

BAD FAITH BLOG

# Progressive's Summary Judgment Dumped on Appeal

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Summary: May & May Trucking ("May & May") was insured by Progressive. May & May leased one of its dump trucks to Trent Quinn who took it to New Orleans after Hurricane Katrina where it was stolen. Sometime after the leasing to Quinn the coverage limits were increased by \$50,000. After disputes arose, May & May filed suit for breach of contract and vexatious refusal to pay. The circuit court's summary judgment in favor of Progressive was reversed on appeal.

May & May Trucking LLC v. Progressive Northwestern Insurance Company, No. WD76488

When Progressive issued its policy to May & May on a dump truck, the initial coverage was for \$75,000. However, it increased the coverage limit to \$125,000 in September 2006. May & May leased its dump truck to Trent Quinn, who took it to assist the Hurricane Katrina clean-up in the New Orleans area. While there, the coverage was increased and the truck was reported stolen. Progressive treated the matter as a fraudulent claim which it investigated while also limiting the potential limits to the initial \$75,000.

In April 2007, Progressive offered to pay \$75,000 to resolve the claim, which May & May refused. While the parties were negotiating the dump truck was recovered. After the recovery Progressive received a repair estimate for \$10,200. It then took the dump truck to a repair facility in Louisiana and eventually paid \$14,206 for the repairs. However, May & May demanded additional funds to resolve the claim, a demand which Progressive refused. Thereafter, May & May filed a petition for breach of contract seeking more than \$17,000, as well as a claim for vexatious refusal to pay.

Progressive filed a motion for summary judgment on both claims which the trial court granted. The summary judgment was supported by the affidavit of one of its claims representatives. May & May successfully appealed to the Court of Appeals on grounds that the affidavit was not based on the personal knowledge of the affiant and substantially referred to hearsay. The Court of Appeals agreed that personal knowledge by the affiant would not have been required. However, when not made on personal knowledge, there have to be statements within the affidavit showing that there was a basis for personal knowledge regarding the facts set forth. Personal knowledge can also be gleaned from the role of the affiant as stated in the affidavit. The Court found that those requirements were not satisfied. Furthermore, based on the submissions by May & May in opposition, combined with the defective affidavit by Progressive, the summary judgment for breach of contract had to be reversed.

The Court of Appeals also reversed the summary judgment on the vexatious refusal claim. Missouri courts require vexatious refusal awards to be based on findings the refusal to pay was “willful and without reasonable cause or excuse as the facts would have appeared to a reasonable person before trial.” Because facts were disputed, the reasonableness issue was not a question of law. The Court of Appeals pointed out that Progressive’s summary judgment pleadings demonstrated that it had reasonably responded to the claim by investigating the validity of the loss before making any payment. At the same time, May & May presented facts “indicating that the extent and nature of the investigation was willful and without reasonable cause or excuse.” That evidentiary support on behalf of May & May came from affidavits stating that the Progressive “claims representative immediately and unreasonably suspected fraud and refused to acknowledge evidence that the dump truck had been stolen.” In addition, the same affidavits stated that Progressive’s claims personnel “acknowledged in February 2007 that it had a duty to pay for the loss of the vehicle, but withheld payment.” Progressive’s decision to withhold payment was based upon Progressive’s “concerns about the coverage date for the new policy limit, despite facts known to Progressive that the loss occurred after the effective date of coverage.” Those facts “controverted Progressive’s list of facts.” Based upon those disputed facts, it was improper for the trial court to enter summary judgment in favor of Progressive on the vexatious claim.

The lessons for both policyholders and insurers are very basic. Make sure your facts are properly supported by persons with personal knowledge. In addition, when the facts are disputed, summary judgment should not be granted. Finally, it is difficult to prevail on summary judgment whenever the test is based upon a reasonableness standard absent undisputed facts.

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