No. 31226 – *Hubert J. Barefield v. DPIC Companies, Inc.*

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Albright, Justice, concurring:

Two of my colleagues have written separately in this case on matters which I believe invite further discussion given the importance of this case and its companions, *Rose v. St. Paul Fire and Marine Insurance Co.*, No. 31317, ___ W.Va. ___, ___ S.E.2d ___ (June 25, 2004), and *Madden v. Allstate Insurance Company*, No. 31392, ___ W.Va. ___, ___S.E.2d ___ (June 10, 2004).

In his separate opinion, concurring in part and dissenting in part to the decision in this case and the decision in *Rose v. St. Paul Fire and Marine Insurance*, Chief Justice Maynard articulates concerns about the vitality of our adversarial system because of those decisions. In particular, the Chief Justice questions the wisdom of (1) allowing the prosecution of third-party bad faith claims against insurers for conduct in the course of litigation, as approved in the instant case, and (2) allowing a third-party bad faith claim to be prosecuted against an insurer for unlawful conduct effectuated by a defense attorney employed to defend an insured, as approved in *Rose.*

The first basis upon which Chief Justice Maynard attacks both decisions is his opposition, on general principles, to the existence of statutory third-party bad faith claims. *See* W.Va. Code § 33-11-4(9) (2002) (Repl. Vol 2003). That type of civil action, as the Chief Justice acknowledges, was first created by this Court in 1981, long before the arrival of any of its present membership.[1] More importantly, however, no party to these proceedings assigned as error the existence of such a statutory cause of action. Without question, an attack on the wisdom of continuing to permit this particular cause of action contributes nothing to the task with which this Court was confronted by the issues presented in the instant case or in *Rose.*

Beyond lamenting the existence of a private cause of action for third-party bad faith claims and suggesting that law created by this Court in *Shamblin v. Nationwide Mutual Insurance* Co., 183 W.Va. 585, 396 S.E.2d 766 (1990), obviates the need for statutory third-party bad faith claims,[2] the Chief Justice expresses concern over creating "potentially conflicting duties of insurers toward both third-party claimants and their own insureds." In his effort to unduly dramatize this concern, the Chief Justice suggests that "insurers now are potentially liable to third-party claimants for every decision they make in the course of

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[1]*See Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981).

[2]*Shamblin* recognized the duty of good faith that an insurer has to its insured; it did not address instances involving third-party bad-faith claims where there is no contractual duty between the insurer and the party making a claim.

defending their insureds," and suggests that such actions will result in a "party [being] punished simply for being adversarial." The Chief Justice posits further that both decisions infringe upon the constitutional rights of insurers and insureds "by seriously compromising their ability to defend themselves." He further opines that the subject decisions give rise in *every* case to "the claim that the insurer had an equal duty to the insured's adversary, the third-party claimant." Finally, the author assures us that insurance premiums will inevitably increase as a result of these two decisions.

In my experience, such a soaring flight of rhetoric, often referred to as "parading the horribles," merely serves to obfuscate or divert attention from the true issues deserving consideration and discussion. Moreover, an examination of these "horribles" suggests they are not as dreadful, or as likely to occur, as the Chief Justice would have us believe. Let us look at the principal complaints:

> *Conflicting duties owed third-party claimants and insureds:* The duty of an insurer owed a third-party claimant, to avoid acts performed in bad-faith can hardly be seen as contrary to the like duty not to deal with insureds in bad faith. Certainly, the insurer does not owe any duty to its insured to act in bad faith regarding anything.
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> *Potentially liable to third-party claimants for every decision made defending insureds*: Only if every decision is tainted with bad faith!
>
> *Party punished for being adversarial*: Only if acting in bad faith!

> *Seriously compromising insureds' and insurers' ability to defend themselves*: By requiring insurers to not act in bad faith?
>
> *Claiming that the insurer had an equal duty to the insured's adversary, the third-party claimant*: The only duty equally owed by an insurer to its insured and a third-party claimant is that insurer owes a duty to its insured and a third-party claimant alike *not to act in bad faith.*
>
> *Premiums will rise*: Unfortunately, a likely possibility for customers of insurers who commit acts of bad faith.

While I am reasonably certain that the "parade of horribles" employed by the Chief Justice is merely an exercise in hyperbole, I also appreciate that wholesale abuse of the causes of action authorized by the two opinions at issue might soon bring to reality one or more of those horribles. In my dissenting opinion to *Madden v. Allstate Insurance Company*, No. 31392, ___ W.Va. ___, ___S.E.2d ___ (June 10, 2004), I recognized that the legal standards adopted by this Court in bad faith cases for invading the attorney-client privilege under the crime-fraud exception "had opened the door for any practicing lawyer" to undertake the invasion of that privilege in such cases for less than valid reasons. *Id.* at ___, ___ S.E.2d at ___ (Albright, J., dissenting, at *9). Likewise, I respectfully suggest that the bench and bar should both be watchful for groundless and, therefore, completely unwarranted assertions of the causes of action authorized by the majority through this case and *Rose.*

The obvious first line of defense against litigational conduct thought to be improper is found in the various existing rules and sanctions provided by our judicial system. It would be a serious mistake for plaintiffs to routinely file bad faith cases premised on conduct occurring during the course of defending insurance claims that does not clearly rise to the level of demonstrable bad faith. To unduly harass defense counsel and insurers with potential lawsuits alleging bad faith that are substantially without merit could easily lead to the abolition of the statutory cause of action at issue in these two cases – by legislative enactment or by a reversal of the case law recognizing this private cause of action,[3] as Chief Justice Maynard clearly advocates.

The second separate opinion deserving comment is the concurring opinion in this case, *Barefield,* in which Justice Davis selected three issues for elucidation which were not before this Court and which, in my judgment, were not ripe or appropriate for discussion in this certified question case. Although this Court has the authority to reformulate questions properly certified, we do not have the liberty to expound on any concern which we anticipate may arise in relation to the question. Our reformulation of certified questions is utilized to remove any impediment there may be to fully addressing the specific legal problem to same raised by the question. Reformulation is not a mechanism this Court should use to address

[3]*See Jenkins v. J.C. Penney Cas. Ins. Co.,* 167 W.Va. 597, 280 S.E.2d 252 (1981).

every conceivable implication which may develop in proceedings from which the question arose. As we observed in *Bass v. Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994),

> "Only those questions should be certified up before judgment which bring with them a framework sufficient to allow this Court to issue a decision which will be pertinent and inevitable in the disposition of the case below."

Id. at 521, 453 S.E.2d at 355, quoting *State, Agency of Transportation v. City of Winooski*, 520 A.2d 998, 999 (Vt. 1986).

In hearing a question certified to us by a federal court, as in this case, or by the highest court of another state, we sit under a special statutory grant of jurisdiction. *See* W.Va. Code § 51A-1-1 *et seq.* In such cases, we have before us only a limited record, not one fully developed by trial. We have no judgment to review: We have only the questions posed and, in some instances, the answer proposed by the submitting court. Therefore, addressing issues beyond the substance of the question as certified would no doubt lead to giving "direction" about matters that do not exist in the pending case or unwittingly providing an advantage to one side in the controversy by pronouncing standards, procedures, or other conclusions favorable to one party or another. In her concurring opinion, Justice Davis chose to address the following issues: The applicability of the defense of litigation privilege; the proposition that aggressive defense tactics do not equate to bad faith misconduct; and the use of evidence of misconduct occurring after a suit is filed in the court

to sustain an independent bad faith cause of action.[4] While these may well be matters related to cases involving bad faith claims under the Unfair Trade Practices Act, none of these subjects required our attention in order to answer the actual certified questions raised. Those three issues were addressed without the benefit of the litigants' perspective developed in briefs and arguments. Moreover, the legal principles at issue were enunciated in a factual vacuum. Simply put, I believe this Court should strive to limit its certified question opinions to the specific issues raised by the questions certified. I respectfully submit that addressing issues beyond those raised by the certified questions serves no purpose with regard to clarifying the status of the law.

I believe the majority opinion written by Justice Starcher fully and succinctly answers the questions posed by the federal district court. Accordingly, I concur.

[4]I have chosen not to use the term "post-litigation misconduct" as it appears the reference concerns conduct occurring after claims have been filed in court rather than after they have been litigated.