2019 WL 2092578
Only the Westlaw citation is currently available.
United States District Court, W.D. Oklahoma.

Tallie MCKINNEY, Plaintiff,
v.
PROGRESSIVE DIRECT INSURANCE COMPANY d/b/a Progressive, and CSAA General Insurance Company d/b/a AAA Insurance, Defendants.

NO. CIV-18-0767-HE
|
Signed 05/13/2019

Attorneys and Law Firms

Gregory W. Milstead, Rex K. Travis, Travis Law Office, Oklahoma City, OK, Thomas E. Baker, Morgan Baker & Morgan, Tulsa, OK, for Plaintiff.

Brad L. **Roberson**, Dawn M. Goeres, Paul M. Kolker, **Roberson** Kolker Cooper & Goeres PC, Oklahoma City, OK, for Defendant Progressive Direct Insurance Company.

Gerard F. Pignato, Justin R. Williams, Pignato Cooper Kolker & **Roberson** PC, Oklahoma City, OK, for Defendant CSAA General Insurance Company.

ORDER

JOE HEATION, CHIEF U.S. DISTRICT JUDGE

***1** Linda McKinney ("McKinney"), as mother and next friend of Tallie McKinney, then a minor, filed this action against defendants Progressive Direct Insurance Company ("Progressive") and CSAA General Insurance Company ("CSAA"), alleging breach of contract and bad faith. Tallie McKinney ("Tallie") has since reached her majority and has been substituted as the plaintiff. CSAA has moved for summary judgment on plaintiff's bad faith claim.

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Material facts are those which "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* To determine whether this standard is met, the court views the evidence in the light most favorable to the non-moving party. Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014). "[T]he plain language of Rule 56(c) mandates entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Background

On June 26, 2017, Tallie was a passenger in a vehicle driven by her friend Sierra Shannon ("Shannon"). Shannon caused a single-car accident. As a result Tallie suffered injuries, including fractures of her right arm and pelvis, which required surgery.

McKinney was the named insured on an insurance policy issued by CSAA. Tallie was identified as a driver on the CSAA policy. Both Shannon and the vehicle she was driving were insured under an insurance policy issued by Progressive. Progressive offered plaintiff the full $ 100,000 limit of liability coverage, which plaintiff accepted in exchange for a release. [1]

Plaintiff submitted a claim to CSAA seeking uninsured("UM")/underinsured ("UIM") benefits. CSAA evaluated plaintiff's claim and determined the total evaluation range was $ 108,482.88 - $ 118,482.88. CSAA then extended an offer to plaintiff's counsel in the amount of $ 8,482.88. Plaintiff rejected this offer without making a counter-offer or discussing CSAA's evaluation further. A few months later, plaintiff filed this case alleging breach of contract and bad faith claims against CSAA and Progressive.

During the course of discovery in this lawsuit, additional documentation was provided to CSAA for its ongoing review in connection with plaintiff's UM/UIM claim, and CSAA re-evaluated the claim and determined a new range of $ 133,888.04 to $ 158,888.04. CSAA then extended a new offer to plaintiff in the amount of $ 33,888.04. [2]

CSAA never received a response from plaintiff or her counsel.

Analysis

***2** Plaintiff asserts that CSAA's initial evaluation and offer were unreasonable and were made in bad faith. Specifically, plaintiff contends that CSAA failed to conduct a reasonable investigation into plaintiff's claim, failed to perform a reasonable evaluation, and failed to promptly pay plaintiff's claim. CSAA contends that its investigation and evaluation of plaintiff's UM/UIM claim was reasonable and the subject of a legitimate value dispute between the parties.

"[A]n insurer has an implied duty to deal fairly and act in good faith with its insured and ... the violation of this duty gives rise to an action in tort...." Christian v. Am. Home Assurance Co., 577 P.2d 899, 904 (Okla. 1978). Further, the Oklahoma Supreme Court has recognized:

> there can be disagreements between insurer and insured on a variety of matters such as insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured.

Id. at 905.

In order to establish a bad faith claim, an insured "must present evidence from which a reasonable jury could conclude that the insurer did not have a reasonable good faith belief for withholding payment of the insured's claim." Oulds v. Principal Mut. Life Ins. Co., 6 F. 3d 1431, 1436 (10th Cir. 1993). In order to determine whether the insurer acted in good faith, the insurer's actions must be evaluated in light of the facts the insurer knew or should have known at the time the insured requested the insurer to perform its contractual obligation. *Id.* at 1437. The essence of the tort of bad faith is

> unreasonable, bad-faith conduct, including the unjustified withholding of payment due under a policy, and if there is conflicting evidence from which different inferences might be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case.

McCorkle v. Great Atl. Ins. Co., 637 P.2d 583, 587 (Okla. 1981).

However, the mere allegation that an insurer breached its duty of good faith and fair dealing does not automatically entitle the issue to be submitted to a jury for determination. Oulds, 6 F.3d at 1436. The Tenth Circuit has held:

> [a] jury question arises only where the relevant facts are in dispute or where the undisputed facts permit differing inferences as to the reasonableness and good faith of the insurer's conduct. On a motion for summary judgment, the trial court must first determine, under the facts of the particular case and as a matter of law, whether insurer's conduct may be reasonably perceived as tortious. Until the facts, when construed most favorably against the insurer, have established what might reasonably be perceived as tortious conduct on the part of the insurer, the legal gate to submission

> of the issue to the jury remains closed.

Id. at 1436-37 (internal citations omitted).

"A claim must be paid promptly unless the insurer has a reasonable belief that the claim is legally or factually insufficient." Willis v. Midland Risk Ins. Co., 42 F.3d 607, 611-12 (10th Cir. 1994). "To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances. If the insurer fails to conduct an adequate investigation of a claim, its belief that the claim is insufficient may not be reasonable." *Id.* at 612 (internal quotations and citation omitted).

***3** Based upon the parties' submissions, and construing the facts most favorably against CSAA, the court concludes plaintiff has not produced evidence which would support an inference of unreasonable conduct on CSAA's part, such as would create a justiciable question as to the existence of the bad faith tort. Plaintiff instead relies largely on conclusory allegations, some of which are contrary to defendant's uncontested evidence. Specifically, plaintiff alleges, with no supporting evidence, that CSAA did not use the medical authorization it was given to obtain plaintiff's medical records and bills. Brett Greiwe, a supervisor in CSAA's Senior Casualty Department, however, states in his affidavit that CSAA did use the medical authorization. *See* Affidavit of Brett Greiwe, attached as Exhibit 5 to CSAA's Motion for Partial Summary Judgment, at ¶ 3. Further, plaintiff asserts that due to the nature of Tallie's injuries, any valuation should have exceeded the available liability insurance. CSAA's evaluations, including its initial valuation, however, did exceed the $ 100,000 in available liability insurance.

Additionally, plaintiff asserts that CSAA's failure to pay any UM/UIM benefits at all constitutes a failure to deal fairly and in good faith. However, it is undisputed that CSAA initially offered to pay $ 8,482.88, and later offered to pay $ 33,888.04, to plaintiff but required plaintiff to sign a release prior to the payment. Oklahoma courts have concluded it is not unreasonable for an insurer to condition payment of UM/UIM proceeds on a signed release of future claims and that such a condition, without more, does not breach the obligation of good faith and fair dealing. *See* Gov't Emps. Ins. Co. v. Quine, 264 P.3d 1245, 1251 (Okla. 2011); Beers v. Hillory, 241 P.3d 285, 293 (Okla. Civ. App. 2010). Finally, plaintiff asserts that she incurred $ 147,134.14 in medical expenses and CSAA's evaluation is clearly unreasonable in light of these incurred expenses. [3] However, both plaintiff's list of medical expenses and CSAA's affidavits from plaintiff's medical providers show that plaintiff's medical providers reduced or discounted her bills and that plaintiff only paid $ 33,685.39 in medical expenses. Basing its evaluation on medical expenses actually paid, rather than those billed but not pursued, is not unreasonable.

The court concludes that CSAA is entitled to summary judgment on plaintiff's bad faith claim. Its Motion for Partial Summary Judgment [Doc. #36] is therefore **GRANTED**.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 2092578

Footnotes

1 *Plaintiff's release of Progressive is limited to coverage under the liability coverage part of its policy and specifically reserves plaintiff's claims for underinsured motorist benefits under both Progressive's policy and CSAA's policy, as well as her bad faith claims against CSAA and Progressive.*

2 *In her response, plaintiff states that her bad faith claim is predicated upon CSAA's pre-filing conduct, not its post-filing conduct.*

3 *Plaintiff has not submitted supporting documentation for these allegedly incurred expenses.*

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Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

Elissa LANE; Kyle Stone, as father and next friend of L.S., a minor, Plaintiffs - Appellants,
v.
PROGRESSIVE NORTHERN INSURANCE COMPANY, Defendant - Appellee.

No. 19-6085
|
FILED February 11, 2020

Synopsis
Background: Insured passengers brought action against automobile insurer to recover for breach of contract and bad faith by denying claim for underinsured motorist (UIM) benefits based on exclusion of coverage if insureds had received statutory minimum under liability coverage. The United States District Court for the Western District of Oklahoma, Stephen P. Friot, Senior District Judge, granted insurer's motion for judgment on pleadings. Passengers appealed, and parties sought certification.

[Holding:] The Court of Appeals held that certifying question regarding validity of exclusion was warranted.

Question certified.

West Headnotes (1)

[1] **Federal Courts** Particular questions

Certifying question to Oklahoma Supreme Court regarding validity of exclusion of underinsured motorist (UIM) coverage if insured received at least statutory minimum in liability coverage under policy was warranted by outcome-determinative effect on injured passengers' claims and unsettled nature of the applicable state law; federal district courts in state reached opposite conclusions on the question, no Oklahoma Supreme Court case was on point, and uninsured motorist (UM) statute did not address whether exclusion was permitted. 20 Okla. Stat. Ann. § 1602; 36 Okla. Stat. Ann. § 3636; Tenth Second Circuit Rule 27.4(A).

(D.C. No. 5:19-CV-00005-F) (W.D. Okla.)

Before HARTZ, BALDOCK, and EID, Circuit Judges.

ORDER CERTIFYING QUESTION OF STATE LAW *

Bobby R. Baldock, Circuit Judge

***1** Plaintiffs Elissa Lane ("Lane") and L.S., a minor ("Stone") were injured in a single-car accident while riding as passengers in a vehicle driven by M.S., a non-party minor. Defendant Progressive Northern Insurance Company ("Progressive") insured the vehicle under a policy issued to M.S.'s parents. The policy provided $100,000 per person/$300,000 per accident in liability coverage. The policy also provided $100,000 per person/$300,000 per accident in uninsured or underinsured motorist coverage ("UM coverage"). Both Lane and Stone recovered the $100,000 per person liability limit, but their injuries were substantial, and their damages exceeded $100,000. In light of their extensive injuries, Lane and Stone sought additional UM coverage. Progressive denied the claims relying on an exclusion in the policy ("the UM Exclusion"). The UM Exclusion provides that UM coverage will not apply "to bodily injury sustained by an insured person where liability coverage for bodily injury in an amount equal to or greater than the minimum limits of liability required by the motor vehicle financial responsibility law of Oklahoma is available for said bodily injury under Part I—Liability to Others[.]" Thus, the provision operates to exclude UM coverage when the insured receives liability coverage in an amount equal to or greater than the minimum limits of liability under Oklahoma law. Because Lane and Stone both recovered $100,000 under the policy's liability coverage—which is more than the Oklahoma minimum of $25,000—they were not entitled to

recover any of the UM coverage, even though their injuries exceeded $100,000.

Following the denial of their claims, Lane and Stone sued Progressive for breach of contract and bad faith. Progressive moved for a judgment on the pleadings, arguing the denial of UM coverage was warranted based upon the UM Exclusion. In opposition to the motion, Lane and Stone argued Progressive's UM Exclusion is void as a matter of public policy under Oklahoma law. The district court granted Progressive's judgment on the pleadings, and Lane and Stone appealed. Although the parties did not seek certification before the district court, they now argue certification is appropriate. We agree. Because the disposition of this appeal turns on an important and unsettled issue of Oklahoma law, we exercise our discretion under Tenth Circuit Rule 27.4(A) and Rule 27.4(B) to certify the question presented below to the Oklahoma Supreme Court:

> Does Progressive's UM Exclusion—which operates to deny uninsured motorist coverage to insureds who recover at least the statutorily mandated minimum in the form of liability coverage—contravene Oklahoma's Uninsured Motorist Statute, codified at Okla. Stat. tit. 36, § 3636? [1]

I.

***2** "When state law permits, this court may: (1) certify a question arising under state law to that state's highest court according to that court's rules; and (2) abate the case in this court to await the state court's decision of the certified question." 10th Cir. R. 27.4(A); *see also* 10th Cir. R. 27.4(B) (explaining this "court may certify on its own or on a party's motion"). As is relevant here, we may certify a question to the Oklahoma Supreme Court "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or [Oklahoma] statute ...." Okla. Stat. tit. 20, § 1602.

The decision to certify a question of law lies within our sound discretion. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). While we have no desire to "trouble our sister state courts every time an arguably unsettled question of state law comes across our desks[,]" we will exercise our discretion and certify a question of state law "where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007). By certifying a sufficiently novel and outcome-determinative question of state law, we "give meaning and respect to the federal character of our judicial system" and recognize "the judicial policy of a state should be decided when possible by state, not federal, courts." *Id.*

II.

Bearing in mind Oklahoma's standards and our own federal jurisprudence, we submit that the question presented above warrants certification. First, the question is undoubtedly outcome-determinative. If the UM Exclusion is void as a matter of public policy, the district court erred in dismissing Lane and Stone's breach of contract claim. To the contrary, if the UM Exclusion is permitted under Oklahoma law, the district court must be affirmed. In either event, the validity of the UM Exclusion controls the outcome of this case.

The unsettled nature of the applicable state law is equally apparent. Tellingly, two federal district courts in the Western District of Oklahoma reached opposite conclusions on the question presented. In this case, the Honorable Stephen P. Friot held the UM Exclusion is valid under Oklahoma law, but in *McKinney v. Progressive Direct Insurance Co.*, No. CIV-18-0767-HE, the Honorable Joe Heaton concluded the UM Exclusion is void against public policy. [2] Notably, both judges rightly acknowledged that no Oklahoma statute or case definitively answers the question.

Turning to that body of law, Oklahoma's Uninsured Motorist Statute sets forth general requirements for uninsured/underinsured motor vehicle coverage. *See* Okla. Stat. tit. 36, § 3636. Although the statute seems to contemplate *some* exclusions, it does not address whether an exclusion like Progressive's is permitted. *See* Okla. Stat. tit. 36, § 3636(H) (requiring insurers to provide insurance applicants with a notice stating in pertinent part, "Uninsured Motorist coverage, *unless otherwise provided in your policy*, pays

for bodily injury damages to ... other people riding in your car who are injured by: ... (3) an insured motorist who does not have enough liability insurance to pay for bodily injury damages to any insured person.") (emphasis added). Interpreting the statute, the Oklahoma Supreme Court has consistently held that "insurance policy provisions and definitions which purport to condition, limit or dilute the provisions of the uninsured motorist statute are void and unenforceable." *Brown v. United Servs. Auto. Ass'n*, 684 P.2d 1195, 1198 (Okla. 1984). Nevertheless, the court has also recognized that "the legislative intent with respect to UM coverage ... could arguably be satisfied with the acceptance of UM insurance with agreed-upon exclusions from coverage." *Ball v. Wilshire Ins. Co.*, 221 P.3d 717, 727 (Okla. 2009). At any rate, the Oklahoma Supreme Court acknowledges that "[c]ase-law development in the area of permissible UM exclusions is clearly limited in number and scope." *Id.* at 729.

***3** With respect to the UM Exclusion before this court, neither party cites an Oklahoma Supreme Court decision directly on point, and from our review, there are none. Thus, this case presents a dispositive and novel question of Oklahoma law, and "[i]n furtherance of the interests of comity and federalism that certification protects," we respectfully request the Oklahoma Supreme Court exercise its discretion to provide authoritative guidance on this issue. *Howard v. Zimmer, Inc.*, 711 F.3d 1148, 1152–53 (10th Cir. 2012) (citation omitted).

III.

Therefore, pursuant to Tenth Circuit Rule 27.4(A) and Okla. Stat. tit. 20, § 1602, the United States Court of Appeals for the Tenth Circuit hereby certifies the following question to the Oklahoma Supreme Court:

> Does Progressive's UM Exclusion—which operates to deny uninsured motorist coverage to insureds who recover at least the statutorily mandated minimum in the form of liability coverage—contravene Oklahoma's Uninsured Motorist Statute, codified at Okla. Stat. tit. 36, § 3636?

The Oklahoma Supreme Court may, of course, reformulate this certified question of law as it deems appropriate. Okla. Stat. tit. 20, § 1604(3).

As required by Oklahoma statute, we include the following information with respect to the names and addresses of counsel of record:

On behalf of Plaintiff:

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And, on behalf of Defendant:

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See Okla. Stat. tit. 20, § 1604(4).

We direct the clerk of this court to transmit a copy of this certification order to counsel for all parties and forward a copy of this order, together with a copy of the parties' briefs, to the Clerk of the Oklahoma Supreme Court. This appeal is therefore ordered ABATED pending the Oklahoma Supreme Court's consideration of this request and resolution of the certified question of state law.

All Citations

--- Fed.Appx. ----, 2020 WL 701704

Footnotes

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 At oral argument, counsel for Progressive urged the Court to narrow the certified question to encompass only class two insureds. We decline to do so but recognize that the Oklahoma Supreme Court has the discretion to reformulate the question as it deems appropriate.

2 We note that *McKinney* is also on appeal before this Court. *See McKinney v. Progressive Direct Insurance Co.*, NO. CIV-18-0767-HE, 2019 WL 2092578 (W.D. Okla. May 13, 2019), *appeal docketed*, No. 19-6127 (10th Cir. Aug. 29, 2019). Counsel for all parties in both cases is the same.