IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2017 Term

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No. 17-0257

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FILED
October 10, 2017
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL.
STATE AUTO PROPERTY INSURANCE COMPANIES
d/b/a STATE AUTO PROPERTY
AND CASUALTY INSURANCE COMPANY,
Petitioner**

v.

**THE HONORABLE JAMES C. STUCKY,
JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA; AND CMD PLUS, INC.
Respondent**

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ORIGINAL PROCEEDING IN PROHIBITION

WRIT GRANTED

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**Submitted: September 19, 2017
Filed: October 10, 2017**

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**JUSTICE KETCHUM delivered the Opinion of the Court.
JUSTICE DAVIS and JUSTICE WORKMAN dissent
and reserve the right to file separate Opinions.**

SYLLABUS BY THE COURT

"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." Syl. pt. 3, *Aetna Cas. and Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Justice Ketchum:

This original prohibition proceeding concerns a liability insurance policy. It is a commercial general liability policy issued by the petitioner, State Auto Property Insurance Companies ("State Auto"), to its insured, respondent CMD Plus, Inc. ("CMD").

CMD, a residential construction company, contracted to build a home for Chandrakant N. and Kimberly S. Shah in Charleston, West Virginia. The construction activities caused ground slippage resulting in damage to the house and property of the adjacent, downhill homeowners, Barry G. Evans and Ann M. Evans ("Plaintiffs"). The plaintiffs filed an action in the Circuit Court of Kanawha County against the Shahs and CMD seeking recovery for their damage.

CMD filed a third-party complaint against its insurer State Auto alleging that State Auto delayed investigating the plaintiffs' claim, settling the plaintiffs' lawsuit, and indemnifying CMD. CMD asserted that, as a result, State Auto committed common law bad faith, violations of the *West Virginia Unfair Trade Practices Act*, and breach of contract. State Auto's efforts to obtain a dismissal of CMD's third-party complaint were unsuccessful. In the current petition for a writ of prohibition filed in this Court, State Auto challenges the circuit court's March 2, 2017, denial of State Auto's motion for summary judgment. State

Auto contends there is no genuine issue of material fact and that it is entitled to a dismissal of CMD's third-party complaint as a matter of law.

The record, including the exhibits filed in support of State Auto's motion for summary judgment, reveals that State Auto defended and indemnified its insured, CMD, throughout the lawsuit as required by the commercial general liability policy. We note that, while the policy was purchased to provide liability coverage for damage to property sustained by third parties, such as the plaintiffs, the terms of the policy provided no coverage to CMD for damage to its own property.

This Court concludes that relief in prohibition is warranted and that State Auto is entitled to a dismissal of CMD's third-party complaint as a matter of law.

I. The Underlying Action

CMD contracted to build a custom home on a parcel in Charleston, West Virginia, owned by the Shahs. The adjacent, downhill property owners were the plaintiffs. Construction activities on the Shah parcel resulted in surface water, storm water, mud and debris inundating and damaging the plaintiffs' house and property.

On April 13, 2011, the plaintiffs filed a lawsuit in the Circuit Court of Kanawha County against the Shahs and CMD. Asserting causes of action for nuisance, trespass and negligence, the plaintiffs sought compensatory damages as well as equitable relief to prevent further interference with the use and enjoyment of their property.[1]

II. The Third-Party Complaint Against State Auto

CMD was insured for the damage to the plaintiffs' property under a commercial general liability policy issued by State Auto which provided coverage up to the policy limit of $1,000,000. CMD promptly notified State Auto of the damage to the plaintiffs' property, and CMD asserts that, at that time, the damage could have been remedied quickly and inexpensively. State Auto advised CMD that it would handle the claim. CMD states that State Auto then conducted a series of inspections and investigations, thereby delaying a potential settlement of the plaintiffs' lawsuit, increasing the amount of the plaintiffs' property damage, and resulting in the lawsuit filed against CMD by the plaintiffs.

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[1] The complaint was styled *Barry G. Evans and Ann M. Evans v. CMD Plus, Inc.; C. K. Shah; Chandrakant N. Shah; and Kimberly S. Shah*, Civil Action No. 11-C-606 (Kanawha Co. 2011). C. K. Shah, a construction contractor, was a corporate officer of CMD.

The record is unclear regarding ownership of the Shah property. The complaint alleged that the Shah property was owned by Chandrakant N. Shah and Kimberly S. Shah. The third-party complaint refers to contractor C. K. Shah as an owner of the property. For purposes of this Opinion, we will refer to the property as the "Shah property."

CMD filed a third-party complaint against State Auto on March 20, 2012. The third-party complaint contained three Counts. Count I alleged that State Auto committed common law bad faith through its delay in resolving the property damage claim of the plaintiffs and through its failure to protect CMD from litigation. Count II alleged, for similar reasons, that State Auto violated the *West Virginia Unfair Trade Practices Act*, *W.Va. Code*, 33-11-1 [1974], *et seq*.[2] Count III alleged a breach of State Auto's contractual obligation to CMD by failing to make insurance proceeds available where liability regarding the plaintiffs' claim was clear.

State Auto filed a motion to dismiss CMD's third-party complaint on the ground that CMD lacked standing to assert common law and statutory bad faith or unfair claims settlement practices regarding how State Auto handled the plaintiffs' lawsuit. According to State Auto, its only obligation to its insured, CMD, was to defend the lawsuit and indemnify CMD for any meritorious claims asserted by the plaintiffs. State Auto contends that it defended CMD and fully settled the plaintiffs' claims. State Auto alleged that CMD's breach

[2] Count II alleged violations of *W.Va. Code*, 33-11-4 [2002], subsections (9)(b), failing to act reasonably promptly regarding a claim arising under an insurance policy; (9)(f), not attempting in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability is reasonably clear; and (9)(g), causing litigation to recover amounts due under an insurance policy.

of contract theory fails for the same reason, *i.e.*, CMD lacks standing to assert any bad faith claim the plaintiffs may have had regarding how State Auto handled the lawsuit.[3]

On September 25, 2012, State Auto's motion to dismiss was denied in part. The order entered by the circuit court stated that the motion was denied "except that the Court will not allow the Third-Party Plaintiff CMD Plus, Inc. to assert claims that, in actuality, are claims of the Plaintiffs, Barry G. Evans and Ann M. Evans. To the extent any such claims have been asserted, those claims are dismissed."

Thereafter, the plaintiffs' lawsuit fully settled resulting in the plaintiffs receiving $325,000 paid by State Auto. The plaintiffs executed an agreement discharging the Shahs, CMD and State Auto from all claims arising from CMD's construction activities.

State Auto then filed a renewed motion to dismiss CMD's third-party complaint on the ground that State Auto met its obligations under the commercial general liability policy to defend and indemnify CMD. State Auto asserted that

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[3] In June 2012, State Auto was granted leave to file a complaint for declaratory judgment on the question of whether the commercial general liability policy covered the plaintiffs' property damage claim. The circuit court determined that none of the policy exclusions applied and that the plaintiffs' claim encompassed the "exact type of damage" the policy was intended to cover. The circuit court noted that, although State Auto was providing a defense to CMD in the underlying action under a reservation of rights, CMD incurred attorney fees as to the declaratory judgment in asserting that the plaintiffs' claim was covered under the policy. Consequently, the circuit court ordered State Auto to pay CMD attorney fees in the amount of $52,757.54.

> the duty to indemnify has not been breached because litigation in the underlying matter was resolved by settlement. Pursuant to the terms of that settlement, State Auto paid to resolve all claims asserted by the [plaintiffs] against CMD while securing a complete release of CMD of and from any and all liability relating to the allegations contained in the [plaintiffs'] Complaint. In fact, State Auto has secured a release to make sure that CMD cannot be sued again in the future. Under these circumstances, no judgment was entered against CMD and no settlement was negotiated wherein payment was demanded of CMD. Accordingly, as a matter of law, CMD cannot set forth any set of facts upon which it may base a claim for bad faith breach of the insurance contract against State Auto.

On November 10, 2015, the circuit court denied State Auto's renewed motion to dismiss. In the order, the circuit court simply restated each Count of CMD's third-party complaint and concluded that the allegations were sufficient to allow the matter to go forward. State Auto sought relief from the November 10, 2015, order by filing a petition for a writ of prohibition in this Court.

In *State ex rel. State Auto Property Insurance Companies v. Stucky*, 2016 WL 3410352 (W.Va. 2016), a Memorandum Decision issued on June 14, 2016, this Court determined that under Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* our analysis of State Auto's requested dismissal was limited to the allegations within the four corners of CMD's third-party complaint. The settlement of the lawsuit and other matters of evidence were not to be considered. This Court concluded that CMD's allegations of common law and statutory bad faith and breach of contract were sufficiently pled to

withstand State Auto's renewed motion to dismiss. Therefore, relief in prohibition was denied with the caveat that State Auto "*could file a motion for summary judgment after the completion of discovery in order to obtain relief*." (emphasis added)[4]

III. State Auto's Motion for Summary Judgment

The parties conducted discovery following the denial of relief in prohibition. In January 2017 State Auto filed a motion for summary judgment. State Auto asserted that there was no question of fact that it had provided CMD with a defense in the plaintiffs' lawsuit and that a settlement and release of the plaintiffs' damage claim was secured at no cost to CMD and without the entry of an adverse judgment. CMD filed a response to the motion, asserting that summary judgment on the third-party complaint was precluded by questions of fact. A number of exhibits were filed by the parties in support of their respective positions.

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[4] Chief Justice Ketchum and Justice Loughry filed dissenting Opinions in *State ex rel. State Auto Property Insurance Companies v. Stucky*. Chief Justice Ketchum stated that CMD's purported first-party claim failed for the following reasons: (1) CMD could not assert a "loss claim" because, under the commercial general liability policy, only damage to the plaintiffs' property (and not CMD's own property) was covered, and (2) CMD could not assert an "excess judgment claim" because there was no judgment, *i.e.*, State Auto settled all of the plaintiffs' claims. Similarly, Justice Loughry noted in his dissenting Opinion: "Because the CGL policy was not procured for the purpose of covering losses directly sustained by the insured, it stands to reason that there is no basis for a first-party bad faith claim."

On March 2, 2017, the circuit court denied State Auto's motion for summary judgment on the basis of unresolved questions of fact regarding CMD's allegations of common law and statutory bad faith and breach of contract. Noting CMD's assertion that State Auto's dilatory handling of the plaintiffs' damage claim resulted in the filing of the lawsuit, the circuit court concluded that CMD had a first-party claim under West Virginia law "in that CMD alleged that its insurer, State Auto, failed to use good faith in settling a claim by someone the insured allegedly harmed or injured."

In the current petition for a writ of prohibition, State Auto seeks relief from the circuit court's March 2, 2017, order. State Auto contends that it performed its obligations under the commercial general liability policy and that, because there are no genuine issues of material fact, CMD's third-party complaint should be dismissed as a matter of law.

IV. Standard for Relief in Prohibition

This Court has original jurisdiction in prohibition proceedings pursuant to art. VIII, § 3, of *The Constitution of West Virginia*. In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925): "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." *Accord* syl.

pt. 1, *State ex rel. Progressive Classic Ins. Co. v. Bedell*, 224 W.Va. 453, 686 S.E.2d 593 (2009).

State Auto contends that the circuit court exceeded its jurisdiction in allowing CMD's third-party complaint to go forward. We therefore apply the following guidelines set forth in syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Accord State ex rel. Rubenstein v. Bloom, 235 W.Va. 70, 72-73, 771 S.E.2d 717, 719-20 (2015).

V. Discussion

The dispositive facts with regard to CMD's third-party complaint against State Auto are not in dispute. CMD, a corporate entity, was issued, and paid the premiums for, a commercial general liability policy with State Auto. As a liability policy, coverage was provided to CMD for damage to the property of others, such as for the damage to the downhill property of the plaintiffs.

State Auto initially contested coverage of the plaintiffs' damage in a declaratory judgment proceeding. When the circuit court determined that coverage would be afforded, State Auto was ordered to pay CMD attorney fees and costs in the amount of $52,757.54. During the declaratory judgment proceeding, State Auto continued to provide CMD with a defense in the lawsuit filed by the plaintiffs. *See* note 3, *supra*.

The lawsuit was fully settled by State Auto resulting in the plaintiffs receiving $325,000. The settlement amount was paid by State Auto on CMD's behalf. CMD was therefore defended and indemnified by State Auto with respect to the lawsuit as required by the commercial general liability policy. The settlement was obtained at no cost to CMD, and no adverse judgment was entered in the circuit court.

Neither the plaintiffs nor the Shahs filed a third-party bad faith claim or an unfair claim settlement action against State Auto. Such an action would have been barred pursuant to *W.Va. Code*, 33-11-4a(a) [2005], which states: "A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice."

Prior to the enactment of *W.Va. Code*, 33-11-4a(a) [2005], this Court held in the syllabus of *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1998):

> A third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty.

Accord Loudin v. Nat'l Liab & Fire Ins. Co., 228 W.Va. 34, 39, 716 S.E.2d 696, 701 (2011). Nevertheless, the plaintiffs released any bad faith claim they may have had against State Auto pursuant to the settlement of their lawsuit seeking damages against the Shahs and CMD.

In this State, an insured has a right to bring a first-party common law or statutory bad faith action against its insurer. Such an action is defined in *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 369, 508 S.E.2d 75, 86 (1998), as follows: "[A] first-party bad

faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured."[5]

In this proceeding, we are asked to determine whether CMD's first-party bad faith claim should be permitted to go forward. The record, however, establishes that CMD was fully defended by its insurer, State Auto, throughout the lawsuit filed by the plaintiffs. State Auto also reached and paid a settlement of $325,000 to the plaintiffs, an amount well within the $1,000,000 policy limit. The defense and indemnification were provided at no cost to CMD, and no judgment was entered against CMD by the circuit court. On this record, we cannot see any evidence that State Auto failed to exercise good faith in meeting its obligations under the commercial general liability insurance policy.

Finally, CMD alleges that State Auto engaged in unfair claim settlement practices and thereby violated three subsections of the *West Virginia Unfair Trade Practices Act*. CMD asserts that State Auto, as a general business practice, failed to act reasonably promptly on the claim for coverage; failed to effectuate a prompt, fair, and equitable settlement of the

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[5] *See State ex rel. Universal Underwriters Ins. Co. v. Wilson*, _ W.Va. _, 801 S.E.2d 216, 223 (2017), wherein we stated: "A prerequisite for any first-party bad faith action is an underlying claim for coverage or benefits or an action for damages which the insured alleges was handled in bad faith by its insurer." *See also* syl. pt. 2 of *Loudin* stating that a first-party bad faith action "is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured." *Accord* syl. pt. 2, *Goff v. Penn Mut. Life Ins. Co.*, 229 W.Va. 568, 729 S.E.2d 890 (2012).

plaintiffs' claim; and forced the plaintiffs to file a lawsuit against the Shahs and CMD to resolve the amounts due under the commercial general liability policy.

Specifically, CMD alleges violations of the following subsections found in *W.Va. Code*, 33-11-4 [2002], of the UTPA:

> (9) No person shall commit or perform with such frequency as to indicate a general business practice any of the following: . . .
> (b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; . . .
> (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
> (g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered[.]

CMD has failed to establish genuine issues of material fact under those subsections of the UTPA. The first two subsections relied upon by CMD are subsections (9)(b) and (9)(f). In the context of a liability policy, such as the commercial general liability policy herein, subsections (9)(b) and (9)(f) are designed to protect plaintiffs who seek liability-related damages from an insured, and are not designed to protect the insured.

Subsection (9)(b) pertains to "communications with respect to claims," and subsection (9)(f) pertains to "settlements of claims in which liability has become reasonably clear."

With regard to a liability insurance policy, the term "claim" is used "in its common (and common sense) usage: an effort by a third party to recover money from the insured." *Evanston Ins. Co. v. Sec. Assur. Co*., 715 F. Supp. 1405, 1412 (N.D. Ill. 1989) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Illinois Corp*., 673 F. Supp. 300, 307 n.17 (N.D. Ill. 1987). "'Claim' ordinarily means a demand on the insured for damages resulting from the insured's alleged negligent act or omission." *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30, 33 (Wash. App. 1989). "[A] claim must relate to an assertion of legally cognizable damage, and must be a type of demand that can be defended, settled and paid by the insurer." *Evanston Ins. Co. v. GAB Bus. Servs., Inc*., 521 N.Y.S.2d 692, 695 (1987).

With respect to the State Auto policy issued to CMD, the "claim" at issue in subsections (9)(b) and (9)(f) is the demand upon CMD by the plaintiffs for compensation for damages resulting from CMD's alleged negligent act or omission. To the extent State Auto failed to "act reasonably promptly upon communications with respect to claims," or failed to "effectuate prompt, fair and equitable settlements of claims," in this action, the UTPA protects only the efforts by the plaintiffs to recover legally cognizable damages from CMD by way of State Auto's liability policy. As the insured protected by the commercial general liability policy, CMD itself can make no demand that can be defended, settled or paid by State Auto. Therefore, CMD has no standing to assert a claim under subsection (9)(b) or subsection (9)(f) of *W.Va. Code*, 33-11-4 [2002].

The third subsection of *W.Va. Code*, 33-11-4 [2002], relied upon by CMD is subsection (9)(g). That subsection prohibits an insurer from "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered." Subsection (9)(g) has no application to the circumstances herein.

"Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). Under a typical liability policy, an insured is not entitled to any "amounts" under the policy, and an insured can make no "claims for amounts" that would later be "reasonably similar to the amounts ultimately recovered." Under the terms of the commercial general liability policy issued by State Auto, the insured, CMD, was entitled to two things: a defense against the liability claim of the plaintiffs and indemnification of any damages within policy limits due to the plaintiffs as a result of CMD's alleged negligent act or omission. CMD cites no authority suggesting CMD had a right to "recover amounts due" under the State Auto policy. CMD therefore has no standing to assert a claim under *W.Va. Code*, 33-11-4(9)(g) [2002].

Syllabus point 3 of *Aetna Cas. and Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963), holds: "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." *Accord* syl. pt. 6, *Old Republic Ins. Co. v. O'Neal*, 237 W.Va. 512, 788 S.E.2d 40 (2016). Moreover, this Court recognized in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995), that summary judgment "is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss."

The insured, CMD, was defended and indemnified by its insurer, State Auto, with respect to the lawsuit filed by the plaintiffs as required by the commercial general liability policy. A settlement was obtained at no cost to CMD, and no adverse judgment was entered in the circuit court. Consequently, this Court is of the opinion that, as a matter of law, CMD cannot maintain a first-party action against State Auto for common law and statutory bad faith and breach of contract.[6]

[6] In addition to the handling of the plaintiffs' claim, CMD's third-party complaint also alleged bad faith regarding State Auto's purported delay in resolving the City of Charleston's claim for the relocation of a sewer line necessitated by the slippage. The record demonstrates, however, that State Auto defended CMD against the City's claim, provided coverage for the relocation of the sewer line and secured a release on behalf of CMD of all liability for damage. The settlement of the claim was without cost to CMD and no judgment was entered. We therefore find no merit in CMD's third-party complaint regarding the claim of the City of Charleston.

VI. Conclusion

This Court grants State Auto's requested relief in prohibition. The March 2, 2017, order of the Circuit Court of Kanawha County which denied State Auto's motion for summary judgment is set aside, and CMD's third-party complaint against State Auto is dismissed as a matter of law.

Writ granted.