

UNITED STATES COURT OF APPEALS **October 6, 2021**

TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

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

ORDER AND JUDGMENT*

Before **HARTZ, BALDOCK, and EID**, Circuit Judges.

The parties are familiar with the historical facts and procedural history of this case. Following a one-car automobile accident, Plaintiffs Lane and L.S., both passengers in the automobile, sought uninsured/underinsured motorist (UM) coverage under an insurance policy issued by Defendant Progressive to the driver's parents. After Progressive paid Plaintiffs the liability limits of the policy, it denied Plaintiffs' UM claims based upon a policy exclusion. That exclusion operated to deny UM coverage to Plaintiffs because they had recovered at least the Oklahoma statutorily-

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

mandated minimum of \$25,000 under the liability portion of the policy.

Plaintiffs subsequently brought this diversity action under 28 U.S.C. § 1332 alleging two causes of action against Progressive: (1) breach of an insurance contract premised upon a violation of Oklahoma public policy, and (2) breach of the implied-in-law duty of good faith and fair dealing premised upon bad faith settlement of insurance claims. The district court granted Progressive judgment on the pleadings. In a thorough written order, the district court first rejected Plaintiffs' argument that the UM exclusion violated the State's public policy: "Lacking clear guidance from statutory or judicial sources, the court concludes that the parties to the insurance policy were free to agree to the exclusion, and that this court should not disallow their bargain." *Lane v. Progressive N. Ins. Co.*, No. 19-CV-5-F, 2019 WL 11276759, at *11 (W.D. Okla. Apr. 30, 2019) (unpublished). Having held that Progressive, as a matter of law, had not breached the policy's terms, the court then necessarily held Progressive had not acted in bad faith in denying Plaintiffs' UM claims. Lastly, as to Plaintiffs' second cause of action, the district court held in the alternative:

Alternatively, with respect to the bad faith claim, the court concludes that if this order is incorrect and the exclusion is not allowed as a matter of law, plaintiffs' bad faith claims still fail. The tort of bad faith does not prevent an insurer from denying any claim as to which the insurer has a reasonable defense. There was a legitimate dispute concerning coverage, and there is no conclusive precedent indicating that the exclusion is not permitted.

Id. at *12 (citation omitted).

Plaintiffs timely appealed to this Court challenging the district court’s dispositive rulings. Following oral argument, we certified 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?” *Lane v. Progressive N. Ins. Co.*, 800 F. App’x 662, 663 (10th Cir. 2020) (unpublished). The Oklahoma Supreme Court accepted our certification, describing this question as “one of first impression and . . . governed by no controlling Oklahoma precedent” *Lane v. Progressive N. Ins. Co.*, 2021 WL 2658997, at *2, 494 P.3d 345, (Okla. June 29, 2021) (internal quotations omitted).

In *Lane*, the Oklahoma Supreme Court, in a five to three decision, held the UM exclusion contained in the Progressive policy violated the State’s public policy and was unenforceable:

Progressive’s UM Exclusion violates [Oklahoma] public policy because an insurer in Oklahoma cannot deprive its policyholder of uninsured-motorist coverage *for which a premium has been paid* through an exclusion that effectively erases its policyholder’s choice to purchase that coverage in the first place. We conclude that Progressive’s UM Exclusion contravenes section 3636 and is therefore void as against public policy.

Id. at *1 (emphasis in original). In other words, the Oklahoma Supreme Court reasoned that because of the sweeping nature of the UM exclusion contained in the Progressive policy at issue here, Progressive effectively sought to avoid affording

Plaintiffs the UM coverage for which the policyholder had paid. *Id.*

All parties agree in their recent supplemental briefing that given the Oklahoma’s Supreme Court’s answer to our certified question in this case, the district court’s grant of judgment on the pleadings to Progressive on Plaintiffs’ cause of action for breach of contract must be reversed. This leaves us only the question of how to resolve the ongoing dispute over Plaintiffs’ cause of action for breach of the implied duty of good faith and fair dealing. Plaintiffs tell us that Progressive’s policy exclusion which prohibits policyholders from getting what they paid for is inconsistent with the duty of good faith and fair dealing. Progressive, the Plaintiffs say, “could not have had a good faith basis for believing its UM exclusion was valid in light of the clearly established precedent and statutory language.”

We are not unsympathetic to Plaintiffs’ position considered in a vacuum. *See Lane*, 2021 WL 2658997, at *8 (Kauger, J., concurring) (describing the policy’s UM exclusion as “border-line theft”). But Plaintiffs’ argument that the UM exclusion’s invalidity was plain under Oklahoma law simply proves too much. We chose to certify the question of the UM exclusion’s validity precisely because of the “unsettled nature of the applicable state law,” which we briefly described. *Lane*, 800 F. App’x at 664–65. The Oklahoma Supreme Court agreed with our characterization of the issue. *Lane*, 2021 WL 2658997, at *2. Moreover, the three dissenting justices in the Oklahoma Supreme Court pointed out that, considering prior Oklahoma precedent, the Court’s decision disallowing the UM exclusion “with respect to Class

2 insureds, in effect [may, only arguably in our opinion], allow[] Class 2 insureds to recover liability and UM benefits in excess of what a Class 1 insured can recover under the same policy.” *Id.* at *10 (Rowe, J., dissenting); *see Hartline v. Hartline*, 39 P.3d 765, 771–73 (Okla. 2001) (holding household and named insured exclusions invalid where they operate to deny minimum mandated coverage in the form of either liability or UM motorist coverage to an injured resident family member). This precedent, coupled with the indeterminative language of the Oklahoma UM statute, *see Lane*, 800 F. App’x at 664–65, gave Progressive “some justifiable reason” to include the UM exclusion in its policy of insurance. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093–94 (Okla. 2005). Such reason precludes as a matter of Oklahoma law a finding that Progressive breached the duty of good faith and fair dealing in this instance.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Entered for the Court,

Bobby R. Baldock
United States Circuit Judge