

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2016-000913

RECEIVED
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SC Court of Appeals

Brittany
Moore.....Appellant

v.

Omni Indemnity Company and
Ben Mosley.....Respondents

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TABLE OF CONTENTS

Table of Authorities.....ii
Statement of Issues on Appeal.....1
Arguments
1. APPELLANT COULD NOT HAVE MADE A DEMAND FOR APPRAISAL UNDER THE
INSURANCE POLICY BECAUSE IT WAS NOT FURNISHED TO HER UNTIL AFTER
SHE FILED SUIT2
2. AN OWNER CAN GIVE HER OPINION AS TO THE VALUE OF HER CAR.....3
3. A GENUINE ISSUE EXISTS AS TO THE VALUE OF THE APPELLANTS' S CAR
THAT SHOULD BE DECIDED BY THE TRIER OF THE FACT.....3
4. APPELLANT DID IN FACT FURNISH RESPONDENT OMNI NOTICE THAT THE
LENDER VALUED THE CAR AT \$17,000 AT THE TIME OF SALE, AND
APPELLANT PAID \$14,000 FOR THE CAR IN FEBRUARY OF 2014.3
5. WHETHER INSURER ACTED IN BAD FAITH IS A FACTUAL ISSUE4
Conclusion.....5

**TABLE OF AUTHORITIES
CASES**

University Medical Associates of
Medical University of South Carolina
v. Unumprovident Corporation, 335 F. Supp 2d 702 (D.S.C.2004).....5

Deese v. American Bankers Life Assurance
Company of Florida, 268 S.C. 160, 208 SE 2d 736 (S.C.1974).....5

Bakala v. Bakala, 352 SC 612, 576 SE 2d 156 (S.C.2003).....3

Koester v. Carolina Rental Car Center,
313 SC 490, 443 SE 2d 392 (S.C.1994).....5

Murphy v. Tyndall, 384 S.C. 50, 681 S.E. 2d 28(S.C. App 2009).....4

Dawkins v. Fields, 354 S.C. 58, 580 S.E. 2d 433 (S.C. 2003).....3

Brown v. State Farm Mutual Ins. Co.,
275 S.C. 776, 269 S.E. 2 769 (S.C. 1980).....4

Doe v. South Carolina Medical Malpractice Liability Joint
Underwriting Association,
347 S.C. 642, 557 S.E. 2d 670(S.C. 2001).....4

**STATEMENT OF ISSUES
ON APPEAL**

1. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT COULD HAVE DEMANDED THE APPRAISAL CLAUSE IN THE POLICY.

2. AN OWNER OF PROPERTY CAN GIVE HER OPINION OF THE VALUE OF THAT PROPERTY.

3. DID THE TRIAL COURT ERR IN RULING THAT THERE WAS NO ISSUE OF FACT AS TO THE VALUE OF THE APPELLANT'S CAR AT THE TIME OF LOSS.

4. DID THE TRIAL COURT ERR IN DETERMINING THAT APPELLANT DID NOT FURNISH ANY DOCUMENTATION SUPPORTING AN INCREASE IN ACTUAL CASH VALUE PRIOR TO FILING SUIT.

5. INSURER'S BAD FAITH IS A FACTUAL ISSSUE.

STATEMENT OF THE CASE

On June 17, 2015, Brittany Moore brought this action alleging that her stepbrother, Ben Mosley, wanted to swap cars with Brittany to drive to Florida because her car was newer and got better gas mileage. (Transcript p6, line 2) While in Florida, Mosley had a single car accident wherein Moore's car was rendered a total loss. (Transcript p6, line 6)

Moore was insured by Omni Indemnity Company, and Mosley was insured by State Farm Mutual Insurance Company (Transcript p5, 19) Omni made the determination that Moore's car was covered under the collision coverage of her policy, even though the car was covered

under the state Farm Policy, as was the driver Ben Mosley. (Transcript p6, line 17) Omni offered Moore \$9,440 under her collision coverage. (Transcript p7, line 3) Moore rejected Omni's offer as too low. (Transcript p7, line 4) State Farm was dismissed without prejudice on August 5, 2015. (Dismissal was misplaced, but matter is not in issue)

Omni and Moore filed cross motions for summary judgment, which were both heard on September 10, 2015. Moore's motion for summary judgment was denied on the ground that there were factual issues as to the value of the car. (This was the Court's determination, but it cannot be found in the transcript or the orders. Not an issue at this point)

ARGUMENTS

I. APPELLANT COULD NOT HAVE MADE A DEMAND FOR APPRAISAL UNDER THE INSURANCE POLICY BECAUSE IT WAS NOT FURNISHED TO HER UNTIL AFTER SHE FILED SUIT.

The Court in its order ruled that "Plaintiff herself also did not invoke the provisions of the appraisal clause." (Order p17, line 4) However, the Appellant was not furnished a copy of the policy until after suit was filed. (Omni insurance policy cover page, dated July 3, 2015) The clause in question is on page 43 of the Omni policy and reads:

"If we and you do not agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. The appraisers will state separately the actual cash value, and the amount of loss. If they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will be binding."

Omni knew that Moore disagreed on the amount of loss. (Affidavit of Stacy Craig item #17, Affidavit of Jessica Leger item

#17) (Complaint paragraph #12) The affidavits of Craig and Leger do not meet the "personal knowledge" requirements of summary judgment rule regarding affidavits. (Dawkins v. Fields) Omni clearly was aware that Moore disagreed as to the loss, but chose to ignore the arbitration clause in the policy so they could browbeat Moore into accepting a lowball offer. This is clearly an issue of fact.

II. AN OWNER OF PROPERTY CAN GIVE HER OPINION AS TO THE VALUE OF HER PROPERTY AT THE TIME OF LOSS.

In Omni's memorandum in support of motion for summary judgment p5 it states, "...Plaintiff did not provide any evidence, documentation, appraisal, or other material to Omni prior to filing her Complaint". This statement is incorrect. In the letter dated May 22, 2015 from attorney for Moore, State Farm as well as Omni were advised that the loss was \$11,200. The car was clean with no nicks or dents, and Ms. Moore bought it in 2014 for \$14,000, and the lending bank valued it at that time at \$17,000. The car only had about 65,000 miles. Ms. Moore can give her opinion as to the value of her car as the owner. (Bakala v. Bakala)

The appraisers hired by Omni have a stricter standard than the owner, as to admissibility. Their opinion is hearsay, and not admissible in court until a foundation is laid for the opinion and is subject to cross examination.

Consequently, the only admissible evidence presented was Appellant's opinion as to value. She stated in her Affidavit that she shopped extensively for the car; compared prices, checked online, as well as advertisements and dealer visits. She stated further that the lending bank appraised the car at \$17,000 when she bought it in February 2014.

III. A GENUINE ISSUE EXISTS AS TO THE VALUE OF THE APPELLANT'S CAR THAT SHOULD BE DECIDED BY THE TRIER OF THE FACT.

Omni knew there was a disagreement as to the value of the car at the time of loss, but instead of invoking the binding appraisal clause in the policy that they never gave to Appellant, Omni decided to keep quiet as to the binding appraisal clause in order to try to force Appellant to accept a payment 30 percent lower than the true value.

IV. APPELLANT DID IN FACT FURNISH RESPONDENT OMNI NOTICE THAT THE LENDER VALUED THE CAR AT \$17,000 AT THE TIME OF SALE, AND APPELLANT PAID \$14,000 FOR THE CAR IN FEBRUARY OF 2014.

The letter dated May 22, 2015 was addressed to State Farm, but a copy was mailed to Omni.

At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. (Murphy v. Tyndall)

V. INSURER'S BAD FAITH IS A FACTUAL ISSUE.

"Bad Faith" is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim. (Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Association.) Unreasonableness or bad faith requires a factual finding. (Brown v. State Farm Mutual Insurance Company (at 771)

CONCLUSION

Summary Judgment is a drastic remedy, and should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.

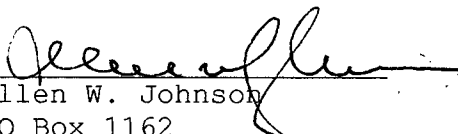
Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them Summary Judgment should not be granted. (Koester v. Carolina Rental Car Center)

An insurance contract is to be construed liberally in favor of the insured and strictly against the insurer. (Deese v. American Banker)

If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim the insured can recover consequential damages in a tort action. (University Medical Associates of Medical University of South Carolina v. Unumprovident Corporation)

Respectfully submitted,

July 22, 2016


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