Cite as 2013 Ark. App. 233

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-915

ESTHER EDGIN ET AL. APPELLANTS V. CENTRAL UNITED LIFE INSURANCE COMPANY APPELLEE	**Opinion Delivered** April 10, 2013 APPEAL FROM THE INDEPENDENCE COUNTY CIRCUIT COURT [NO. CV-07-261-4] HONORABLE TIM WEAVER, JUDGE REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

This bad-faith case arises from a dispute regarding the meaning of the term "actual charges" in a supplemental cancer insurance policy. Esther Edgin; Mary McCullough; Carolyn Peterson, Special Administrator of the Estate of Terrence Peterson; and Nancy Whitman, Executrix of the Estate of Michael Whitman, appeal from an order granting summary judgment to appellee Central United Life Insurance Company. Because genuine issues of material fact remain to be tried, we reverse and remand.

Appellants sued appellee for breach of contract, the statutory penalty, bad faith, and fraudulent suppression, claiming that appellee had underpaid benefits; at one time, it had paid "actual charges" billed by health-care providers, but later unilaterally changed its practice, paying only the discounted "fee-scheduled" amount that the providers had received from government entities (such as Medicare) and insurance companies. Appellee moved for

summary judgment. In response, appellants offered numerous definitions of "actual charges" in dictionaries and health-care treatises that supported their position; the depositions of several of appellees' attorneys, officers, and employees, and Kathy Ferrell, a "certified legal nurse consultant"; and the affidavits of Ferrell, Whitman, Peterson, and Edgin. The circuit court dismissed the breach-of-contract and fraudulent-suppression claims because the parties had settled them, and granted summary judgment to appellee on appellants' bad-faith and punitive-damages claims with the following explanation:

> There is no evidence that Central United engaged in affirmative misconduct or that it lacks a good faith defense to plaintiffs' claims under the policies. The conduct of Central United was not dishonest, oppressive or malicious. Its actions were not carried out with a state of mind that could be characterized by hatred, ill will or with a spirit of revenge.

Appellants then appealed.

Summary judgment may be granted by a trial court only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, clearly show that there are no genuine issues of material fact to be litigated and the party is entitled to judgment as a matter of law. *Grayson & Grayson, P.A. v. Couch*, 2012 Ark. App. 20, 388 S.W.3d 96. When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Id.* On appeal, we need only decide if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Id.* In making this decision, we view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences

against the moving party. *Id*. Summary judgment should be denied if reasonable minds might reach different conclusions from the undisputed facts. *Id*. This is such a case.

Through the tort of bad faith, an insurer may be held accountable for failing to investigate and settle a claim. *Watkins v. S. Farm Bureau Cas. Ins. Co.*, 2009 Ark. App. 693, 370 S.W.3d 848. Our supreme court has defined "bad faith" as dishonest, malicious, or oppressive conduct in order to avoid a just obligation to its insured, carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge. *Id*. The standard for establishing a claim for bad faith is rigorous and difficult to satisfy. *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Guyer*, 2011 Ark. App. 710, 386 S.W.3d 682. The tort of bad faith does not arise from a mere denial of a claim; there must be affirmative misconduct. *Id*. A mistake, negligence, confusion, or bad judgment is insufficient so long as the insurer is acting in good faith. *Id*.; s*ee also Switzer v. Shelter Mut. Ins. Co.*, 362 Ark. 419, 208 S.W.3d 792 (2005); *State Auto Prop. & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999); *Parker v. S. Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 935 S.W.2d 556 (1996); *S. Farm Bureau Cas. Ins. Co. v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996); *Cincinnati Life Ins. Co. v. Mickles*, 85 Ark. App. 188, 148 S.W.3d 768 (2004); Howard W. Brill, *Arkansas Law of Damages* § 24:4 (5th ed. 2004).

The contract did not define "actual charges." Between 1995 and January 2003, appellee accepted health-care providers' bills as the amount of "actual charges." Appellee decided that it had been overpaying such benefits after a private consultant informed it in January 2003 that it could pay the discounted amount actually paid by a private insurer or a

governmental agency as the "actual charges" amount. Appellee's in-house and outside attorneys, however, could find no legal authority on the topic. Nevertheless, appellee quickly implemented the change and did not inform its insureds of that fact until five months later. The Arkansas Insurance Department did not initially accept appellee's position but eventually did so, with some qualifications.

Appellants contend that appellee's bad faith can be sufficiently inferred to survive a motion for summary judgment from the evidence that, when it made its unilateral decision to make this change, there was no legal support for its position; that it must have been aware of federal regulations, industry dictionaries, and other insurers' "actual charges" definitions that supported appellants' position; that it was unsuccessful in attempting to persuade the National Association of Insurance Commissioners to accept its definition; and that its actions were so unreasonable as to be dishonest. We agree.

We recognize that an insurer's refusal to pay a claim cannot constitute wanton or malicious conduct when an actual or valid controversy as to liability under the policy exists. *Cato v. Ark. Mun. League Mun. Health Benefit Fund*, 285 Ark. 419, 688 S.W.2d 720 (1985); *Watkins*, *supra*. However, we believe that a question of fact remains as to whether there actually was a "valid controversy" in this case. An insurer's pattern or practice of knowingly using an unreasonable interpretation of the phrase "actual charges" to withhold payment of, or underpay, policy benefits can be evidence of bad faith. *See Pedicini v. Life Ins. Co. of Ala.*, 682 F.3d 522 (6th Cir. 2012). Although this specific question has not been decided by our state's appellate courts, we have long noted that whether something is reasonable is a question

of fact. *See Carnell v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 698, 425 S.W.3d 787. In awarding summary judgment to appellee, the circuit court made findings of fact as to appellee's state of mind and the reasonableness of its interpretation of the policy. In light of the proof offered by appellants, these questions of fact should be decided by a jury.

Reversed and remanded.

WALMSLEY and WYNNE, JJ., agree.

Hare, Wynn, Newell & Newton, LLP, by: *Paul Byrd* and *Nolan E. Awbrey*, for appellants.

Womack, Landis, Phelps & McNeill, P.A., by: Jeffrey *Puryear* and *Ryan Wilson*, for appellee.

Post Law Firm, by: *Jerry Post*, for appellee.

Rushton, Stakely, Johnston & Garrett, P.A., by: *Dennis Bailey*, for appellee.