the West Virginia law of commercial arbitration. See, e.g., N.Y. Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and Board of Education v. Miller, 160 W.Va. 473, 236 S.E.2d 439 (1977). Unless the policyholder is able to introduce evidence of intentional injury--not negligence, lack of judgment, incompetence, or bureaucratic confusion--the issue of punitive damages should not be submitted to the jury.

Id. at 330-31, 352 S.E.2d at 80-81. This standard clearly differs from the *Stevens* standard since it is not concerned with wrongful conduct which affects merely *the rights of others,* generally, but instead requires proof of malicious conduct in the insurer's handling of *the policyholder's claim*.

Since *Hayseeds*, we have reaffirmed the "actual malice" standard for punitives in another first-party property damage case, *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989), and extended the standard to an insured's action against his insurer for failure to settle a third-party liability claim within policy limits. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990). Moreover, in both *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 450 S.E.2d 635 (1994), and *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996), we applied the "actual malice" standard to a third-party's *Jenkins*-type action against an insurer for unfair claim settlement practices under *W. Va. Code* § 33-11-4(9). We see no reason why this Court should abandon the "actual malice" standard, with its focus on the insurer's treatment of the policyholder, where, as in the case *sub judice*, a first-party claim is asserted under the Unfair Claim Settlement Practices Act.[4]

[4] When this case was last before us, we implicitly noted that the "actual malice"standard governs the recovery of punitives in a first-party *Jenkins* action, stating stated that "to recover punitive damages it must be shown that the conduct of the insurer was wilful, malicious, and intentional." *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 423, 475 S.E.2d 507, 515 (1996).

In determining the appropriate standard for punitive damages in a first-party action under *W. Va. Code* § 33-11-4(9), we have examined the law in other jurisdictions which allow a private cause of action under their state unfair claim settlement practices acts.[5] Our survey of those states has revealed no authority for a departure from the "actual malice" standard established in *Hayseeds, supra.* In fact, every state which we found to have addressed the issue has adopted a similar punitives standard requiring proof of wrongdoing directed toward the insured, and evidenced in the mishandling of his or her claim, as opposed to merely generalized wrongdoing. *See, e.g., Wittmer v. Jones,* 864 S.W.2d 885, 890 (Ky. 1993) ("[T]here must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury."); *Dees v. American National Fire Ins. Co.*, 861 P.2d 141, 149 (Mont. 1993) ("[P]unitive damages may be awarded when a defendant has been found guilty of actual malice. . . . A defendant is guilty of actual malice if he has knowledge of facts or intentionally

[5] West Virginia's unfair claim settlement practices act, *W.Va. Code* § 33-11-4(9) [1985], was derived from the National Association of Insurance Commissioners' Model Unfair Claim Settlement Practices Act. Almost every state has adopted some version of the Model Act. Unlike West Virginia, a vast majority of courts have held that their state unfair claim settlement practices acts do not create private causes of action against insurers. 16A John Alan Appleman & Jean Appleman, *Insurance Law and Practice* § 8885 (Supp. 1998); *see, e.g., A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987) (decided under Virginia Unfair Insurance Practices Act, citing decisions from other jurisdictions). Only a small minority of courts have found a private cause of action under their state statutes. *See Jenkins v. J.C. Penney, supra* (recognizing an implied private cause of action under *W.Va. Code* § 33-11-4(9)).

disregards facts that create a high probability of injury to the plaintiff and . . . deliberately proceeds to act . . . .").

Accordingly, in harmony with other jurisdictions and consistent with our prior decisions in this area, we now hold that where an insured asserts a first-party claim against his or her insurance carrier for unfair claim settlement practices under *W.Va. Code* § 33-11-4(9) [1985], punitive damages shall not be awarded against the insurer unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim.

Having determined that the "actual malice" standard controls the recovery of punitive damages under the appellant's *Jenkins* claim, we now address the second issue identified above. That is, does the evidence in this case meet or fail to meet the "actual malice" standard?

Before embarking on an analysis of the facts, we pause to discuss *Hawkins v. Allstate Insurance Company*, 733 P.2d 1073 (Ariz.), *cert. denied,* 484 U.S. 874 (1987), a case on which the appellant relies to support his position that the evidence justifies an award of punitive damages. Upon a careful review of *Hawkins*, we find that the

appellant's reliance on it is misplaced for a number of reasons. First, *Hawkins* was an action for the common law tort of bad faith. It did not arise under the Arizona Unfair Claim Settlement Practices Act, *A.R.S.* § 20-461, which provides "solely an administrative remedy" and does "not create a private right or cause of action." *Melancon v. USAA Cas. Ins. Co.*, 849 P.2d 1374 (Ariz. Ct. App. 1992). Hence, the punitive damages award upheld in *Hawkins* related to a claim substantially different from the appellant's claim, which is based upon the provisions of this state's Unfair Claim Settlement Practices Act, *W.Va. Code* § 33-11-4(9) [1985]. Second, *Hawkins* is factually distinguishable from the instant case in several respects. Most importantly, the adjuster in *Hawkins* deducted a flat clean-up fee of $35.00 without ever inspecting the claimants' vehicle to see if it was in fact dirty, whereas in this case, Mr. Dailey inspected the appellant's vehicle and itemized the deductions made, allotting $20.00 for cleaning the car's stained interior and dirty engine. This factual difference is critical because Allstate's use of the invalid $35.00 cleaning deduction in *Hawkins* supplied the "bad faith conduct" which, when motivated by the requisite "evil mind," supports an award of punitives under Arizona law. *See Hawkins*, 733 P.2d at 1080-81. Third, *Hawkins* holds "that information regarding how an insurance company handles other claims is admissible if it is sufficiently similar *to the insured's experiences* to show a pattern of claims handling." *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 804 P.2d 1323, 1326 (Ariz. Ct. App. 1991) (emphasis added). The policyholders in *Hawkins* offered the testimony of a former Allstate employee to establish the insurer's motive or state of mind when

dealing with its insureds. The *Hawkins* Court ruled that this testimony was admissible because it "made it more probable that the invalid $35.00 cleaning fee deduction used in estimating the actual cash value of Hawkins' loss was not mistakenly nor inadvertently made." 733 P.2d at 1081. In the case *sub judice*, the appellant's experiences do not include Allstate's use of unsubstantiated deductions in adjusting his claim. Thus, *Hawkins* does not persuade us that there is sufficient evidence to support an award of punitive damages in this case.

As indicated earlier, the evidence in this case shows that Mr. Dailey promptly inspected the appellant's totaled vehicle and computed its actual cash value using the NADA guide. By the appellant's own admission at trial, multiple parts of his car were damaged before the loss. In calculating the amount payable on the claim, Mr. Dailey accounted for the car's condition prior to the accident by taking certain deductions, all of which were itemized on an inspection form.[6] Less than two weeks

[6] On October 7, 1988, Informational Letter No. 55, signed by West Virginia Deputy Insurance Commissioner, Hanley C. Clark, was mailed to all insurance companies selling automobile insurance in West Virginia. Informational Letter No. 55 states, in pertinent part:

> [A]ny deduction of "reconditioning" charges from the book value of total loss automobiles is highly artificial and is improper. Therefore, it should be noted that the deduction of "reconditioning", "clean-up", "clean and shampoo", "carpet and upholstery cleaning" and similar fees from total loss automobile claims will be treated as unfair trade practices.

after the appellant notified Allstate of his loss, Allstate payed $1,429.50 on the claim, believing that the appellant had accepted that figure as a settlement. The appellant conceded in his trial testimony that, prior to Allstate's payment of $1,429.50, he never made any offer or counter proposal to Mr. Dailey. In other words, Mr. Dailey was never informed that there was a certain amount of money greater than $1,429.50 that the appellant was claiming as fair compensation for his loss. We find that this evidence fails to satisfy the "actual malice" standard since it does not show that Allstate knew that the appellant's claim was proper and maliciously settled it in an unfair manner. We therefore conclude that Allstate was entitled to summary judgment in its favor on the issue of punitive damages under the appellant's *Jenkins* claim.

IV.

CONCLUSION

Upon all of the above, the circuit court's decision granting summary judgment in favor of Allstate Insurance Company on the issue of punitive damages under the appellant's *Jenkins* claim is affirmed, and this matter is remanded to the circuit court for further proceedings.

(Emphasis in original). Prior to this directive, the taking of reconditioning deductions was listed as a factor in determining the value of used cars by the "Official Used Car Guide" (the NADA guide), which states that "[a]ppropriate deductions should be made for re-conditioning costs incurred to put the car in salable condition."

Affirmed.