IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NORMA EPPERSON and RON EPPERSON, husband and wife,
Plaintiffs/Appellants,

v.

AAA FIRE & CASUALTY INSURANCE COMPANY, a foreign corporation, *Defendant/Appellee*.

No. 1 CA-CV 15-0846
FILED 1-31-2017

Appeal from the Superior Court in Apache County
No. S0100CV201300207
The Honorable Michael D. Latham, Judge

AFFIRMED

COUNSEL

Joseph W. Watkins PC, Tucson
By Joseph W. Watkins
Counsel for Plaintiffs/Appellants

Hill, Hall & DeCiancio, PLC, Phoenix
By Christopher Robbins
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Chief Judge Michael J. Brown joined.

T H O M P S O N, Judge:

¶1 Plaintiffs/appellants Norma and Ron Epperson appeal the superior court's summary judgment in favor of defendant/appellee AAA Fire & Casualty Corporation (AAA). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In July 2013, a fire destroyed one of the Eppersons' residences, located in Concho, Arizona. They submitted a claim for the loss to AAA under their homeowner's insurance policy. The fire was the Eppersons' fourth significant loss at the property in less than three years. In August 2013, AAA notified the Eppersons that it had begun an investigation into the fire loss claim under a reservation of rights.

¶3 On August 21, 2013, AAA requested that Jim Norwood of Arizona Investigations and Professional Consultants, PLLC, investigate the fire loss claim and verify the Eppersons' information.[1] Norwood prepared a report dated September 5, 2013, in which he summarized statements by Sergeant Jeff Soderquist of the Apache County Sherriff's Office, Jason Kirk, the St. Johns Assistant Fire Chief, and Kay McDaniels, the Eppersons' neighbor. Both Soderquist and Kirk were at the fire scene and told Norwood they thought the fire was suspicious, noting that all of the Eppersons' belongings had been removed from the house prior to the fire. Ron Epperson and his friend, who was staying there at the time, gave conflicting accounts of the event. Furthermore, the neighbor told an investigator that Ron Epperson had told her he intended to build a house

[1] AAA had not concluded its investigation of the Eppersons' prior loss claim — for water damage at the property in November 2012 — and Norwood's scope of work also included that investigation. We confine our analysis to the portions of Norwood's investigation that are relevant to AAA's handling of the July 2013 fire loss claim.

on the property, "burn it down, and use the insurance money to buy another property." Norwood noted that Jim Borrego, Fire Chief for the Vernon Fire Department, was in charge of the scene of the fire and he intended to obtain a copy of any report the Vernon Fire Department had prepared.

¶4 In September and November 2013, AAA requested the Eppersons provide additional information and documentation from appellants in order to complete its investigation. AAA asked the Eppersons to submit to examinations under oath.

¶5 In November 2013, the Eppersons filed this action alleging AAA had acted in bad faith by unreasonably delaying its investigation of the fire loss claim and by refusing to extend coverage for the loss. The court stayed the lawsuit pending AAA's completion of its claim adjustment process. The Eppersons did not provide the information and documents AAA requested in November 2013 and did not agree until January 2014 to allow AAA to examine them under oath. After it completed Ron Epperson's examination in February 2014, AAA asked Norwood to conduct an additional investigation to follow-up on Ron's statement. Norwood prepared a report dated April 7, 2014, in which he summarized his follow-up conversation with Jason Kirk (who had since become the St. Johns Fire Chief), and identified the additional public records he had obtained from the Apache County Sheriff's Office and the Vernon Fire Department. Kirk explained that he believed the fire had burned too quickly considering there were no contents in the home, and Ron Epperson gave an inconsistent account of the incident on the night of the fire. Norwood also described his unsuccessful attempts to locate Ron Atkinson, a neighboring property owner, Gale Eneboe, the man who was in the house with Ron Epperson on the night of the fire, and James Borrego, the Fire Chief at the scene of the fire who had since left the Vernon Fire Department.

¶6 On April 10, 2014, the Eppersons provided AAA contact information for Eneboe and Borrego. In addition, Ron Epperson submitted a signed statement describing his confusion over the claims process and asserting that he had experienced memory issues for several years. Norwood conducted an interview with Eneboe on July 14, 2014, which he summarized in a July 27, 2014 report. AAA examined Norma Epperson under oath on August 12, 2014. Thereafter, the Eppersons sent AAA a letter in which Ron Epperson's doctor opined that Ron's medical conditions and medications could explain Ron's "memory lapses, periods of confusion, and cognitive dysfunction."

¶7 On November 7, 2014, AAA paid the Eppersons for the fire loss claim. After the lawsuit resumed, AAA moved for summary judgment on the Eppersons' bad faith claim, arguing that no reasonable jury could find that it handled the fire loss claim unreasonably.[2] The Eppersons did not controvert any of AAA's factual statements, but maintained that a jury should determine whether AAA had acted in bad faith by failing to contact witnesses and develop information that might support the Eppersons' claim. In addition, they contended the affidavit of their insurance expert, Frederick C. Berry, Jr., who opined that AAA breached the applicable standard of care, precluded summary judgment.

¶8 The superior court granted AAA summary judgment, ruling "no reasonable juror could determine that [AAA] acted in bad faith given the numerous red flags related to [the Eppersons'] claim history and delays caused by the [Eppersons] during [AAA's] attempts to process the claim." The court also noted that AAA had presented significant evidence to support its claim-handling process and the Eppersons did not refute that evidence, but instead offered only "conclusory legal statements, accusations and expert opinions" that did not create a material question of fact for a jury.[3]

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[2] AAA also argued that its payment of the fire loss claim rendered moot any breach of contract claim asserted in the complaint. Although the Eppersons maintained in the superior court that AAA had not fully compensated them for the claim, on appeal they do not challenge the superior court's determination that they failed to show a breach of the insurance contract.

[3] The Eppersons filed a motion for reconsideration in which they cited, for the first time, testimony from the AAA adjustor assigned to the fire loss claim, Mark Wenban, denying that he had seen the Eppersons' letters to AAA containing the contact information for the witnesses the Eppersons deemed relevant to the investigation. The superior court denied the motion without allowing a response. Although the Eppersons re-urge this evidence on appeal, we generally do not consider arguments first presented in a motion for reconsideration, *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006), and decline to do so in this case, particularly because the evidence was available to the Eppersons before the superior court ruled on the summary judgment motion. *Cf. Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 273, 678 P.2d 453, 458 (App. 1983) (noting trial court may consider new matters raised in a motion for reconsideration when the new facts or

¶9 The Eppersons timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2016).[4]

DISCUSSION

¶10 The Eppersons argue the superior court erred in granting summary judgment for AAA. Summary judgment is proper when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). This court determines de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson,* 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and all reasonable inferences arising therefrom in the light most favorable to the non-moving party. *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992).

¶11 To obtain summary judgment, the moving party must set forth evidence demonstrating the absence of any genuine issue of material fact and its entitlement to judgment. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 14, 180 P.3d 977, 980 (App. 2008). When the non-moving party would have the burden of proof on a claim or defense at trial, the moving party is not required to present evidence negating the non-moving party's claim, but must "point out by specific reference to the relevant discovery" that evidence does not exist to support that claim or defense. *Id.* at 117, ¶ 22, 180 P.3d at 982. Once the moving party shows the non-moving party lacks sufficient evidence "to carry its ultimate burden of proof at trial, the burden then shifts to the non-moving party to present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Id*. at 119, ¶ 26, 180 P.3d at 984. In fulfilling this burden, the non-moving party must present admissible evidence showing a genuine issue for trial. Ariz. R. Civ. P. 56(e)(4); *cf. Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) (stating self-serving assertions that are not supported by the factual record are insufficient to defeat a motion for summary judgment).

¶12 In this case, the Eppersons alleged AAA breached the covenant of good faith and fair dealing implied in the parties' insurance

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circumstances come to light between the granting of the motion for summary judgment and the motion for reconsideration).

[4] We cite the current version of applicable statutes unless revisions material to this decision have occurred since the relevant events.

contract by unreasonably delaying its investigation of the Eppersons' fire loss claim. "An insurer acts in bad faith when it unreasonably investigates, evaluates, or processes a claim (an 'objective' test), and either knows it is acting unreasonably or acts with such reckless disregard that such knowledge may be imputed to it (a 'subjective' test)." *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 597-98, ¶ 19, 277 P.3d 789, 794-95 (App. 2012) (citing *Zilisch v. State Farm Mut. Auto. Ins. Co.,* 196 Ariz. 234, 238, ¶ 22, 995 P.2d 276, 280 (2000)). These objective and subjective tests are applied to both the insurer's evaluation of a claim and its claim-handling process. *Id*.

¶13 In moving for summary judgment, AAA presented undisputed evidence that it promptly interviewed relevant witnesses, performed an investigation of the fire scene, and sought relevant public documents. When those initial inquiries indicated that the fire was suspicious in origin, AAA requested the Eppersons provide documents and statements under oath to allow AAA to complete its investigation. The Eppersons did not immediately cooperate with AAA's investigation, failing for several months to provide the requested information and submit to sworn examination. After Ron Epperson's testimony, AAA conducted follow-up interviews, obtained additional records, and attempted to contact the witnesses Ron identified.

¶14 Despite these uncontradicted facts, the Eppersons argue that the superior court erred in ruling as a matter of law that no material issue of fact exists regarding whether AAA handled the fire loss claim in bad faith, citing their allegation AAA did not contact "key" witnesses. However, the record shows that AAA immediately attempted to contact the witnesses the Eppersons believed relevant to the investigation once the Eppersons identified them. Moreover, the Eppersons set forth no evidence that the witnesses they say AAA delayed in contacting, or failed to contact, were significant to the claim investigation or would have altered its course or outcome in any way. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (noting evidence that may provide a "scintilla" or create the "slightest doubt" is not sufficient to withstand a motion for summary judgment).

¶15 The Eppersons maintain the superior court improperly disregarded the affidavit of their insurance expert, Berry, who opined that AAA failed to promptly, fairly and fully investigate the fire loss claim

because it did not pay the claim within 30 days.[5] The superior court ruled that the opinions contained in the affidavit did not amount to evidence that created a genuine issue of material fact. *See Florez*, 185 Ariz. at 527, 917 P.2d at 256 (holding conclusory expert affidavits that did not refer to facts to support the expert's opinion, or listed facts that did not support the expert's legal conclusion, were insufficient to raise a triable issue of fact) (citation omitted).

¶16 We find no error in the court's determination. Berry opined that AAA violated the standard of care and committed bad faith claim handling by failing to pay the Eppersons' fire loss claim within 30 days. Yet, Berry admits in his affidavit that the standard of care does not require an insurer to pay a fire claim within 30 days after it is reported if "there is a really good reason to suspect arson." The undisputed evidence in this case indicates that AAA had good reason to suspect arson. Accordingly, Berry's affidavit did not raise a material question of fact that precluded summary judgment.

¶17 Viewing the evidence in the light most favorable to the Eppersons, we determine the superior court did not err by ruling, as a matter of law, that no material question of fact existed regarding whether AAA's investigation of the fire loss claim was reasonable.

ATTORNEYS' FEES

¶18 AAA requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2016), which allows a court to award attorneys' fees to a successful party in an action arising out of a contract. *See Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 544, 647 P.2d 1127, 1142 (1982) (holding an action alleging insurer's bad faith is one "arising out of a contract" under § 12-341.01(A)). We grant its request and will award AAA its costs and fees, in an amount to be determined, upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

[5] Berry also opined that AAA's failure to contact the witnesses identified by the Eppersons violated the standard of care for claim handling. But, as discussed, there is no material dispute of fact that AAA immediately attempted to contact the witnesses once the Eppersons identified them.

CONCLUSION

¶19 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA