

# Nelson & Dahle, P.C.

316 North 26th Street Billings, Montana 59101 p: 406.867.7000

## FEDERAL COURT

Burton v. Mountain West Farm Bureau Mutual Ins., 27 MFR 341, 11/15/2000

INSURANCE: Comparative negligence not available as affirmative defense to bad-faith claim... Molloy.

Michael Burton was injured in a car driven by Truscott, an insured of Mountain West. He settled with Truscott, and now asserts first-party and third-party claims against Mountain West. He alleges that as an "insured" for purposes of med-pay, Mountain West failed to inform him that the \$5,000 med-pay on each of 3 other vehicles owned by Truscott were available to him. He alleges that as a third-party claimant with respect to liability, Mountain West required him to agree that the stacked med-pay would constitute an advance against any future recovery and that it failed to fairly investigate and promptly settle.

Mountain West asserts as an affirmative defense that if Burton can state a claim for common-law bad faith his recovery is limited by "comparative bad faith." Burton moves to strike this affirmative defense.

Burton argues that to the extent that "comparative bad faith" is directed at the first-party claim it is precluded by Stephens ( Mont. 1993), and to the extent that it is directed at his common-law claim he had no duty toward Mountain West.

Mountain West argues that whether Burton proceeds on a first-party or third-party claim the action sounds in tort, not contract, and therefore comparative analysis is appropriate. It cites Worden (10th Cir. 1965), which implicitly sanctioned a comparative theory in an action sounding "principally in negligence."

Mountain West's blending of contributory or comparative negligence, affirmative defense, and the reciprocal nature of the duty of good faith & fair dealing does not sit well with the Court. Comparative negligence offsets the recovery of plaintiffs whose own negligence contributes to their injuries. It is not based on the plaintiff's breach of a duty toward the defendant, but goes to the plaintiff's causation of his own injuries.

Mountain West's brief indicates that its theory does not pertain to the causation of Burton 's damages; it believes that his conduct eventually accrued to his detriment, but that accrual is 2 steps away from his conduct. Rather, it alleges that his conduct caused or influenced its own acts --- contributed to its "reasonable basis in law or fact" for denying or withholding payment of his claims. Its right to present facts indicating reasonableness of its conduct is preserved by its general denial of Burton 's allegations of bad faith; an affirmative defense is unnecessary.

To the extent that Mountain West wishes to contend that it was injured by Burton 's breach of a purported duty it can counterclaim, in which case it must prove that he had a duty toward it, he breached that duty, and his breach was the proximate cause of damages to it. To let Mountain West claim in an affirmative defense that its liability for his damages should be offset by his conduct would complicate the jury's determination of his damages. Mountain West can adequately defend by presenting his own conduct as a reasonable factual basis for denying his claim. Burton 's motion to strike is granted.

Burton v. Mountain West Farm Bureau Mutual Ins., 27 MFR 341, 11/15/00 .

Alan Lerner (Lerner & Danno), Kalispell, and Dale McGarvey (McGarvey, Heberling, Sullivan & McGarvey), Kalispell, for Burton ; Randall Nelson (Nelson Law Firm), Billings , for Mountain West.