IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIMBERLY J. WRIGHT, Appellant, v. PEMCO MUTUAL INSURANCE COMPANY, Respondent.	)	No. 64233-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 12, 2010

Appelwick, J. — Wright appeals the trial court's summary judgment dismissal of her request for a declaratory judgment interpreting her rights under the underinsured motorist statute, RCW 48.22.030. She argues that adding another vehicle under her insurance coverage created a new policy, triggering Pemco's duty to obtain a new underinsured motorist (UIM) waiver from her. A change to the liability limit or UIM coverage are both recognized as material changes that create a new policy for purposes of the UIM waiver. Wright changed neither. We affirm.

FACTS

In 1994, Kimberly Wright insured her Ford Escort with Pemco Mutual

Insurance Company, carrying both liability and underinsured motorist limits of $50,000 per person and $100,000 per accident. In 2001, Wright increased the bodily injury limits to $100,000/$300,000 but left the UIM coverage at $50,000/$100,000. In August of 2001, she signed the statutorily required UIM waiver, acknowledging that she was reducing her UIM coverage and that Pemco had offered her the opportunity to buy UIM coverage up to an amount equal to her third party liability coverage. She renewed the policy in 2002 and 2003 with the same UIM limits.

In August 2003, she added a Hyundai to her policy, with the same coverage as the Escort, except that she added collision coverage. Neither the liability coverage nor the UIM coverage changed. Pemco sent a revised policy to Wright confirming the addition of the new car and coverage amounts. Shortly thereafter, Wright removed the Escort from her policy altogether. Wright renewed the policy for the Hyundai in 2004, 2005, and 2006. The declarations Wright received each year showed the reduced UIM limits.

Wright was injured in a car accident with an underinsured motorist on February 19, 2007. Wright demanded Pemco provide her with $100,000 in UIM coverage. Pemco refused, stating that the lower $50,000/$100,000 coverage limits that she had selected in her written waiver applied.

Wright sued for declaratory relief, arguing that the higher UIM coverage limit applied. She maintained that the addition of a new vehicle created a new policy, which in turn required a new UIM waiver. She also brought claims for bad faith and violations of the Consumer Protection Act (CPA), chapter 19.86

RCW. Pemco moved for summary judgment to dismiss all of Wright's claims, and the trial court granted the motion. The court also denied Wright's motion for reconsideration.

DISCUSSION

We review summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing an order of summary judgment, we engage in the same inquiry as the trial court, considering the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

Factual issues may be decided on summary judgment "'when reasonable minds could reach but one conclusion from the evidence presented.'" Van Dinter v. City of Kennewick, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quoting Cent. Wash. Bank, v. Mendeson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989)). A declaration that contains only conclusory statements without adequate factual support does not create an issue of material fact that defeats a motion for summary judgment. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

I. Validity of the UIM Waiver

Wright claims as a threshold issue that the 2001 UIM waiver was ambiguous and inaccurate, and that she relied on Pemco to inform her of the

precise nature of the UIM waiver.

RCW 48.22.030 does not provide any standard form that an insurer must provide for the insured to waive UIM coverage. Generally, a waiver is the intentional and voluntary relinquishment of a known right. Dombrosky v. Farmers Ins. Co., 84 Wn. App. 245, 255, 928 P.2d 1127 (1996). A waiver may also be present where there is conduct that warrants an inference of the relinquishment of the right. Id. The waiver at issue here contained a cogent description of UIM coverage.[1] It also explained that, under state law, Pemco was required to provide UIM coverage in an amount equal to liability coverage, unless the insured desired to reduce or delete UIM coverage, in which case the waiver was required.[2] Wright's signature appears on the waiver, and she does not allege that the signature is not hers. Absent any allegations that her signature was procured by fraud or duress, its presence demonstrates an intent to waive UIM coverage.

We discern no genuine issue of material fact concerning the validity of the 2001 waiver. Wright's allegation that the UIM waiver was invalid is meritless.

II. Declaratory Relief

[1] "Underinsured Motorist-Bodily Injury Coverage pays you, your family, and passengers in your motor vehicle for bodily injury caused by a negligent driver who carries no insurance or has insufficient insurance to cover damages. . . . It does not pay for injuries to the underinsured driver."

[2] The waiver document stated,

> "State law requires PEMCO to provide Underinsured Motorist Coverage as part of your auto policy unless you choose to reduce the amount of coverage or delete it altogether. If you want to reduce or delete any Underinsured Motorist Coverages from your policy, please indicate your choice by checking the appropriate box or boxes below. . . .
>
> [UIM] Coverage is initially provided in an amount equal to your Bodily Injury Liability Coverage . . . . We may change these limits only with your written consent."

Wright requested a declaratory judgment that the addition of the Hyundai and the collision coverage to her policy in 2003 created a new policy, requiring Pemco to provide UIM coverage at the same level as her liability coverage unless she executed another written waiver. The ordinary standards of appellate review apply when a trial court considers a declaratory judgment action on its merits. Nollette v. Christianson, 115 Wn.2d 594, 599–600, 800 P.2d 359 (1990); see RCW 7.24.070. Thus, conclusions of law involving interpretations of statutes are reviewed de novo. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Interpretation of an insurance contract is a question of law we also review de novo. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

RCW 48.22.030 requires every new or renewed policy of automobile liability insurance to provide UIM coverage in the same amount as the insured's third party liability or bodily injury coverage unless the insured rejects such coverage in writing.[3] Johnson v. Farmers Ins. Co. of Wash., 117 Wn.2d 558, 562, 817 P.2d 841 (1991). Once the insured rejects the UIM coverage, the

[3] RCW 48.22.030(2) provides in pertinent part,

> No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom . . . .

RCW 48.22.030(3) reads, "Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section."

insurer cannot provide supplemental or renewal policies with UIM coverage, unless the insured requests reinstatement of the UIM coverage in writing. RCW 48.22.030(4)[4]; Johnson, 117 Wn.2d at 562. The requirements of RCW 48.22.030 are incorporated into insurance policies. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 254, 850 P.2d 1298 (1993). The statute does not define "new policy" or "renewal of an existing policy." RCW 48.22.005, .030(2).

Division Two in Jochim v. State Farm Mutual Automobile Insurance Co., 90 Wn. App. 408, 412, 952 P.2d 630 (1998), and Division Three in Torgerson v. State Farm Mutual Automobile Insurance Co., 91 Wn. App. 952, 958, 957 P.2d 1283 (1998), both cited Johnson as adopting a "materiality" standard in distinguishing between new and renewal policies. The inquiry focuses on whether the changes in the policy are sufficiently material to support a conclusion that a new, rather than a renewal, policy was issued. Johnson, 117 Wn.2d at 571–73.

In Jochim, the insureds waived full UIM coverage and later substituted cars under their existing policy. 90 Wn. App. at 409–10. They then added collision, comprehensive, and death indemnity coverage for the new cars. Id. at

[4] RCW 48.22.030(4) provides in pertinent part,

> A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy.

The statute does not define "supplemental policy," but supplemental and renewal policies are treated the same with respect to UIM waivers.

410. The insurer also automatically increased the UIM property damage coverage according to company policy. Id. Division Two held that these changes did not materially change the policy to create a new one, because the liability coverage limits remained the same. Id. at 415–16. The court's conclusion was driven by its reasoning that changes in liability limits create a new policy because only such changes, by statute, affect the extent of UIM coverage that the insurer must make available. Id. at 414.

In Torgerson, the insureds had liability limits of $100/$300,000 for their van and waived UIM and personal injury protection coverage altogether. 91 Wn. App. at 955–56. They later replaced the van with another one and added comprehensive, collision, personal injury protection, and UIM coverage (for an amount less than their liability coverage). Id. at 956. Division Three held that adding UIM coverage created a new policy requiring a new waiver of UIM coverage equal to liability limits. Id. at 961. In so holding, it questioned Jochim's apparent bright line rule of no material change in policy unless liability coverage limits change. Id.

In Johnson, the Supreme Court rejected the contention that addition of a new car was a material change creating a new policy for purposes of the UIM waiver statute. 117 Wn.2d at 573–74. There, the policy there was first issued in 1963, and the insured married in 1968. Id. at 562. In 1983, the insured changed the liability policy limits and agreed to less UIM coverage. Id. After the insured and his wife separated in 1985, the wife traded in the insured car, bought another car, and arranged coverage for the new car.[5] Id. at 563. That coverage

was provided in the same amounts under the same policy number that had been in effect since 1968. Id. Only the named insured, the named insured's address, the insured vehicle, and the insurance agent changed. Id. The court determined that the wife's changes were simply renewals of the prior coverage, as there was no change in coverage levels. Id. at 573. The court stated that, absent a change in coverage levels, neither a change in the named insured nor the substitution or addition of cars to the policy does not create a new policy requiring the insurer to renew its offer of full UIM coverage. Id. at 573–74.

Here, Wright did make changes to her policy, but none of them qualify as material changes. Wright added a car to her policy, but the addition of a new car to an existing policy is no more than a renewal of, or an action supplementary to, the original policy. Id. at 571. Wright also added collision coverage when she added the Hyundai to her policy. However, the addition of collision coverage does not fall within the purview of the rule announced in either Jochim or Torgerson. The liability limit remained the same, precluding the trial court from finding a new policy had been created under Jochim. The UIM coverage limits remained the same as well, precluding the trial court from finding a new policy had been created under Torgerson. The addition of a new car and collision coverage did not materially change Wright's existing policy, so Pemco's statutory duty to offer full UIM coverage was not triggered. As a matter of law, Wright's changes to her policy did not constitute a new policy.

The trial court did not err in denying Wright's claim for declaratory relief.

[5] The court held that the insured's 1983 waiver of full UIM coverage was effective as to his wife. Johnson, 117 Wn.2d at 570.

Summary judgment was proper on this cause of action.

III. Bad Faith and CPA Claims

Wright alleged that Pemco acted in bad faith and violated the CPA.[6] An insurer has a duty to act in good faith, including a duty to deal fairly with its insured. RCW 48.01.030 ("The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance."); Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). Whether an insurer has acted in bad faith is a question of fact. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). To prevail, Wright must demonstrate that Pemco's alleged misconduct was unreasonable, frivolous, or untenable. Liberty Mut. Ins. Co. v. Tripp, 144 Wn.2d 1, 23, 25 P.3d 997 (2001). Wright must also demonstrate that Pemco's alleged bad faith caused her harm. Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Accordingly, an insurer is entitled to summary judgment on a policyholder's bad faith claim if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party. Smith, 150 Wn.2d at 484.

To prevail in an action under the CPA, a plaintiff must establish the

[6] Wright has not clearly delineated which of Pemco's acts constitute CPA violations and which constitute bad faith, so out of an abundance of caution, we analyze the facts as they relate to both.

following: (1) the defendant has engaged in an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) the plaintiff has suffered injury in his or her business or property; and (5) a causal link exists between the unfair or deceptive act and the injury suffered. Indus. Indem. Co. of the Nw. v. Kallevig, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990) (construing RCW 19.86.020 et. seq.).

As Pemco points out, Wright has not alleged that Pemco's decision to reject her effort to collect $100,000 in UIM coverage was bad faith. Even if she had she would not prevail, as a reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the CPA. Transcon. Ins. Co. v. Wash. Pub. Util. Dists.' Util. Sys., 111 Wn.2d 452, 470, 760 P.2d 337 (1988). Rather, Wright asserts that Pemco acted in bad faith in three distinct ways that concern the circumstances surrounding Pemco's denial of her UIM claim.

A. Delivery of Insurance Policy

First, Wright alleges Pemco never provided her a copy of its insurance policy when Pemco first issued the policy to her in 1994, in violation of RCW 48.18.260(1) ("Subject to the insurer's requirements as to payment of premium, every policy shall be delivered to the insured or to the person entitled thereto within a reasonable period of time after its issuance.").

The regulations pertaining to RCW 48.18.260 provide that insurance companies and their agents must deliver policies within a reasonable period of time after issuance. WAC 284-30-580(1), (4). They also provide that "[i]t shall

be an unfair practice and unfair competition for an insurer or agent to engage in acts or practices which are contrary to or not in conformity with the requirements of this section." WAC 284-30-580(4).

The record demonstrates that Wright became a Pemco customer in 1994, but Pemco only has documentation of her policies going back to 2001. In her declaration, Wright stated that "[t]o the best of my knowledge, I have never received any of the Auto Policies, Policy Jackets or Endorsements listed on any of the documents I have provided here all the time I was insured with Pemco." (Emphasis omitted.) The trial court did not make any finding to resolve the factual conflict. However, even construing the facts most favorably to Wright and assuming Pemco never delivered the insurance policy, Wright has failed to show how the failure to deliver the policy caused her harm. Harm is an element of both a claim for bad faith and a CPA violation. Therefore, as a matter of law, Pemco is entitled to dismissal of her claim on this front.

B. Opportunity to Reinstate UIM Coverage

Second, Wright alleges Pemco acted in bad faith, because it did not have a policy in place to advise its customers how to reinstate UIM coverage after waving it. Wright fails to provide authority to support her argument. In fact, the plain language of the UIM statute places the burden on the insured to request UIM coverage once the insured has already waived it: "If a named insured . . . has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured . . . subsequently requests such overage in writing." RCW 48.22.030(4); Johnson, 117 Wn.2d at

567.

Pemco relied on a reasonable interpretation of the UIM statute, which does not impose upon an insurance company even a discretionary duty to advise clients about how to reinstate UIM coverage. Wright cannot show that the conduct was unreasonable, frivolous, or untenable, and her bad faith claim must fail as a matter of law. Tripp, 144 Wn.2d at 23. Nor can she show that the conduct constituted an unfair or deceptive act or practice, so her CPA violation must also fail as a matter of law. Kallevig, 114 Wn.2d at 920-21.

C. Financial Benefit

Third, Wright alleges that Pemco benefitted financially by failing to give her the opportunity to raise her UIM coverage back to $100,000/$300,000. She cites to Pemco data detailing the ratios of premiums to payouts, and highlights that, in 2003, Pemco made more money on its premiums for $50,000/$100,000 policies than its $100,000/$300,000 policies.

There is no evidence that Pemco prevented her from increasing her UIM coverage. Wright specifically requested that she wanted to reduce her premiums and signed the UIM waiver, reducing her UIM coverage and thereby her premiums. Again, Wright has failed to show either that Pemco's conduct was unreasonable, frivolous, or untenable, and her bad faith claim must fail as a matter of law. Tripp, 144 Wn.2d at 23. Nor can she show that the conduct constituted an unfair or deceptive act or practice, so her CPA violation must also fail as a matter of law. Kallevig, 114 Wn.2d at 920–21.

The trial court did not err in dismissing the bad faith and CPA violation

claims. There are no genuine issues of material fact, and Wright has failed to provide prima facie evidence of her claims. Pemco is entitled to judgment as a matter of law. CR 56.

Wright requested fees on appeal. As she has not prevailed on appeal, she is not entitled to fees.

We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

Grosse, J.