FILED
United States Court of Appeals
Tenth Circuit

May 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMY GIERTZ,

Plaintiff - Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant - Appellee.

No. 22-1114
(D.C. No. 1:18-CV-01781-DDD-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

Amy Giertz appeals from a final judgment entered in favor of State Farm Mutual Automobile Insurance Company ("State Farm") following a jury trial. Giertz claims the district court erred in (1) entering a pair of bifurcation orders and (2) excluding from trial certain evidence. This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and **affirms**.

Giertz was injured in an automobile-bicycle accident involving Claire Gordon. After settling her claims against Gordon for the limits of Gordon's automobile

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

liability insurance policy, Giertz sought underinsured motorist ("UIM") benefits from State Farm, her own automobile liability insurer. State Farm disputed Giertz's entitlement to UIM benefits. Ultimately, Giertz filed suit against State Farm, raising the following three causes of action: (1) a breach of contract claim; (2) a common-law tort claim for bad faith breach of insurance contract[1]; and (3) a statutory claim that State Farm denied her UIM benefits without a reasonable basis.[2]

On State Farm's motion, the district court severed for trial Giertz's contract claim from her common-law and statutory bad faith claims. It concluded that first resolving whether State Farm breached its contract with Giertz could potentially save time and resources. For instance, the district court determined that, should the jury find no breach occurred, Giertz's bad faith claims would necessarily fail.[3] Thereafter,

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[1] *See State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 188 (Colo. 2004) (en banc) ("Unlike the breach of the implied duty of good faith and fair dealing in an ordinary contract, breach in an insurance contract gives rise to a separate cause of action in tort.").

[2] *See* Colo. Rev. Stat. §§ 10-3-1115, -1116.

[3] In this regard, the district court concluded as follows:

> Both convenience and economy may be served because it appears at least possible that trial of the breach-of-contract claim will be dispositive of the case. To succeed on each of her claims, Ms. Giertz must prove a threshold matter: "that the fault of the uninsured motorist gave rise to damages and the extent of those damages." *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265, 1269 (Colo. App. 2001). It isn't clear Ms. Giertz will be able to do so. She has no recollection of the accident, Doc. 63 at 4 (quoting deposition testimony of Ms. Giertz), and Ms. Gordon along with two eyewitnesses testified that Ms. Giertz, not Ms. Gordon, was at fault for the accident, *id*. at 5–6. So trying this issue separately has the possibility to dispose of the whole case, cutting

the district court, sua sponte, entered a second bifurcation order. In the second order, the district court determined "convenience[] and economy require a different division of the issues at trial." According to the district court, "[t]he threshold nature of the fault determination warrants a separate trial."[4] Thus, the district court severed the issue of Gordon's alleged fault from all other issues and ordered that the issue would be presented to the jury in the first portion of the trial as a standalone question: "The Court shall hold a trial on whether Ms. Gordon was at fault in the underlying accident first, and, if necessary, will hold a second section of the trial on Ms. Giertz's breach-of-contract claim and bad-faith claims, including the amount of damages incurred."

Prior to trial, State Farm filed a motion in limine, asking the district court to exclude from the first phase of trial evidence regarding the thought processes of State Farm's claims adjusters in disputing Giertz's claimed entitlement to UIM benefits. Over Giertz's objection, the district court granted the motion. In relevant part, the

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down on trial time, which will convenience the jury, the court, the parties, and the witnesses.

[4] In support of this conclusion, the district court reasoned as follows:

> If the jury determines that Ms. Gordon did not cause the accident, then no further factual inquiry is required. Trying this issue separately may dispose of the whole case, shortening the trial time, conveniencing the jury, the court, the parties, and the witnesses. But if Ms. Giertz demonstrates fault, the second section of the trial will more logically combine the inquiry into the amount of damages and whether the denial of any additional payment was carried out in bad faith. Both the nature of the evidence and the witnesses necessary for the two inquiries better align with this division.

district court concluded: (1) testimony from the adjusters would not be based on personal knowledge, *see* Fed. R. Evid. 602; (2) testimony from the adjusters would not qualify as admissible opinion testimony, *see* Fed. R. Evid. 701; and (3) testimony as to internal liability assessments and fault evaluations was not relevant to the element of Giertz's contract claim focused on Giertz's and Gordon's relative fault, *see* Fed. R. Evid. 401.

The case proceeded to a jury trial on the issue of the comparative fault of Giertz and Gordon. The jury found Giertz and Gordon were equally at fault for the accident. Thus, pursuant to Colorado law, Giertz failed to establish Gordon was at fault for the accident. *See* Colo. Rev. Stat. § 13-21-111. As a result of her failure to demonstrate Gordon's fault, Giertz's contract claim necessarily failed. *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265, 1269 (Colo. App. 2001); *see also Newton v. Nationwide Mut. Fire Ins. Co.*, 594 P.2d 1042, 1043 (Colo. 1979) (holding the same in the related context of uninsured motorist coverage). And, given the failure of her contract claim, her bad faith claims also failed. *See supra* n.3. The district court, therefore, entered judgment in State Farm's favor as to all claims set out in Giertz's complaint.

Giertz appeals, asserting the district court erred in severing the issue of fault from the remaining aspects of her contract claim and from the bad faith claims. In so asserting, she claims the district court's decision to bifurcate her claims impermissibly changed the nature of her contract claim. She also asserts the district court erred in excluding testimony from State Farm's claims adjusters.

District courts have "considerable discretion in determining how [trials are] to be conducted." *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993). Accordingly, this court will not disturb a "trial court's bifurcation order absent an abuse of discretion." *Id.*[5] District courts may order separate trials of "one or more separate issues, claims, crossclaims, counterclaims, or third-party claims" "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). "Bifurcation is not an abuse of discretion if such interests favor separation of issues and the issues are clearly separable. Regardless of efficiency and separability, however, bifurcation is an abuse of discretion if it is unfair or prejudicial to a party." *Angelo*, 11 F.3d at 964 (citation omitted). This court likewise reviews the district court's evidentiary decision for abuse of discretion. *See Texas E. Transmission Corp. v. Marine Off.-Appleton & Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978) ("The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court, and we will not disturb that decision on appeal absent a showing of a clear abuse of discretion."). The standard for abuse of discretion is high. *ClearOne Commc'ns., Inc. v. Bowers*, 643 F.3d 735, 773 (10th Cir. 2011). To satisfy this difficult standard, Giertz "must show that the district court

[5] State Farm has advanced on appeal a particularly strong argument Giertz waived any objection to the district court's bifurcation orders by affirmatively agreeing in the district court that her breach-of-contract claim was separate from her common-law and statutory bad faith claims and that hearing the breach issue first would advance efficiency. This court need not resolve that issue, however, because this appeal can most efficiently and straight-forwardly be resolved in State Farm's favor on the merits. *See United States v. Garcia-Ramirez*, 778 F.3d 856, 857 (10th Cir. 2015).

committed an error of law (for example, by applying the wrong legal standard) or committed clear error in its factual findings." *Id.* (quotation omitted). Otherwise, a district court only abuses its discretion when it renders "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1205–06 (10th Cir. 2003) (quotation omitted).

In severing the issue of fault from the remaining issues for trial, Giertz claims the district court both separated related issues and prejudiced her by altering the nature of her breach-of-contract claim. That is, Giertz asserts she was entitled to prove her bad faith claims by reference to the allegedly real reasons State Farm denied her UIM claim. With this claim in mind, she further asserts the district court's bifurcation order, along with the exclusion of evidence from State Farm's claims adjusters, prevented her from proving her claims. Giertz's arguments in this regard are based on a misinterpretation of Colorado law.

To demonstrate a contractual entitlement to UIM benefits, an insured has the burden to prove liability on the part of the underinsured motorist and damages exceeding the limits of the underinsured motorist's own coverage. *See Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998).[6] Only after the

[6] *Peterman* holds as follows in the closely related context of uninsured motorists: "[T]he UM statute is designed to protect insureds injured by uninsured motorists in the same manner as those injured by insured motorists. Both the statute and the insurance policy here at issue require an insurer to pay, up to policy limits, what an insured is 'legally entitled to recover' from an uninsured motorist. The insured has the burden to prove liability and damages." 961 P.2d at 493 (citation omitted).

insured party to the UIM contract has satisfied this burden—whether in a trial against either the underinsured motorist or the UIM insurer or in arbitration—is the insurer under a contractual and statutory duty to compensate the insured. *Id.* To be clear, then, a finding of no legal liability on the part of the underinsured motorist will eliminate a claim under the insurance provider's UIM coverage. *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 188 (Colo. 2004) ("[S]ection 10–4–609's coverage [the statutory provision applicable to uninsured and underinsured motorists] applies only if the insured is 'legally entitled' to damages. Consequently a finding of no liability or of limited damages on the part of the uninsured motorist will eliminate or limit a claim under the insurance provider's UM coverage."). In defending against a UIM claim when liability for the accident is at issue, the insurer steps into the shoes of the alleged tortfeasor, as though the insurer were the driver. *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649, 657 (Colo. 2012). Thus, the trial of the UIM contract claim proceeds the same as if the case were tried against the other driver, with the focus being on the accident itself. *Id.*[7]

[7] *Sunahara* describes this process as follows:

> The UIM context . . . places the insurance company in the "unique role" of becoming almost adversarial to its own insured. UIM coverage is designed to put a driver who is injured by an underinsured motorist in the same position as if the underinsured motorist had liability limits in amounts equal to the insured's coverage. Thus, the fact-finder in a UIM case must weigh the evidence presented by the defendant insurance company, essentially standing in the shoes of the underinsured motorist, against the evidence presented by the injured plaintiff. The defendant insurance company will naturally attempt to

Importantly, before an insured individual can recover against her UIM carrier for either statutory or common-law bad faith, she must first establish she is entitled to UIM benefits. *See Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 228 (Colo. App. 2002), *superseded by statute on other grounds, as recognized in Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 148 n.10 (Colo. 2007)[8]; *Jarnagin v. Banker's Life & Cas. Co.*, 824 P.2d 11, 15 (Colo. App. 1991); *Tynan's Nissan, Inc. v. Am. Hardware Mut. Ins. Co.*, 917 P.2d 321, 326 (Colo. App. 1995); *see also O'Malley v. U.S Fid. & Guar. Co.*, 776 F.2d 494, 500–01 (5th Cir. 1985) (noting similar aspect of Mississippi law providing that recovery on a bad faith claim "would not have been possible" absent a finding for the plaintiff on the question of coverage).[9] Furthermore, the

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> minimize the plaintiff's damages in such a case because doing so serves the company's financial interests.

280 P.3d at 657.

[8] As *Daugherty* explains,

> The basic elements of any tort claim are: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury caused by the breach of duty. The duty at issue in a bad faith breach of insurance contract claim is the insurance company's duty to act in good faith and deal fairly with its insured. However, the insurance company is not called upon to perform this duty until some contractual duty imposed by the insurance policy has arisen. While the contractual duty and the duty to act in good faith are separate and distinct duties, they are related, and both must exist simultaneously to create a bad faith claim.

55 P.3d at 228 (citations omitted).

[9] To the extent Giertz's appellate briefing could be read as asserting her breach of contract claim against State Farm must be measured against the reasons stated by State Farm at the time it denied her request for UIM coverage, such argument is

relevant Colorado authorities make clear that the facts necessary to prove a breach of contract claim—liability of the underinsured motorist and damages to the insured that exceed the underinsured motorist's policy limits—are entirely different from the facts necessary to prove the bad faith claims. The breach-of-contract claim concerns the circumstances of the accident and the extent of insured's damages; the bad-faith claims concern the practices the insurer employed to evaluate the insured's UIM claim.[10]

The authorities cited above make clear the district court did not abuse its discretion in bifurcating the contract and bad faith claims in this case. The district court reasonably recognized that the threshold issue of Gordon's liability is separate from the issues relevant to Giertz's bad faith claims and that the recovery on the bad faith claims was necessarily dependent on Giertz's entitlement to UIM benefits. Accordingly, the district court did not abuse its discretion in concluding that trying the disputed issue of liability first and separate from the bad faith claims had the

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foreclosed by the authorities cited above. Furthermore, her attempt to collapse her breach of contract claim into her bad faith claims is at odds with the well-established principle of Colorado law that coverage cannot be created by equitable principles like implied waiver and estoppel. *Hartford Live Stock Ins. Co. v. Phillips*, 372 P.2d 740, 742 (Colo. 1962).

[10] To succeed on a common law claim of bad faith breach of an insurance contract, a plaintiff must prove that the insurer acted both unreasonably and with knowledge of or reckless disregard of its unreasonableness in the denial of a covered claim. *Hyden v. Farmers Ins. Exch*., 20 P.3d 1222, 1226 (Colo. App. 2000). To succeed on the statutory bad faith claim, a plaintiff must prove that "the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." Colo. Rev. Stat. § 10-3-1115(2).

potential of disposing of the whole case. This is particularly true given that the fault of the underinsured motorist was heavily contested and Giertz's case suffered from potential evidentiary problems. *See supra* n.3. Thus, Rule 42(b)'s requirement of separateness is satisfied. Nor can Giertz convincingly argue the district court abused its discretion in bifurcating the issues of breach and bad faith by pointing to other district court orders refusing to bifurcate such issues. District courts have wide latitude to balance competing interests under Rule 42(b) and come to conclusions that make sense in each case. That discretion is validly exercised as long as it is reasonable under the relevant circumstances of each case. The district court's decision here easily satisfies that standard.

Giertz's claim of prejudice, along with her challenge to the district court's exclusion of State Farm's internal claim deliberations, centers on the allegation that bifurcation prevented her from using evidence of State Farm's pre-suit evaluation of her UIM claim. The problem for Giertz, however, is that she would not have been able to use that evidence to prove her breach of contract claim even if the district court did not order separate trials. In *Sunahara*, the Colorado Supreme Court held that evidence of an insurer's internal settlement evaluation, settlement authority, settlement offers, reserves and claims handling activities are irrelevant to an insured's negligence-based UIM claim because such evidence does not constitute an admission of liability or the worth of the claim. 280 P.3d at 656–57. Courts occasionally bifurcate breach-of-contract and bad-faith claims to preclude such

evidence and, thereby, avoid jury confusion and prejudice to the parties. *See Oulds v. Principal Mut. Life Ins. Co.*, 6 F.3d 1431, 1435 (10th Cir. 1993).

The district court did not abuse its wide discretion in severing the issue of Gordon's liability from the remaining breach issues and from the bad-faith claims. The liability issue is separate from the remaining breach issues and bad-faith claims. The district court reasonably concluded bifurcation would further efficiency, while minimizing prejudice and confusion. And, the district court correctly concluded, pursuant to the dictates of *Sunahara*, that State Farm's internal claim deliberations were legally irrelevant to the question of Gordon's liability. Thus, the judgment of the United States District Court for the District of Colorado is hereby **AFFIRMED**.

Entered for the Court

Michael R. Murphy
Circuit Judge