IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Sean McKee,
Plaintiff Below, Petitioner

vs. **25-ICA-85**
(CC-31-2021-C-280)

State Farm Mutual Automobile Insurance Company, and Parker Hall Insurance Agency, Inc.,

Defendants Below, Respondents.

On Appeal from the Circuit Court of Monongalia County
Case No. CC-31-2021-C-280
The Honorable Cindy S. Scott

Petitioner's Brief

Submitted By:

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ASSIGNMENTS OF ERROR

1. The Monongalia County Circuit Court erred in finding that there is no genuine issue as to any material fact in its granting of Defendant's Motion for Partial Summary Judgment as to Count I of the Complaint, by Orders entered January 5, 2024, and February 6, 2025.

2. The Monongalia County Circuit Court erred in failing to view the evidence in light most favorable to the nonmoving party.

STATEMENT OF THE CASE

This is a civil suit brought by Sean C. McKee (hereinafter referred to as "Mr. McKee") against State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm") and Parker Hall Insurance Agency Inc. (hereinafter referred to as "Parker Hall"), which stems from Mr. McKee's automobile accident and claims for personal injuries, bad faith, and unfair claims settlement practices. [J.A. 1-10]

In September 2019, Mr. McKee was insured by State Farm (Policy No. 212-5863-C14-48P) through its authorized agent Parker Hall. This policy covered a 2015 Ford Focus and provided underinsurance coverage.[1] [J.A. 47] There is no allegation that that policy was not in effect in September 2019 or that the premium was not paid

[1] The policy used as an Exhibit in State Farm's Motion for Partial Summary Judgment is for the policy period of July 20, 2015, to March 14, 2016. This policy renewed every six months and was in effect on September 12, 2019.

and current. On September 12, 2019, Mr. McKee traded in the 2015 Ford Focus for a 2016 Subaru WRX, from Ron Lewis Chrysler Dodge Jeep Ram of the Pittsburgh, Pennsylvania area. [J.A 43] On that same date – September 12, 2019 -- Mr. McKee called Parker Hall to advise of the trade/purchase of the automobiles. [J.A. 122] That call was placed from phone number (304) 777-9737 to (304) 296-2228, a number registered with Parker Hall and lasted four (4) minutes and forty-eight (48) seconds. [J.A. 122] In addition, upon Mr. McKee's purchase of his new vehicle, an employee of Ron Lewis Chrysler Dodge Jeep Ram contacted Parker Hall to inform the insurance company of Mr. McKee's purchase. Two days later, on September 14, 2019, Mr. McKee's new vehicle was delivered to Ron Lewis Chrysler Dodge Jeep Ram of Waynesburg, Pennsylvania, and was retrieved by Mr. McKee and his father. Pursuant to the requirements of his State Farm policy, Mr. McKee called and informed Parker Hall of the purchase/trade and the subsequent delivery of the Subaru, to substitute coverage of the Ford for the Subaru under the existing policy. Parker Hall and/or State Farm failed to change the insurance policy accordingly to cover the newly purchased vehicle.

On October 3, 2019, Mr. McKee was injured in a head-on vehicular collision while driving the 2016 Subaru WRX. The wreck occurred on University Avenue in Morgantown, West Virginia, when Larissa Wiencek failed to yield the right of way to Mr. McKee. Mr. McKee suffered multiple major injuries as a result of the accident. On October 4, 2019, Mr. McKee again placed a phone call from phone number (304) 777-9737 to (304) 296-2228, this time to report the accident. [J.A. 123-124]

Mr. McKee, by letter, on or about March 15, 2021, advised State Farm of his settlement with the tortfeasor and of his intent to seek compensation under the underinsured motor vehicle ("UIM") provision of his policy in the amount of One Hundred Thousand Dollars ($100,000.00) / Three Hundred Thousand Dollars ($300,000.00) of coverage for him, pursuant to his policy. [J.A. 136-137] Underinsured motor vehicle coverage under State Farm Policy No. 212-5863-C14-48P provides as follows:

> ***We*** will pay compensatory damages for ***bodily injury*** and ***property damage*** an ***insured*** is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured***. The ***bodily injury*** and ***property damage*** must be caused by an accident that involves the operation, maintenance, or use of an ***underinsured motor vehicle*** as a motor vehicle. [J.A 69]

Insured is defined as:

1. ***you***;
2. ***resident relatives***;
3. any other ***person*** while ***occupying*** or otherwise using:
    a. ***your car***;
    b. a ***newly acquired car***; or
    c. a ***temporary substitute car***.

[J.A 68]

Newly Acquired Car is defined as:

A ***car*** newly ***owned by you***. A ***car*** ceases to be a ***newly acquired car*** on the earlier of:

1. the effective date and time of a policy, including any binder, issued by ***us*** or any other company that describes the ***car*** as an insured vehicle; or

2. the end of the 14th calendar day immediately following the date the ***car*** is delivered to ***you***.

[J.A. 56]

By letter dated July 28, 2021, State Farm informed Mr. McKee of its refusal to extend coverage to Mr. McKee, citing his failure to meet the definition of a newly acquired vehicle, as defined by their policy. [J.A. 129-132]

Mr. McKee filed a Complaint in the Monongalia County Circuit Court on or about September 30, 2021. [J.A 1-10] On August 28, 2023, State Farm filed a Motion for Partial Summary Judgment. [J.A 32-101] On December 11, 2023, Plaintiff filed a Response to State Farm's Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment. [J.A. 102-137] By Order entered January 5, 2024, the Court granted State Farm's Motion for Partial Summary Judgment as to Count I and Denied Plaintiff's Cross Motion for Summary Judgment. [J.A. 202-207] On February 2, 2024, Plaintiff file a Motion for Rule 54(b) certification. [J.A.208-210] On February 6, 2025, the Order certifying summary judgment pursuant to Rule 54(b) was entered. [J.A. 237-239]

SUMMARY OF ARGUMENT

In this case, because State Farm disputes the aforesaid notice, genuine issues of material fact exist regarding whether Mr. McKee took reasonable actions and methods to timely reflect the trade of the 2015 Ford Focus and substitution of the newly purchased Subaru to his State Farm insurance policy, thus providing him with UIM coverage. Mr. McKee asserts that the automobile dealership where he purchased the vehicle called Parker Hall to inform it of the purchase. Mr. McKee further contends that he called Parker Hall to inform it of his purchase of the 2016

Subaru WRX and to have it added to his State Farm policy in place of the 2015 Ford Focus. [J.A. 125-127] AT&T cell phone records for telephone number (304) 777-9737 to (304) 296-2228[2] show that Mr. McKee called Parker Hall on September 12, 2019, at 3:35 p.m. and that this call lasted 4 minutes and 48 seconds. [J.A. 122] Further, Mr. McKee submitted an affidavit stating that he spoke to a female during this phone call to whom he provided the VIN for the vehicle, the make, model, and year of the vehicle, and requested that the newly purchased Subaru be added to his State Farm insurance policy that was then in place. [J.A. 125-127] Unbeknownst to Mr. McKee, Parker Hall did not notify State Farm of the purchase of the 2016 Subaru, and it was not added to his policy.

Twenty-one days later, on October 3, 2019, Mr. McKee was involved in a motor vehicle collision. On October 4, 2019, Mr. McKee contacted Parker Hall to inform them of the accident. [J.A. 123-124]

By letter dated July 19, 2021, Mr. McKee, through his counsel, advised State Farm of his pending settlement with the tortfeasor and seeking payment of the UIM policy limits. [J.A. 128] State Farm denied Mr. McKee coverage of the UIM provisions of the policy, stating that the 2016 Subaru was not listed as a covered vehicle and that it did not qualify as a "newly acquired" vehicle. [J.A. 129-132] State Farm takes the position that Mr. McKee did not notify Parker Hall or State Farm of the purchase of the 2016 Subaru WRX until October 4, 2019. [J.A. 32-42, 184-185] This is clearly a genuine question of material fact to be tried.

[2] (304) 296-2228 is the landline telephone number registered with Parker Hall Insurance Agency, Inc.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 argument and disposition by a memorandum decision. *See* W. Va. R. App. P. 19(a) ("cases involving assignments of error in the application of settled law "and "cases claiming an unsustainable exercise of discretion where the law governing that discretion is settle").

ARGUMENT

This Court's standard of review arising from an appeal from a circuit court's order granting summary judgment is *de novo*. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). "In reviewing a circuit court's order granting summary judgment this Court, like all reviewing courts, engages in the same type of analysis as the circuit court. That is 'we apply the same standard as a circuit court', reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party". State ex rel. Vanderra Res., LLC v. Hummel, 242 W.Va. 35, 42, 829 S.E.2d 35, 42 (2019).

1. **The Monongalia County Circuit Court erred in finding that there is no genuine issue as to any material fact in its granting of Defendant's Motion for Partial Summary Judgment as to Count I, by Orders entered January 5, 2024, and February 6, 2025.**

The Monongalia County Circuit Court incorrectly determined that there was no genuine issue as to any material fact as to whether Mr. McKee's had underinsurance motorist coverage (UIM) on October 3, 2019. [J.A. 202-207, 237-239]

"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. 1, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, Id.

The party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence," and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed. 2d 202, 214 (1986).

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

"Any person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured." W. Va. Code § 33-12-22.

In the present case, genuine issues of material fact exist regarding whether the Plaintiff, Mr. McKee, took reasonable measures to timely add his newly purchased vehicle to his State Farm insurance policy, providing him with UIM coverage.

Mr. McKee asserts that on September 12, 2019 – the date of the purchase -- he called Parker Hall to inform them of his purchase of a 2016 Subaru WRX with a trade in of the 2015 Ford Focus, which had already been covered on his existing State Farm policy. [J.A. 122, 125-127] State Farm disputed this assertion and thus subpoenaed AT&T for the cell phone records for phone number (304) 777-9737, the phone Mr. McKee used to place the call. [J.A. 121] These phone records showed that he called Parker Hall on September 12, 2019, at 3:35 p.m. [J.A. 122] This call lasted 4 minutes and 48 seconds per the cell phone records provided by AT&T. [J.A. 122] Mr. McKee submitted an affidavit stating that he spoke to a female during this phone call to whom he provided the VIN for the vehicle, the make, model, and year of the vehicle and requested that Parker Hall add the newly purchased Subaru to the State Farm insurance policy that was then in place. [J.A. 125-127]

Per his affidavit, Mr. McKee states further that a call was made to Parker Hall again on September 14, 2019, the day he took possession of the vehicle. [J.A. 125-127] This time a voice message was left advising Parker Hall of the delivery of the 2016 Subaru. Unbeknownst to Mr. McKee, Parker Hall did not notify State Farm of the purchase of the 2016 Subaru, and it was not added to his policy.

On October 3, 2019, Mr. McKee was involved in a motor vehicle collision. On October 4, 2019, he contacted Parker Hall to inform them of the accident. [J.A. 125-

127] Mr. McKee twice spoke to someone at Parker Hall that afternoon. These calls are also reflected on Mr. McKee's cell phone records. [J.A. 123-124]

State Farm takes a very narrow stance on the situation and simply argues that the 2016 Subaru WRX was not listed on Mr. McKee's policy on October 3, 2019; therefore, there is no UIM coverage available to Mr. McKee. [J.A. 32-42, 175-201] State Farm obstinately chose to ignore and deny Mr. McKee's insistence that he did call Parker Hall and request coverage of the Subaru. Instead, State Farm unilaterally decided the dispute in its own favor and wrongly sought imprimatur from the circuit judge.

The Court, likewise, did not consider the whole picture of why and how the Subaru was not on the policy. [J.A. 202-207] This issue is not as straight forward and cut and dried as State Farm would have one believe. The Court did not give consideration to Mr. McKee's version of events to explain the lack of UIM coverage. But for Parker Hall's lack of diligence, the Subaru would have been listed on the policy on October 3, 2019.

Whether Mr. McKee reported the purchase of the 2016 Subaru WRX to State Farm via Parker Hall prior to the accident and whether Parker Hall's failure to assist Mr. McKee contributed to his lapse in automobile coverage are crucial and material factual issues which are in dispute. These factual issues are relevant, and need resolved in order to determine whether there is UIM coverage. By virtue of Mr. McKee proffering evidence as to his phone calls to Parker Hall, this evidence satisfies the burden of offering more than a mere "scintilla of evidence," sufficient for a reasonable jury to find in his favor.

Mr. McKee insists that he requested coverage of the 2016 Subaru WRX from Parker Hall for his State Farm policy prior to the accident. Despite independent evidence of a phone call being placed to Parker Hall on September 12, 2019, from Mr. McKee's cell phone, and Mr. McKee's affidavit, State Farm and Parker Hall maintains that Mr. McKee did not report the purchase of the new vehicle until after the accident. [J.A. 184-185] Although State Farm and Parker Hall acknowledge that a phone call lasting more than four minutes was placed on September 12, 2019, they dispute that that call was completed. [J.A. 219-220] Rather, they submit that Mr. McKee sat on hold for four minutes and forty-eight seconds and there was never any conversation. [J.A. 184-185, 219-220] Instead, State Farm and Parker Hall maintain that there was never a request to add the Subaru until October 4, 2019 – the day after the accident.

Contrary to State Farm's position, this dispute is very relevant as to whether Mr. McKee is entitled to UIM coverage for the October 3, 2019, accident.

Mr. McKee had a current, existing auto policy in place with UIM coverage on a 2015 Ford Focus. There has been no claim that the premium had not been paid on the policy. Mr. McKee attempted to replace the 2015 Ford Focus with a 2016 Subaru WRX when he traded in the Ford. State Farm had already received a premium that could have been transferred to the replacement Subaru.

The circumstances surrounding those initial attempts – including when Mr. McKee called, for what purpose, and whether such attempts were thwarted by failure of Parker Hall – are undoubtedly disputed at this time. There are genuine

issues of material fact regarding whether Mr. McKee was prevented from complying with State Farm's 14-day policy transfer requirements, due to Parker Hall's failure to record, alter, and/or assist Mr. McKee.

The central issue in this case is not the policy limits but whether Mr. McKee's Subaru vehicle should have been covered at the time of the accident. Given the disputed facts surrounding Plaintiff's attempt to transfer said coverage, the application of the 14-day policy requirement, and Parker Hall Insurance Agency's role in the process, summary judgment was inappropriate. These are material factual disputes that should be resolved by a jury, not decided as a matter of law. If the jury determines that the Plaintiff did, indeed, timely notify agent Parker Hall (and therefore State Farm) of the trade/purchase of the Subaru, then there will be coverage under the policy. Therefore, the Monongalia County Circuit Court erred in granting Defendant's Motion for Partial Summary Judgment.

Furthermore, State Farm and Parker Hall emphasize the strict adherence to the fourteen-day window in which the purchase qualifies as a newly acquired car. The accident occurred on October 3, 2019, or nineteen (19) days after taking possession of the Subaru. State Farm and Parker Hall argue that Mr. McKee did not notify them of the purchase of the vehicle until October 4, 2019, missing the window of newly acquired car by *six (6) days*.

"In cases which involve liability claims against an insurer, several factors must be considered before the Court can determine if the delay in notifying the insurance company will bar the claim against the insurer. The length of the delay in notifying

the insurer must be considered along with the reasonableness of the delay. If the delay appears reasonable in light of the insured's explanation, the burden shifts to the insurance company to show that the delay in notification prejudiced their investigation and defense of the claim. If the insurer can produce evidence of prejudice, then the insured will be held to the letter of the policy and the insured barred from making a claim against the insurance company. If, however, the insurer cannot point to any prejudice caused by the delay in notification, then the claim is not barred by the insured's failure to notify." Syl. Pt. 2, Dairyland Ins. Co. v. Voshel, 189 W.Va. 121, 428 S.E.2d 542 (1993). *See* also, State Auto. Mut. Ins. Co. v. Youler, 183 W.Va. 556 (1990).

Although Youler involved an insured giving notice of an accident, the same reasoning can be applied to the circumstances of this case. The Court in Youler held as follows:

> In the typical case, the insured must put on evidence showing the reason for the delay in giving notice. Once this prerequisite is satisfied, the insurer must then demonstrate that it was prejudiced by the insured's failure to give notice sooner. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice sooner will not be a bar to the insured's recovery. If the insurer puts on evidence of prejudice, however, the reasonableness of the notice ordinarily becomes a question of fact for the fact finder to decide.

Youler at 563, 744.

In this case, no prejudice exists. Mr. McKee asserts that he notified Parker Hall and State Farm regarding coverage of the Subaru on September 12, 2019, but even adopting State Farm's argument that it first became aware of the vehicle on October

4, 2019, a mere six (6) days had passed since the deadline set by the policy. At no time has State Farm or Parker Hall asserted prejudice as a result of the delay. State Farm has not presented any evidence of harm or prejudice in investigating the accident or the claims. A delay of six (6) days is not unreasonable and the burden should shift to State Farm to show that this delay impaired their investigate and defense of the claim. If State Farm cannot point to any unfairness or detriment caused by the delay, then Mr. McKee's claim should not be barred by the delay of six (6) days.

2. **The Monongalia County Circuit Court erred in failing to view the evidence in light most favorable to the nonmoving party.**

The Monongalia County Circuit Court failed to apply this standard, improperly resolving factual disputes in favor of the moving party instead of allowing them to be determined by a jury.

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202, 212 (1986).

In fact, Courts are to draw "any permissible inferences from the underlying facts in the most favorable light to the party opposing the motion." Matsushita Elec.

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986).

The nonmoving party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. Anderson, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214. Such evidence must have "substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a 'trial worthy' issue." Williams v. Precision Coil Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

Mr. McKee has presented evidence to show that he contacted Parker Hall within the required 14-day window regarding the newly purchased vehicle with trade in of the Ford Focus and coverage of the Subaru under his existing State Farm policy. [J.A. 122, 125-127] Importantly, Mr. McKee's cell phone records show that he called Parker Hall on September 12, 2019. This call lasted 4 minutes and 48 seconds. Mr. McKee also submitted his affidavit in which he described the details of the phone conversation he had with a female Parker Hall employee on September 12, 2019 – the day he purchased the vehicle. Specifically, Mr. McKee provided detailed information about the vehicle, including VIN, year, make, and model. Mr McKee explicitly requested that the 2016 Subaru be added to his existing insurance policy 212 5863-C14-48P. Mr. McKee insists that the conversation he had with a male

Parker Hall employee on October 4, 2019, was to advise State Farm of the accident, **not** to report the purchase of the Subaru.

Whether proper and timely notification was made and whether Parker Hall's failure to fulfill its obligation to assist Mr. McKee contributed to his lapse in automobile coverage are not only factual issues which should have been determined as "genuine, material issues," but in turn, should have been found in favor of the nonmoving party – Mr. McKee. By virtue of Mr. McKee proffering evidence as to his phone calls to Parker Hall, such evidence must satisfy the burden of offering more than a mere "scintilla of evidence," sufficient for a reasonable jury to find in his favor.

The trial court also failed to consider conflicting evidence as it pertains to the actions – or inactions – of Parker Hall in the matter at hand. Mr. McKee contends that despite his best efforts, Parker Hall failed to transfer his automobile policy coverage to his newly purchased vehicle. This in itself raises factual disputes as to whether Parker Hall acted negligently in assisting Mr. McKee. By the trial court's resolving these disputed facts, the court improperly acted as a factfinder, a job for the jury.

Whether Sean McKee had UIM coverage under his State Farm policy should be determined by a trier of fact – not a judge on a motion for summary judgment.

The trial court adopted State Farm/Parker Hall's position that Mr. McKee failed to comply with State Farm's 14-day requirement. This is improper at the summary judgment stage, the stage in which all reasonable inferences are to be drawn in favor of the nonmoving party.

In addition, in its Order the Court described the factual dispute in paragraph 4 but then goes on to state the standard of when granting a motion for summary judgment is proper in paragraph 6. [J.A. 202-207] This divergence in the opinion is clear error.

Because the trial court improperly weighed disputed evidence, disregarded testimony favorable to Mr. McKee, and failed to draw reasonable inferences in Mr. McKee's favor, the Monongalia County Circuit Court's decision to grant summary judgment was in error. There are facts that are in dispute; therefore, the issue of coverage is not a question of law. These factual disputes should have been left for a jury to decide, and the judgment should therefore be reversed.

CONCLUSION

Appellant, Mr. Sean C. McKee, respectfully requests that this Court find that the Monongalia County Circuit Court erred in granting State Farm's Motion for Partial Summary Judgment, and this Court reverse and remand for further proceedings, including a trial by jury to determine the questions of fact that exist in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May 2025, I served a true copy of the foregoing **"Petitioner's Brief"** upon the following, via the Court's E-Filing system, which will provide notification of the same to counsel of records as follows:

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