S.C. No. 87026

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL.
ROXANNE KELLY,

Relator,
v.

THE HONORABLE MARCO A. ROLDAN,

Respondent.

W.D.
Appealed from the Circuit Court
of Jackson County, Missouri
The Honorable Marco Roldan, Judge
Circuit Court No. 0516-CV02409

REPLY BRIEF OF RELATOR

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I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON ANY CLAIMS PLAINTIFF HAS BROUGHT AGAINST RELATOR, ROXANNE KELLY, AND WITH DIRECTIONS TO SUSTAIN RELATOR=S MOTION TO DISMISS, BECAUSE RESPONDENT, THE HONORABLE MARCO A. ROLDAN, ACTED IN EXCESS OF THE TRIAL COURT=S JURISDICTION AND DEPRIVED RELATOR OF AN ABSOLUTE DEFENSE, IN THAT RESPONDENT OVERRULED RELATOR=S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED, EVEN THOUGH A CLAIM FOR BAD FAITH AGAINST AN INDIVIDUAL ADJUSTER EMPLOYEE DOES NOT EXIST IN THE STATE OF MISSOURI, BECAUSE THE DUTY OF GOOD FAITH DOES NOT RUN FROM AN INDIVIDUAL ADJUSTER EMPLOYEE TO THE INSURED, IT RUNS FROM THE INSURER TO THE INSURED.

COMES NOW Relator Roxanne Kelly and states the following in reply to Respondent=s Brief:

Plaintiff has failed to state a claim against Relator Kelly for bad faith because the duty that is the basis for Plaintiff=s claims stems from the contract of insurance, and Relator Kelly was not a party to that contract. Despite Respondent=s efforts to suggest otherwise, Missouri law simply has not reached this issue.

Respondent=s Brief states that Missouri law holds that the duty to exercise good faith arises out of the fiduciary relationship between the parties, as opposed to the terms and conditions of the contract. The language Respondent=s Brief relies on is taken primarily from Craig v. Iowa Kemper Mutual Insurance Company, 565 S.W.2d 716 (Mo. App. 1978). Relator contends that the Craig opinion does not hold that the duty of good faith, in terms of the insurer/insured relationship, arises from something other than the agreement between the insurance company and the insured. In fact, in Craig, the Court recognized the following:

> The general jurisprudence recognizes that a ***policy of insurance*** imports the utmost good faith by the insurer to perform according to its terms. This principle extends to imply covenant of good faith and fair dealing from every ***contract of insurance***. The law thereby assumes the agreement of an insurer not to injure the right of an insured to receive the benefits of the ***contract***. Couch on Insurance 2d, s 23:8 (Supp. p. 8). The Courts apply this principle of implied good faith (by whatever designation) to give an

insured a remedy both on the policy ex contractu and in tort. Craig, 565 S.W.2d at 722. (Emphasis added).

In other words, the Court in Craig clearly states that the policy of insurance is what imports the utmost good faith by the insurer to perform according to its terms. It is an agreement between the insurer not to injure the right of an insured, not an agreement between an employee of the insurer and the insured.

Respondent=s Brief cites to the following language from the Craig opinion in support of their position that the duty of good faith does not stem from the agreement between the insurer and the insured:

> The duty to deal in good faith, therefore, does not arise from consent and contract but from the nature of the relationship. Craig, 565 S.W.2d at 723.

The Anature of the relationship@ the Court is referring to in the above statement is explained in terms of the ***agreement*** between the parties, in the sentence that is immediately before it in the opinion:

> ***Such terms of agreement*** repose in the ***insurer*** the power to act for the insured, akin to authority a client vests in an attorney, or a principal in an agent each a relationship of inherent fiduciary obligation.

Id.

The relationship of an insurer and insured is between the insurance company and the insured as parties to the agreement. It is the terms of the agreement, or insurance policy, that give power to the insurer, as agent in a third-party claim, to act on behalf of the insured principal. An employee such as Relator Kelly, is an agent of the insurer. The employee is not an agent of the insured, because there is no agreement between the employee and the insured that would give rise to such relationship. The employee, such as Relator Kelly, has not agreed to provide any insurance coverage to the insured or defense, etc. Without the relationship, there is no inherent fiduciary duty of good faith. Without any duty, there can be no tort for breach of such duty. The actions and liability of the employee may be imputed to the insurance carrier, as principal, but not the other way around as Respondent=s Brief would suggest.

Respondent=s Brief still maintains that Aother jurisdictions@ support Respondent=s argument, yet Respondent has still only cited a single case where a viable claim was brought against an individual adjuster/employee. *See*, Gallagher Bassett Services, Inc. v. Jeffcohe, 887 So.2d 777 (Miss. 2004). On the other hand, Relator Kelly has provided the Court with numerous decisions supporting the majority rule that the duty of good faith does not run from an individual adjuster/employee to the insured.

As mentioned in Schwartz v. State Farm Mutual Auto Insurance Company, 174 F.3d 875 (7th Cir. 1999), Plaintiff=s claim against Relator Kelly is really nothing more than an attempt to reverse the doctrine of respondeat superior. According to Plaintiff=s theory,

Relator Kelly=s liability would be derivative of her employer, who is actually a party to the contract of insurance. Such a result is essentially the complete opposite of respondeat superior. A legal duty that extends from the insurance company is not automatically imputed to the employees, so that any liability for a breach of that duty by the employer, extends to the employees as well. Respondent=s Brief has cited no authority to support such an argument.

Further, the argument in Respondent=s Brief that Missouri Courts have allowed a Missouri insured to seek damages from a claims adjustment company, appears to be misplaced. The case cited by Respondent=s Brief, Emerson Elec. Co. v. Crawford & Co., 963 S.W.2d 268, 272, resolved a damages issue by applying Louisiana substantive law, rather than Missouri substantive law. The Court did not reach the issue of duty, nor did it discuss any potential liability against an individual employee or the adjusting company. In any event, the issue in this case is not the liability of a claims adjustment company, it is the liability of an employee of the insurance carrier.

A similar case cited by Respondent=s Brief to support Plaintiff=s claim, Gallagher Basset Services, Inc. v. Jeffcoat, 887 So.2d 777 (Miss. 2004), which happens to involve a first-party claim, does not discuss the duty owed by an individual employee adjuster at all. The Rule cited by Respondent=s Brief from the case states than an Ainsurance adjuster, agent, or other similar ***entity*** may be held independently liable for its work on a

claim . . . .@ Id. at 722. By definition, the term Aentity@ cannot refer to an individual employee. Black=s Law Dictionary, 7th 3d., defines Aentity@ to be:

> An organization (such as a business or a governmental unit) that has a legal identity apart from its members.

It is clear the majority rule does not extend liability to an individual adjuster or employees for bad faith. The individual adjuster is not in privity with the insurance contract and, therefore, has no duty to the insured. Although the claim of bad faith is arguably a tort, the duty owed still stems from the policy of insurance or agreement between the insured and the insurer. Plaintiff has cited language from two Missouri cases, Craig v. Iowa Kemper Mutual Insurance Company, 565 S.W.2d 716 (Mo. App. 1978) and Duncan v. Andrew County Mutual Insurance Company, 665 S.W.2d 15 (Mo. App. 1983), where the Court was making the distinction that a fiduciary relationship was present in a third-party claim, but not in a first-party claim. The reason being that the relationship between the insurer and the insured is more of a debtor/creditor relationship, rather than fiduciary, when a first-party claim is involved. This distinction does not somehow allow a claim against an individual adjuster, because regardless of whether the fiduciary duty arises only in the third-party claim, it is still the contract of insurance or agreement that forms the basis for that fiduciary duty between the insurer and the insured.

Without being a party to the contract, Relator Kelly did not have a duty to the insured for which she could have breached, and therefore there is no claim for bad faith against Relator Kelly for which relief can be granted.

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CERTIFICATE OF SERVICE

The undersigned, attorney for Relator herein, certifies that a copy of this Certificate of Service and a signed copy of the Certification as to Word Count, Virus Scan, and that Disk is Virus Free was mailed on the 11th day of November, 2005, to the following parties, as follows:

The Honorable Marco A. Roldan
Circuit Court of Jackson County, Missouri
JACKSON COUNTY COURTHOUSE
308 West Kansas Avenue
Independence, MO 64050

RESPONDENT JUDGE

Tim Dollar
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ATTORNEYS FOR PLAINTIFF/RESPONDENT
QUINLOCK SHOBE

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Paul Hasty, Jr.
Burke D. Robinson
For the Firm

CERTIFICATION
AS TO WORD COUNT, VIRUS SCAN AND THAT DISK IS VIRUS FREE

Pursuant to Rule 84.06, Relator hereby certifies that the word count herein, as calculated by the word count system employed, is 1,398 words, and does not exceed the 7,750 word limit provided by the rule. Additionally, Relator certifies that the disk submitted to the Court has been scanned for viruses and are virus-free.

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