IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1820
Summary Calendar

LINDA KATHLEEN BROWN, etc., et al.,

Plaintiffs-Appellants,

VERSUS

UNITED STATES AVIATION INSURANCE GROUP
and
UNITED STATES AVIATION UNDERWRITERS,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas
4:92 CV 562 A

March 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Linda Brown, appearing individually and as next friend of her minor children and as administratrix of her late husband's estate (collectively, the "plaintiff"), appeals the take-nothing judgment and sanctions entered in favor of the defendant insurers. Concluding that the district court was correct in deciding that the plaintiff's cause of action is without merit, but also

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

concluding that the sanctions entered by the district court were inappropriate, we affirm in part and reverse in part.

I.

The plaintiff's husband was killed in a helicopter crash. When the aircraft's manufacturer's insurers refused to settle the matters of liability and damages, the plaintiff sued those insurers under TEX. INS. CODE ANN. art. 21.21, § 16(a) (West Supp. 1993), which provides in part that "[a]ny person who has sustained actual damages as a result of another's engaging in an act or practice declared . . . to be . . . unfair or deceptive acts or practices in the business of insurance . . . may maintain an action against the person or persons engaging in such acts or practices." The defendants counterclaimed for attorneys' fees and costs under TEX. INS. CODE ANN. art. 21.21, § 16(c), which states that "[o]n a finding . . . that an action under this section was groundless and brought in bad faith or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs."

The insurers claim the plaintiff has no standing under article 21.21, as she is not the insured or the beneficiary under the policy. We so held in *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 326-27 (5th Cir. 1990), reasoning as follows:

> The [plaintiffs] argue that any person means every person and since they have been injured by an insurer who engaged in an act prohibited by art. 21.21, they are entitled to bring a claim against [the insurer].
>
> The broad reading of the statute urged by the

> [plaintiffs] is precluded by precedent and by logic. Texas does not permit any person to recover under art. 21.21 unless there is a direct and close relationship between the wrongdoer and the claimant. . . . [A]bsent privity of contract or some sort of reliance by the person bringing a claim on the words or deeds of the insurer, a suit will not lie under art. 21.21.

The Texas Supreme Court has not addressed this question, and the state courts of appeals are divided. *Compare Watson v. Allstate Ins. Co.*, 1992 Tex. App. LEXIS 888 (Tex. App.)) Fort Worth Apr. 8, 1992, writ granted) (opinion on rehearing) (person injured by insured has standing under article 21.21) *with Employers Casualty Co. v. International Trucking Co.*, No. 04-90-00012-CV (Tex. App.)) San Antonio June 26, 1991, rehearing pending) (third party cannot bring article 21.21 cause of action against insurer because he cannot claim beneficiary status in absence of determination of insured's liability). Thus, we follow our own precedent, especially in light of the lack of finality of the state proceedings as above described. The plaintiff has no standing under article 21.21, and the district court properly entered judgment on that ground.

II.

The district court became impatient with the plaintiff for failing to comply with certain obligations imposed by the court's order of July 28, 1992, including, in the court's view, failure to initiate a status conference, to cooperate in the filing of a joint status report, to participate in a settlement conference, and timely to file a joint status report. The plaintiff points

out that she complied, at least in part, by, for example, filing a unilateral status report once the defendants, apparently thinking the plaintiff would not cooperate in filing a joint report, filed a unilateral report of their own. There also is indication in the record that part of plaintiff's problem was the changing of attorneys, the illness of her second attorney, and her attorney's absence from his office for extended periods of time.

As a sanction, the district court ordered the "death penalty" for the plaintiff, declaring not only that her action under article 21.21 was groundless but entering a finding for the defendants on their counterclaim for costs and fees. The court granted the fees by imposing, as a sanction, the finding that plaintiff's claims "were brought in bad faith or were brought for the sole purpose of harassment."

The plaintiff asserts that that order "is an act of pure retribution containing sanctions brought *sua sponte* by Judge McBryde as a result of his ire caused by what he perceived to be a complete failure of the parties to obey his previous orders." We need not evaluate the accuracy of that assertion, for it is evident, in any event, that dismissal with prejudice)) to which the order here was tantamount)) is a drastic remedy to which a court may resort only in extreme situations in which there is "a clear record of delay or contumacious conduct by the plaintiff." *Silas v. Sears Roebuck & Co.*, 586 F.2d 382, 385 (5th Cir. 1978).

There is no indication that the court considered lesser

sanctions here, designed to achieve compliance and expedite the proceedings. Nor is there an unequivocal showing of contumacious or contemptuous behavior. Moreover, there is no support, in the record before us, for the district court's finding that the lawsuit was brought in bad faith or for the sole purpose of harassment, so there is no basis for an award of attorneys' fees.

Because of our conclusion that plaintiff cannot prevail under article 21.21, this matter is at an end. While plaintiff should have been more attentive to the district court's scheduling order, her failure fully to comply is moot, as she has lost on the merits. Little, if anything, would be gained by a remand for consideration of a "lesser sanction."

The judgment is AFFIRMED insofar as it denies any recovery under article 21.21. The order imposing sanctions is REVERSED.