STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Steve Sayre, individually and as Administrator of the Estate of Robert Keith Sayre, Plaintiff Below, Petitioner

vs) No. 11-1135 (Jackson County 10-C-130)

Westfield Insurance Company, Defendant Below, Respondent

FILED
November 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Steve Sayre, plaintiff below, individually and as Administrator of the Estate of Robert Keith Sayre, appeals the Circuit Court of Jackson County's July 7, 2011, "Order Granting Defendant Westfield Insurance Company's Motion to Dismiss Plaintiff's Complaint and Amended Complaint or, in the alternative, Granting Motion for Summary Judgment." Petitioner is represented by George B. Morrone III, J. Michael Ranson, Cynthia M. Ranson, and Carrie L. Newton. Respondent, defendant below, Westfield Insurance Company, is represented by J. Victor Flanagan, Tiffany R. Durst, and Nathanial D. Griffith.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no prejudicial error and issues this memorandum decision pursuant to Rule 21(c)(2) of the Revised Rules of Appellate Procedure.

Petitioner's son Robert Keith Sayre died from injuries received in an August 21, 2008, automobile accident. The son was riding as the guest passenger in a car owned by James Smith that was being driven by Richard "Ryan" Smith. Ryan Smith also died as a result of the accident. Petitioner asserts that the accident was caused by the negligence and/or recklessness of both Ryan Smith and the driver of the other vehicle, Kurtis Barnett.

Ryan Smith and the Smith vehicle were covered by an automobile insurance policy issued by Respondent Westfield Insurance Company to James and Theresa Smith. Petitioner and Westfield, as the liability carrier, reached a tentative settlement whereby Westfield agreed to pay petitioner the policy's full per person liability coverage of $100,000. Barnett and his vehicle were covered by a policy issued by a different insurance company. A tentative settlement was reached whereby petitioner and the Estate of Ryan Smith would split the liability limits of Barnett's insurance.

Petitioner also asserted a claim for the underinsured motorist coverage in the Smith/Westfield policy. The policy provided that Westfield would pay underinsured motorist

benefits to an "insured," which was defined as "1. You or any family member, [or] 2. Any other person occupying or using your covered auto." (Emphasis in original omitted.)

Pursuant to the notice provision of West Virginia Code § 33-6-31e, by letter of March 25, 2010, petitioner notified Westfield, in its capacity as the underinsured motorist carrier, of the proposed liability settlements for full policy limits. On May 1, 2010, petitioner's counsel sent a letter to Westfield's counsel acknowledging that the underinsured policy limit was $20,000. This letter then said, "We hereby request that your client go ahead and tender this coverage as well as a one-third attorney fee."

On May 14, 2010, Westfield agreed to waive subrogation on the liability claims; agreed to pay the underinsured motorist claim; and tendered a check to petitioner for the full underinsured motorist coverage of $20,000. However, Westfield refused to pay attorney's fees to petitioner for procuring the underinsured motorist benefits.

On August 20, 2010, petitioner filed the instant lawsuit against Westfield for its handling of his underinsured motorist claim, including the refusal to pay attorney's fees. Petitioner asserted negligence, breach of contract, common law bad faith, and violation the unfair claim settlement practices portion of the West Virginia Unfair Trade Practices Act ("UTPA"), West Virginia Code § 33-11-4(9). He also sought declaratory relief. An Amended Complaint was filed on October 27, 2010. Petitioner did not negotiate the May 14, 2010, check until sometime after November 8, 2010, when Westfield modified its Release to allow the attorney's fee issue to be litigated. The circuit court dismissed or, in the alternative, entered summary judgment for respondent on all of petitioner's claims.

In the instant appeal, petitioner challenges only the circuit court's rulings on his common law bad faith and UTPA claims. We consider this appeal under a de novo standard of review. *See* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995) (de novo standard applies to review of order granting motion to dismiss); Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) (de novo standard applies to review of order granting summary judgment).

Petitioner argues, inter alia, that he can bring a first-party common law bad faith and statutory UTPA lawsuit because his son was an "insured" under the underinsured motorist policy language. After a careful review of the parties' arguments and the record on appeal, we conclude that it is unnecessary under the facts of this particular case for us to address the issue of whether petitioner may make a first-party bad faith claim for purposes of resolution. Even assuming for purposes of argument that petitioner could bring a first-party action, and even if all facts are considered in a light most favorable to petitioner, he cannot survive dismissal.

As to the common law bad faith claim, we find that petitioner alleged insufficient facts to survive Rule 12(b)(6) dismissal. Petitioner alleged in his Amended Complaint that he was "compelled . . . to institute this litigation in order to recover amounts due under Westfield's policy[.]" However, petitioner had already received a check for the full underinsured motorist coverage *before* he filed suit. Although there remained a disagreement as to whether he was entitled to attorney's fees under *Hayseeds, Inc. v. State Farm Fire and Casualty*, 177 W.Va. 323,

352 S.E.2d 73 (1986), petitioner was certainly not compelled to bring suit to collect any policy benefits.

As to the UTPA claim, this Court has held: "More than a single isolated violation of W.Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of 'a general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action." Syl. Pt. 3, *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981). Petitioner alleged, generally, that Westfield had previously denied his underinsured motorist claim in a March 12, 2010, letter. He also alleged that Westfield insisted that he release his claim for attorney's fees as part of the settlement of the underinsured motorist claim. Even accepting these allegations as true, we conclude that they are insufficient for petitioner to survive dismissal when considered in conjunction with the entire circumstances of the case.

As the circuit court recognized, West Virginia Code § 33-6-31e allowed Westfield, in its capacity as the underinsured motorist carrier, sixty days to preserve or waive its subrogation rights after receiving notice of the proposed liability settlements. Petitioner provided Westfield with notice of the liability settlements by letter of March 25, 2010. Fewer than sixty days later, on May 14, 2010, Westfield had not only waived subrogation and consented to the liability settlements, but had also agreed to pay the underinsured motorist claim and had tendered a check for the full underinsured per person policy limit. As to the release issue, after hearing from both parties, the circuit court found that Westfield had inadvertently included language in the Release that also required the release of the attorney's fee claim; that despite being in communication with Westfield's counsel, petitioner's counsel did not advise of the problem with the Release until after suit was filed; and that upon being advised of the issue, Westfield's counsel agreed to revise the Release. We find that these allegations are insufficient to establish a violation of the UTPA, much less the commensurate requirement that petitioner demonstrate that Westfield violated the UTPA with such frequency as to indicate a general business practice. *See*, W.Va. Code § 33-11-4(9); *see also Russell v. Amerisure Ins. Co.*, 189 W. Va. 594, 597 n.4, 433 S.E.2d 532, 535 n.4 (1993), *overruled on other grounds*, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).

Finally, the circuit court stated that it was treating Westfield's motion to dismiss as a motion for summary judgment to the extent that the circuit court considered matters outside of the pleadings, such as the applicable policy of insurance. Petitioner argues that he had no notice that the motion would be considered under a summary judgment standard. However, petitioner himself relied upon the undisputed policy language, a matter outside of the pleadings, when arguing that his decedent was an insured. Furthermore, in Westfield's motion, which contained exhibits not attached to the Amended Complaint, Westfield recognized that the circuit court might convert the matter into a motion for summary judgment and set forth the well-settled summary judgment standard. It is well-established that in order to defeat a motion for summary judgment, the petitioner must rehabilitate the evidence attacked by the respondent, produce additional evidence showing the existence of a genuine issue for trial, or submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. *See*, Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). We find that upon receipt of Westfield's motion, which clearly argued

matters outside the pleadings and invited the circuit court to treat the motion as one for summary judgment, petitioner did none of the above. As such, we find that the circuit court committed no reversible error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 26, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh