[Cite as *Tchankpa v. Ascena Retail Group, Inc.*, 2016-Ohio-8354.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kassi Tchankpa,	:	
Plaintiff-Appellant,	:	
		No. 16AP-190
v.	:	(C.P.C. No. 15CV-10472)
Ascena Retail Group, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *William J. O'Malley,* for appellant. **Argued:** *William J. O'Malley*.

On brief: *Dawson & Myers, LLC,* and *Robert W. Myers,* for appellees. **Argued:** *Robert W. Myers.*

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Kassi Tchankpa was employed by Ascena Retail Group, Inc. ("Ascena") when he got injured while moving a computer. His medical treatment was initially covered by his employer's medical insurance with Aetna. At some point in time, Aetna, perhaps as a result of communication with Ascena, came to view the injury as being part of a potential workers' compensation claim and began refusing to pay the accruing medical bills.

{¶ 2} Tchankpa's treating physician became frustrated at not being paid and curtailed Tchankpa's medical treatment, which resulted in Tchankpa's medical picture deteriorating.

{¶ 3} Ascena, a self-insured employer for workers' compensation claims, began paying Tchankpa's medical bills, but later discontinued payment. Ascena now appears to contest the issue of whether Tchankpa's injury arose out of his employment.

{¶ 4} A district hearing officer with the Industrial Commission of Ohio initially found that Tchankpa had the right to participate in the workers' compensation system, but Ascena pursued that ruling to the staff hearing officer in an appeal who found that Tchankpa did not have the right to participate in the workers' compensation system.

{¶ 5} While the issue of who should pay the medical bills was being contested, Tchankpa filed a lawsuit alleging that Ascena was guilty of an intentional tort for refusing to pay his medical bills and withholding workers' compensation benefits. That lawsuit was dismissed by a trial court judge who felt that the lawsuit failed to state a claim upon which relief could be granted. Tchankpa, now represented by counsel, has appealed that dismissal, assigning a single error for our review:

> The Common Pleas Court committed reversible error when it dismissed Mr. Tchankpa's lawsuit for failing to state a claim upon which relief can be granted.

{¶ 6} Tchankpa's frustration is understandable. He had a good job and was injured while employed. The company's medical insurance paid his medical bills for a while. Then someone informed the medical group insurance company that the injury might be part of a claim for workers' compensation, so the payments stopped.

{¶ 7} Ascena is a self-insured employer, so Ascena was required to pay Tchankpa's medical bills if the injury arose out of his employment. Ascena argued before the Industrial Commission that the injury was not a new injury arising out of Tchankpa's employment.

{¶ 8} As a self-insured employer, Ascena was required to file paperwork with the Ohio Bureau of Workers' Compensation. The paperwork led a district hearing officer of the Industrial Commission to find that Tchankpa's injury allowed him to participate in the Ohio Workers' Compensation system. Ascena appealed to a staff hearing officer, who overruled the hearing officer's decision.

{¶ 9} Tchankpa has the right to appeal to the common pleas court to reconsider his right to participate. He filed that appeal in Franklin C.P. No. 14CV-10861. Tchankpa voluntarily dismissed that action without prejudice on June 21, 2016.

{¶ 10} Tchankpa wanted someone to pay his doctor so he could get more treatment. Ascena refused to pay. Aetna, the group medical insurance provider for Ascena, refused to pay apparently because of the possibility the medical claim fell under the purview of workers' compensation.

{¶ 11} Tchankpa justifiably felt that Ascena was responsible for his predicament. Ascena was fighting his right to participate in the workers' compensation system. The insurance company hired by Ascena was refusing to pay his medical bills because of the questions about the right to participate in the workers' compensation system.

{¶ 12} We note that while the obligation to pay the medical bills stays in limbo, Ascena benefits; its premium for workers' compensation coverage is not raised because of a worsening claims history. The insurance company premiums with Aetna also do not increase for a claim it is not paying.

{¶ 13} Pursuant to Civ.R. 12(B)(6), a court should grant a motion to dismiss where, looking only to the complaint, the plaintiff fails to articulate more than unsupported legal conclusions. *Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658, 659 (1995); *Community Hous. Network, Inc. v. Stoyer*, 10th Dist. No. 06AP-73, 2006-Ohio-5094, ¶ 6.

{¶ 14} R.C. 2745.01 provides in pertinent part, as follows:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶ 15} As noted earlier, Tchankpa sued Ascena because of its apparent responsibility for his inability to pay his medical bills and thus his inability to get the medical treatment he needed.

{¶ 16} The complaint filed by Tchankpa alleged that Ascena moved Tchankpa from the group of employees covered by Aetna to an employee who was pursuing a workers'

compensation claim, thereby terminating his health insurance coverage while contesting his eligibility for workers' compensation.

{¶ 17} The facts as alleged in the complaint are sufficient to support a claim that Ascena acted in bad faith in terminating the medical coverage of the injured employee, knowing it would cause physical and psychological harm to the employee. As a result, the complaint stated a viable claim for relief and should not have been dismissed. At this stage of the proceedings, we do not know all the details and much of what is in the briefs has not been proved. However, the complaint filed by Tchankpa clearly alleges that Ascena terminated Tchankpa's medical coverage under conditions which indicate bad faith and which indicate knowledge that the termination of the coverage would do physical harm to Tchankpa.

{¶ 18} As a result, we sustain the sole assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand the case for further proceedings.

Judgment reversed; case remanded.

TYACK, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 19} Because I believe the majority overreached in supplying a cause of action neither alleged by appellant nor, after changes in statutory and case law, definitively recognized in law, and because I believe appellant failed to state operative facts to support recovery, I respectfully dissent.

{¶ 20} First, as a preliminary issue, it is impossible to identify the specific claim alleged from the language of this complaint. According to the complaint, appellant brings an intentional tort claim against appellee, citing to R.C. 2745.01(A) and (B). Appellant references an "intentional tort" generally but never actually defines what intentional tort appellant believes appellee committed. While appellant cites to R.C. 2745.01(A) and (B), this statute simply proscribes the requirement of "intent to injure" required as a part of intentional tort claims against employers. Does plaintiff's cause of action arise out of appellee's administration or denial of workers' compensation benefits, out of appellee's handling of appellant's private insurance, both? Without a clear presentation or "plain

statement of the claim," in my opinion, the complaint falls short of the notice to appellee required by civil procedure rules. Civ.R. 8(A) and 10(C).

{¶ 21} Second, I do not believe appellant has otherwise alleged facts that supply such notice relative to a specific claim for an employer intentional tort. In cases where a plaintiff asserts an intentional tort claim against an employer, the Supreme Court of Ohio "modified the standard for granting a motion to dismiss by requiring that the plaintiff plead operative facts with particularity." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190 (1988). *See also Henderson v. State*, 8th Dist. No. 101862, 2015-Ohio-1742, ¶ 10 ("to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions"). As appellant did not plead facts that, taken as true, establish that appellee had a duty to pay appellant, that appellee acted with deliberate intent to cause appellant an injury, and that it was appellee's actions that caused appellant an injury, the complaint in this case fails to state a claim for an employer intentional tort.

{¶ 22} Third, I disagree that the facts alleged here support a cause of action based on bad faith, as concluded by the majority opinion. The majority opinion states that appellant has stated a claim "that [appellee] acted in bad faith in terminating the medical coverage of the injured employee, knowing it would cause physical and psychological harm to the employee." (Majority Opinion at ¶ 17.)

{¶ 23} The legal basis for this conclusion is unclear, and, in my opinion, whether a bad faith cause of action is viable in this context at all is questionable. In *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446, ¶ 55, this court noted case law appearing to support a cause of action for a self-insured employer's bad faith acts in administering employee workers' compensation claims. However, *White* itself identified such a cause of action as an intentional tort and was decided prior to the enactment of R.C. 2745.01 and cases thereafter defining a "deliberate intent to injure" requirement in cases involving employer intentional tort. *Id.* at ¶ 53; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 57 (establishing that R.C. 2745.01 allows employees to recover for an intentional tort for injuries that result from a "deliberate intent to injure" and modifies the common-law definition of an employer

intentional tort). *See also Cincinnati Ins. Co. v. DTJ Enters. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, ¶ 11 ("The General Assembly's intent in enacting R.C. 2745.01 was to 'significantly restrict' recovery for employer intentional torts to situations in which the employer 'acts with specific intent to cause an injury.' * * * '[A]bsent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system.' "). In addition, although a cause of action may exist for the tort of bad faith[1] in an insurer's handling and payment of the claims of its insured, such a cause of action arises from an underlying contract and typically involves disputes on the insurance contract between an insurance company and the insured. *See, e.g., Zoppo v. Homestead Ins.* Co., 71 Ohio St.3d 552, 555 (1994); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272 (1983); *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 695-96 (1992); *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036.

{¶ 24} Regardless, even if a bad faith cause of action is viable in the context presented here, in my opinion, appellant failed to plead sufficient, operative facts to support recovery. Appellant did not allege in his complaint that appellee terminated his medical coverage, as the majority opinion suggests, does not allege that appellee had a duty to pay his medical bills, either as a self-insured employer under the Ohio workers' compensation system or under contract, for example, and, importantly, did not reference bad faith.

{¶ 25} While courts must construe pleadings so as to do substantial justice, the " 'notice pleading' requirement is not meaningless." *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. No. 98861, 2014-Ohio-25, ¶ 113; Civ.R. 8(F); *Henderson v. State*, 8th Dist. No. 101862, 2015-Ohio-1742, ¶ 10 (noting that while Ohio is a notice pleading state, "[n]evertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state

[1] Whether such a claim requires some form of wrongful intent is unsettled. *Compare Zoppo v. Homestead Ins.* Co., 71 Ohio St.3d 552, 555 (1994), paragraph one of the syllabus ("An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."), *with Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630 (1996) (declining to extend *Zoppo*'s definition of bad faith using the "reasonable justification" standard to a particular case of an insurer's alleged failure to defend and, instead, employed the definition of bad faith previously set in *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 695-96 (1992), which includes "wrongful intent." *Roberts* at 633-34. *See also Farmer Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142, ¶ 75.

legal conclusions"). Overall, I do not believe the complaint in this case is sufficient to give appellee fair notice of the nature of the action. *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶ 49.

{¶ 26} For the above stated reasons, I believe the trial court properly dismissed the complaint, and, therefore, I would affirm the decision of the trial court. Because the majority does not, I respectfully dissent.

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