SC87026

IN THE SUPREME COURT OF MISSOURI

Roxanne Kelly,
Relator

vs.

The Honorable Marco A. Roldan, Judge
Circuit Court of Jackson County, Missouri,
Respondent.
Circui t Court No. 0516-CV-02409

BRIEF OF RESPONDENT

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ARGUMENT

In a single **Point Relied On**, Relator improperly challenges Respondent's act of overruling a Motion to Dismiss bad faith insurance practices claims against Relator Roxanne Kelly, which remain pending with claims against Kelly's employer, Allstate Insurance Company. Relator advocates an improvident use of this Court's power to issue a writ of prohibition to prevent the matter from proceeding to judgment on the merits, and/or mandamus to require the trial court to sustain the Motion to Dismiss.

The extraordinary relief requested by Relator is not supported by long established precedent governing individual liability and the nature of bad faith claims in Missouri. Procedurally, the requested relief burdens this Court with the difficult task of examining the contested claims without the benefit of controlling authority clearly barring those claims, and without a full factual record demonstrating the egregiousness of Relator's conduct.

Further litigation of the contested claims should be permitted based on the following factors which are not in dispute: (1) The subject claims are tort claims; (2) The tort claims are based on the alleged violation of fiduciary duty arising out of the fiduciary nature of the relationship; and (3) Relator Kelly is alleged to have known of and participated in the tortious conduct. The subject claims are not "clearly barred" by established precedent in Missouri, thereby making the extraordinary relief requested by Relator both unsupported and premature.

Relator seeks to circumvent the appellate process without demonstrating that the trial court is acting in excess of its jurisdiction; that the trial court's ruling will cause

irreparable harm; or that the subject claims are clearly barred. Rather, Relator seeks an extraordinary remedy to *establish* a bar to bad faith claims against an individual adjuster or employee in the State of Missouri. The very nature of Relator's argument, *in and of itself*, demonstrates that the requested remedy should not be afforded through a writ of prohibition and/or mandamus.

I. Requested Writ of Prohibition and/or Mandamus is an Extraordinary Remedy Not Warranted By Actions of Trial Court In Overruling Motion to Dismiss Bad Faith Insurance Practices Claims Against Relator.

A writ of mandamus is not a proper means to *establish* an existing right, but may only be utilized to enforce a clearly established and presently existing right. State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 576 (Mo. banc 1994) [citations omitted]. Simply stated, the purpose of the writ is *not* to adjudicate. Id. However, adjudication of Missouri's bad faith insurance practices law is precisely what Relator is requesting of this Court, which is per se improper in the context of the writ process. Such adjudication should and will take place through the judicial appeals process, which is procedurally designed to adjudicate substantive legal issues. Mandamus is clearly not appropriate in this matter.

A writ of prohibition is an "extraordinary remedy" designed to be used "with great caution and forbearance and only in cases of extreme necessity." State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750, 752 (Mo. banc 1991) citing Derfelt v. Yocom, 692 S.W.2d 300, 301 (Mo. banc 1985). Prohibition should not be used as a substitute for the appeals process. Id. citing State ex rel. Boll v. Weinstein, 295 S.W.2d

62, 67 (Mo. banc 1956). Nor should prohibition be used as a substitute for the judgment or discretion of a court properly exercising its jurisdiction, or to litigate grievances that may be adequately redressed through the ordinary course of judicial proceedings. Id. citing Knisley v. State, 448 S.W.2d 890, 892 (Mo. 1970).

Writs of prohibition are typically only issued in one of three limited situations, where (1) "there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction"; (2) there is "a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated"; or (3) "some 'absolute irreparable harm may come to the litigant if some spirit of justifiable relief is not made available to respond to a trial court's order'". State ex rel. Chassaing v. Mummert, 887 S.W.2d at 577 citing State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862 (Mo. banc 1986).

Relator fails to offer any basis to conclude that any of these situations exist in this matter to justify what amounts to a request for substantive adjudication of the law. First, the trial court is vested with subject matter jurisdiction in this matter and with personal jurisdiction over Relator. (See Petition, pp. A1-A8 of Relator's Appendix.) Second, as discussed more fully herein, the trial court properly overruled Relator's motion to dismiss based on applicable authority, and in no way acted in excess of its jurisdiction. Lastly, Relator has an adequate remedy through the appeals process.

Missouri Rule of Civil Procedure 84.22(a) provides: "No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court." As the rule states,

prohibition is unavailable where an appeal would provide adequate relief. State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750, 752 (Mo. banc. 1991). See also State ex rel. Jim Walters Plastics v. Sihnhold, 629 S.W.2d 668, 669 (Mo.App. E.D. 1982) ("Prohibition is not a remedy for all difficulties. It cannot be used as a substitute for appeal.").

Allowing the instant litigation to proceed against Relator, in and of itself, will not result in irreparable harm, and Relator has made no showing to the contrary. The underlying litigation will continue against Allstate Insurance Company irrespective of whether Relator is a party to the suit; the defense of both parties is being conducted through the same counsel; and adequate relief for any perceived error will be available through appeal after final judgment.

II. Extraordinary Remedy Not Warranted Because Relator Has Not Been Denied Access To A Clear And Absolute Defense Under Missouri Law.

Relator urges this Court to exercise its discretion to issue a writ in this matter by citing cases in which the denial of a motion to dismiss denied the party access to a *clear and absolute* defense, such as statutory immunity under worker's compensation, sovereign immunity, res judicata, or collateral estoppel. Only where the law *clearly* bars the subject claim, and the party seeking the writ of prohibition has an "absolute defense," is the issuance of a writ of prohibition appropriate to prevent unwarranted and useless litigation. State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498, 500 (Mo.App. E.D. 1985) [citations omitted] (Writ of prohibition issued to halt further litigation where legal malpractice claim clearly barred by collateral estoppel.)

As evidenced by the cases cited herein, as well as by Relator's own recitation of Missouri bad faith law, the contested action does not involve the denial of an absolute defense which clearly bars the subject claims. Nor is further litigation of the claims against Relator unwarranted or useless. Exactly the opposite is true. The parties should be permitted to develop a full factual record to properly adjudicate the subject claims through the appeals process.

Relator improperly relies on several cases which are readily distinguishable, to support the propriety of a writ of prohibition in this matter. In the first, State ex rel. Feldman v. Lasky, 879 S.W.2d 783, 784 (Mo.App. E.D. 1994), the trial court denied a motion to dismiss based on worker's compensation immunity even though plaintiff and defendant agreed that the claims related to the parties' mutual employment. Id. at 785. An order of prohibition and dismissal of the action were deemed appropriate because the plaintiff's claims were exclusively cognizable under the Missouri Workers' Compensation Law, which provided the only means of recovery. Id. at 786.

Similarly, State ex rel. Deutsch v. McShane, 25 S.W.3d 591, 592 (Mo.App. E.D. 2000), involved a suit against two former trustees alleging breach of warranty and fraud pertaining to the sale of land and property owned in trust. The defendant trustees were sued in their capacities on behalf of the trust, not in their individual capacities. Id. However, neither former trustee had control any longer of the assets that would be used to satisfy liability to the plaintiff, and the court issued a writ of prohibition in response to the trial court's denial of a motion to dismiss. Id. Unlike the situation in Feldman and Deutsch, Missouri law does not bar the subject bad faith claims against Relator. Rather,

Relator improperly requests this Court to *establish* a bar to the subject claims through issuance of a writ.

Relator also relies on State ex rel. MFA Insurance Co. v. Murphy, 606 S.W.2d 661 (Mo. banc 1980), wherein a writ of prohibition issued directing the trial court to dismiss a claim for uninsured motorist benefits, *a purely contractual claim*, based on the insured's refusal to join the uninsured tortfeasor as required by the insurance policy. Id. at 663. Relator incorrectly relies on two additional cases which also involve purely contractual claims, as well as a failure by the insured to comply with a condition precedent contained in the insurance policy. See State ex rel. Ehrlich v. Hamilton, 879 S.W. 491 (Mo. banc 1994); State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994).

Unlike those cases cited by Relator to justify an extraordinary remedy in this matter, the contested bad faith claims pending against Relator are tort claims based on a fiduciary duty that is neither governed by the terms of the insurance policy, nor precluded by established precedent.

III. Bad Faith Insurance Practices Claims Pending Against Relator Kelly Are Tort Claims That Do Not Depend On The Insurance Contract.

Relator maintains that plaintiff has failed to state a claim against Relator/Defendant Kelly based solely on the contention that the adjuster is not a party to the insurance contract. Relator's argument fails to acknowledge 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 insurance contract. Although Relator cites cases from other

jurisdictions for the proposition that Relator owes no duty to the insured, Missouri's bad faith law does not support Relator's contention.

Relator Kelly concedes that Missouri recognizes the claim of bad faith insurance practices as a *tort* that is distinct and different from the contractual duty to defend. (See Brief of Relator, p. 8.) This fundamental principle is important because the nature of the action reflects the source of the duty. Failure to defend gives rise to an action in *contract*, whereas bad faith gives rise to an action in *tort*. Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 756 (Mo. 1950). The duty to *defend* and the duty to exercise *good faith* each exists independently. Landie v. Century Indemnity Co., 390 S.W.2d 558, 562 (Mo.App. 1965). Only the duty to defend is determined by the terms and conditions of the insurance policy. Id. See also Ganaway v. Shelter Mutual Insurance Co., 795 S.W.2d 554, 556 (Mo.App. S.D. 1990). The tort claims pending against Relator Kelly, however, are based on a duty to exercise good faith that is not determined by the insurance contract. The contested claims seek a recovery, not for a breach of the insurance contract, but for tortious conduct in administering the claim.

Despite the tortious nature of the contested claims, Relator nonetheless contends that the duty to exercise good faith is derived from the insurance contract. However, Missouri law does not recognize an implied covenant of good faith in the insurance contract to rationalize the claim of bad faith insurance practices. Craig v. Iowa Kemper Mutual Ins. Co., 565 S.W.2d 716, 723, FN5, overruled on other grounds (Mo.App. 1978). The duty of an insurer to exercise good faith arises, not from consent and contract, but from a fiduciary relationship similar to that of attorney-client or principal-agent, each of

which involves an inherent fiduciary obligation. Craig v. Iowa Kemper Mutual Ins. Co., 565 S.W.2d at 723 [citations omitted]. It is the existence of this fiduciary relationship ". . . *beyond and apart from any subsisting implied covenant of good faith and fair dealing on the part of an insurer* under a policy of insurance, which exposes an insurer to liability in tort . . . [*emphasis added*]" Duncan v. Andrew County Mutual Insurance Co., 665 S.W.2d 13, 18 (Mo.App. W.D. 1983).

Hence, Missouri law looks to the nature of the relationship under a specific set of circumstances in finding a fiduciary duty. When an insured is subject to potential liability, the insurer-insured relationship attains a protected status analogous to that of an attorney-client relationship. Grewell v. State Farm Mutual Automobile Insurance Co., Inc., 102 S.W.3d 33, 36 (Mo. banc 2003). In the circumstance of a third-party claim, a fiduciary relationship exists between the insurer and insured. Grewell v. State Farm Mutual Automobile Insurance Co., Inc., 162 S.W.3d 503, 508 (Mo.App. W.D. 2005). The duty to exercise good faith cannot be accurately described as arising out of the insurance contract, as Relator contends. Rather, it is the fiduciary relationship between the parties when the insured is exposed to a third-party claim that supplies the duty to exercise good faith.

A fiduciary relationship may be found as a matter of law based on the parties' relationship, or as a result of the "special circumstances" attendant to the parties' relationship. Shervin v. Huntleigh Securities Corp., 85 S.W.3d 737, 740 (Mo.App. E.D. 2002) citing A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 394 (Mo.App. E.D. 1998). Equity does not limit the circumstances under which a fiduciary relationship may

be found, but looks to whether a special confidence is placed on one side of the relationship with a resulting influence on the other. Shervin at 741 citing Robertson v. Robertson, 15 S.W.3d 407, 412 (Mo.App. S.D. 2000). "The question is always whether or not trust is reposed with respect to property or business affairs of the other." Id.

In the context of bad faith in the claims adjusting process, an insured in Missouri may seek damages from a claims adjustment company that has contracted with the insurer, even though no contract exists between the insured and the independent adjustment company. Emerson Elec. Co. v. Crawford & Co., 963 S.W.2d 268, 272 (Mo. App. E.D. 1997).

The relationship between Relator Kelly and the insured as it pertains to this particular liability claim is a fiduciary relationship. To characterize her alleged involvement as merely an employee of Allstate is misleading. Relator Kelly was responsible for handling, and did in fact handle, the third-party liability claim asserted against the insured. (See Brief of Relator, p. 1.) By the very nature of the relationship, the insured was at the mercy of Relator with respect to the liability claim and the insured had every right to expect that Relator would exercise the good faith required by the fiduciary relationship among the parties.

The petition states a claim for tortious bad faith conduct and punitive damages against Relator/Defendant Kelly for her acts and omissions. Missouri law simply does not dictate that Relator may act with impunity and avoid tort liability, irrespective of the nature and extent of her tortious conduct, merely because she was not a party to the contract of insurance.

Finally, the legal concept of bad faith in Missouri is not amenable to the bright line rule advocated by Relator. The term "bad faith" describes a state of mind that may be evidenced by circumstantial or direct evidence, and has varying applications that depend on the facts involved in a particular case. Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 754 (Mo. 1950). The individual liability of Relator Kelly depends on *Relator's state of mind*, independent of the terms and conditions of the insurance contract.

While Relator relies on cases from other jurisdictions to support the argument that no individual liability can attach to Kelly, other jurisdictions have decided the issue to the contrary. See Gallagher Bassett Services, Inc. v. Jeffcoat, 887 So.2d 777, 784 (Miss. 2004) (An insurance adjuster, agent or other similar entity may be held independently liable for its work on a claim if its conduct amounts to gross negligence, malice, or reckless disregard for the rights of the insured.)

The remedies available to an insured, as well as the reasoning employed to justify those remedies, vary among the jurisdictions, especially in those situations where the insurer is alleged to have acted in bad faith. Missouri clearly recognizes the tort of bad faith based on duties separate and distinct from the insurance contract. Those decisions simply do not preclude a bad faith cause of action against Relator Kelly, and furthermore, the development of bad faith law in Missouri supports liability on the part of the adjuster.

Relator quotes extensively from the 7th Circuit decision Schwartz v. State Farm Mut. Auto. Ins. Co., 174 F.3d 875 (7th Cir. 1999), which addresses the alleged bad faith denial of the insured's claim for underinsured motorist coverage under Indiana law. Clearly, Schwartz involved a first-party claim for coverage arising out of injuries

sustained by the insured. Id. at 877. The tort claim of bad faith in Missouri does not encompass such first-party claims. See Duncan v. Andrew County Mutual Insurance Co., 665 S.W.2d 13, 18 (Mo.App. W.D. 1983). Nor is plaintiff asserting a first-party claim for coverage.

The factual difference is significant because Missouri distinguishes first-party claims asserted by the insured for a loss under the policy because, in such a situation, "the parties occupy a contractually adversary or creditor-debtor status as opposed to standing in a fiduciary relationship." Duncan, 665 S.W.2d at 19. In the context of a third-party claim, where the insurer exercises the right to control the litigation and settlement, a fiduciary relationship arises under Missouri law. Id. at 18. "It is the existence of this fiduciary relationship . . ., *beyond and apart from any subsisting implied covenant of good faith and fair dealing on the part of an insurer under a policy of insurance*, which exposes an insurer to liability in tort . . . [*Emphasis added*]." Id. Secondly, the plaintiffs in Schwartz merely alleged that the individual adjuster acted in bad faith by complying with the terms of an allegedly illusory policy, any liability for which, the court noted, would be derivative of the employer's. Schwartz at 878. Finally, the Indiana Supreme Court has made it clear that the tort of bad faith denial of insurance claims is based on a special relationship "between an insurer and an insured because they are in privity of contract." Schwartz at 879 quoting Erie Ins. v. Hickman, 622 N.E.2d 515, 518 (Ind. 1993). Based on those factors, the court found that there was no reasonable basis to conclude that a claim had been stated against the individual adjuster under Indiana law.

Similarly, the other decisions cited by Relator are based on state laws which vary from the bad faith law in Missouri. The lower court decision in Youngs v. Security Mutual Insurance Co., 775 N.Y.S.2d 800, 2004 N.Y. Slip Op. 24039 (2004), is based on New York precedent stating that a bad faith claim "does not state a separate cause of action but derives solely from the contract." Youngs, 775 N.Y.S.2d at 801. The decision of the appellate court in Ebner v. Ohio Casualty Insurance Co., 1995 W.L. 611878 (Tex. App. 1995) (not designated for publication), relies on Texas precedent for the holding that no *duty of good faith and fair dealing* extends to individual adjusters because they are not in privity of contract with the insureds. Ebner, 1995 W.L. 611878, p. 5. Similarly, the plaintiff in Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Ca. 1973), alleged that certain non-parties to the insurance contracts breached only the *duty of good faith and fair dealing* in the insured's first-party claims under three fire insurance policies. Gruenberg, 510 P.2d at 1038.

Unlike Missouri, none of the decisions cited by Relator discuss the viability of a bad faith claim in the context of a fiduciary relationship beyond and apart from the insurance contract. Under Missouri law, plaintiff's allegations against Relator/Defendant Kelly state a cause of action based in tort that does not rely on the terms and conditions of the insurance contract. The few Missouri cases cited by Relator merely state that the duty to defend is based on the terms of the contract, which is separate and distinct from the fiduciary duty owed to the insured in adjusting a third-party claim.

IV. Corporate Employees Who Knowingly Participate In Tortious Conduct Are Subject To Individual Liability.

Relator Kelly is not immune from liability merely because her involvement in handling the underlying liability claim resulted from her employment with Allstate Insurance Company. Although the parties agree that there is no Missouri case directly addressing the individual liability of an insurance adjuster for acts or omissions arising out of bad faith, there is long established precedent providing for individual liability of corporate employees who commit tortious acts in the course of employment.

This Court recently held that "[a]n individual is not protected from liability simply because the acts constituting the tort 'were done in the scope and course, and pertained to, the duties of his employment.'" State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W.3d 502, 505 (Mo. banc 2004) citing Curlee v. Donaldson, 233 S.W.2d 746, 754 (Mo. App. 1950). Otherwise, as long as the agent was acting in the capacity of her agency, the agent would be permitted to shield herself from liability for nearly any wrong she commits. Id. citing Boyd v. Wimes, 664 S.W.2d 596, 598 (Mo.App. W.D. 1984). Thus, the favored rule in Missouri is that "a corporate officer may be held individually liable for *tortious corporate conduct* if he or she had 'actual or constructive knowledge of, and participated in, an actionable wrong.'" Id. citing Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 153 (Mo.App. E.D. 1995); Grothe v. Helterbrand, 946 S.W.2d 301, 304 (Mo.App. S.D. 1997).

Plaintiff has alleged that Relator Kelly was the individual responsible for handling the underlying liability claims and communicating with the insured. Such active participation on the part of Relator does not appear to be in dispute. Even if Relator's acts and omissions resulting from bad faith were undertaken at the direction of her

employer, Relator Kelly still cannot escape liability for her tortious conduct for that reason alone. Nor does it matter if she committed the tortious acts for the benefit of her employer. "No one can lawfully authorize the commission of a tort and [ ] an agent who commits it is liable in the same measure as though he had done it for himself." White v. McCoy Land Co., 101 S.W.2d 763, 766 (Mo. App. 1936) aff'd, White v. Scarritt, 111 S.W.2d 18 (Mo. 1937).

V. Public Policy Supports Individual Liability for Relator Kelly

Permitting an insurance agent to be shielded from individual liability, irrespective of the nature and egregiousness of the tortious conduct, does not serve to protect the insured's rights arising out of the fiduciary relationship, and provides little incentive for the adjuster to act in accordance with the insured's interests.

Missouri cases which hold that an insurance agent is not liable where the agent fails to advise the insured of optional additional insurance coverage are often based on public policy. The very policy reasons often cited for not imposing liability on an agent for failing to advise the insured of additional coverage weigh heavily in favor of imposing liability on an adjuster who exercises bad faith in handling a third-party claim against the insured.

For example, in Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82 (Mo.App. E.D. 1994), the court reasoned that agent liability would discourage insured customers from taking charge of and making choices regarding their own financial needs; would presume that agents had more knowledge about the insured customers' financial assets and abilities than the insureds themselves; and would change the nature of the insurance

industry from a competitive marketplace into a financial counseling industry. Farmers at 85. In direct contrast, the ability to settle a third-party claim against the insured is taken away from the insured and placed in the hands of the adjuster, giving rise to a fiduciary relationship as a result. No similar public policy is served by precluding individual liability on the part of Relator Kelly, no matter how egregious or intentional her conduct.

VI. Conclusion

Plaintiff has stated a claim against Relator Kelly based on the concept of bad faith in Missouri and the alleged violation of a fiduciary duty that does not rely upon the terms and conditions of the insurance contract. The subject claims are not clearly barred so as to justify the extraordinary relief requested by Relator. To extent that the duties of individual adjusters in Missouri need to be addressed, such adjudication should occur through the appeals process following judgment, after a factual record has been fully developed in this matter.

WHEREFORE, based on the foregoing, Respondent respectfully requests that this Court quash the Preliminary Writ of Prohibition and/or Mandamus issued in this matter.

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CERTIFICATE OF SERVICE
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