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# SUPREME COURT OF ARKANSAS

No. 10-750

ARKANSAS RESEARCH MEDICAL TESTING, LLC; ARCH SUB, LLC; STEPHENS CAPITAL PARTNERS, LLC; & STEPHENS HOLDING COMPANY,
APPELLANTS,

VS.

WILLIAM JENNINGS B. OSBORNE & MARIE E. OSBORNE,
APPELLEES,

**Opinion Delivered** April 14, 2011

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
NO. CV2008-11041,
HON. MARION A. HUMPHREY, JUDGE,

REVERSED AND REMANDED.

**PAUL E. DANIELSON, Associate Justice**

Appellant Arkansas Research Medical Testing, LLC (hereinafter "ARMT")[1] appeals from the judgment of the Pulaski County Circuit Court finding that it was liable to the appellees, William Jennings B. Osborne and Marie E. Osborne, for the sum of $3,000,000. Additionally, it appeals from the circuit court's denial of ARMT's motions for directed verdict and motion for judgment notwithstanding the verdict. ARMT specifically argues on appeal that: (1) the evidence was insufficient to support a verdict for breach of the implied covenant of good faith and fair dealing; (2) the implied covenant of good faith and fair dealing does not

[1]Although the other defendants remain in the caption of the case, ARMT is the sole appellant. The judgment was entered only against ARMT as all other defendants were dismissed. We also note that following the trial, ARMT's name was changed to Axient, LLC. However, to avoid confusion, this opinion will continue to use ARMT.

provide a separate cause of action for bad faith; (3) the verdict should be dismissed because the first count of the Osbornes' complaint sounded in tort; and (4) the circuit court erred in ruling that the Osbornes could introduce their reliance upon alleged oral misrepresentations contrary to the purchase agreement after its execution.

The Osbornes originally filed a cross-appeal; however, they filed a motion to dismiss it on November 29, 2010. This court then dismissed the cross-appeal on December 15, 2010.

The relevant facts are these. The Osbornes were owners of Arkansas Research Medical Testing Center, Inc., which specialized in procuring and performing clinical drug trials for pharmaceutical companies. In June of 2004, the Osbornes entered into an asset purchase and sale agreement whereby they sold Arkansas Research Medical Testing Center, Inc., to Arch Sub, LLC, a wholly owned subsidiary of Stephens Capital Partners. The company was re-organized as ARMT.

As part of the purchase agreement, Mr. Osborne was to remain on board with ARMT in a consulting role, for which he would be paid $500,000, over the course of five years. The contract also contained an earn-out provision, which provided that the Osbornes would be compensated up to an additional $3,000,000 a year for three calendar years from 2004 through 2006, if the company reached certain minimum profit thresholds. The Osbornes also consented to a noncompete agreement, for which they were paid an additional $100,000 a year for a period of five years.

Pursuant to the earn-out provision, the Osbornes were paid a total of $3,000,000 for the calendar year 2004. However, for calendar years 2005 and 2006, annual gross revenues

were less than $7,500,000, and no payments were made. On October 10, 2008, the Osbornes filed suit against ARMT; Arch Sub, LLC; Stephens Capital Partners, LLC; and Stephens Holding Company. The complaint alleged breach of the covenant of good faith and fair dealing, breach of fiduciary duty, breach of contract, breach of third-party-beneficiary agreement, interference with contract, constructive fraud, and promissory estoppel. Following an unsuccessful motion for partial summary judgment on the implied covenant and contract counts, the case proceeded to a jury trial.

At the end of the Osbornes' case, and again at the conclusion of the case, ARMT moved for a directed verdict. The motion was denied as to the following counts: breach of the covenant of good faith and fair dealing, breach of contract, breach of a third-party-beneficiary agreement, and constructive fraud. The jury returned with a verdict against ARMT of $2,000,000 for breach of the implied covenant of good faith and fair dealing in 2005, and $1,000,000 for breach of the implied covenant of good faith and fair dealing in 2006. However, the jury found that no breach of contract, breach of a third-party-beneficiary agreement, or constructive fraud had occurred.

ARMT moved for judgment notwithstanding the verdict, arguing that Arkansas has not recognized a separate cause of action for breach of an implied covenant and that there was no evidence of bad faith to prevent the earn-out payments. The motion was denied, and this appeal timely followed. We now turn to the merits of the appeal.

While ARMT does not present it as its first point on appeal, the first issue we must determine is whether or not breach of the implied covenant of good faith and fair dealing

provides a cause of action in Arkansas separate and apart from a breach of contract. We hold it does not.

The Restatement (Second) of Contracts § 205 states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *W. Memphis Adolescent Residential, LLC v. Compton*, 2010 Ark. App. 450, ___ S.W.3d ___; *Cantrell-Waind & Assocs. v. Guillaume Motorsports, Inc.*, 62 Ark. App. 66, 968 S.W.2d 72 (1998). However, in *Country Corner Food & Drug, Inc. v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (1998), this court specifically declined to recognize a new tort for failure to act in good faith and specifically held that

> *[t]he fact that every contract imposes an obligation to act in good faith does not create a cause of action for a violation of that obligation, and, as discussed above, this court has never recognized a cause of action for failure to act in good faith.* [The appellant] adduces no authority or argument for why this court should now recognize a new tort for failure to act in good faith or how such a recognition can be reconciled with our previous case law which only recognizes the tort of bad faith against insurance companies. Without a cogent reason supported by convincing authority for taking this step, we decline to recognize this new tort in Arkansas.

332 Ark. at 655–56, 966 S.W.2d at 899 (emphasis added).

More recently, in *Preston v. Stoops*, 373 Ark. 591, 285 S.W.3d 606 (2008), we again recognized that there is no cause of action in tort for a breach of the covenant of good faith and fair dealing. In that case, we could not reach the issue of whether a cause of action for a breach of the covenant of good faith and fair dealing could be stated in contract because the action in that case had clearly been pled in tort. *See id.* We did, however, restate what had

been noted in *Country Corner*—that this court has never recognized a cause of action for failure to act in good faith. *See id*.

After rejecting the invitation to recognize a new tort for failure to act in good faith in *Country Corner*, and twice stating that this court has never recognized any cause of action for failure to act in good faith, both our court of appeals and certain federal courts have recently interpreted that to mean that this court will not recognize any separate cause of action, be it in tort or in contract, for the breach of the covenant of good faith and fair dealing. *See W. Memphis Adolescent Residential, LLC*, *supra* (relying on *Preston* and holding that Arkansas law does not recognize a separate cause of action for a breach of contractual duties of good faith and fair dealing and only recognizes a cause of action in tort against insurance companies for bad faith); *see also In re Price*, 403 B.R. 775 (Bankr. E.D. Ark. 2009) (relying on *Preston* and *Country Corner* and holding that Arkansas does not currently recognize a cause of action in contract or in tort for violation of the obligation to act in good faith); *Smith v. Lincoln Ben. Life Co.*, No. 08-1324 (W.D. Pa. March 23, 2009) (also relying on *Preston* and *Country Corner* and holding that Arkansas law does not recognize a claim for the breach of duty of good faith and fair dealing sounding in contract, separate from a breach-of-contract claim). In the instant case, the Osbornes do not provide a compelling argument as to why this court should recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing separate from a breach-of-contract claim.

Traditionally, this court has narrowly construed the concept of bad faith. As we noted in *Findley v. Time Insurance Co.*, 264 Ark. 647, 573 S.W.2d 908 (1978), the tort of bad faith

arose from the duty of good faith and fair dealing implied in a contract between the parties. While we chose to recognize a tort arising from that duty, the tort of bad faith, we specifically limited its applicability to an insurer who actively engaged in dishonest, malicious, or oppressive conduct in order to avoid its liability. *See id.* at 654–55. We simply see no reason to now recognize a separate contract claim for breach of the duty of good faith and fair dealing. Therefore, a breach of the implied covenant of good faith and fair dealing remains nothing more than evidence of a possible breach of a contract between parties.

Because we decline to recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing, we must reverse and remand for the circuit court to set aside the judgment in the instant case, and we need not reach the other issues raised on appeal.

Reversed and remanded.

BROWN, J., not participating.