

2002

J & C Enterprises Inc., a Utah corporation v. Mid-Continent Casualty Company, an Oklahoma corporation : Reply Brief of Appellant

Utah Court of Appeals

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I & C ENTERPRISES, INC., a
Utah corporation

Plaintiff/Appellant,

vs.

MTD-CONTINENT CASUALTY COMPANY,
an Oklahoma corporation.

Defendant/Appellee.

Appeal No. 20020421-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENTS OF THE EIGHTH
JUDICIAL DISTRICT COURT, HON. A. LYNN PAYNE PRESIDING

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MAY 14 2003

Pauline Jones
Clark of the Court

IN THE UTAH COURT OF APPEALS

J & C ENTERPRISES, INC., a)
Utah corporation)
)
 Plaintiff/Appellant,)
)
vs.)
)
MID-CONTINENT CASUALTY COMPANY,)
an Oklahoma corporation,)
)
 Defendant/Appellee.)

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ARGUMENT

Defendant, in its Brief of Appellee, would have this Court focus only on the storage costs dispute as the reason this claim did not settle in a timely manner, and forget the other reasons this matter did not settle, in an effort to convince the Court that the issue of good faith and fair dealing, including attorney fees, was properly dismissed on summary judgment by the trial court and that it was actually the Plaintiff's fault this matter was litigated. However, there were other significant reasons including the dispute over the value of the wreck coupled with the wrongful withholding of a substantial portion of the agreed value by the Defendant, plus the denial of the debris removal, towing and cleanup costs. These other disputes equally caused this litigation and are the basis upon which there is at least an issue for trial on whether there was a breach of the implied covenant of good faith and fair dealing by the Defendant. Indeed, as argued by the Plaintiff in the Brief of Appellant, the fact that there are fairly debatable claims raised by an insured does not and should not provide a license to the insurer to delay in payment on claims that are not fairly debatable until the fairly debatable claims are settled.

Defendant infers in paragraph 14 of its Statement of Facts, in the Brief of Appellee, and in other sections of Appellee's Brief, that one reason for delay in settlement of the claim was Plaintiff's unreasonable demands for \$75,000 on the value issue. However, Defendant also states in the Statement of the Case section of Appellee's Brief (at page 2), without the support of any citation to the Record, that the Defendant obtained appraisals, and based thereon, offered \$33,500, to Plaintiff to settle the value issue. It is particularly telling in Defendant's assertion that the Plaintiff acted unreasonably in settling the value issue that the parties ultimately settled for \$55,000 on value (see page 2 of Brief of Appellee, and T. at 530). The settlement amount

on value of \$55,000 is closer to the Plaintiff's initial demand of \$75,000 than Defendant's initial offer (based on its appraisals) of \$33,500. Thus, any inference that the Plaintiff acted unreasonably in settling the value issue is simply incorrect and contrary to the evidence on record.

Second, Defendant states that it "tendered" or "repeatedly tendered" the full agree-to value of \$55,000 (see pages 2, 9, 12, and 22-24, Brief of Appellee). None of these statements are supported by citations to the Record. In deed, such statements are false. An issue at trial was whether the final payment on value by the Defendant of \$10,000 was ever tendered to the Plaintiff on the question of whether interest should be awarded. (T. at 531). The trial court found that there was no tender and awarded interest on the final \$10,000 payment at the rate of 10% from December 24, 1997, the date the parties settled the value issue. (T. at 575). Whether or not the court was correct in its finding that there was no tender is not at issue in this appeal. What is at issue, among other sub-issues of Plaintiff's first issue (see Issue I at page 1, Brief of Appellant), is whether the court erred in dismissing the claim under the implied covenant of good faith and fair dealing where the Defendant had failed to tender the full balance of the value (the \$55,000) by wrongfully withholding \$10,000 from the Plaintiff and by not paying the amount requested by the Plaintiff for debris removal and towing.

Important to this issue are Section 31A-26-301(1), Utah Code Annotated, and R590-190-10, Utah Administrative Code.

Section 31A-26-301(1), states:

Unless otherwise provided by law, an insurer shall timely pay every valid insurance claim made by an insured. . . .

R590-190-10, states:

(1) The insurer shall provide to the claimant a statement of the time and manner in which any claim must be made and the type of proof of loss required by the insurer.

(2) Within 30-days after receipt by the insurer of a properly executed proof of loss, the insurer shall complete its investigation of the claim and the first party claimant shall be advised of the acceptance or denial of the claim by the insurer unless the investigation cannot be reasonably completed within that time. If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within 30-days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, within 45-days after sending the initial notification and within every 45-days thereafter, send to the first party claimant a letter setting forth the reasons additional time is needed for the investigation, unless the first party claimant is represented by legal counsel or public adjuster. Any basis for the denial of a claim shall be noted in the insurers claim file and must be communicated promptly and in writing to the first party claimant. Insurers are prohibited from denying a claim on the grounds of a specific provision, condition, or exclusion unless reference to such provision, condition or exclusion is included in the denial.

(3) Unless otherwise provided by law, an insurer shall promptly pay every valid insurance claim. A claim shall be overdue if not paid within 30-days after the insurer is furnished written proof of the fact of a covered loss and of the amount of the loss. Payment shall mean actual delivery or mailing of the amount owed. If such written proof is not furnished to the insurer as to the entire claim, any partial amount supported by written proof or investigation is overdue if not paid within 30-days. Payments are not deemed overdue when the insurer has reasonable evidence to establish that the insurer is not responsible for the payment, notwithstanding that written proof has been furnished to the insurer.

It is also important to this issue to note that whether Defendant was liable for the \$10,000 remaining balance on the value was also an issue at trial as set forth in the Amended Complaint

(T. at 16 and 19) and the Final Order and Judgment (T. at 531 and 575). Yet, this issue was not addressed under the Finding of Fact and Conclusions of Law set forth in the Order on summary judgment (T. at 345) or at anytime during the hearing on summary judgment. Yet Plaintiff was foreclosed from arguing at trial whether such withholding constituted bad faith or unfair dealing by the trial court's ruling on summary judgment. (T. 346).

Finally, Defendant's reliance on authorities outside of this jurisdiction (page 14 of Brief of Appellee) is unnecessary and such authorities should not be relied upon by this court since the law in this area is well established by the Utah appellate courts as set forth in *Pugh v. North American Warranty Services*, 1 P.3d 570 (Utah App. 2000).

CONCLUSION

In response to Defendant Brief of Appellee, there are reasons this litigation proceeded which are attributed to the Defendant's actions which are not supported the fairly debatable defense, including the failure pay debris remove and towing and withholding of \$10,000 of the settled value. Although the trial court addressed the failure to pay the debris removal and towing issue in relation to the fairly debatable defense in the summary judgment hearing, it improperly concluded that payment of this item was fairly debatable in light of its statement in the summary judgment hearing transcript that such was "not a supportable position to take." (T. at 595, p. 27). Furthermore, the fact that the trial court did not even address the withholding of payment of the \$10,000 in the findings of fact and conclusion of law in the Order on summary judgment (T. at 345), the dismissal of the bad faith and unfair dealing issues on summary judgment were not fully supported by the findings and thus was improper.

Wherefore, the Plaintiff respectfully renews its requests that the Utah Court of Appeals either reverse the trial court's determination that attorney fees and punitive damages be dismissed and remand to the trial court for determination of those amounts, including attorney fees on appeal, or that the that the court remand the matter back to the trial court for trial on the issue of the whether the Defendant acted reasonably in denying the claims of the Plaintiff within the purview of the standards of the implied covenant of good faith and fair dealing. Plaintiff also respectfully renews its request that the Utah Court of Appeals reverse the trial court's determination that the Plaintiff's claims for storage fees on the Julie Lewis Trust property should be dismissed.

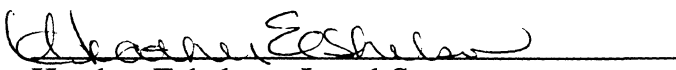
Respectfully submitted this 14 day of May, 2003.


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CERTIFICATE OF SERVICE

I, Heather Eskelson, do hereby certify that on May 14, 2003, I mailed first class, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to:

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