

NO. 12-15-00277-CV
IN THE COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS

IN RE: AAA TEXAS COUNTY §
MUTUAL INSURANCE COMPANY, § *ORIGINAL PROCEEDING*
RELATOR §

MEMORANDUM OPINION

AAA Texas County Mutual Insurance Company seeks mandamus relief from the trial court's November 6, 2015 orders denying its motion to sever and abate Thomas Jackson's extracontractual claims and compelling discovery.¹ We conditionally grant the writ.

BACKGROUND

On June 12, 2013, vehicles driven by Thomas Jackson and Patricia Tompkins collided in Longview. Jackson filed a claim for underinsured motorist (UIM) benefits with AAA, his insurer. Jackson later filed a lawsuit against AAA for breach of contract under the UIM portion of his policy, violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code, and breach of the duty of good faith and fair dealing. AAA filed a motion to sever and abate the extracontractual claims. Following a hearing, the trial court denied the motion but ordered that the contractual and extracontractual claims be heard separately in a bifurcated trial. The trial court also granted Jackson's motion to compel AAA to respond to discovery regarding the extracontractual claims. AAA then filed this original proceeding. On AAA's motion, we stayed the proceedings in the trial court until further order of this Court.

¹ The respondent is the Honorable David Scott Brabham, Judge of the 188th Judicial District, Gregg County, Texas. The underlying proceeding is trial court cause number 2014-1365-A, styled *Thomas Jackson vs. AAA Texas County Mutual Insurance Company*.

PREREQUISITES TO MANDAMUS

Mandamus is an extraordinary remedy that is available only when the trial court has clearly abused its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A clear abuse of discretion occurs when a trial court “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). A trial court has no discretion in determining what the law is or in applying the law to particular facts. *Id.* at 840. A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Id.*

If a trial court abuses its discretion in denying a motion to sever and abate extracontractual claims, there is no adequate remedy by appeal. See *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 675-76 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). This is because an insurer stands to lose substantial rights by being required to prepare for claims that may be rendered moot and may not have accrued. *In re United Fire Lloyds*, 327 S.W.3d 250, 256 (Tex. App.—San Antonio 2010, orig. proceeding). Therefore, we need not address whether appeal is an adequate remedy for AAA.

SEVERANCE AND ABATEMENT

AAA argues that the trial court abused its discretion when it denied AAA’s motion to sever and abate Jackson’s extracontractual claims and compelled discovery. Jackson argues that a bifurcated trial is sufficient to protect AAA’s interests.

Standard of Review

The trial court has broad discretion in the severance of causes of action. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 734 (Tex. 1984). However, that discretion is not unlimited. See *Millard*, 847 S.W.2d at 671. The trial court has a duty to order severance when “all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby.” *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956).

In most circumstances, a trial court’s decision to grant or deny a motion to abate is within the court’s discretion. *In re Allstate Cty. Mut. Ins. Co.*, 209 S.W.3d 742, 746 (Tex. App.—Tyler 2006, orig. proceeding). Abatement of extracontractual claims is required when, under the circumstances, both parties would incur unnecessary expenses if the breach of contract claim were decided in the insurer’s favor. *In re Am. Nat’l Cty. Mut. Ins. Co.*, 384 S.W.3d 429, 436 (Tex. App.—Austin 2012, orig. proceeding). Thus, abatement is necessary when a determination on the breach of contract claim in favor of the insurer will negate the insured’s extracontractual claims. *Id.* Without the abatement, the parties

would be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial. *Id.*

Governing Law

Any claim against a party may be severed and proceeded with separately. TEX. R. CIV. P. 41. Claims are properly severable if the controversy involves more than one cause of action, the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and the severed claim is not so interwoven with the remaining action that it involves the same facts and issues. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990). The controlling reasons to allow a severance are to avoid prejudice, do justice, and promote convenience. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007).

A severance divides the lawsuit into two or more separate and independent causes. *Hall v. City of Austin*, 450 S.W.2d 836, 837-38 (Tex. 1970). When this has been done, a judgment that disposes of all parties and issues in one of the severed causes is final and appealable. *Id.* at 838. An order for a bifurcated trial leaves the lawsuit intact but enables the court to hear and determine one or more issues without trying all controverted issues that the same hearing. *Id.* The order rendered at the conclusion of a separate trial is often interlocutory, because no final and appealable judgment can properly be rendered until all of the controlling issues have been tried and decided. *Id.* The same jury hears both parts of a separate or bifurcated trial. See *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994). On the other hand, a suit severed into two separate and distinct causes will be heard by two different juries. See *Akin*, 927 S.W.2d at 630.

In the context of insurance cases, a breach of an insurance contract claim is separate and distinct from bad faith, Insurance Code, or DTPA causes of action and each might constitute a complete lawsuit within itself. See *Millard*, 847 S.W.2d at 672; *Akin*, 927 S.W.2d at 629. But, in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract. *Akin*, 927 S.W.2d at 629. And, in insurance cases involving bad faith claims, the Texas Supreme Court has recognized that severance may be necessary if the “insurer has made a settlement offer on the disputed contract claim” or if there are “other compelling circumstances.” *Id.* at 630.

An insurer generally cannot be liable for failing to settle or investigate a claim that it has no contractual duty to pay. See *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005). In the context of UIM coverage, an insurer is under no contractual duty to pay UIM benefits until the insured proves that the insured has UIM coverage, that the other driver negligently caused the accident that resulted in covered damages, the amount of the insured’s damages, and that the other driver’s insurance coverage is deficient. See *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006). Thus, an insured generally must first establish that the insurer is liable on the contract before the

insured can recover on extracontractual causes of action against an insurer for failing to promptly pay, failing to settle, or failing to investigate an underinsured motorist insurance claim. *In re Allstate Cty. Mut. Ins. Co.*, 447 S.W.3d 497, 501 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). As a result, Texas case law establishes that severance and abatement of extracontractual claims is required in many instances in which an insured asserts a claim for UIM benefits. *Id.*

Analysis

AAA argues that its motion to sever and abate should have been granted because it made a settlement offer to Jackson. AAA urges that, absent a severance and abatement, Jackson will use the settlement offer as evidence for his breach of contract and extracontractual claims before proving he has a right to recover under the UIM policy. Jackson does not deny the existence of the offer; however, he argues that AAA neither made this argument nor presented evidence of the settlement offer to the trial court.

Jackson's petition states that AAA offered to pay \$20,000.00 to Jackson. Whether this offer was an offer to settle the entire claim or just a partial payment is disputed by the parties. AAA did not reference the offer in its motion to sever and abate. At the hearing, AAA did not argue as a basis for the severance that it had made an offer to settle the entire claim. Nor did AAA present evidence of the offer. Because the settlement offer was not presented to the trial court, it could not have formed the basis of its decision and we may not consider it. *See In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998) (appellate court limited to the record before the trial court).

AAA also argues that the extracontractual claims should be severed because of the time, effort, costs, and judicial resources associated with litigating and preparing for trial on extracontractual claims that have not yet accrued. AAA urges this is necessary because Jackson has not established a contractual right to recovery on the breach of contract claim. AAA contends that if the case were to remain bifurcated, it would be required to prepare for a trial on the bad faith claims before Jackson establishes that AAA has a contractual duty to pay the UIM claim.

Jackson alleges AAA breached its duty of good faith and fair dealing "by denying and/or delaying payment of benefits" to him in accordance with the insurance agreement. He further alleges AAA violated Texas Insurance Code Section 541.060(a)(2)(A) by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim for which liability has become reasonably clear. Jackson also avers that this failure is a violation of the Texas Deceptive Trade Practices Act. To prevail on these claims, Jackson must first establish that AAA is liable under the insurance contract by proving he was covered by the insurance policy, the other driver negligently caused the automobile collision that resulted in Jackson's alleged injuries, the amount of his damages, and the other driver was underinsured. *See Allstate*, 447 S.W.3d at 502. AAA contests liability for breach of contract, and Jackson

has not established that AAA is liable under the insurance contract. And, Jackson's extracontractual claims would be rendered moot by a determination that AAA is not liable on Jackson's breach of contract claim.

Under these circumstances, AAA has shown that severance and abatement are necessary to do justice, avoid prejudice, and further convenience. See *United Fire Lloyds*, 327 S.W.3d at 256. Jackson also seeks production of documents related to AAA's claim handling process and procedures. AAA argues that Jackson will attempt to introduce the settlement offer and AAA's claim handling procedures as evidence that AAA breached its contract. While these may be relevant to the extracontractual claims, they are irrelevant to the breach of contract claim and privileged from discovery. Allowing Jackson to conduct broad discovery into AAA's claims handling history and evaluation process and then allowing Jackson to introduce such evidence to support his breach of contract claim would be manifestly unjust. See *In re Progressive Cty. Mut. Ins.*, 439 S.W.3d 422, 427 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding).

Because Jackson's extracontractual claims ultimately could be rendered moot, AAA is not required to put forth the effort and expense of conducting discovery, preparing for a trial, and conducting voir dire on those claims. *United Fire Lloyds*, 327 S.W.3d at 256. Accordingly, we conclude that severance of the extracontractual claims is required. See *Allstate*, 447 S.W.3d at 501. Therefore, the trial court abused its discretion when it denied AAA's motion to sever and abate and compelled discovery on Jackson's extracontractual claims.

DISPOSITION

For the reasons set forth above, we have concluded that AAA has shown it is entitled to mandamus relief. Accordingly, we ***conditionally grant*** AAA's petition for writ of mandamus and direct the trial court to (1) vacate its November 6, 2015 order denying AAA's motion to sever and abate and issue an order granting the motion, severing Jackson's extracontractual claims against AAA, and abating the severed cause and (2) vacate the portion of its November 6, 2015 order compelling AAA respond to discovery on the extracontractual claims. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within ten days of the date of the opinion and order***. The trial court shall furnish this court, within the time for compliance with this court's opinion and order, a certified copy of this order evidencing such compliance. Our stay of November 17, 2015 is ***lifted***.²

² After Jackson filed his response to AAA's mandamus petition, and AAA filed a reply, Jackson filed a motion requesting sanctions against AAA, its counsel, or both. After careful consideration, we overrule the motion.

BRIAN HOYLE
Justice

Opinion delivered August 18, 2016.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
ORDER

AUGUST 18, 2016

NO. 12-15-00277-CV

AAA TEXAS COUNTY MUTUAL INSURANCE COMPANY,

Relator

V.

HON. DAVID SCOTT BRABHAM,

Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by **AAA TEXAS COUNTY MUTUAL INSURANCE COMPANY**, Relator. Said petition for writ of mandamus having been filed herein on November 16, 2015, and the same having been duly considered, because it is the opinion of this Court that the petition is meritorious, it is therefore **CONSIDERED, ADJUDGED AND ORDERED** that the petition for writ of mandamus be, and the same is, **conditionally granted**.

And because it is further the opinion of this Court that the trial judge will act promptly and (1) vacate its order denying AAA's motion to sever and abate and issue an order granting the motion, severing Jackson's extracontractual claims against AAA, and abating the severed cause and (2) vacate its order compelling AAA respond to discovery on the extracontractual claims, the writ will not

issue unless the Honorable David Scott Brabham, Judge of the 188th District Court of Gregg County, Texas, fails to comply with this Court's order *within ten days of the date of this opinion and order*.

It is further ORDERED that **THOMAS JACKSON**, real party in interest, pay all costs incurred by reason of this proceeding.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.