In The
Supreme Court of Virginia

RECORD NO: 160852

EBENEZER MANU,

Appellant,

v.

GEICO CASUALTY COMPANY,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
CASE NO. CL-2015-6367

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

ARGUMENT

The Trial Court erred by sustaining GEICO Casualty Company's Demurrer to Mr. Manu's Complaint which alleged a cause of action under Virginia Code § 8.01-66.1(D)(1). Specifically, the Trial Court erred in ruling that Virginia Code § 8.01-66.1(D)(1) did not provide Mr. Manu a remedy against GEICO Casualty Company for its alleged bad faith conduct in adjusting his uninsured motorist bodily injury claim.

A. Uninsured Motorist Coverage Was Intended To Be Within The Reach of Va. Code § 8.01-66.1(D)(1)

GEICO's first argument is that because Va. Code § 8.01-66.1(D)(1) does not mention uninsured motorist coverage, "the words used in those subsections indicate that uninsured motorist coverage was not intended to be within the statute's reach". (Appellee Br. 7).

But subsection (D)(1) does not mention any particular coverages, and instead references all insurance companies "licensed in this Commonwealth to write insurance as defined in § 38.2-124" and where the insurer "denies, refuses or fails to pay to its insured a claim of more than $3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured…." This broad reference to first party coverages clearly does not exclude UM coverage. And, the cross reference to Va. Code § 38.2-124 completely negates GEICO's argument as that section specifically includes uninsured motorist coverage arising under Va. Code § 38.2-2206(A). Even without examining the legislative history which

favors Manu's position, this expansive reference to claims by an insured against his insurer militates against GEICO's conclusion that somehow this language excludes an uninsured motorist claim.

GEICO adds that "[l]ike subsection (A) of Va. Code § 8.01-66.1, subsection (D)(1) speaks to types of coverages which potentially have deductibles ("...in excess of the deductible, if any"). There are no deductibles in uninsured motorist coverages." (Appellee Br. 7). GEICO continues, "had the General Assembly intended for subsection (D) to apply to uninsured motorist coverage, it would have written the subsection without reference to deductibles, or as with medical payments coverage, added a separate paragraph making it applicable to uninsured motorist coverage. (Appellee Br. 8). GEICO is incorrect in its belief that this section refers exclusively to coverages with deductibles. The words "if any" clearly qualify the need for deductibles and demonstrate the General Assembly intended the remedy to apply to claims with or without deductibles. And, as the citation below verifies, GEICO is incorrect that there are no deductibles in uninsured motorist coverage.

> The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident <u>but may provide an exclusion of the first $ 200 of the loss or damage</u> where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

Va. Code § 38.2-2206(A) (emphasis added). There is no requirement under Va. Code § 8.01-66.1(D)(1) that the insurance coverage at issue be one which could include a deductible, and even if that were so, a deductible can apply to an uninsured motorist property damage claim.

B. The Correct Starting Point For Analyzing Va. Code § 8.01-66.1(D)(1) Is The Language In That Code Section And Not With Va. Code § 38.2-2206 And Years of Prior Case Law

GEICO starts with the premise that Va. Code § 38.2-2206 controls and limits Va. Code § 8.01-66.1(D)(1):

> Rather, consistent with Virginia's uninsured motorist statute and years of cases interpreting it, until there is a judgment imposing liability on an uninsured motorist in a tort case, an uninsured motorist carrier has no duty either to appear or defend, let alone adjust or negotiate a claim, and nothing in Va. Code § 8.01-66.1(D)(1) amends Va. Code § 38.2-2206 or reverses years of interpretation by this Court of that statute.

(Appellee Br. 9). But GEICO is incorrect that a bad faith UM claim under Va. Code § 8.01-66.1(D)(1) is limited by language in Va. Code § 38.2-2206, a statute which was enacted long before the remedial provisions of Va. Code § 8.01-66.1(D)(1) were enacted. Without referring to the obvious desire of legislators to provide a remedy for bad faith handling of all first party claims, GEICO strains to make Va. Code § 8.01-66.1(D)(1) subservient to Va. Code § 38.2-2206. Rather than recognizing that the unambiguous language of Va. Code § 8.01-66.1(D)(1) creates a remedy for bad faith which is applicable to

all first party claims, GEICO argues that this remedial statute, cannot mean what it says, because it might "reverse years of interpretation by this Court of that statute." (Appellee Br. 9). GEICO fails to address how cases decided before the bad faith statute was enacted can control the meaning of this subsequently enacted remedial statute.

GEICO agrees that Va. Code § 8.01-66.1(D)(1) altered the existing law to create bad faith claims for some first party claims, but argues the language exempts UM claims. (Appellee Br. 26). However, as argued above and in Manu's Opening Brief, there exists no support in Va. Code § 8.01-66.1(D)(1) or its legislative history for carving out an exclusion for UM coverage. And, with respect to decisions decided before the enactment of Va. Code § 8.01-66.1(D)(1), the very fact that prior law did not provide for the remedy created by the legislature in 1991 explains why the prior law is an unreliable foundation for interpreting this more recently enacted remedial statute.

C. There Exists No Conflict Between The Rules Pertaining to How and When a UM Carrier May Defend A Lawsuit And A Requirement Of Good Faith Dealing With an Insured Pretrial, Despite GEICO's Argument to the Contrary

As GEICO's brief repeatedly notes, the uninsured motorist carrier is not charged with a duty to *appear or defend* an uninsured motorist in an action filed by their insured against the uninsured motorist. While this is undoubtedly the state of the law under Va. Code § 38.2-2206, GEICO's

attempt to convert an uninsured motorist carrier's lack of a duty to defend into a lack of a duty to deal with its insured in good faith pre-trial does not follow. (Appellee Br. 14). GEICO's argument suggests that if the uninsured motorist carrier does not have a duty to defend such an action, it has no duty to act whatsoever. GEICO's argument turns this Court's logic as articulated in Nationwide v. St. John on its head. Instead of "punish[ing] an insurer whose bad faith dealings force an insured to incur the expense of litigation[1]," GEICO's seeks an interpretation of Va. Code § 8.01-66.1 that will empower delay and denial tactics by uninsured motorist insurers thereby forcing their insureds to incur needless litigation expenses. GEICO's response to this draconian result is that somehow the language of Va. Code § 38.2-2206 demands it: ". . . it is not insurer conduct, but rather Va. Code § 38.2-2206 which 'forces' an insured to obtain a judgment against an uninsured motorist as a predicate to liability . . . ." (Appellee Br. 27). GEICO would prefer the Court find these two statutes irreconcilable, and determine that Va. Code § 38.2-2206 is of "superior" import and effect. In effect, GEICO asks this Court to render Va. Code § 8.01-66.1(D)(1) meaningless in its application to uninsured motorist claims.

[1] Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 75 (2000)

Manu submits that the duty of an uninsured motorist carrier to act in good faith is in no way incongruous to its lack of a duty to defend an uninsured motorist in a lawsuit filed by the insured. Both considerations can be handled under St. John's standard of "reasonableness." Nationwide v. St. John, 259 Va. 71, 75-76 (2000). For instance, a requirement that an insurer conduct a "reasonable investigation of the facts and circumstances underlying the insured's claim"[2], is hardly an onerous burden. Nor does it somehow morph into a requirement that the insurer retain counsel and defend the uninsured motorist in pending litigation. Similarly, an insurer's duty to have discovered some "evidence . . . [which] reasonably supports a denial of liability"[3], does not amend or abrogate this Court's construction of Va. Code § 38.2-2206.

D. Although Manu Argues That Cases Decided Before 1991 Are Irrelevant, If Such Cases Are to Be Reviewed, The Focus Should Be On Colonial Ins. Co. v. Rainey.

There are no decisions from this Court which address Va. Code § 8.01-66.1(D)(1). While Manu believes that case law prior to the enactment of § 8.01-66.1(D)(1) in 1991 is irrelevant to interpreting its scope, GEICO's attempt to distinguish and minimize the import of this Court's interpretation

[2] Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 75 (2000)

[3] Id.

of "legally entitled to recover" in Aetna Casualty & Surety Co. v. Dodson, 235 Va. 346 (1988) and Colonial Ins. Co. v. Rainey, 237 Va. 270 (1989) misses the mark.

The long and short of Geico's argument is that regardless of the fact that Va. Code § 38.2-2206(A) was enacted well before Va. Code § 8.01-66.1(D)(1), the uninsured motorist statute controls the meaning and interpretation of Va. Code § 8.01-66.1(D)(1). While GEICO's position is inconsistent with established rules of statutory interpretation, purely for argument's sake, Manu will turn back the clock to cases decided before the remedial statute at issue was enacted. If this Court chooses to focus on the cases decided before 1991, then the focus should be on Colonial Ins. Co. v. Rainey, 237 Va. 270 (1989). Unlike most of the cases relied on by GEICO, Rainey is a case between an insured and his uninsured motorist carrier. Although bad faith was not an issue, the case is instructive as to when an insured is "legally entitled to recover damages", which is the focus of much of GEICO's brief. According to GEICO, judgment against the uninsured motorist is a prerequisite to recovery against the uninsured motorist carrier. (Appellee Br. 18, see also 13, 15, 17, 19). Rainey holds that legally entitled to recover means a "legally enforceable right to recover damages from an owner or operator of an uninsured motor vehicle". Rainey, 237 Va. 270, 725. And, a legally enforceable right to recover damages is met when there is

a claim establishing that the uninsured motorist is "potentially liable to the insured". Rainey, at 276. There can be no quarrel with the conclusion that Manu at all relevant times had established that an uninsured motorist was "potentially liable" for his damages. Therefore, as far back as 1989 when Rainey was decided, it was established law that legally entitled to recover damages from an uninsured motorist did not require the insured reduce his claim to judgment.

GEICO argues that the Aetna Casualty & Surety Co. v. Dodson reasoning "is not inconsistent with the holding of Midwest Mutual." (Appellee Br. 18). GEICO does not attempt to explain how the Dodson Court's use of the phrase, "Midwest Mutual is inapposite here," demonstrates consistency between the two decisions.[4] Dodson, 235 Va. 346, 351 n. 6 (1988). A less strained interpretation of Dodson would read the decision literally – as a rejection of the argument that the phrase "legally entitled to recover" is synonymous with reducing an uninsured motorist claim to judgment. Id. The Dodson Court clarified that an insured is "legally entitled to recover" under Va. Code § 38.2-2206 so long as there is a *legally enforceable right* to recover, without regard to a judgment. Id. As set forth above, the definition of *legally enforceable right to recover* was further clarified in 1989 with the Rainey decision.

[4] Inapposite is generally defined as "not pertinent".

In an effort to distinguish Rainey, GEICO suggests the decision is inapplicable as it "nowhere discuss[es] *when* the duty of good faith arises, [and] the case made no mention whatsoever of duties of good faith, because that had nothing to do with that case." (Appellee Br. 20). While Rainey does not mention bad faith, it does represent a dagger in the heart of GEICO's claim that a legally enforceable right to recover is preconditioned on a judgement against the uninsured operator. And, GEICO's argument is most interesting considering that none of the cases it cites in support of its interpretation of Va. Code § 8.01-66.1(D)(1) reference an insurer's duty to act in good faith under that statute or any other.

CONCLUSION

The plain meaning of Va. Code § 8.01-66.1(D)(1) and its legislative history demonstrate the Trial Court erred in finding that GEICO did not owe Mr. Manu a pre-trial duty to evaluate, adjust and attempt to settle his UM claim in good faith. Mr. Manu's bad faith action against GEICO is permissible under Va. Code § 8.01-66.1(D)(1) and the Trial Court erred in vacating Judge Kloch's original Order and sustaining GEICO's Demurrer. Mr. Manu respectfully requests this Court reverse and remand the case to the Trial Court, at which time the Trial Court should rule on Manu's motion to compel discovery from GEICO.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 5:26(h), that on this 5th day of December, 2016, I electronically filed the foregoing via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that a true and exact copy of the foregoing was served, via e-mail, upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief contains 2,114 words.

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