

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Tiffanie McNair

Court of Appeals No. L-13-1163

Appellant

Trial Court No. CI0201201577

v.

State Farm Fire and Casualty Co.

DECISION AND JUDGMENT

Appellee

Decided: December 20, 2013

* * * * *

Timothy J. Walerius, for appellant.

Cormac B. DeLaney, for appellee.

* * * * *

JENSEN, J.

{¶1} Plaintiff-appellant, Tiffanie McNair, timely appeals the June 27, 2013, judgment of the Lucas County Court of Common Pleas granting summary judgment to defendant-appellee, State Farm Fire and Casualty Co., on her claim for bad faith. For the

reasons that follow, we find McNair's assignment of error well-taken and we reverse the trial court's decision.

I. Factual Background

{¶2} On August 22, 2011, Christopher Lawrence died from a gunshot wound to the back of his head. He was the named insured on a \$50,000 life insurance policy issued by State Farm. McNair, his girlfriend and the mother of his minor child, Kyan Lawrence, was the owner and primary beneficiary of that policy. Kyan was the successor beneficiary.

{¶3} On September 6, 2011, McNair executed the necessary claim forms to collect the insurance proceeds. Her local State Farm agent faxed the forms to the corporate office on September 9, 2011. State Farm, through Life Claims Examiner, Jeff Bittner, acknowledged her claim in a letter dated September 12, 2011. Bittner informed her that because of the circumstances of Lawrence's death, State Farm needed to gather additional information. Although not specifically stated in the letter, State Farm needed this additional information to ensure that McNair had not played a role in Lawrence's murder. That same day, Bittner left a message for Detective Bob Schroeder, the lead investigator on the Lawrence case.

{¶4} Four days later, McNair, through her local agent, inquired about the status of the claim. State Farm employee, Olivia Crutcher, told her that the claim had been referred to an examiner because under federal law, State Farm was required to confirm

with the police that the beneficiary had no involvement in the homicide. After another phone call from the local agent on September 20, 2011, State Farm made another attempt to contact the detective. Following an exchange of voice mails, State Farm employee, Marline Lowe, spoke with Detective Schroeder. He told her that Lawrence had been sitting in his truck in front of his house when shots were fired toward the house. A bullet went through the back window of the truck, hitting Lawrence. Police were not sure whether Lawrence was the intended target. Although police had several suspects, no charges had been filed and no one had been ruled out as a suspect. Lowe conveyed this to Bittner.

{¶5} A week later, the local agent called Bittner again. Bittner told her that State Farm would not pay the proceeds of the policy until McNair was ruled out as a suspect. He said that State Farm's position was based on Ohio's slayer statute, R.C. 2105.19. Under this statute, a person may not collect life insurance proceeds if he or she has been convicted of causing the death of the named insured. That same day, September 27, 2011, State Farm sent another letter to McNair indicating that it still needed to gather additional information from Toledo police concerning its investigation and would contact her again in approximately two weeks.

{¶6} In the meantime, on September 28, 2011, McNair called Bittner, inquiring again about the proceeds. Bittner told McNair that Detective Schroeder had told him that no one had been ruled out as a suspect yet. Bittner again cited the Ohio slayer statute as

the basis for State Farm's refusal to pay the insurance proceeds. McNair read the statute to Bittner and indicated that it did not appear to apply. She asked to speak with Bittner's superior.

{¶7} The next day, Mia Brack, from State Farm, spoke with McNair. McNair asked Brack to show her where in the policy it stated that it could not pay the proceeds until the beneficiary was ruled out as a suspect. Brack told her that it was state law—not a provision of the policy. McNair expressed concern that the investigation could go on forever and that State Farm's position didn't seem right to her. Brack told her that State Farm was not at a point yet where it could release the proceeds and that it would follow up with the detective at least every two weeks.

{¶8} Bittner left another message for Detective Schroeder on October 10, 2011. On October 13, 2011, attorney Keith Mitchell, retained by McNair, called Bittner and Bittner conveyed the same message: that State Farm could not release the proceeds until McNair was ruled out as a suspect. He called Detective Schroeder again and left another message.

{¶9} On October 14, 2011, Detective Schroeder spoke with State Farm employee, Becky Spratt. He told her that police had made no arrests and no one had been ruled out as a suspect, but he believed the shooting was retaliation for another gang-related incident. According to Spratt's notes, Detective Schroeder said that McNair "remains under suspicion." Three days later, Bittner updated McNair's local State Farm agent.

{¶10} Bittner left messages for Detective Schroeder again on October 28, 2011, and November 9, 2011. On November 9, 2011, the local agent called again and spoke with State Farm employee, Dee McMillan. McMillan repeated State Farm's position.

{¶11} On November 14, 2011, Bittner spoke with Detective Schroeder again and was told that the homicide investigation remained open and active and that McNair had not been ruled out as a suspect. In response to a letter from Bittner dated November 14, 2011, requesting a written statement, Detective Schroeder sent a fax to Bittner indicating that the police department could not issue a written statement on a continuing investigation but that he would contact Bittner if the status of the investigation changed. Bittner conveyed the same message to attorney Mitchell again on December 8, 2011, and they talked about what the procedure would be if McNair disclaimed the proceeds in favor of her son, the successor beneficiary. Bittner said that the successor beneficiary would also need to be ruled out as a suspect and explained the procedure for paying benefits to a minor.

{¶12} Bittner left messages for Detective Schroeder again on December 8 and 22, 2011, and January 4, 2012. Bittner updated McNair and McNair informed him that she was no longer represented by Mitchell. On January 5, 2012, Bittner spoke with McNair and sent her another letter, providing essentially the same information as his September 27, 2011 letter. McNair told Bittner that contrary to what Bittner had been

telling her, Detective Schroeder told her that she had been ruled out as a suspect. Bittner left another message for Detective Schroeder on January 9, 2012.

{¶13} McNair retained another attorney, Tim Walerius. Walerius sent a letter to Bittner dated January 4, 2012, and spoke with him on January 9, 2012. Their conversation mirrored all the others: McNair had not been ruled out as a suspect, the investigation is active and ongoing, and State Farm will continue to follow up with the detective. Bittner spoke with Detective Schroeder again on January 27, 2012, and nothing had changed. McNair had still not been ruled out as a suspect.

{¶14} McNair filed the present action on February 6, 2012, alleging breach of contract and bad faith. After several extensions, State Farm answered and counterclaimed on May 2, 2012, seeking to interplead the \$50,000 life insurance proceeds with the court. It joined no one else in its counterclaim. The trial court allowed State Farm to deposit the funds with the court on July 19, 2012.

{¶15} Discovery proceeded. State Farm was served with discovery requests seeking information about prior life insurance claims it had handled where a homicide was involved. It was granted two extensions of time to respond to discovery, then filed a motion for protective order on August 17, 2012. Because additional extensions of time were sought by State Farm, that motion did not become decisional until October 15, 2012. In the meantime, McNair filed a motion to release the life insurance proceeds on September 14, 2012. State Farm deposed Detective Schroeder on September 26, 2012.

Although State Farm did not oppose McNair's motion, it filed a "response" to it.

McNair's motion was denied on October 5, 2012.

{¶16} McNair filed a motion for partial summary judgment seeking release of the proceeds on November 8, 2012, to which State Farm again filed a "response" to address alleged misrepresentations by McNair. On January 7, 2013, the trial court finally ordered that the life insurance proceeds be released to McNair on the basis that no competing claim against the funds existed. This resolved McNair's breach of contract claim. Her bad faith claim remained.

{¶17} State Farm moved for summary judgment on the bad faith claim on March 14, 2013. It argued that it had acted reasonably in handling McNair's claim and in filing the interpleader action. It stressed that it had never disputed its liability to pay the policy benefits, that it had promptly and repeatedly contacted Detective Schroeder, and that Detective Schroeder's deposition testimony confirmed that McNair had not been ruled out as a suspect. It contended that it was faced with the potential that McNair could be determined to be ineligible to collect the benefits and that there was a risk that it would have to pay the proceeds twice. It claimed that by seeking frequent updates from Detective Schroeder, it acted reasonably and that it had reasonable justification for interpleading the proceeds instead of simply just paying them. State Farm also argued that it acted properly in considering Ohio's slayer statute in handling the claim. It maintained that to the extent the slayer statute did not provide authority for holding the

proceeds, the common law did. State Farm disputed that the delay in paying the proceeds constituted bad faith, pointing out that it had tried calling Detective Schroeder 13 times and had corresponded with McNair or her representatives via telephone 22 times, in addition to sending seven status letters. It urged that it could not force the detective to conclude its investigation and that it acted appropriately in the meantime.

{¶18} McNair responded that State Farm did not meet its obligation of good faith by merely calling the detective and asking if McNair had been ruled out as a suspect. She insisted that State Farm did not even follow its own procedures in conducting its investigation. It asked no follow-up questions of the detective, conducted no interviews, and did not even obtain the crime report. In support of her position, McNair submitted a 28-paragraph affidavit from John Smalley, an attorney with 27 years of experience in representing insurance companies and handling matters involving insurance contracts, claims practices, and bad faith issues. He opined that State Farm acted in bad faith in failing to ask additional questions, talk to witnesses, and conduct an investigation beyond merely calling the detective to ask whether McNair had been ruled out as a suspect.

{¶19} The trial court granted State Farm's motion for summary judgment and dismissed McNair's claim. The court found that McNair had presented no evidence in support of her claim. It disregarded Smalley's affidavit as "nothing more than conclusory observation, with no factual basis" and determined that he had not alleged that State Farm was required to follow the discretionary procedure outlined in the claims manual and

identified no actions that fell below the acceptable practice in reviewing an insurance claim. The court concluded that it was reasonable for State Farm to focus its inquiry on Detective Schroeder, it kept McNair and her representatives apprised of the status of the investigation, and it eventually sought to take McNair's statement, but McNair filed her complaint instead. The court found that State Farm's position was consistent with Ohio common law in that it sought to prevent payment of the proceeds to a person who may have "intentionally and feloniously" caused the death of the insured. The court determined that there were no facts indicating that State Farm sought to interplead the funds to further delay payment.

{¶20} McNair appeals the trial court's dismissal of her bad faith claim, and assigns the following error:

The trial court erred in granting summary judgment because there was evidence Defendant failed to conduct an adequate investigation and lacked reasonable justification to deny Plaintiff's claim.

II. Standard of Review

{¶21} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶22} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶23} McNair contends that State Farm acted in bad faith by failing to adequately investigate her claim and by relying on inapplicable legal authority in delaying payment of benefits. She claims that the trial court erred in holding that she did not create a genuine issue of material fact as to her claim, and in rejecting the opinions of her expert witness, John Smalley.

{¶24} An insurer has the duty to act in good faith in the handling and payment of the claims of its insured. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), paragraph one of the syllabus. An insurer fails to exercise good faith where the circumstances do not furnish reasonable justification for its refusal to pay the claim. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), paragraph one of the syllabus. An insurer that improperly fails to pay a valid claim may be liable in tort for bad faith. *Hoskins* at 246; *Beever v. Cincinnati Life Ins. Co.*, 10th District Franklin No. 02 AP-543, 02 AP-544, 2003-Ohio-2942, ¶ 20. Even where a claim is ultimately paid, the insurer's "foot-dragging" in handling and evaluating the claim may support a bad-faith cause of action. *Drouard v. United Servs. Auto. Assn.*, 6th Dist. Lucas No. L-06-1275, 2007-Ohio-1049, ¶ 16.

{¶25} Several Ohio courts, including this court, have addressed bad faith claims in situations where the insured or a beneficiary alleged a failure to adequately investigate. In *Zoppo*, for instance, the Ohio Supreme Court considered whether the insurer in that

case had conducted an adequate investigation before denying its insured's claim following a fire at the bar he owned. The court held that there was ample evidence to support a finding that the insurer failed to conduct an adequate investigation and was not reasonably justified in denying its insured's claim. *Id.* at 555. Among the court's criticisms of the investigation was that the insurer had focused primarily on the insured from the outset. *Id.* It did not seriously explore evidence that other individuals had threatened to burn down the bar, that there had been previous threats and attempts to burn it down, and a man who had once been ousted from the bar told a group of patrons that he had set the fire. *Id.* The insurer ignored evidence that there had been a previous robbery and it failed to locate key witnesses, verify alibis, or follow up with witnesses. *Id.* The court observed that in interviewing some of the alleged perpetrators, "the investigators did little more than ask cursory questions such as whether they were responsible for the fire," and ceased questioning when they answered "no." *Id.* The court reinstated the trial court's finding of bad faith.

{¶26} The Tenth District examined whether an insurer had fulfilled its duty to investigate in a case involving payment of life insurance proceeds. In *Beever*, the insurer claimed that the decedent had presented false information on his life insurance application concerning his alcohol abuse, therefore, justifying its refusal to pay the proceeds of the policy to his beneficiary. The trial court granted summary judgment to the insurer and the beneficiary appealed. The court reversed the trial court's decision. It

held that the evidence presented by plaintiff—that the insurance company had merely reviewed the records from decedent’s hospitalization immediately preceding his death and failed to interview or speak with any of the decedent’s medical providers, failed to seek an expert medical opinion, and failed to speak with decedent’s surviving spouse and friends concerning his alcohol use—created a genuine issue of material fact regarding whether the insurer was reasonably justified in delaying payment. *Id.* at ¶ 40-45.

{¶27} Our case addressing an insurer’s duty to conduct an adequate investigation involved a claim for uninsured/underinsured motorist (“UM/UIM”) coverage. In *Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App.3d 607, 625, 716 N.E.2d 250 (6th Dist.1998), the insurer appealed following a jury verdict in favor of plaintiffs on their bad faith claim, arguing that the trial court erred in denying its motion for directed verdict. We upheld the trial court’s ruling. The plaintiffs had presented evidence that other than an initial six-hour investigation, in the four months between being notified of the claim and plaintiffs’ filing of their lawsuit, the insurer had failed to take statements, never spoke with any officers, reviewed no public records, and did nothing more to assess the claim until 16 months after suit was filed. We held that this constituted substantial, competent evidence to support plaintiffs’ claim that the insurer had breached its duty to conduct an adequate investigation.

{¶28} The investigations held to be deficient in *Zoppo*, *Beever*, and *Furr* closely mirror the investigation conducted by State Farm. The evidence presented by McNair

demonstrates that the only steps taken by State Farm to investigate McNair's claim was to contact the detective in charge of investigating the Lawrence homicide. It appears from State Farm's file that the only question asked of the detective was whether McNair had been ruled out as a suspect. Despite the fact that the detective at one point indicated that he had reason to believe that the shooting was gang-related, State Farm never asked any questions or performed even a cursory investigation of its own to determine whether there was any evidence implicating McNair in Lawrence's murder. State Farm's file did not contain a copy of the Toledo Police Department's crime report, it never interviewed McNair, it took no statements from witnesses, and it asked only cursory questions of the detective. At his deposition, Detective Schroeder testified that when he said that McNair had not been ruled out as a suspect, this was because absolutely no one had been ruled out—not because there was any evidence suggesting McNair's involvement. In fact, he testified that he had no evidence or testimony indicating that McNair was involved.

{¶29} On top of this, State Farm failed to follow its own procedures for investigating eligibility for benefits in homicide cases. Although the procedures instruct the investigator to use discretion in his or her investigation, they provide a checklist to assist investigators. The first step is to contact the investigating authorities to determine whether the beneficiary can be ruled out as a suspect. It is undisputed that State Farm did this, however, the policy provides that if the answer to that question is no, more questions should be asked, including (1) are there any suspects? (2) are they actively pursuing the

investigation? (3) is the beneficiary a suspect? (4) have they been contacted by any other insurance companies? (5) have they talked with the beneficiary yet? State Farm presented no information to suggest that it asked any follow-up questions upon learning that McNair had not been ruled out.

{¶30} The procedure then instructs the investigator to send a pattern letter to law enforcement contacts and to follow up in two weeks. Again, it appears that this was done. But the manual also advises the investigator to conduct interviews of the beneficiary and family members of the decedent. It suggests asking questions such as (1) can they provide the circumstances surrounding the death? (2) do they have any idea what might have happened? (3) do they have any idea who might be involved? (4) was the insured in any kind of financial trouble? (5) do they have any information that may help with the investigation? (6) have they retained an attorney for any reason? State Farm did not interview McNair nor did it interview Lawrence's family members. After numerous phone calls from McNair, and demands from her attorney, a January 30, 2012 note to the file finally acknowledges that interviews would need to take place. This was four-and-half months after McNair provided notice of the claim. Up until that time, the claims file suggests that State Farm intended to simply wait for the police department's homicide investigation to conclude before it would handle the claim any further.

{¶31} In our view, the claims file itself and State Farm's failure to follow its own procedures demonstrate the inadequacy of its investigation. But McNair went further and

presented the affidavit of John Smalley, an attorney licensed in Ohio who has spent the majority of his 27-year career representing insurance carriers, advising his clients on proper claims handling, and defending them in all types of insurance matters, including bad faith claims. Much of Smalley's affidavit simply recites the law of insurance bad faith. But it also indicates that he reviewed the claims file, the police report, Detective Schroeder's deposition, the pleadings and correspondence, and State Farm's policies and procedures. After reviewing that information, he opined that State Farm's investigation was inadequate.

{¶32} Smalley provided the numerous reasons for his opinion. First and foremost, Smalley believed that the investigation should have gone beyond simply asking whether McNair had been ruled out as a suspect. In addition, he was critical of the fact that the claims file made no mention that the claim handler had reviewed the crime report. That report states that three black males were seen fleeing the scene of the murder and reveals that there was a second shooting victim. Smalley contended that the note in the file indicating that the detective's initial impression was that Lawrence's shooting was gang-related suggested that McNair did not murder Lawrence, therefore, the proceeds should have been released to her. He also believed that it was pertinent that the police were not even sure that Lawrence was the intended target of the shooting. Smalley identified further deficiencies: the adjuster failed to interview McNair or ask follow-up questions during conversations with the detective; the police investigation had no end in sight, yet

State Farm seemed positioned to just hold on to the money indefinitely; State Farm failed to further investigate the nature of McNair's possible involvement in the homicide; and State Farm appeared to have a one-sided approach to its investigation instead of an objective view. Smalley ultimately concluded that the claim should have been paid long before January 30, 2012 and that State Farm did little more than try to insulate itself from damages for bad faith. He also noted that State Farm's eventual deposit of the funds with the court further delayed payment of the insurance proceeds.

{¶33} The trial court concluded that Smalley provided conclusory opinions with no additional facts or evidence. We disagree. We believe his affidavit provides extensive detail in support of his conclusion that State Farm's investigation was inadequate. In fact, the opinions offered by Smalley were very similar to those offered by the expert witness in *Furr*. In *Furr*, the insured's expert, a lawyer with expertise in representing and advising insurance companies, detailed his expertise in insurance law and provided testimony explaining casualty insurance, UM/UIM insurance, reserves, bad faith claims, the procedure for processing and investigating claims, and the insurer's duty to its insured. After being presented with the factual scenario of the case, he testified that the claim was handled in a manner that fell below the standard of care and that there was no reasonable justification for the insurer's delay in payment. We concluded that the trial court properly admitted the expert's testimony. *Furr*, 128 Ohio App.3d at 618, 716 N.E.2d 250.

{¶34} We reach the same conclusion here. Like the expert in *Furr*, Smalley's affidavit sets forth his expertise and explains basic insurance bad faith law. Paragraph 19 of his affidavit sets forth the materials he reviewed, paragraph 20 provides his ultimate opinion that State Farm breached its duties to McNair, and paragraphs 21-27 describe at great length the problematic actions (and inaction) of State Farm and specifically identify how State Farm's conduct fell below the standard of care. *See also Beever*, 10th Dist. Franklin No. 02 AP-543, 02 AP-544, 2003-Ohio-2942 at ¶ 42; *Zoppo*, 71 Ohio St.3d at 556, 644 N.E.2d 397 (permitting the opinions of experts who testified that insurers' investigations were inadequate). We believe that much of Smalley's affidavit should have been considered by the trial court. Like the other evidence presented by McNair, the opinions expressed in Smalley's affidavit created a genuine issue of material fact on McNair's bad faith claim.

{¶35} Finally, we address McNair's argument that State Farm improperly relied on the slayer statute in delaying payment of the claim. While it is true that R.C. 2105.19 was inapplicable because McNair had not been convicted in connection with Lawrence's death, the common law clearly bars a beneficiary from receiving life insurance proceeds if he or she intentionally and feloniously caused the insured's death. *Shrader v. Equitable Assurance Society of the United States*, 20 Ohio St.3d 41, 45, 485 N.E.2d 1031 (1985). So whether or not State Farm cited the right statute to support its position, it relied on the correct principle of law. However, as indicated previously in this decision,

we find that McNair presented evidence creating a genuine issue of material fact as to whether State Farm acted in bad faith in investigating her claim. We reverse the trial court's judgment granting summary judgment to State Farm.

IV. Conclusion

{¶36} The trial court erred in dismissing McNair's bad faith claim and in disregarding the affidavit of her expert witness. We, therefore, find McNair's assignment of error well-taken and we reverse the June 27, 2013 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.