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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO.: 372568

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

KI SIN KIM,
individually,
Respondent,

vs.

ALLSTATE INSURANCE COMPANY, INC.,
a foreign corporation,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Vicki Hogan

BRIEF OF RESPONDENT

LAW OFFICE OF DOUGLAS E. WILSON
Douglas E. Wilson, WSBA #21206
Attorney for Respondent, Ki Sin Kim
520 Pike Street, Suite 1520
Seattle, WA 98101
Phone: (206) 338-7806

ORIGINAL

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I. INTRODUCTION

The Respondent/Plaintiff, Ms. Ki Kim, obtained an Order on Summary Judgment that Allstate had committed acts of bad faith by not paying for emergency room treatment and by merging the contents of the PIP file with the contents of the UIM file. This ruling was correct and supported by existing law.

The Trial Court denied the Appellant's Motion for Summary Judgment. Many issues remained for the jury including whether the respondent intended to deceive or was merely wrong. Issues of fact also remain regarding the materiality of the alleged misrepresentations. Ms. Kim denies that she intended to deceive.

Allstate has submitted surveillance evidence of Ms. Kim. Said evidence was not considered by the Trial Court. Allstate had the evidence before moving for Summary Judgment and did not submit it. On reconsideration, the Trial Court refused to consider the evidence. The Respondent objects to the consideration of the evidence because it was not part of the record at the Motion for Summary Judgment.

II. STATEMENT OF CASE

The Respondent/Plaintiff was injured in motor vehicle accident with a drunk driver. (CP 277-278) The drunk driver did not have insurance. (CP 277-278) Ms. Ki Kim, the Respondent, had Personal

Injury Protection (PIP) and Uninsured Motorist Coverage (UIM) with Allstate Insurance Company. (CP 282-303) The duty owed by Allstate to its insured was different under the respective policies. Allstate impermissibly merged the investigation of the PIP file and UIM file.

Allstate merged the PIP investigation file (where Allstate had quasi-fiduciary obligations to the plaintiff and the plaintiff, in turn, had a duty to cooperate with Allstate) with the UIM file where Allstate “stood in the shoes” of the tortfeasor. (CP 393, 396, 397) The result was that Allstate impermissibly had the best of both situations. Allstate did not “stand in shoes” of the tortfeasor and instead utilized the first-party PIP cooperation clause to compel the plaintiff to do things that she would never be obligated to do in the UIM (or third-party) context. (CP 396, 397) Allstate thereafter used the impermissibly obtained information to deny claims for PIP and UIM benefits.

The Respondent/Plaintiff asserts that she was harmed by Allstate’s refusal to separate the two files. During the course of a PIP investigation, a claimant has a reasonable expectation that the insurance company will hold the information in confidence and not disclose statements and expert opinions in the event of a subsequent UIM or third-party claim.

Allstate's claim that it is entitled to judgment as a matter of law fails because a jury should determine whether Ms. Kim intended to deceive and whether the alleged misrepresentations were material. Under the circumstances of this case, including the overreaching conduct by Allstate, a jury could easily conclude that Ms. Kim had no intent to deceive anyone. She may not have been 100% accurate but a jury could conclude that she was not in breach of the contract.

The Trial Court's holding that Allstate acted in bad faith is supported by existing case law. Allstate breached its duty to its insured by merging the files and by using impermissibly obtained information to deny benefits.

III. LEGAL ARGUMENT

On July 1, 2005, Ms. Kim was insured by Allstate Insurance Co. for PIP benefits and UIM benefits when the car she was driving was struck by an uninsured drunk driver. (CP 284-303, 277-279) The paramedics described Ms. Kim's car as having extensive front-end damage with intrusion into the passenger compartment. (CP 305) Ms. Kim was transported to Tacoma General with a 3-4 inch laceration on her scalp and many other injuries. (CP 305, 310-349) The cost of urgent care exceeded \$19,000.00. (CP 280)

Over the following six months, Allstate refused to pay medical bills, refused to provide Ms. Kim with copies of her own recorded statements, and refused to provide her with a copy of the chiropractor's report. (CP 399) Ms. Kim's then counsel, Kevin Kwong, did everything he was asked in his attempts to get the emergency room bills paid. (CP 390) He was under the impression that Allstate was gathering information for purposes of determining whether PIP medical benefits should be paid. (CP 390) Some of the forms for PIP benefits were not completed by Ms. Kim but rather by her attorney who was in the process of trying to get emergency room treatment bills paid rather than articulating the exact amount of wage loss. (CP 390) Ms. Kim has denied intentionally trying to deceive anyone.

Without any explanation, four and half months following the accident, Allstate's counsel, Cole, Lether, Wathen & Leid, PC insisted that Ms. Kim produce all damage estimates (property damage was not at issue), photographs or videos depicting the vehicle, four years of income tax returns, evidence of income for twelve months, W-2 forms for four years, all information given to law enforcement relating to the loss, bank account statements, a list of all debts over \$500.00, and a copy of the client's driver's license. (CP 396-397) Allstate has never articulated any reason or basis to withhold the payment of PIP benefits pending an

investigation. Allstate concealed the fact that it was conducting surveillance of the insured and instead mislead its insured by stating that Allstate would pay for the treatment that was reasonable, necessary, and related to the accident. (CP 393)

When Cole, Lether, Wathen & Leid, PC conducted the third recorded interview, Ms. Kim started to discuss the issue of being at her work premises. (CP 351, 394, 399) When Ms. Kim started to explain that she had been to her employer's restaurant, the attorney immediately changed the subject to whether she received free food rather than ask her to explain the videotape. (CP 394) Counsel, acting as the PIP investigator, owed a duty of loyalty to the insured but instead concealed the fact that he was aware of information that contradicted the insured's testimony. Moreover, when Ms. Kim started to explain the situation, he denied her any chance to do so by diverting the questions away from Ms. Kim's explanation.

Summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law". CR 56(c). A party moving for summary judgment bears the initial burden of showing the absence of a material fact. See *Young v. Key*

Pharm. Inc., 112 Wn. 2d 216, 225, 770 P.2d 182, 188 (1989). If the defendant meets this burden, the inquiry shifts to the plaintiff who bears the burden of proof at trial. See *id.* If the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, then the court should grant the motion. See *id.*, quoting *Celotex Corp. v. Catrett*, 447 U.S. 317, 322 (1986).

A. Whether plaintiff intended to deceive Allstate is a question for a jury

Ms. Kim denies that she ever intended to deceive anyone. Ms. Kim was in the process of getting her medical bills paid and not focused on the wage portion of the claim which was being handled by her employer and her attorney. (CP 390) It is reasonable that a jury could conclude that if Ms. Kim was given a fair opportunity to explain her answers, her lack of intent to deceive would have been clear. A material misrepresentation is one that is designed, purposefully, by the insured to mislead the insurance company. A simple error does not constitute a material misrepresentation. *Allstate Ins. Co. v. Huston* 123 Wn. App. 530, 94 P.3d 358 (2004). Here, Allstate played a game of “blind man’s bluff” hoping that their insured would make a misstatement.

A material misrepresentation, not made with the intent to deceive or defraud, does not void the policy. Whether a misrepresentation is material and whether a misrepresentation is made with the intent to

deceive and defraud, are questions usually for the jury, with the burden of proof upon the insurer.” *Quinn v. Mutual Life Ins. Co.* 91 Wash. 543, 158 P. 82 (1916).

Surprisingly, the cases cited by the Allstate are cases where the action was decided by a jury and, accordingly, do not support the contention that Allstate is entitled to judgment as matter of law. See *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.3d 499, (1988), *Wickswat v. SAFECO*, 78 Wn. App. 958, 904 P.2d 767 (1995), and *St. Paul v. Salovich*, 41 Wn.App. 652, 705, P.2d 812 (1985). These cases demonstrate that the role of a jury is very important in determining whether the insured intended to deceive.

The appellant cites *Mutual of Enumclaw v. Cox* as supportive of the proposition that Allstate is entitled to judgment as a matter of law. *Mutual of Enumclaw v. Cox* 110 Wn.2d 643, 757 P.3d 499 (1988). However, in *Cox* the court did not rule as a matter of law that fraud had occurred. The matter was tried to a jury and the plaintiff was found by a jury to have committed fraud. Here, the Trial Court has ruled that issues of material fact exist which preclude the entry of judgment in favor of Allstate.

B. Plaintiff's Obligation to Cooperate

On July 7, 2005, Mr. Kwong, Plaintiff's counsel, sent a letter stating that he was representing Ms. Kim. Allstate acknowledged his appearance and indicated that Allstate had already taken a recorded statement from Ms. Kim. (CP 351) As required by law, the Plaintiff complied with Allstate's voluminous first-party PIP requests including: being interviewed and recorded by two claims representatives, submitting to examination under oath conducted by an attorney, providing tax information, executing medical releases, submitting to a chiropractic exam, providing bank account information, providing bank statements and producing four years of income tax returns. (CP 353-386, 399) The Plaintiff had no choice but to comply with Allstate's voluminous requests or risk forfeiture of her first-party coverage. *Tran v. State Farm*, 136 Wn.2d 214, 224 961 P.2d 358 (1998).

C. Allstate is not permitted to act as an adversary while conducting a PIP investigation

The law is very clear in the State of Washington that when an insured seeks PIP benefits from an insurer, the insurer is **not** permitted to act as an adversary. Allstate had an "enhanced fiduciary obligation" that rises to a level higher than that of mere honesty and lawfulness of purpose. It requires that an insurer deal fairly with an insured giving equal consideration in all matters to the insured's interests as well as its

own. *Van Noy v. State Farm*, 98 Wn.App. 487, 492, 983 P.2d 1129 (1999) (Div. 1) (affirmed). Allstate did not act as a quasi-fiduciary but instead mislead its insured, withheld benefits, and concealed information.

Allstate's duties in relation to the PIP claim included: 1) the duty to disclose **all facts** that would aid its insured in protecting her interest; 2) the duty of equal consideration; and 3) the duty not to mislead its insured. *Van Noy* at 493. Instead, Allstate concealed information, put its own interests above its insured, and mislead the plaintiff into thinking that they were conducting an investigation of PIP benefits while they were surreptitiously conducting an investigation with the hope of uncovering information to defeat all potential claims. There is no way to reconcile the fact that Allstate had the above duties at the same time it concealed information from her and used said information to deny claims.

By law, the determination of whether or not emergency room PIP benefits are owed is limited to very specific factors including: 1) whether the claimant had PIP coverage (not disputed); 2) whether the treatment was reasonable (not disputed); 3) whether the treatment was necessary (not disputed); and 4) whether the treatment was incurred during the applicable time frame listed in the insurance policy (not disputed). WAC 284-30-395. Without explanation, Allstate did not pay any of the expenses.

Sound public policy should discourage insurers from creating a financial hardship for its insureds without explanation. Allstate has never indicated why it subjected its insured to this treatment. To permit such conduct would encourage insurers to engage in impermissible activities with hope of uncovering a basis for denial. Should an insurance company be permitted to ignore huge medical expenses until it has a chance to sift through the insured's garbage, tap telephones, or conduct other impermissible acts?

During the seven months between seeking emergency treatment at Tacoma General Hospital and the ultimate denial, Allstate never investigated a single factor listed in WAC 284-30-395. When Allstate withheld payment of PIP benefits and demanded that the insured submit to an IME, Allstate did not even use a practitioner qualified to opine on any of the factors listed in WAC 284-30-395. David Nicholes, D.C., a chiropractor, is not qualified to testify about any aspect of the treatment received from licensed emergency medical doctors.

The issue of wage loss was collateral, at best, to the issue of medical coverage. The attorney representing Ms. Kim does not remember the issue of wage loss being significant. (CP 390) At the time Ms. Kim made the alleged misrepresentations, wage loss was not the focus of any inquiry because she was trying to get her medical bills paid.

This is confirmed by the correspondence sent by Allstate, which barely mentions wage loss. (CP 393) Allstate misled its insured and was not investigating any of the issues that Allstate claimed to be investigating. Essentially, Allstate was on a "fishing expedition" hoping to uncover some basis to deny benefits.

On November 21, 2005, four months after the accident, Allstate continued to withhold payment of first party benefits pending an examination under oath, to be taken by their attorney. Allstate concealed from Ms. Kim the fact that they were conducting surveillance and that the real reason for the examination had nothing to do with the payment of medical benefits but rather to see if she would make any misrepresentations. (CP 396, 397) A cursory review of the examination demonstrates that the examiner had an agenda different than what an insured is legally entitled to expect. On page 14, Ms. Kim revealed that she had returned to her place of work on a few occasions. Rather than conducting an unbiased investigation by asking her to explain the contents of the video, the attorney immediately changed the subject to inquire about whether she received free meals while she was there. (CP 394) The attorney was acting as Ms. Kim's adversary by taking advantage of the fact that he had knowledge of information not known to

her. The conduct of counsel violates the quasi-fiduciary duty owed to the insured during a PIP investigation. See *Van Noy* at 492.

D. Allstate was not permitted to merge the PIP file with the UIM file

Allstate was not permitted to mix the PIP file with the UIM file because the duty to the insured is different under each situation. As the UIM carrier, Allstate “stands in the shoes” of the uninsured driver and should not have a competitive advantage that arises out of the fact that the claimant seeks first party benefits. See *Ellwein v. Hartford* 142 Wn2d. 766, 780, 15 P.3d 640 (2000). The duty of good faith does not disappear after a UIM claim is made. A UIM claimant has a reasonable expectation that he/she will be dealt with fairly and in good faith by its insurer. *Id* at 780. At the time of the examination under oath, Ms. Kim was seeking PIP benefits while Allstate was defending a UIM claim.

A third-party tortfeasor would not be permitted to take multiple statements nor would they be permitted to compel an Independent Medical Exam (IME) prior to litigation. Here, Allstate took advantage of the fact that they could compel certain actions under the cooperation clause of the PIP policy to the detriment of the insured. Compelling an IME and using the first party expert as the UIM expert is “bad faith” as a matter of law. The court in *Ellwein* found it troubling that the insurer would “commingle” the liability representation file with the UIM file. If

the insurer truly “stands in the shoes” of the tortfeasor, then the benefit of the adversarial relationship should be accompanied by its costs. UIM insurers should be prohibited from using or manipulating an expert where it would be unable to do so if it were, in fact, a third-party tortfeasor. *Ellwein* at 782.

Allstate committed another act of bad faith by putting the opinions of the PIP expert in the UIM file. The Supreme Court of the State of Washington has held that the contents of an insured’s PIP file are privileged and the production cannot be compelled in a subsequent third-party claim for damages because the insured has a reasonable expectation that the information will be held in confidence. *Harris v. Drake*, 116 Wn.App 261, 273, 65 P.3d 350 (2003).

It is impossible to reconcile that Ms. Kim was seeking PIP benefits while Allstate was commingling the information with the UIM defense file. *Harris v. Drake* involved different insurance companies but the present situation is far worse because Allstate had a fiduciary duty to the insured when a third-party carrier would not. Allstate’s position that a quasi-fiduciary obligation does not exist when its insured has both PIP and UIM coverage is incorrect. Why would an insurance company be permitted to ignore its PIP quasi-fiduciary responsibilities solely because the insured had a UIM policy? It would violate public policy if an

insured was forced to waive its quasi-fiduciary expectations under PIP coverage if the insured also purchased UIM coverage.

It is unclear as to what capacity the attorney was acting in when he conducted the examination under oath. Was he investigating a PIP claim or was he defending a UIM claim? Five months after the emergency room bills were incurred, Allstate went so far as to withhold PIP benefits until Ms. Kim produced all property damage estimates (property damage had been resolved), all photographs of the cars, four years tax returns, 12 months of bank statements, and a list of all debts over \$500.00. (CP 353-386, 396,397) To the insured, the attorney was merely retained by Allstate to investigate the PIP file where she had an expectation of confidentiality. To use the same attorney in the context of a UIM claim means that Allstate stood in a superior position to that of a third-party insurance company.

Rather than honor the fiduciary duty owed to the plaintiff, the defendant, as of December 5, 2005, ignored her request for a copy of her recorded statement taken on October 26, 2005 and refused to provide a copy of the IME report for an exam conducted in October 2005. (CP 399) Allstate continually concealed material facts from its insured. At no time did the plaintiff refuse to do anything. Allstate waited until January 31, 2006 to inform the plaintiff why her bills were being denied. This clearly

violates all obligations of a prompt and fair investigation required under WAC 284-30-395.

E. Allstate's conduct violated the Washington State Consumer Protection Act

The Plaintiff asserts that the Defendant violated the Washington State Consumer Protection Act by committing acts in the stream of commerce that were deceptive or illegal, that caused damages, and that those actions affect the public interest. RCW 19.86. Allstate had fiduciary responsibilities to the plaintiff while she attempted to obtain coverage for her medical bills. Clearly, the plaintiff and her attorney, at all material times, felt they were seeking payment of medical bills under the PIP policy.

A PIP insurer (and presumably the law firm hired to conduct the investigation of the PIP claim) owe the PIP insured a quasi-fiduciary duty to "deal fairly" with the insured, giving equal consideration in all matters to the insured's interest as well as its own. *Harris* at 285 citing *Van Noy, Ellwein v. Hartford Accident & Indem.* 142 Wn.2d 766, 779-81, 15 P.3d 640 (2000), *Safeco v. Butler* 118 Wn2d 383, 389, 823 P.2d 499 (1992) reconsideration denied, *Tank v. State Farm* 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). Allstate and its counsel had a duty to disclose all facts that would aid its insured in protecting her claims, the duty of equal

consideration, and the duty not to mislead Ms. Kim. See *Van Noy* at 492.

This conduct violated the Washington State Consumer Protection Act.

IV. CONCLUSION

The issues presented by Allstate address the mental state of the insured and the materiality of any alleged misrepresentations. These issues are factual in nature and cannot be decided summarily. However, whether or not Allstate violated the duty of good faith is a legal question for the Court to decide. The facts of this case clearly establish that Allstate acted in bad faith and violated the Washington State Consumer Protection Act.

Respectfully submitted this 5th day of September, 2008.

THE LAW OFFICE OF DOUGLAS E. WILSON



Douglas E. Wilson, WSBA #21206
Attorney for Respondent

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DECLARATION OF SERVICE BY MAIL

LAW OFFICE OF DOUGLAS E. WILSON
Douglas E. Wilson, WSBA #21206
Attorney for Respondent, Ki Sin Kim
520 Pike Street, Suite 1520
Seattle, WA 98101
Phone: (206) 338-7806

TO: Clerk of the Court; Court of Appeals, 950 Broadway, Suite 300,
MS TB-06, Tacoma WA 98402-4454, (253) 593-2970;

TO: Rory W. Leid, Cole Lether Wathen & Leid, P.C., 1000 Second
Ave, Suite 1300, Seattle, WA 98104-1082, (206) 622-0494
Attorney for Petitioner.

I, Kevin R. Leithead, hereby certify that a copy of the
Respondent's Brief of Respondent was sent via ABC Legal Messenger to
the following people, at the following addresses, on the 5th day of
September, 2008:

Rory W. Leid

Cole Lether Wathen & Leid, P.C.

1000 Second Ave, Suite 1300

Seattle, WA 98104-1082

Method of Delivery: ABC Legal Messenger

Date: September 5, 2008

I certify under penalty of perjury under the laws of the State of
Washington the foregoing is true and correct.

DATED in Seattle, Washington this 5th day of September, 2008.


Kevin R. Leithead