No. 17-0257 - *State of West Virginia ex rel. State Auto Property Insurance Companies d/b/a/ State Auto Property and Casualty Insurance Company v. The Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, West Virginia; and CMD Plus, Inc.*

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OF WEST VIRGINIA

Workman, Justice, dissenting, joined by Justice Davis:

I respectfully dissent to the majority opinion, not only because the majority has improperly inserted itself into the role of trial court, but also because it has implicitly altered the law without even enunciating a new syllabus point.

This case has a remarkably tortured history, including factual complexities rendering it particularly unsuitable for disposition by summary judgment and writ of prohibition. To briefly summarize the salient events, a construction project by CMD resulted in damage in 2009 to property owned by Mr. and Mrs. Barry Evans. The Evanses sued CMD in 2011; CMD was insured by State Auto under a commercial general liability policy. CMD ultimately filed a third-party complaint against State Auto in March 2012, alleging bad faith,[1] violations of the Unfair Trade Practices Act by failure to attempt a good faith settlement, and breach of contract.

[1]CMD sought damages for its economic losses, attorney's fees, annoyance and inconvenience, mental anguish, and emotional distress under *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986). CMD did receive attorney's fees in the amount of $52,757.54 for prevailing in the June 2012 declaratory judgment action filed by State Auto, wherein it sought to deny coverage.

The circuit court denied State Auto's motion to dismiss in 2012, pending resolution of the underlying claim. Subsequent to four years of litigation, including an unsuccessful attempt by State Auto to deny coverage, State Auto finally resolved the Evanses' underlying claims against CMD in 2015. State Auto then filed another motion to dismiss CMD's action against it, and the circuit court once again denied the motion.

State Auto then sought relief from this Court, through a writ of prohibition; this Court wisely denied that request in *State ex rel. State Auto Prop. Ins. Companies v. Stucky*, No. 15-1178, 2016 WL 3410352 (W.Va. June 14, 2016) (hereinafter "*Stucky I*"). This Court held that CMD had met its burden of enumerating sufficient claims for its first-party bad faith, statutory bad faith, and breach of contract actions. This Court found that CMD had sufficiently pled its allegations and that State Auto's motion to dismiss was properly denied by the circuit court. We observed "CMD's third-party complaint against State Auto is a first-party bad faith action because CMD is suing its own insurer, State Auto, for *failing to use good faith in settling a claim* brought against CMD by the Evanses." *Id*. at *3 (emphasis supplied). We further noted:

> CMD alleged, inter alia, "[a]s a result of State Auto not properly handling CMD's claim, the Plaintiffs filed their Complaint against CMD and the Shahs for the alleged property damage to the Evans property." This states a first-party common law bad faith claim under our 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.

Id. at *4.

Chief Justice Ketchum and Justice Loughry dissented to that decision. Chief Justice Ketchum opined that CMD could not assert a loss claim because only damage to the plaintiffs' property was covered, and Justice Loughry opined that there was no basis for a first-party bad faith claim because the policy was "not procured for the purpose of covering losses directly sustained by the insured." *Id. at* *6-9.

State Auto thereafter filed a motion for summary judgment in the circuit court, and that request was denied. The circuit court held that CMD had alleged dilatory handling of the claim, resulting in the filing of a lawsuit, and had further alleged the absence of good faith in settling the claim. Thus, the circuit court held that summary judgment was inappropriate at that juncture.

In response, State Auto once again sought this Court's intervention, requesting a writ of prohibition and arguing that the circuit court clearly erred in denying its motion for summary judgment. I believe the majority's decision to grant a writ of prohibition is erroneous. First, a writ of prohibition is an extraordinary remedy to be utilized in extremely

limited instances.[2] Despite this Court's consistent observation that the writ "does not lie for errors or grievances which may be redressed in the ordinary course of judicial proceedings[,]" the majority permits State Auto to employ an extraordinary writ as essentially a substitute for appeal in this case. *County Court v. Boreman*, 34 W.Va 362, 366, 12 S.E. 490, 492 (1890). A writ of prohibition is inappropriate in this case, and courts should be exceedingly wary of overindulgence in extraordinary remedies and "should sparingly use a writ to review an order denying a motion for summary judgment and limit its use to cases where extraordinary and compelling reasons exist to warrant such relief." *State ex rel. Speer v. Grimm*, 599 S.W.2d 67, 69 (Mo. Ct. App. 1980). As this Court cautioned in pertinent part

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[2]In the oft-quoted syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court identified the five factors to be examined in conjunction with a request for a writ of prohibition:

> 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.

of syllabus point one of *State ex rel. USF&G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995),

> [T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Even if the majority somehow finds it appropriate to reach the merits of the summary judgment issue via an extraordinary writ, I find its ultimate conclusions improper. The moving party, State Auto, had the "*burden* of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, in part, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963) (emphasis supplied). In granting the writ, the majority references the axiomatic standard for issuance of a writ, as enumerated in syllabus point four of *Hoover*. *See Hoover*, 199 W.Va. at 14, 483 S.E.2d at 14. While the majority does not bother to evaluate each of the five factors, one can assume it finds the third factor dispositive; it considers the circuit court's denial of summary judgment clearly erroneous as a matter of law. I believe this is an inaccurate conclusion by the majority. State Auto asked the circuit court to grant summary judgment. Thus, State Auto had the burden of showing the absence of a genuine issue of material fact, and any doubt was to be resolved in favor of CMD.

In denying the motion for summary judgment, the circuit court found the existence of genuine issues of material fact and held: "After a review of the pleadings, the Motion, the memoranda, and the evidence presented, as well as oral argument, the Court finds that State Auto is not able to overcome the applicable legal standard for a Rule 56 motion for Summary Judgment." Further, the circuit court found "that there exist genuine issues of material fact regarding" CMD's claims. The circuit court recognized that the hillside slippage was reported to State Auto on March 9, 2009, and that State Auto was informed that the slippage was causing property damage to the Evanses. As early as March 26, 2009, State Auto was presented with a repair estimate of $14,563.50. At the direction of State Auto, the slip was not repaired and continued to deteriorate.

According to the circuit court's recitation of facts in evidence, State Auto subsequently hired an independent adjuster, Ken Shaffer, and an engineer, Darren Franck, for the purpose of proposing a remedy and resolution. Despite information presented to State Auto indicating that the slip had continued to worsen, had damaged a City of Charleston sewer line, and had jeopardized a pending sale of the newly-constructed home, no action was taken. When Mr. Franck advised State Auto that a submitted repair estimate should be approved, State Auto fired Mr. Franck. By October 2009, Mr. Shaffer also recommended that State Auto approve a repair for $151,000. State Auto refused the recommendation and fired Mr. Shaffer. State Auto was again advised that the delays were adversely affecting

CMD and causing damage including the loss of the sale of the newly-constructed home and additional interest payments. In May 2011, counsel for the Evanses submitted a settlement proposal that was allegedly substantially lower than the ultimate June 2015 settlement of $325,000. CMD asserts that the matter could have concluded nearly seven years earlier for $14,563.50.

The circuit court found this evidence sufficient to warrant denial of State Auto's summary judgment motion and reasoned as follows:

> CMD has put forth evidence that State Auto failed to act in good faith and deal fairly in regards to the claim. CMD's evidence includes testimony of C.K. Shah that the claim could have been resolved but-for the mismanagement and failure of State Auto. CMD also has put forth expert testimony from James McQueen, who has opined that State Auto established a course of conduct that falls far below industry standard for the handling of a complicated construction claim, and that State Auto put its own interests ahead of the interests of its insured policyholder from the fall of 2009 forward by taking a coverage position that was untenable, impractical, and grossly unfair to Evans and to its insured.
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> Additionally, CMD has put forth evidence that State Auto failed to properly defend and indemnify CMD throughout the claim process. Such evidence includes that State Auto failed to properly investigate the claim, failed to propose a remedy to resolve the Evans claim, failed to promptly and appropriately approve and resolve the claim, and failed to hire an independent lawyer to represent CMD's interests in the litigation filed by the Evans. This Court finds that the duty to defend and indemnify arc not met merely by providing the insured with an attorney and ultimately obtaining a release of the insured.

The circuit court relied upon this Court's definition of a first-party bad faith action as "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." *State of West Virginia ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 369, 508 S.E.2d 75, 86 (1998). The circuit court concluded that "CMD properly has asserted and has presented evidence to prove a first-party bad faith claim against State Auto" and further found: "There is no requirement under West Virginia law that claims falling under the first type of first-party bad faith action only arise where there has been an excess judgment."

The majority is apparently convinced by State Auto's argument. The majority holds: "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." The majority further finds:

> 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.

Thus, the majority implicitly alters the law without even enunciating a new syllabus point, suggesting that an insurer has only two duties under the commercial general liability policy

– provision of a defense and indemnification – and that eventual satisfaction of those two duties precludes any recovery in a bad faith action.

This over-simplified approach is myopic. As the circuit court astutely observed, "the duty to defend and indemnify are not met merely by providing the insured with an attorney and ultimately obtaining a release of the insured." On this matter's first appearance in this Court, a majority recognized that CMD is claiming bad faith in the settlement *process,* "for failing to use good faith in settling a claim." *Stucky I*, 2016 WL 3410352 at *3. The majority in the present case draws the line injudiciously by essentially agreeing with State Auto's assertion that provision of a defense and indemnification are sufficient, regardless of the manner in which such things are accomplished. However, paying in the end may not always be sufficient; an insurer must also adhere to its duty of good faith and fair dealing throughout the process. This is particularly imperative where the insured incurs damages of his own, as a result of any bad faith or unreasonable delay, in addition to the amount of indemnification. The allegations made by the insured below were that the insurer acted in bad faith in acknowledging and then denying coverage; by failing to resolve a claim where liability was clear for seven years; by causing the insured to lose the sale of a house that was affected by the slide, as well as to incur additional mortgage and finance charges, attorney's fees and other out-of-pocket expenses; by causing the insured to be sued both in a declaratory relief proceeding wherein the insured denied coverage after first

acknowledging it and the ultimate civil action; by firing both an independent adjuster and an engineer, each of whom recommended payment of the claim early on; and by causing the insured to suffer other consequent damages as the result of the long delay and obstreperousness of the insurer in failing to meet its obligations under the insurance contract in a timely manner.

This Court most assuredly should not be in the business of resolving factual issues, more properly left to a jury. The circuit court was justified in denying summary judgment, and, viewing the evidence in a light most favorable to the non-moving party, it is obvious that State Auto did not meet its burden of demonstrating that no genuine issue of material fact exists. We have uniformly held that a common law duty of good faith and fair dealing is an essential component of every insurance relationship. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 434, 504 S.E.2d 893, 897 (1998) (holding a "common law duty of good faith and fair dealing in insurance cases . . . runs between insurers and insureds and is based on the existence of a contractual relationship"); *see also Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*, 784 N.W.2d 542, 552 (Wis. 2010) ("An insurance company owes a duty to its insured to settle or compromise a claim made against the insured and to act in good faith in doing so.").

We have also consistently recognized that "[a] policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation. The goal is for all policyholders to get the benefit of their contractual bargain. . . ." *Miller v. Fluharty*, 201 W.Va. 685, 694, 500 S.E.2d 310, 319 (1997) (footnote omitted). "[W]hen an insured purchases a contract of insurance, he buys insurance – not a lot of vexatious, time-consuming, expensive litigation with his insurer." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 329, 352 S.E.2d 73, 79 (1986); *see also Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984) ("The motivation of the insured when entering into an insurance contract differs from that of parties entering into an ordinary commercial contract. By obtaining insurance, an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure commercial advantage. . . . Particularly when handling claims of third persons that are brought against the insured, an insurance company stands in a position similar to that of a fiduciary." (internal citations omitted)).[3] Thus, an insurer should not be permitted to unjustifiably delay or impede resolution of a claim in a manner that causes additional damages to its insured.

[3]"The relevant inquiry is whether the facts pleaded show the absence of any reasonable basis for denying the claim, 'i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.'" *Trimble*, 691 P.2d at 1142 (quoting *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978)).

Critically, the ultimate financial satisfaction is not singularly dispositive in bad faith cases. The circuit court's holding in this regard is thus consistent with prior holdings of this Court, as well as other jurisdictions. *See Stucky I,* 2016 WL 3410352 at *4 ("While this Court has acknowledged that common law bad faith claims falling under the first type above may or often arise where there is an excess judgment against the insured, we have not held that such claims can only arise where there has been an excess judgment."). In *Goodson v. American Standard Insurance Co. of Wisconsin*, 89 P.3d 409 (Colo. 2004), the Supreme Court of Colorado observed that the "basis for tort liability is the insurer's conduct in unreasonably refusing to pay a claim and failing to act in good faith, not the insured's ultimate financial liability." *Id.* at 414 (internal citations omitted). Consequently, "the fact that an insurer eventually pays an insured's claims will not prevent the insured from filing suit against the insurer based on its conduct prior to the time of payment." *Id.* Neither the absence of an excess judgment nor ultimate settlement for policy limits is necessarily fatal to an insured's claim for bad faith. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818 (Mo. 2014); *see also Roehl,* 784 N.W.2d at 553 (addressing insurer's actions exposing insured to liability for sums within deductible amount and holding "the breach of duty from which the tort claim follows is not of any explicit term of the contractual obligations but of the implicit duty to act in good faith in carrying out the insurance contract."); *Trimble*, 691 P.2d at 1142 (holding that an actual judgment in excess of policy limits was not a necessary prerequisite to liability).

As the Supreme Court of Kansas accurately summarized in *Bollinger v. Nuss*, 449 P.2d 502 (Kan. 1969): "In the final analysis, the question of liability depends upon the circumstances of the particular case and must be determined by taking into account the various factors present, rather than on the basis of any general statement or definition." *Id.* at 511-12. In penning this dissent, I certainly do not profess to know how a jury would have resolved the present case or what the ultimate verdict should have entailed.[4] I do, however, vehemently oppose a resolution via summary judgment awarded by *this Court* in the form of the majority's grant of a writ of prohibition.

I also find it extremely disconcerting that this Court has demonstrated an increasingly frequent penchant for rushing to ultimate judgment without the full benefit of thorough proceedings and rulings from the circuit court level. Principles of judicial restraint would obviously advise against such impetuousness. As I emphasized in my separate opinion in *Morrisey v. West Virginia AFL-CIO*, No. 17-0187, 2017 WL 4103745 (W.Va.

[4]I also recognize another outstanding issue which would have benefitted from jury resolution. State Auto had raised a claim of timeliness of CMD's bad faith claims. When first confronted with this assertion in State Auto's attempt to dismiss the case on a Rule 12(b) motion, this Court explained that our "examination of the pleadings indicates that this is not the type of case from which only one conclusion may be drawn regarding the timeliness of CMD's bad faith claims. For this reason, we find no merit to State Auto's timeliness argument." *Stucky I,* 2016 WL 3410352 at *5. This Court also observed, in *Gaither v. City Hospital, Inc*., 199 W.Va. 706, 487 S.E.2d 901 (1997), that "[i]n the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." *Id.* at 714-15, 487 S.E.2d at 909-10.

Sept. 15, 2017), an "appellate court must refrain from adopting a position that has not been tested 'in the crucible of the adversary process[.]'" *Id.* at *8 (Workman, Justice, concurring in part, and dissenting in part) (quoting Peter J. Rubin, *Keynote Address: Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 Ohio St. L.J. 825, 832 (2009)). Discussing the emboldening, yet sobering, recognition that courts do indeed "have the last word," Justice Rehnquist observed as follows in his dissent in *Furman v. Georgia*, 408 U.S. 238 (1972):

> But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone dissenting in *United States v. Butler* must be constantly borne in mind:
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> > [W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.

Id. at 467 (Rehnquist, Justice, dissenting) (internal citations omitted). That sense of self-restraint must be rigorously observed, and this Court must be vigilant in wielding its power wisely. We must not impose, by judicial fiat, a result that is properly achievable only by allowing the cases to play out on the stages of the lower courts. While the majority rushes headlong to judgment, such action contravenes fundamental principles of judicial review. By deciding this case on a factual basis without any guidance on the law relating to the underlying issue, the majority preserves their freedom to decide yet another case on another day with similar issues differently, if they please, and leaves the law in this arena very murky.

Based upon the foregoing, I resolutely dissent. I am authorized to state that Justice Davis joins me in this separate opinion.