IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DARRON KEITH DANIEL,	)	
	)	
Plaintiff/Appellee,	)	**Shelby Circuit No. 54570 T.D.**
	)	
VS.	)	**Appeal No. 02A01-9508-CV-00167**
	)	
THE ATLANTA CASUALTY COMPANY,	)	
	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE GEORGE H. BROWN, JR., JUDGE

STUART BRIAN BREAKSTONE
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Memphis, Tennessee
Attorney for Appellant

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Attorney for Appellee

REVERSED IN PART, AFFIRMED IN PART

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

In this breach of contract action, the Plaintiff, Darron Keith Daniel, filed suit against

the Defendant, Atlanta Casualty Insurance Company, for failing to pay for damages incurred from the theft of Plaintiff's truck pursuant to the terms of the insurance contract issued by the Defendant. A judgment was entered in the general sessions court in favor of the Defendant, and the Plaintiff appealed to circuit court. The circuit court directed a verdict in favor of the Defendant regarding the Plaintiff's claims under the Tennessee Consumer Protection Act and regarding the Plaintiff's claims that the bedliner of the truck and the added window tint were covered items under the Plaintiff's insurance contract. After a jury trial, the circuit court entered a judgment in favor of the Plaintiff for $5,068.81 in compensatory damages, $1,533.32 for the Defendant's bad faith and $1,164.35 in prejudgment interest. The Defendant has appealed the circuit court's judgment in favor of the Plaintiff. For the reasons stated hereafter, we reverse the circuit court's judgment as to the Defendant's bad faith and affirm the remaining issues on appeal.

FACTS

In March of 1991, the Plaintiff purchased a new 1991 Silverado truck from Chuck Hutton Chevrolet and paid approximately $15,000.00. The truck was insured by the Defendant. Sometime after purchasing the truck, the Plaintiff alleged that he added certain items to the truck including an alarm system, a bedliner, a bugshield, Eagle GT tires, American Racing rims and window tint. The Plaintiff admitted that these added items were not listed on his application for insurance with the Defendant. The Plaintiff also admitted that he did not notify the Defendant of the existence of these additional items at any time.

On October 20, 1992 at approximately 6:30 p.m., the Plaintiff parked his truck in a parking lot in downtown Memphis and walked to the Peabody hotel. At approximately 9:30 p.m. the same evening, the Plaintiff left the Peabody hotel and discovered that his truck had been stolen. The Plaintiff immediately reported the truck as stolen to a Memphis police officer. On October 21, 1992, the Plaintiff called Associates General, the Defendant's agent in Memphis, and reported the theft. Hearing no response from the Defendant, the Plaintiff again called Associates General around November 28, 1992. The Plaintiff then

called the Defendant's Atlanta office. On November 30, 1992, the Defendant sent a proof of loss theft package to the Plaintiff for the Plaintiff to complete and return to the Defendant. On December 1, 1992, the Defendant took a recorded statement from the Plaintiff.

On December 20, 1992, the Memphis Police Department notified the Plaintiff that his truck had been recovered and was sitting at an impound lot in Helena, Arkansas. The Plaintiff then drove to the impound lot in Helena, Arkansas and inspected the truck. Upon inspecting the truck, the Plaintiff testified that the truck was covered with mud, that there were different tires on the truck and that the window tinting had been stripped. The Plaintiff testified that the vehicle identification number, the bug shield, the bedliner, the alarm system and the speaker covers had been removed. The Plaintiff stated that there were burn marks on the interior of the truck, that many additional scratches and small indentations were on the exterior of the truck and that the truck had been driven approximately 17,000 miles during the two months that the truck was missing.

On December 21, 1992, the Plaintiff notified the Defendant that his truck had been recovered. On December 23, 1992, the Defendant's appraiser, Floyd McGlothian of Metro Appraisal, inspected the truck at the impound lot in Helena, Arkansas. McGlothian testified that there was no evidence of forced entry upon his inspection of the truck. McGlothian testified that there was no evidence of broken glass, that the steering column was not broken and that there was no evidence of any tampering with the wiring which might indicate that the truck was hot-wired in order to start the truck. He also stated that there was no evidence indicating that an alarm system had been installed on the truck. McGlothian further testified that the interior of the truck was clean and in very good condition. He said that there were no burn marks on the interior of the truck and that there was no glass inside the truck. McGlothian stated that there were no rock marks or cracks on the windshield. According to his testimony, the truck had 42,384 miles on it after it was recovered. He further found from his inspection that all of the tires and tire rims matched, that the tires appeared to be consistent with similar tires having 42,000 miles on them and

that the tire rims appeared to be stock Chevrolet rims. McGlothian's total estimate for the repair and cleaning of the truck was $112.86.

On January 13, 1993, the Plaintiff retrieved his truck from the impound lot in Helena, Arkansas and paid $170.00 to the impound lot in order to get possession of the truck. The Defendant reimbursed the Plaintiff for $65.00 of this storage fee and paid the Plaintiff the policy limit of $300.00 for loss of use of the Plaintiff's truck.

On January 18, 1993, the Plaintiff took his truck to Pryor Oldsmobile and requested that an appraiser at Pryor Oldsmobile inspect the truck. Pryor Oldsmobile prepared a damage appraisal report indicating damages to the truck in the amount of $4,916.91. In January of 1993, the Defendant requested that McGlothian make a second inspection of the truck. In February of 1993, McGlothian went to the Plaintiff's work site to inspect the truck. He testified that the Plaintiff would not let him touch the truck, and McGlothian was only able to make a visual inspection of the truck. McGlothian stated that the truck was in a "much worse condition" in February of 1993 than when he first inspected the truck on December 23, 1992. On February 23, 1993, McGlothian's damage report revealed damages to the Plaintiff's truck totaling $4,051.31. Thereafter, McGlothian made a third attempt to inspect the truck and went to the Plaintiff's sister's house to view the truck. The Plaintiff again only allowed McGlothian to make a visual inspection of the truck. Upon McGlothian's view of the truck, he testified that there were additional dents and scratches on the truck which were not present on his first inspection of the truck on December 23, 1992. The Defendant asserts that this additional damage to the Plaintiff's truck was not present when the Defendant first inspected the Plaintiff's truck on December 23, 1992. The Defendant argues that because the Plaintiff's insurance policy with the Defendant expired on November 27, 1992, the Defendant is not liable to the Plaintiff for this additional damage to the Plaintiff's truck.

On April 12, 1993, the Plaintiff filed suit in general sessions court.

LAW

The issues before this Court are as follows:

(1) Whether the trial court erred in failing to direct a verdict in favor of the Defendant as to the issue of the Defendant's alleged bad faith refusal to pay the Plaintiff's claim;

(2) whether the trial court erred in holding that the added tires, rims and alarm system were covered items under the Plaintiff's insurance policy;

(3) whether the trial court erred in excluding from evidence the Plaintiff's financial records and the police report.

First, we will consider whether the trial court erred in failing to direct a verdict in favor of the Defendant on the issue of the Defendant's alleged bad faith refusal to pay the Plaintiff's claim. T.C.A. § 56-7-105 provides:

> in all cases when a loss occurs and [an insurance company] refuse[s] to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, [the insurance company] shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure inflicted additional expense, loss, or injury upon the holder of the policy or fidelity bond.

We note that the question of whether an insurance company should pay the statutory penalty is ordinarily a question of fact for the jury. Doochin v. U.S. Fidelity & Guar. Co., 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993); Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561, 567 (Tenn. Ct. App. 1982). Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict. T.R.A.P. 13(d). However, we do not find any material evidence which supports the jury's verdict of bad faith on the part of the Defendant. The Plaintiff's truck was recovered within two months of when it was stolen. The Defendant had its appraiser inspect the truck on December 23, 1992 which was two days after the Plaintiff notified the Defendant that his truck had been recovered. McGlothian's damage report revealed damages to the Plaintiff's truck totalling $112.86. The Defendant relied upon McGlothian's damage estimate and did not pay the

Plaintiff for damages to his truck since the estimated damage amount fell below the Plaintiff's $500.00 deductible. The Defendant reimbursed the Plaintiff for $65.00 of the storage fee that Plaintiff paid to the impound lot, and the Defendant paid the Plaintiff the policy limit of $300.00 for loss of use of the Plaintiff's truck. Although the Defendant's damage report on February 23, 1993 revealed damages to the Plaintiff's truck totalling $4,051.31, McGlothian testified that this additional damage was not present when he first inspected Plaintiff's truck on December 23, 1992. Moreover, there is evidence in the record indicating the Plaintiff's bad faith in refusing to allow the Defendant to make a second inspection of the truck. Because the Plaintiff only allowed the Defendant to make a visual inspection of the truck rather than a full, complete inspection upon the Defendant's second inspection of the truck, we find that the Plaintiff did not comply with his insurance contract with the Defendant which required the Plaintiff to cooperate with the Defendant in the investigation of any claim. Thus, we find that there is no material evidence in the record indicating the Defendant's bad faith refusal to pay the Plaintiff's claim for damages.

Second, the Defendant argues that the trial court erred in holding that the added tires, rims and alarm system were covered items under the Plaintiff's insurance policy. Under Tennessee law, it is well settled that exceptions, exclusions and limitations in insurance policies must be construed against the insurance company in favor of the insured. Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 (Tenn. 1991). Where ambiguity arises, it is also a basic premise of contract law that contracts are construed against the drafter. Travelers Ins. Co. v. Aetna Casualty & Sur. Co., 491 S.W.2d 363, 365 (Tenn. 1973). In the present case, the Plaintiff's insurance contract does not exclude tires, rims and alarm systems from coverage under the policy. Moreover, tires, rims and alarm systems are not defined as custom items under the contract. We, therefore, agree with the circuit court's ruling that the Plaintiff's added tires, rims and alarm system were not excluded from coverage under the Plaintiff's contract with the Defendant.

Finally, the Defendant argues that the circuit court erred in not admitting the Plaintiff's financial records and the police report into evidence. We agree with the circuit

court's ruling which excluded the Plaintiff's payment history on the truck from the evidence considered by the jury. The circuit court properly applied Rule 403 of the Tennessee Rules of Evidence in prohibiting the admission of evidence tending to show that the Plaintiff was not current on his monthly truck payments. Alternatively, the Defendant argues that evidence of the Plaintiff's payment history on the truck should be admitted to show the Defendant's state of mind in not paying the Plaintiff's claim. This argument is without merit. Rule 803(3) of the Tennessee Rules of Evidence allows into evidence statements reflecting the declarant's then existing state of mind. Rule 803(3) of the Tennessee Rules of Evidence does not allow into evidence statements tending to show a non-declarant's state of mind as the Defendant has argued. Thus, the Defendant's contention that the Plaintiff's financial records should be admitted under the state of mind hearsay exception is without merit.

The Defendant also argued that the court below erred in not admitting the police report into evidence. The Plaintiff objected to the admission of the police report on the grounds of hearsay. The Defendant argued that the police report should be admitted into evidence to show the Defendant's state of mind in denying the Plaintiff's claim. This argument of the Defendant is, likewise, without merit. Rule 803(3) of the Tennessee Rules of Evidence does not allow into evidence statements tending to show a non-declarant's state of mind. Thus, the Defendant's contention that the police report should be admitted into evidence under the state of mind hearsay exception is without merit. We, therefore, agree with the ruling of the court below which excluded the police report from evidence.

The judgment of the circuit court is hereby reversed as to the Defendant's bad faith refusal to pay the Plaintiff's claim and is affirmed as to the remaining issues on appeal. Costs on appeal are taxed to the Appellant, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.