IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-265

Filed: 31 December 2020

Sampson County, No. 19 CVS 163

TAMMY LOU HOPE, Plaintiff,

v.

INTEGON NATIONAL INSURANCE COMPANY, Defendant.

Appeal by Plaintiff from order entered 22 November 2019 by Judge Henry L. Stevens, IV, in Sampson County Superior Court. Heard in the Court of Appeals 23 September 2020.

Brent Adams & Associates, by Brenton D. Adams and Mark R. McGrath, for the Plaintiff-Appellant.

Bennett Guthrie PLLC, by Rodney A. Guthrie and Jasmine M. Pitt, for the Defendant-Appellee.

DILLON, Judge.

Plaintiff Tammy Lou Hope appeals the trial court's order granting Defendant Integon National Insurance Company summary judgment on her claims. We affirm in part and reverse in part.

I. Background

On 11 February 2019, Plaintiff filed a complaint against Defendant, alleging the following:

Plaintiff purchased from Defendant an auto liability insurance policy.

On 20 February 2016, Plaintiff's vehicle was damaged. She claims that her vehicle was struck by an unidentified vehicle in a hit-and-run accident. Plaintiff's vehicle was rendered a total loss. Plaintiff surrendered the vehicle to Defendant and sought coverage. Defendant, though, denied coverage, contending that Plaintiff was not entitled to any compensation. Specifically, there was evidence that Defendant's investigator surmised that the damage was caused by Plaintiff running into a stationary object.

In her complaint, Plaintiff alleged facts sufficient to state a claim for breach of contract for not paying coverage under the terms of the policy, though she did not expressly label any claim as a simple breach of contract. Specifically, she alleged that she was entitled to either Uninsured Motorist ("UM" or "UIM") coverage (which covers damage caused by unidentified drivers) or, alternatively, collision coverage (which provides coverage, even if caused by Plaintiff) for the damage to her car; that she was entitled to a rental car under the rental reimbursement provision of the policy; that Defendant did not pay Plaintiff's claim; and that Defendant "breached the [insurance] contract." And she expressly prays for "compensatory damages which she is entitled to under the terms of the policy."

Plaintiff also alleged an unfair trade practices claim and a claim for breach of the contract's covenant of good faith, seeking punitive damages.

Defendant filed its answer, recognizing in part that Plaintiff was seeking coverage under the policy terms.

Plaintiff moved for partial summary judgment. Defendant filed a response, along with its own motion for summary judgment on all issues, again recognizing that Plaintiff was seeking, in part, coverage. In its response, Defendant specifically noted that, in its investigation of Plaintiff's claim, it determined that she "struck a fixed stationary object while moving in a forward motion and that none of her damages were consistent with being struck by another motor vehicle." Defendant, in its response, noted that Plaintiff's claim was denied for fraud and misrepresentation.

After a hearing on the matter, the trial court entered its order on summary judgment in favor of Defendant and against Plaintiff and taxed costs against Plaintiff.

Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

III. Analysis

In this case, certain facts are undisputed. It is undisputed that Plaintiff possessed an insurance policy with Defendant, and that Plaintiff's vehicle was damaged beyond repair. It is undisputed that Defendant denied Plaintiff's claim for insurance benefits under the policy.

We conclude that the trial court erred in granting summary judgment on Plaintiff's claim seeking coverage under the policy. There is an issue of fact as to whether Plaintiff's coverage was voided by her misrepresentation concerning the cause of the damage. She claims it was caused by an unidentified driver; Defendant claims that it was caused by her own negligence when she hit a stationary object. Accordingly, we reverse summary judgment as to this claim for coverage under the terms of the policy. These issues must be resolved at a trial.

Regarding Plaintiff's claims for unfair and deceptive trade practices and for breach of the covenant of good faith and fair dealing, we affirm. Plaintiff offered no evidence to prove that Defendant did anything but act in an honest fashion in underwriting her claim.

Plaintiff's claims were premised on bad acts, but her affidavit in support of her motion alleges no such bad acts – neither motive nor conduct. Her affidavit avers that her allegations are true, that an unidentified vehicle reversed into her vehicle and sped away, and that Defendant refused to pay her claim. It does not, however,

offer a basis for, or a showing of evidence in support of, a bad faith or unfair trade practices claim. Plaintiff does suggest at one point of the litigation that Defendant failed even to conduct an investigation, but she has backed off that allegation.

By contrast, Defendant's sworn evidence shows that it conducted an investigation, that it found the cause of Plaintiff's vehicular damage differed from her account, and that it denied the claim on the basis of fraud and misrepresentation. Defendants records show that it considered Plaintiff's version of the accident, but simply concluded after investigation that the accident likely did not occur as Plaintiff claims.

This Court has held that "bad faith" means "not based on honest disagreement or innocent mistake." *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 421, 424 S.E.2d 181, 185, *aff'd per curiam,* 334 N.C. 682, 435 S.E.2d 71 (1993); *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (1985). That is, an honest disagreement between parties does not constitute bad faith.

With regard to Plaintiff's claim for unfair trade practices, Plaintiff failed in her burden to forecast evidence showing that Defendant acted in any unfair or deceptive way. *See Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1993) (recognizing that the claim requires a showing of "an unfair or deceptive act or practice, or unfair method of competition").

Accordingly, we affirm the trial court's grant of summary judgment for Defendant on these claims, including Plaintiff's claim for treble and punitive damages.

As we are reversing the trial court's grant of summary judgment on Plaintiff's claim for coverage under the terms of the policy, we vacate the award of costs to Defendant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge YOUNG concurs.

Judge MURPHY concurs in part and dissents in part.

Report per Rule 30(e).

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MURPHY, Judge, concurring in part and dissenting in part.

I concur with the Majority's conclusion the trial court erred in granting Defendant's motion to dismiss on the breach of contract claim. However, the Majority incorrectly affirms the trial court's grant of Defendant's motion to dismiss "Plaintiff's claims for unfair and deceptive trade practices and for breach of the covenant of good faith and fair dealing" because "Plaintiff offered no evidence to prove that Defendant did anything but act in an honest fashion in underwriting her claim." *Supra* at 4. I dissent as to this portion of the Majority.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019).

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. . . . When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. . . . If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. . . . Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations and marks omitted). A genuine issue of material fact is one in which

> the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . [A] genuine issue is one which can be maintained by substantial evidence.

Smith v. Smith, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (quoting *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974)).

In reviewing a motion for summary judgment, the trial court was required to consider all of the evidence before it and not just the parties' affidavits and Defendant's cherry-picked portions of its own records. On appeal, Plaintiff properly relies on the discovery obtained from Defendant in this matter, which reveals the following admission from 10 March 2016 in Defendant's logs:

> BI – Sending to SIU to review for field assistance.***Policy canceled at renewal on 02/09/2016, reinstated on 02/16/2016. Agent did not inspect IV prior to reinstatement. NI called claim in to us on 02/21/2016. Police report shows doi 02/20/2016 and supports passengers in IV and NI's claim that IV was traveling straight on main road and unknown CV backed into path of IV and then fled scene while IV was disabled. Only supposed IP McDowell, unlisted fiance of NI, has sought medical treatment to date as far as we know. Three cars on policy. One listed driver. Impact analysis specialist has concluded that IV did not strike another vehicle as reported but likely struck a fixed object. NI claimed to us and to officer that she has piece of hit and run CV. I agree that damages do not look consistent with another car backing into path of front left of IV, however, we failed to get a

> description of hit and run CV from NI nor did we attempt to get photos of pieces of potential hit and run CV to see if they matched IV damages in any way. Alternate theory to facts of loss is that loss occurred between 02/09/2016 and 02/16/2016 while policy was canceled and insured reinstated policy and notified police and NGIC that loss occurred on 02/20/2016 in order to claim coverage. Another theory is that NI struck fixed object in which case we should handle any passenger injury claims as BI rather than UMBI. Another theory is that IP McDowell was driving IV and struck fixed object. If IP were driving, we should be investigating MMR. If IP were driving and struck fixed object, there could be no UMBI claim for IP. Both NI and IP statements in file supports facts presented by NI, IP and police report. Photos and impact analysis do not support facts of loss presented. We could attempt face to face interviews with NI and IP to pin down date of loss, who was driving IV, and whether IV struck another vehicle or fixed object. We could attempt canvas of insured's neighborhood to speak with friends and neighbors to see if they have knowledge of facts of loss. Sending to SIU to review for field assistance.

Viewed in the light most favorable to Plaintiff, these logs reflect Defendant's active search for alternative factual theories that would change how and if the damage to the vehicle and injuries to passengers were covered by Defendant. Whether this document indicates Defendant searched for alternative theories to reduce coverage and landed upon the fraudulent behavior exemption, or was part of an authentic investigation, is a genuine issue of material fact. Viewed in the light most favorable to Plaintiff, this issue is genuine in that there is substantial evidence of such conduct reflected by Defendant's own internal logs.

Further, viewed in the light most favorable to Plaintiff, this issue is material since the intent to pursue an alternative factual theory to reduce coverage would constitute bad faith, as an action "not based on honest disagreement or innocent mistake." *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (1985) ("That this breach was accomplished in bad faith is indicated by the great volume of evidence which tends to show that [the] defendant's refusal to pay or settle [the] plaintiff's claim on any reasonable basis was not based on honest disagreement or innocent mistake."). Similarly, it would constitute "acts or practices [that] had the capacity or tendency to deceive or were unfair." *S. Bldg. Maint., Inc. v. Osborne*, 127 N.C. App. 327, 333, 334, 489 S.E.2d 892, 897 (1997) ("However, when a breaching party to a contract engages in a practice which 'offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers[,]' an action [for unfair and deceptive trade practices] can be maintained.").

Plaintiff's claims based on bad faith and unfair and deceptive trade practices should have survived Defendant's motion for summary judgment. As a result, viewed in the light most favorable to Plaintiff, her claim for punitive damages based upon Defendant's improper conduct also should have survived. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184, *aff'd*, 334 N.C. 682, 435 S.E.2d 71 (1993) ("In order to recover punitive damages for the tort of an insurance

company's bad faith refusal to settle, the plaintiff must prove (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct.").

While Defendant may very well have a plausible explanation of its shifting theories to deny coverage and contingent plans that do not constitute bad faith, taking the forecast of evidence in the light most favorable to Plaintiff, she survives the drastic remedy of summary judgment on her bad faith claim, her unfair and deceptive trade practices claim, and her punitive damages claim. The jury is the proper body under our State Constitution and general statutes to determine if Defendant acted in bad faith, justifying punitive damages, and if Defendant engaged in unfair and deceptive trade practices. I respectfully dissent.