IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60521
Summary Calendar

DIANE B. HEBERT,

Plaintiff-Appellant,

VERSUS

MID-SOUTH INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:93cv101RR)

(February 16, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

In this diversity case alleging wrongful denial of an insurance claim under Mississippi law, the plaintiff, Diane Hebert, appeals a partial grant of summary judgment entered in favor of defendant, Mid-South Insurance Company ("MSI"). Concluding that the district court did not err, we affirm.

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Hebert had out-patient gall bladder surgery in May 1991. Following the surgery, she made an insurance claim to MSI for the total amount of the bills, either $9,416.59 according to Hebert, or $9,398.45 according to MSI. MSI did not pay the full amount: It paid the fees of the surgeon and Ocean Springs Anesthesia in full, and 50% of the assistant surgeon's bill and 80% of the remaining hospital costs. Hebert asserts that she was left with an unpaid balance of $1,476.38.

Plaintiff purchased her insurance contract, No. 848715, from MSI agent Chuck Aldrich in 1989. The language in the policy at issue in this case states:

> For Plan B the amount payable will be eighty percent (80%) of the first $5,000 of covered expense, after the deductible, and one hundred percent (100%) of the covered charges thereafter, up to the maximum benefit for each injury or sickness.
>
> For Plan A and Plan B the amount payable will be one hundred percent (100%) and the deductible amount will be none (0) for the following: (a) out-patient surgery; (b) a second surgical opinion; (c) hospital charges for pre-admission testing within 5 days of the confinement. The percentage stated above and the deductible will apply to all other covered expenses.

Hebert had chosen Plan B. The term "covered expenses" is defined to include hospitalization, surgeon charges and physician charges. The term "out-patient surgery" also appears under the "covered expenses" provision in the contract:

> COVERED EXPENSES - These are the Usual and Customary expenses actually incurred by a Covered Person for the following services and supplies for Sickness and Injury . . . .
>
> 5. The following services and supplies while

> confined to the hospital or on an outpatient basis:
> . . .
>
> (h) outpatient surgery at an accredited hospital or ambulatory surgical center, including charges for the operating room, anesthetics and their administration, and other medically necessary supplies and services.

The terms "surgery" and "out-patient surgery" are not specifically defined.

Hebert felt that all of her expenses should have been covered under the terms of the policy and called MSI on several occasions to discuss the payments. She also says that she questioned Aldrich, who apparently contacted MSI in an attempt to have the company honor the policy as Hebert understood it. Hebert eventually went to an attorney to pursue legal action. She is seeking compensatory and punitive damages; this appeal concerns the latter.

II.

Hebert filed her complaint in March 1993. Following discovery, MSI filed a motion for partial summary judgment on the punitive damages issue a year later. The district court granted the motion, holding that MSI had a legitimate reason to deny Hebert's claim and that there had been no showing of malice, gross negligence, or reckless disregard for Hebert's rights.

Hebert filed a motion to reconsider, attaching two affidavits that she had not earlier included and the ex parte statement of Sharon Knowles, a former MSI employee. The court denied the motion to reconsider, finding that Hebert's evidence was cumulative at

best.

Hebert filed a motion to supplement the record on appeal with Knowles's deposition and additional affidavits. The court granted the motion to supplement but concluded that the additional items would not have changed its opinion on the original motion for partial summary judgment.

III.

We review a motion for summary judgment using the same standard as the district court. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). All evidence and inferences to drawn therefrom are reviewed in the light most favorable to the non-moving party. Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992). According to FED. R. CIV. P. 56(c), summary judgment is proper "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 the moving party is entitled to a judgment as a matter of law." Once the motion has been made, the burden falls to the non-moving party to show that there is a genuine issue for trial. Fraire, 957 F.2d at 1273. The mere allegation of a factual dispute is not enough; a genuine dispute about material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Punitive damages in Mississippi "are assessed as an example

and warning to others and should be allowed only with caution and within narrow limits." Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977). They are granted as a means to punish the defendant for wrongdoing and to deter others from similar conduct. Id.

In a breach of contract claim, punitive damages are not recoverable "unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort." Veal, 354 So. 2d at 247 (quoting Progressive Casualty Ins. Co. v. Keys, 317 So. 2d 396 (Miss. 1975)). Such conduct must amount to more than an "ordinary tort"; it must constitute "bad-faith-plus." Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1187-88 (Miss. 1990); Estate of Wesson v. United States, 843 F. Supp. 1119, 1122 n.6 (S.D. Miss. 1994).

Punitive damages will not be awarded "if an insurance company has a legitimate or an arguable reason for failing to pay a claim." Standard Life, 354 So. 2d at 248.[1] The burden is on the plaintiff to show, by a preponderance of the evidence, "both an absence of an arguable reason . . . and malice or gross negligence or reckless disregard for their rights." American Mfrs. Mut. Ins. Co. v. Cupstid, 673 F. Supp. 186, 188 (S.D. Miss. 1987) (citing State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 253 (Miss. 1985); Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830 (Miss. 1986)).

[1] The terms "legitimate reason," "arguable reason," and "reasonable reason" have all been used in this context. The Mississippi Supreme Court has settled on "arguable" but acknowledges that they are "synonyms." Andrew Jackson Life, 566 So. 2d at 1184 n.11.

This circuit, following Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 809-10 (Miss. 1983), has stated a three-part test for determining whether a bad faith case should be presented to a jury:

> Initially, the trial court should examine whether as a matter of law the insurer has a legitimate or arguable reason to deny the claim. Should the court find that there is a legitimate or arguable reason for the denial, a punitive damage instruction should not be given; if, however, reasonable minds could differ as to whether there is a legitimate or arguable reason, the court must next consider whether there is evidence of gross negligence or intentional misconduct in the denial of the claim. If there is sufficient evidence to indicate that the insurer had no legitimate or arguable reason to deny the claim and that the insurer acted intentionally or was grossly negligent, a punitive damage instruction should be granted.

Merchants Nat'l Bank v. Southeastern Fire Ins. Co., 751 F.2d 771, 775 (5th Cir. 1985) (footnote and citation omitted).

MSI submits that its own good faith interpretation of the contract was the reason that it did not pay the full amount of the claim. MSI claims that only the surgeon's fees are subject to the no-deductible provision and that this interpretation is a legitimate or arguable reason for the denial.

"Arguably-based denials are generally defined as those which were rendered upon dealing with the disputed claim fairly and in good faith." Andrew Jackson Life, 566 So. 2d at 1184. In Pioneer Life Ins. Co. v. Moss, 513 So. 2d 927, 930-31 (Miss. 1987), the court held that facts relied upon by the company in denying the claim, if reasonably interpreted and relied upon by the company, will constitute an arguable reason, even if the company turns out to be mistaken in its belief.

At least one federal district court in Mississippi has stated:

> An arguable reason for the denial of an insured's claim, such as will insulate the insurer from a subsequent claim for punitive damages, has been defined as "one in support of which there is some credible evidence. There may well be evidence to the contrary. A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusion on the basis of which he acts."

Cupstid, 673 F. Supp. at 188 (quoting Blue Cross & Blue Shield, Inc. v. Campbell, 466 So. 2d 833, 851 (Miss. 1984) (Robertson, J., concurring in denial of rehearing)).

MSI's reading of the contract is arguable. The policy indicates that there is a deductible for the first $5,000 of "covered expenses." Out-patient surgery falls under "covered expenses" in paragraph 5(h). The no-deductible provision, however, which immediately follows the deductible provision, specifically applies to "out-patient surgery." MSI submits that "out-patient surgery," as used in the no-deductible provision, covers only the surgeon's fees.

The fact that paragraph 5(h) references "out-patient surgery . . . including [other expenses]" is subject to a reading that both supports and does not support MSI. On the one hand, "out-patient surgery at an accredited hospital or ambulatory surgical center" is separated by a comma from the "including" part and suggests that "out-patient surgery" is considered a separate thought or concept. The most specific definition of "surgery" is the actual operation itself. On the other hand, another reading of 5(h) is that the concept of "out-patient surgery" itself includes the other expenses listed. The problem is that either reading of the specific words "out-patient surgery" as used in 5(h), if

applied to "out-patient surgery" in the no-deductible provision, renders one of the provisions irrelevant.

We conclude that, even though the provisions of the contract may eventually be construed against MSI, MSI's reason for not paying the full amount of the claim was arguable. Hebert has not presented evidence that MSI's construction of the contract has been declared contrary to Mississippi law, nor has she presented evidence that there was any reason for denying the claim other than MSI's interpretation of the contract.

IV.

The Mississippi Supreme Court has recognized that there may be some circumstances in which the insurer has an arguable basis for denying a claim but where submission of the punitive damages issue to the jury is still warranted. See, e.g., Blue Cross, 466 So. 2d at 843. The "absence or presence of an arguable basis is not per se determinative of whether the punitive-damages issue should be submitted to the jury." Andrew Jackson Life, 566 So. 2d at 1185. Specifically, "submission of the punitive-damages issue may be submitted))notwithstanding the presence of an arguable basis." Id. at 1186.

Mississippi's highest court has discussed this particular issue in conjunction with a directed verdict analysis. In general, if the defendant could survive a directed verdict motion on the contract claim, an arguable or legitimate reason for denying the claim would exist, and a punitive damage instruction would be

foreclosed. See, e.g., Aetna, 487 So. 2d at 833. As noted above, however, the court has held that this test "is not infallible." Blue Cross, 466 So. 2d at 843. "[U]nder some contrived or specious defense, an insurance carrier may be entitled to have the jury pass upon the issue of liability under the contract, yet not thereby insulate itself against a punitive damage claim based upon bad faith." Id.

The "exception" to the directed verdict test, for both plaintiffs and defendants, applies only in "extreme factual situations." Aetna, 487 So. 2d at 834. The court in Andrew Jackson Life cites two possible situations in which an insurer with an arguable reason might still be subject to punitive damages: first, an insurer who has an arguable reason but uses the "insured's financial straits . . . as settlement leverage," id. at 1186; second, an insurer who might still "be held liable for punitive damages for infliction of emotional distress through commission of sufficiently repugnant acts in dealing with the insured and disputed claim," id.

Moreover, the Mississippi Supreme Court has articulated one specific "subset" of the exception called the "lying exception": It "'arises in the context of an insurance company's defense which is based wholly on an issue of the truthfulness of the insurance company's witnesses.'" Lewis v. Equity Nat'l Life Ins. Co., 637 So. 2d 183, 186 (Miss. 1994) (quoting Blue Cross, 466 So. 2d at 853 (Robertson, J., concurring)). It is "'operative . . . only where the jury is asked to reject on grounds of deliberate

falsehood or fabrication [or misrepresentation] the insurer's defense to the underlying contract claim.'" Andrew Jackson Life, 566 So. 2d at 1183 (quoting Blue Cross, 466 So. 2d at 852 (Robertson, J., concurring) (emphasis in original).

For example, the exception is applicable "where . . . an agent has misrepresented information that the claimant disclosed to him." Id. These cases generally involve a grossly negligent or intentional misrepresentation about the date or coverage of a policy by an agent for the purpose of inducing the purchase of the policy. See, e.g., Lewis, 637 So. 2d at 186; Andrew Jackson Life, 566 So. 2d at 1187; Nichols v. Shelter Life Ins. Co., 923 F.2d 1158, 1165 (5th Cir. 1991).

Hebert apparently has raised the exception argument for the first time on appeal, see, e.g., McQueen Contracting, Inc. v. Fidelity & Deposit Co., 863 F.2d 1216, 1219 (5th Cir. 1989), so we need not address it. Were we to consider it, however, we would conclude that no exception is applicable to the facts of this case. Hebert's argument is that an exception to the arguable-reason rule should apply if she can still show some evidence of gross negligence or intentional misconduct. Aside from the fact that she has failed to show either, this is simply an incorrect legal statement. A plaintiff must show evidence of misconduct that specifically establishes the "lying exception" or an extreme bad faith situation such as intentional infliction of emotional distress or an attempt to use the insured's dire financial situation as settlement leverage. Hebert's suggestion would render the arguable-reason

prong of the punitive damages inquiry irrelevant.

In this case, there has been no allegation or evidence presented that would indicate that MSI has been anything but truthful in its dealings. Hebert has not contended that she was lied to during her dealings with MSI before or after the surgery. There has been no evidence presented that the defense was contrived or specious.

The fact that Hebert's agent, Aldrich, was of the opinion that her construction was correct, is irrelevant. She contacted Aldrich after MSI indicated that it would not pay the full amount of the claim. There is no evidence to indicate that Aldrich induced Hebert into the contract by representing that her construction of the policy was the one that is correct.

Hebert has failed to establish that an exception to the arguable reason test exists. Therefore, punitive damages are not warranted in this case.

V.

Because an arguable reason exists and because Hebert has failed to establish that an exception to the arguable-reason prong exists, there is no need to assess whether an issue of material fact exists on whether MSI acted intentionally or with gross negligence in denying the claim. The judgment is AFFIRMED.