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NO. COA01-1420

NORTH CAROLINA COURT OF APPEALS

Filed: 21 January 2003

STEVEN EDWARD RIVENBARK,

Plaintiff,

v. Columbus County
No. 00 CVS 288

NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY,
INC.,

Defendant.

Appeal by plaintiff from judgment entered 27 June 2001 by Judge James Floyd Ammons, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 20 August 2002.

Michael W. Willis for plaintiff-appellant.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., and Brian O. Beverly, for defendant-appellee.

TIMMONS-GOODSON, Judge.

This action arises out of a March 1990 automobile accident in which plaintiff Steven Edward Rivenbark ("Rivenbark") was injured following a collision with James Alfred Suggs ("Suggs"). Suggs was issued a citation for and subsequently pled responsible to his failure to yield for a stop sign. At the time of the accident,

defendant North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") provided underinsured motorist coverage ("UIM") to Rivenbark.

In November 1992, Rivenbark filed suit against Suggs and for the first time, notified Farm Bureau of the action, as required by law. Rivenbark retained attorney Michael Willis ("Willis"), who represented him during the underlying liability suit against Suggs and continued to represent him on appeal. In answering Rivenbark's claims, Suggs denied liability.

Thereafter, Farm Bureau's adjuster, Jim Morton ("Morton"), contacted Suggs' insurer, Seibels-Bruce Insurance Company ("Seibels-Bruce"), and learned that according to the accident report, Suggs caused the accident. Further investigation revealed that Rivenbark had incurred $3,915 in medical expenses, and that he had been judged totally disabled from March to August 1990, partially disabled from August to October 1990, and permanently impaired. Rivenbark's physical injuries would subsequently impact his farming operation and his income through the pendency of the litigation. Morton reported to Farm Bureau in December 1992 that Seibels-Bruce had offered Rivenbark a "fair figure of $15,000" and that he was sure Rivenbark's claim would settle within Seibels-Bruce's $25,000 policy limit. Farm Bureau continued to monitor the underlying liability suit through one of its litigation supervisors.

Following his failure to produce certain financial records, Rivenbark dismissed his suit against Suggs in March 1994, only to

refile in December 1995. In 1995, Rivenbark filed for and was eventually discharged in bankruptcy. In January 1996, Seibels-Bruce offered and Rivenbark accepted a settlement in the amount of $25,000, the company's liability policy limit. After learning of Seibels-Bruce's settlement, Farm Bureau entered settlement talks with Rivenbark to no avail. Pursuant to North Carolina's UIM statute, Farm Bureau joined in the underlying liability suit and retained attorney Jacqueline Newton ("Newton") to defend against Rivenbark's UIM claim. Seibels-Bruce had previously hired the law firm with which Newton was an associate to defend Suggs in the underlying liability suit. Following what Newton characterized as a more extensive investigation than that conducted by Seibels-Bruce, she uncovered evidence indicating that Rivenbark may have struck Suggs prior to entering the intersection. Newton learned from the investigating officer that there was physical evidence that Rivenbark may have left the road and struck Suggs first. Newton also learned that an eyewitness, Rosa Williamson ("Williamson"), claimed to have seen Rivenbark weaving prior to impacting with Suggs. As for Rivenbark's physical injuries, Newton learned that Rivenbark had a back condition existing prior to the accident.

Rivenbark dismissed his action again in November 1996, refiling the suit in April 1998. Believing that the policy limit of his UIM coverage was $25,000, Rivenbark and his attorney indicated to Farm Bureau that they would accept the policy limit in settlement of his claim. Rivenbark, however, believed his

claim was worth $500,000. Due to intrapolicy stacking, Rivenbark's UIM was actually valued at $75,000.[1] When discussing the settlement with Farm Bureau and its attorneys, Rivenbark simply stated that he wanted to settle at the UIM policy limit. Farm Bureau made an Offer of Judgment of $2,000, not accepted by Rivenbark. Neither Farm Bureau nor Newton valued Rivenbark's claim over the $25,000 amount already tendered by Seibels-Bruce.

The trial of the underlying liability action commenced on 17 May 1999. During the trial, Rivenbark's economic expert, Dr. Boone Turchi ("Dr. Turchi"), testified that Rivenbark's projected economic loss was between $118,741 and $1,187,409, depending on the extent of Rivenbark's disability. Rivenbark's evidence indicated that his physical suffering, especially with regards to his back, resulted from the 1990 accident.

Defendant attempted to call Williamson, who was to testify that Rivenbark was weaving prior to the accident. The trial court, however, informed Newton that Williamson claimed to have seen an apparition or ghost. In response, Newton excused Williamson from testifying and did not call any other witnesses, with the exception of Suggs and his wife. The Suggs testimony indicated that Suggs had previously assaulted his wife with a vehicle. Newton noted later in an affidavit that she continued to

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[1]At the time of Rivenbark's accident, his auto insurance policy allowed for intrapolicy stacking of UIM coverage, meaning his UIM coverage limit equaled the collective sum of the UIM cover for each vehicle covered by the policy. *See Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989).

believe that $2,000 was a reasonable settlement offer, that there was a question of liability, and that the damages claimed were excessive. Newton noted that as for the issue of damages, rather then call Farm Bureau's economic expert, she decided to rely on the cross-examination of Dr. Turchi.

The jury returned a verdict in Rivenbark's favor, awarding him $75,000, $50,000 above Seibels-Bruce's policy limit. Farm Bureau tendered its portion of the judgment shortly thereafter. After trial, Newton informed the trial court that the policy limit was $75,000, a fact the court subsequently related to Rivenbark and Willis.

During the pendency of the underlying liability action, Rivenbark filed an action against Farm Bureau in May 1998, alleging that the insurance company acted with bad faith in failing to adequately defend Rivenbark's UIM claim. Relevant to the issues presented in the present appeal, Rivenbark stated in his 1998 bad faith complaint that defendant refused to tender the UIM policy limit, "which would be another" $25,000. Subsequently, Rivenbark voluntarily dismissed the original complaint.

Following a 1999 back surgery, Rivenbark refiled the present action on 5 July 2000, alleging the same bad faith claim. Farm Bureau filed a motion for summary judgment, which was granted by the trial court in its 27 June 2001 order. Rivenbark appealed the trial court's Summary Judgment order on 5 July 2001. The trial court subsequently granted Farm Bureau's motions for expert witness fee and deposition costs in orders dated 4 October and 13

November 2001. Rivenbark did not file a notice of appeal as to the court's orders awarding the above-noted costs.

Rivenbark presents two assignments of error on appeal: that the trial court erred I) in granting summary judgment in Farm Bureau's favor based upon Rivenbark's bad faith claim; and II) in awarding Farm Bureau costs for the deposition of Dr. Turchi and a corresponding expert witness fee.[2]

I.

Rivenbark first argues that Farm Bureau acted in bad faith in the process of settling Rivenbark's UIM claim. Rivenbark contends that Farm Bureau's egregious conduct included the following: dishonestly evaluating his claim; unnecessarily delaying settlement given Suggs' clear liability and Rivenbark's resulting physical injuries and economic and emotional loss; failing to correct Rivenbark and his attorney's misapprehension as to his UIM policy limit; and not adequately explaining its failure to promptly settle. With Rivenbark's arguments, we disagree.

Summary judgment is appropriate where "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 a party is entitled

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[2]Farm Bureau also presents two cross-assignments of error on appeal. Because we overrule Rivenbark's assignments of error upon review, addressing Farm Bureau's cross-assignments of error is unnecessary.

to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). The movant must establish that a triable issue of fact is lacking. *Sykes v. Keiltex Industries*, Inc., 123 N.C. App. 482, 484-85, 473 S.E.2d 341, 343 (1996).

If the movant meets this burden, the nonmovant must then "produce a forecast of evidence demonstrating that the [nonmovant] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The trial court must view the evidence in the light most favorable to the nonmoving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Insurers have an implied-in-law duty of good faith "to do nothing wrongful to deprive the insured of the benefits" of his insurance policy. *Newton v. Insurance Co.*, 291 N.C. 105, 114-15, 229 S.E.2d 297, 303 (1976) (citations omitted); *Robinson v. N.C. Farm Bureau Ins. Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987)("An insurance company is expected to deal fairly and in good faith with its policyholders."), *disc. review denied*, 321 N.C. 592, 364 S.E.2d 140 (1988). Although our Courts have long recognized the existence of the above-noted duty, *see Newton*, 291

N.C. at 114-15, 229 S.E.2d at 303, they have been "slow to impose upon an insurer liabilities beyond those called for in the insurance contract." *Id.* at 116, 229 S.E.2d at 303.

To establish that an insurer acted in bad faith, the insured must prove, in addition to the tortious act (here, a refusal to settle), some element of aggravation indicating that an insurer's actions were "wilful, wanton and in conscious disregard of [its] duty to pay plaintiff's insurance claim." *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 62-63, 370 S.E.2d 695, 699 (1988). The insured's case cannot simply be based upon "[an] honest disagreement or innocent mistake." *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (citation omitted), *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985).

Rivenbark was entitled to recover UIM benefits upon "exhaust[ing]" Suggs' liability coverage. N.C. Gen. Stat. § 20-279.21(b)(4) (1990) (amended effective 1 November 1991). However, Farm Bureau "may at its option, upon a claim pursuant to [UIM] coverage, [have paid] moneys without there having first been an exhaustion of the liability insurance policy." *Id.* It is a rare practice for the UIM insurer to pay a claim before exhaustion, but it may so chose if liability is clear, damages exceed that tortfeasor's liability coverage, and the tortfeasor's personal assets make subrogation by the UIM carrier worthwhile. George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance* § 4:1, at 244-45 (2002). Where a UIM insurer does not

elect to pay the UIM claim and upon receiving notice of an insured's suit against the tortfeasor, the UIM insurer "shall have the right to appear in defense of such claim . . . and participate in such suit as fully as if it were a party." N.C. Gen. Stat. § 20-279.21(b)(4).

Upon review of the entire record, we are unable to conclude that there was any bad faith on the part of Farm Bureau. Although we are sympathetic to Rivenbark's physical and economic hardship, there is simply no evidence that Farm Bureau acted wilfully and wantonly regarding its participation in the settlement process. Under the UIM statute, Farm Bureau was under no obligation to pay or settle with Rivenbark prior to the exhaustion of his liability claim. Farm Bureau's evidence indicated that damages and even liability were unclear and that Rivenbark's claim was worth no more that the $25,000 policy limit tendered by Suggs' insurer, Seibels-Bruce. *Compare Dailey,* 75 N.C. App. 387, 331 S.E.2d 148 (finding bad faith existed where homeowner's insurance company informed insured's neighbors that insured started a fire that damaged insured's home, although there was absolutely no evidence to support that conclusion, and further required insurer obtain expert estimate that company had no intention of reviewing). It appears that Farm Bureau reasonably relied upon Seibels-Bruce's assessment, especially given that Rivenbark did not notify Farm Bureau of his claim until two years after the accident. Furthermore, Rivenbark, not Farm Bureau, contributed significantly

to the delay in filing, dismissing, and refiling his claims, albeit his explanation that he did so because of a lack of funds.

Rivenbark contends that Farm Bureau failed to adequately explain its unwillingness to settle. As indicated above, prior to Seibels-Bruce's offer, Farm Bureau was under no obligation to settle. Rivenbark had himself acknowledged that he was slow to submit economic records, partially based upon the late filing of his tax returns. In its answer to Rivenbark's bad faith complaint, Farm Bureau noted that the delay in Rivenbark's disclosure of economic records caused a delay in the settlement negotiations. Rivenbark further contends that Farm Bureau should have informed him that it was relying on Williamson to contest liability because his attorney could have informed the defense that she lacked credibility. However, according to Newton, she informed the trial court through pre-trial materials that she would be calling Williamson, pre-trial materials to which we logically assume Rivenbark was privy.

Rivenbark further argues that Farm Bureau should have corrected his and his attorney's misapprehension regarding the UIM policy limit. Until informed otherwise by the trial court in the underlying liability action, Rivenbark and his attorney believed that the policy's limit was $25,000, not $75,000 as dictated by the UIM statute applicable to Rivenbark's policy. Rivenbark claims that Farm Bureau knew or should have known of his mistake because in his original bad faith complaint, he noted his belief that the policy limit was $25,000.

There is no evidence to suggest that Farm Bureau knew of Rivenbark's mistaken belief until he filed his original bad faith complaint in May 1998, a date far beyond the commencement of the underlying liability action. Further, there is no indication that Rivenbark or his attorney ever inquired about the policy. Even if Farm Bureau could have corrected Rivenbark's mistake, there was no evidence that it would have affected his settlement. Rivenbark noted in his deposition that if he had known the policy limit, he would have asked for more money, up to and including the policy limit. However, Farm Bureau had rejected Rivenbark's offer to settle at what he assumed was the policy limit, $25,000. It defies logic to think that if Rivenbark had asked for the actual $75,000 policy limit, Farm Bureau would have agreed to settle. Given the above-noted facts and other relevant evidence presented below, we conclude that the trial did not err in granting Farm Bureau's motion for summary judgment. Accordingly, Rivenbark's first assignment of error is overruled.

II.

Rivenbark also assigns error to the trial court’s order awarding Farm Bureau costs in relation to the deposition and expert witness fee of Dr. Turchi. However, Rivenbark failed to file a notice of appeal from the trial court’s order. Farm Bureau has filed a motion to dismiss and a motion to strike materials attached to Rivenbark’s brief in support of his argument that the order awarding cost was erroneous.

A notice of appeal *must* be filed within thirty days of the entry of a civil judgment by the trial court. N.C.R. App. P. 3(a), (c)(1) (2002). Also, the notice of appeal *must* specify "the order from which appeal is taken." N.C.R. App. P. 3(d). "Failure to give timely notice of appeal in compliance with . . . Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983).

Here, Rivenbark filed a notice of appeal from the court's order granting summary judgment. Because Rivenbark did not appeal the trial court's orders awarding costs, we do not have jurisdiction to consider the propriety of those orders. Accordingly, we grant Farm Bureau's motion to dismiss Rivenbark's purported appeal of the trial court's 4 October and 13 November 2001 orders awarding expert witness fees and deposition costs. We further grant Farm Bureau's motion to strike materials submitted on appeal by Rivenbark and any portions of the record on appeal pertinent to the propriety of the trial court's orders awarding costs, *see* N.C.R. App. P. 9(a) (2002).

For the above-stated reasons, we affirm the trial court's order granting Farm Bureau's motion for summary judgment.

Affirmed.

Judge HUNTER concurs.

Judge GREENE concurred in the opinion prior to 31 December 2002.

Report per Rule 30(e).