2015 IL App (3d) 140028-U

Order filed April 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff and Counterdefendant-Appellee, v. REGINALD HUTCHINS, by his mother and next friend, LATONYA JOHNSON, Defendants and Counterplaintiffs-Appellants.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-14-0028 Circuit No. 04-MR-201 Honorable Barbara Petrungaro, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment dismissing injured party's complaint for damages against insurer under section 155 of the Insurance Code where a *bona fide* dispute existed as to whether the claimant was an "insured" under the policy.

¶ 2 Defendant and counterplaintiff, Reginald Hutchins, by his mother and next friend, LaTonya Johnson, filed a claim for benefits under a motor vehicle insurance policy issued to his

grandparents, Artis and Rose Williams, for injuries he sustained when he was struck by an underinsured motorist. The insurer, State Farm Fire and Casualty Company (State Farm) brought an action in circuit court, seeking a declaration that Hutchins did not reside with his grandparents and was not entitled to benefits under the policy. In response, Hutchins filed a countercomplaint for damages under section 155 of the Insurance Code (Insurance Code) 215 ILCS 5/155 (West 2008), alleging that State Farm's delay in settling the claim was vexatious and unreasonable. Following an appeal and remand, the trial court (1) granted Hutchins' motion for summary judgment as to State Farm's complaint, finding that he was entitled to benefits under the policy, and (2) dismissed Hutchins' countercomplaint for damages for State Farm's delay in paying the policy benefits. Hutchins appeals the dismissal of his section 155 claim. We affirm.

¶ 3 On June 14, 2003, Hutchins was struck by a motor vehicle operated by an underinsured motorist while he was walking across a street in Chicago. He was 14 years old at the time and was seriously injured. The driver who struck Hutchins was insured and carried per person liability injury limits of $20,000.

¶ 4 At the time of the accident, Hutchins spent time with both his mother, LaTonya Johnson, who lived in Chicago, and his grandparents, Artis and Rose Williams, who lived in Bolingbrook. Johnson filed a claim on Hutchins' behalf, seeking underinsured motorist coverage benefits under a State Farm policy that had been issued to Artis and Rose. The policy provided:

> "We will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured*** and cause by an accident arising out of the operation, maintenance or use of an ***underinsured motor vehicle***.

The policy defined "an insured" as:

"the ***person*** or ***persons*** covered by uninsured motor vehicle or underinsured motor vehicle coverages.

With respect to ***bodily injury***, this is:

1. the first ***person*** named in the declarations;

2. his or her ***spouse***; [or]

3. their ***relatives*** ***."

The policy further defined "relative" as:

"a ***person*** related to ***you*** and ***your spouse*** by blood, marriage or adoption who ***resides primarily*** with ***you***. It includes your unmarried and unemancipated child away at school."

¶ 5 State Farm filed a complaint seeking a declaration that Hutchins "was not at all relevant times, prior to and up to the time of the occurrence, a resident of the home of the Defendants, ARTIS WILLIAMS and ROSE WILLIAMS." In addition, the complaint asked the trial court to enter an order finding that State Farm did not owe underinsured motorist coverage to Hutchins under the policy.

¶ 6 Shortly after State Farm filed its complaint, Hutchins filed a countercomplaint for damages under section 155 of the Insurance Code.[1] In the countercomplaint, Hutchins alleged that he "primarily resided" with his grandparents and therefore qualified as an insured under the policy. He alleged that State Farm's failure to pay the coverage benefits and to appear in arbitration was unreasonable and vexatious conduct under section 155 of the Code. He also

[1] The countercomplaint was originally filed by LaTonya Johnson, as mother and next friend of Hutchins, a minor. Hutchins is no longer a minor and will be referred to as the counterplaintiff.

claimed that the insurance company's delay in settling the claim and failure to promptly investigate claim violated section 154.6 of the Code (215 ILCS 5/154.6 (West 2004)) and sections 919.40 and 919.50 of the Illinois Administrative Code (Administrative Code) (50 Ill. Adm. Code §§ 919.40, 919.50 (2004)).

¶ 7 In August of 2008, defendants filed a motion for summary judgment, arguing that the policy term "resides primarily" as used in the definition of "relative" was ambiguous and that at all relevant times Hutchins was a resident of the Williams household. Exhibits submitted with the motion included deposition testimony in which Rose, Hutchins and Johnson testified that Hutchins spent most of his time at the Williamses' house in Bolingbrook. In response, State Farm filed a cross-motion for summary judgment. Attached to its motion were tax returns and housing applications in which Johnson named Hutchins as a member of her household in Chicago.

¶ 8 The trial court denied defendants' motion for summary judgment and granted judgment in favor of State Farm. The court concluded that Hutchins' primary residence was in Chicago with his mother and therefore State Farm was not obligated to provide insurance coverage.

¶ 9 Defendant appealed, and we reversed the trial court's ruling in a three-part decision. *State Farm Fire & Casualty Co. v. Reginald Hutchins*, 2012 IL App (3d) 100339-U. Justice Wright, writing for the majority, found that State Farm's amended complaint did not ask the trial court to address the dispositive question of Hutchins' "primary residence," but only requested a declaration that Hutchins "did not" reside with his grandparents at all relevant times prior to the occurrence. Justice Wright held that the facts indicated that Hutchins "did" reside with his grandparents. She then concluded that the answer to that question did not resolve the pending litigation between the parties and remanded the cause for further proceedings.

¶ 10 Justice McDade wrote a special concurrence agreeing to remand the cause. However, she also concluded that the term "resides primarily" was ambiguous. Because she believed such language was ambiguous, she stated that she would have reversed the trial court's order granting summary judgment in State Farm's favor and entered summary judgment in defendant's favor on the ground that policy ambiguities are to be resolved in the insured's favor. *Hutchins*, 2012 IL App (3d) 100339-U, ¶¶ 54-68 (McDade, J., specially concurring).

¶ 11 In a dissent, Justice Holdridge disagreed with the majority's characterization of State Farm's complaint, stating that the "dispositive issue" in the complaint was whether Hutchins was an insured, which, under the policy, was limited to Hutchins' "primary residence" on the date of the accident. Justice Holdridge concluded that there could be no disputable issue of material fact that, at the time of the accident, Hutchins resided primarily with his mother in Chicago, and he found the evidence in support thereof overwhelming. Thus, he concluded that summary judgment should have been granted in favor of State Farm. *Hutchins*, 2012 IL App (3d) 100339-U, ¶¶ 69-73 (Holdridge, J., dissenting).

¶ 12 On remand, State Farm filed a second amended complaint seeking a declaration that Hutchins "did not primarily reside at the home of the Defendants, ARTIS WILLIAMS and ROSE WILLIAMS, at the time of the subject accident on June 14, 2003" and that Hutchins was not entitled to coverage under the policy. Hutchins and his grandparents moved to dismiss the amended complaint, arguing that State Farm could not prevail in its declaratory action because this court had previously concluded that "resides primarily" was ambiguous.

¶ 13 State Farm also moved for summary judgment on Hutchins' section 155 countercomplaint, arguing that the existence of a *bona fide* dispute as to coverage was evident in

light of our split decision. Thus, State Farm claimed that Hutchins could not show that it acted in bad faith under section 155 of the Code.

¶ 14 Following a hearing, the trial court determined that the policy language was ambiguous and granted defendants' motion to dismiss State Farm's second amended complaint. Notwithstanding its finding of ambiguity, the court concluded that there was "clearly a *bona fide* dispute of coverage" and granted summary judgment in favor of State Farm on Hutchins' countercomplaint.

¶ 15 Hutchins filed a motion to reconsider that portion of the trial court's order granting summary judgment in favor of State Farm on his section 155 countercomplaint. Included with the motion to reconsider was a cross-motion on the same countercomplaint seeking summary judgment in Hutchins' favor. The trial court denied both motions.

¶ 16 STANDARD OF REVIEW

¶ 17 Review of a trial court's ruling granting summary judgment is *de novo*. *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 302 (2000). However, whether an insurer's action in denying or delaying payment of a claim is vexatious and unreasonable is a question of fact, and a trial court's determination regarding such conduct will be upheld on review unless it is an abuse of discretion. *Dark v. United States Fidelity and Guaranty Co.*, 175 Ill. App. 3d 26, 30-31 (1988) ("While the question of whether the insurer's action and delay is vexatious and unreasonable is a factual one, it is a matter for the discretion of the trial court. As such, the trial court's determination will not be disturbed on review unless an abuse of discretion is demonstrated in the record."). Thus, we will apply the abuse of discretion standard of review even though the trial court granted summary judgment. See *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010).

¶ 18 ANALYSIS

¶ 19 On appeal, Hutchins argues that the trial court erred in finding the existence of a *bona fide* dispute as to coverage under the State Farm policy. Hutchins maintains that even if a *bona fide* dispute previously existed, our order finding that he was entitled to coverage under the policy voided any claim of a *bona fide* dispute and rendered State Farm's conduct vexatious and unreasonable.

¶ 20 Pursuant to section 155 of the Insurance Code, the court may allow a plaintiff to recover reasonable attorney fees, other costs and a penalty if an insurer causes an unreasonable delay in settling a claim. 215 ILCS 5/155 (West 2012). Section 155 provides:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (West 2012).

¶ 21 The primary inquiry in a section 155 claim is whether an insurance company's conduct is unreasonable and vexatious. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). The relevant question we must answer in determining whether an insurer's actions are "unreasonable and vexatious" is whether the insurer had a *bona fide* defense to the claim. *Norton*, 406 Ill. App. 3d at 745. "*Bona fide*" is defined as "[s]incere" or "genuine." Black's Law Dictionary 168 (7th ed. 1999). An insurer does not violate section 155 merely because it litigated and lost the issue of insurance coverage. *Valdovinos v. Gallant Insurance Co.*, 314 Ill. App. 3d 1018, 1021 (2000). In addition, section 155 does not create a duty to settle; a delay in settling a claim does not violate the Code if the delay is caused by a *bona fide*, or genuine, dispute. *Norton*, 406 Ill. App. 3d at 745. A trial court must consider the totality of the circumstances. *American States Insurance Co. v. CFM Construction Co.*, 398 Ill. App. 3d 994, 1003 (2010). Its decision to award attorney fees and costs under section 155 will not be disturbed absent an abuse of discretion. *Siwek v. White*, 388 Ill. App. 3d 152, 159-60 (2009).

¶ 22 Here, the trial court properly exercised its discretion in finding a *bona fide* dispute. As discussed in our prior, whether Hutchins was entitled to coverage under the policy hinged on whether he "resided primarily" with the insured party in Bolingbrook. See *Hutchins*, 2012 IL App (3d) 100339-U, ¶¶ 33, 59, 71. State Farm opened a claim in July 2003 and received medical records that identified Hutchins' address as his mother's residence in Chicago, not the Williamses' Bolingbrook residence. This raised a question as to whether Hutchins was a covered relative as defined under the policy. At the time State Farm filed its declaratory judgment action in March of 2004, no Illinois court had interpreted the phrase "resides primarily with you." *Cf. Janes v. Western States Insurance Co.*, 335 Ill. App. 3d 1109, 1116-18 (2001) (finding no *bona fide* dispute in light of clear Illinois precedent that stacking of underinsured

motorist coverage from separate policies was not prohibited). Thus, based on the information State Farm had collected, Hutchins' primary residence was a disputed question of fact. State Farm filed a declaratory judgment action asking the court to answer the question in its favor. While the trial court ultimately concluded that judgment in State Farm's favor was inappropriate, State Farm's delay in paying the claim was based on a real and genuine belief that Hutchins' did not reside primarily with Artis and Rose Williams and therefore was not covered under the policy.

¶ 23 Hutchins claims that collateral estoppel and law of the case preclude a finding of a *bona fide* dispute. He asserts that this court's decision in *Hutchins* provided clear precedent that voided any claim of a *bona fide* dispute and rendered State Farm's conduct vexatious. We disagree. Our earlier ruling did not provide clear precedent that "resides primarily" was ambiguous. The majority concluded that Hutchins "did" reside with the insured as the question was posed in State Farm's declaratory judgment complaint and remanded the case for further proceedings. Nothing in Justice Wright's order resolved the question as to whether State Farm was obligated to pay the claim. Thus, Hutchins cannot not maintain that State Farm's failure to pay the claim after we reversed the trial court's order granting summary judgment in State Farm's favor was vexatious or unreasonable. Even if the majority had determined that the term "resides primarily" was ambiguous, the decision would not impact the viability of State Farm's *bona fide* dispute defense. See *Valdovinos*, 314 Ill. App. 3d at 1021 (insurer does not violate section 155 merely because it litigated and lost the issue of insurance coverage).

¶ 24 Last, Hutchins argues that State Farm's section 154.6 violations provide a private cause of action independent of a section 155 claim and the *bona fide* dispute defense. Hutchins asserts that a *bona fide* dispute as to coverage is not a defense to an insured's section 155 claim where

the insurer engages in misconduct "unrelated in whole or in part" to the alleged *bona fide* dispute. It is well settled that section 154.6 of the Insurance Code does not create a private cause of action. See *Area Erectors, Inc. v. Travelers Property Casualty Co. of America*, 2012 IL App (1st) 111764, ¶ 30. In this case, the *bona fide* dispute as to the claimant's status as an insured was a defense to Hutchins' section 155 claim regardless of allegations of misconduct under section 154.6.

¶ 25 In this case, the trial court determined that it was reasonable for State Farm to pursue its contention that Hutchins did not reside primarily with Artis and Rose Williams, and was not covered as an "insured" under the policy. We find that the trial court did not abuse its discretion in ruling that State Farm was not vexatious and unreasonable in delaying payment of Hutchins' claim. The trial court properly dismissed Hutchins' countercomplaint for section 155 damages.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.