No. 24487 -- Donald C. McCormick v. Allstate Insurance Company

Workman, J., concurring:

While I agree with the result of the majority opinion, I write separately to emphasize the distinction between a Hayseeds action and a Jenkins statutory action in an attempt to minimize any ambiguity. As we recognized in McCormick III, 197 W. Va. 415, 475 S.E.2d 507 (1996), a Jenkins claim "is a type of action which is wholly distinct from an underlying contractual action on an insurer's failure to comply with its insurance contract." 197 W. Va. at 427, 475 S.E.2d at 519. We recently acknowledged, in footnote five of Light v. Allstate Insurance Co., ___ W. Va. ___, ___ S.E.2d ___ (No. 24365, July 7, 1998), that the phrase "bad faith" has been used to refer to both the Hayseeds underlying contract action and the Jenkins statutory action. The confusion potentially generated through that lack of distinction is insidiously dangerous. Erosion of the distinction between the two will inevitably lead to further overlapping between the two types of claims. While the actions parallel one another in some respects, they are different in others. The two causes of action require different elements of proof and determinations of liability. Any practice by this Court of using the two phrases interchangeably may have been the result of inattentiveness, not design, and additional confusion can be limited by remedying that practice.

While we have not been squarely confronted with an issue of duplication of damages resulting from the overlapping of the two claims, we recognized the potential for a duplication of damages problem as early as the origin of the statutory cause of action in Jenkins:

> To permit a direct action against the insurance company before the underlying claim is ultimately resolved may result in duplicitous litigation since the issue of liability and damages as they relate to the statutory settlement duty are still unresolved in the underlying claim. Once the underlying claim has been resolved, the issues of liability and damages have become settled and it is possible to view the statutory claim in light of the final result of the underlying action. A further policy reason to delay the bringing of the statutory claim is that once the underlying claim is resolved, the claimant may be sufficiently satisfied with the result so that there will be no desire to pursue the statutory claim. Moreover, it is not until the underlying suit is concluded that the extent of reasonable damages in the statutory action will be known.

167 W. Va. at 608-09, 280 S.E.2d at 259.

Obviously, as we explained in syllabus point seven of Harless v. First National Bank, 169 W. Va. 673, 289 S.E.2d 692 (1982),

> It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.

In Dodrill v. Nationwide Mutual Insurance Co., 201 W. Va. 1, 491 S.E.2d 1 (1996), we approved a jury instruction cautioning the jury against duplicitous damages in an unfair claims settlement practices case, as follows: "The law does not permit double recovery of damages. And if you find the Plaintiff has been fully compensated for all of his injuries in the underlying action, then you should award him only the increased fees and expenses resulting from the failure to offer a prompt and fair settlement." 201 W. Va. at 16, 491 S.E.2d at 16.

As an element of the differentiation between the contract action and the statutory action, the majority in the present case has, in syllabus point two, held that punitive damages shall not be awarded against an insured in a first-party statutory claim unless the policyholder can establish a high threshold of actual malice, meaning that the insurer actually knew that the claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim. Implicit in that standard is the recognition that in the statutory setting, it is the unfair settlement practice toward which the statute is directed, rather than just the action toward that particular individual. Thus, contrary to the approach of the lower court, recovery of punitives does not necessitate actual malice toward the individual insured, but instead contemplates only that the insurer denied the claim knowing it to be proper, and that the unfair practice itself can in aggravated circumstances indicate such a blatant disregard of civil obligations to insureds in general that the insurer may be liable

for punitives. Because the trial court made a finding of fact that the insurer did not deny the claim with knowledge that it was proper, the first part of the standard for punitive damages was not met, and it is for that reason that the ruling stands, despite the lower court's apparent erroneous conclusion that the malice must be directed at that specific insured. However, it should be emphasized that it is that unfair settlement practice from which evidence of malice will usually be derived, and no evidence of actual malice against the insured is necessary so long as it is demonstrated that the insurer was utilizing an unfair settlement practice it knew to be wrong.