IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00625 COA

WILLIAM (BILLY) TAYLOR SWAILS, III

APPELLANT

v.

AMERICAN MUTUAL FIRE INSURANCE COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LOWNDES COUNTY

ATTORNEY FOR APPELLANT:

WILLIAM C. WALKER, JR.

ATTORNEYS FOR APPELLEE:

CARY E. BUFKIN

EUGENE R. NAYLOR

NATURE OF THE CASE: INSURANCE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED

IN FAVOR OF THE APPELLEE

MANDATE ISSUED: 5/29/97

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

DIAZ, J., FOR THE COURT:

William Swails III appeals from a grant of summary judgment in favor of American Mutual Fire Insurance Company. Swails contends that the trial court erred as a matter of law and that genuine issues of material fact precluded summary judgment. We agree and reverse and remand to the trial court for further proceedings.

STATEMENT OF THE FACTS

In April 1989 the Appellee, American Mutual Fire Insurance Company (AMI), issued an automobile insurance policy to William Swails, Jr. the father of William Swails (Swails), the Appellant herein. When the policy was issued, father and son resided together in South Carolina. In July 1989, Swails came to Columbus, Mississippi to visit his mother. Because of a domestic dispute between father and son, Swails was unsure about returning to South Carolina. While in Mississippi, Swails became employed and purchased a new Isuzu pickup from a dealership in Columbus. He secured insurance on this vehicle through a second company, American Interstate Insurance Company of Georgia (AII).

On August 26, 1989, Swails was driving his new truck and was involved in an automobile accident resulting in the death of his uncle, Gregory Harper, who was a passenger in the vehicle. A wrongful death action was instituted April 9, 1990, against Swails by the heirs at law of Gregory Harper. Swails then requested that the first company, AMI, provide coverage, provide a defense, and pay the policy limits. Following this request, AMI retained John W. Crowell (Crowell). At the inception, AMI claims it was undecided as to whether Crowell would be defending Swails or simply investigating the coverage issue. However, during this period of time, Crowell entered an appearance on behalf of Swails and met with Swails and his mother to discuss the August, 1989 accident. Swails and his mother claim to have believed from the beginning that Crowell was representing Swails in the pending litigation. On March 21, 1991, nearly one year after the wrongful death action was brought, Crowell filed a Complaint for Declaratory Judgment seeking a declaration of the rights and obligations of the parties on behalf of AMI. AMI deposited the policy limits of $15,000.00 with the court. On April 9, 1991, approximately one year after being notified of the accident, AMI sent Swails a reservation of rights letter. Following the reservation of rights letter, AMI had Crowell removed from the case, and Ronald Roberts was substituted as counsel on April 15, 1991. On May 7, 1991, Swails filed an answer and counterclaim to AMI's complaint for declaratory judgment. Swails alleged breach of fiduciary duty and bad faith by AMI. On July 8, 1991, an agreed order for disbursement of funds was entered releasing AMI's $15,000.00 policy limit to the estate of Gregory Harper. On April 19, 1994, AMI filed a motion for summary judgment. The trial court granted AMI's motion on June 14, 1994, and dismissed Swails' counterclaim with prejudice.

Swails also notified the second company, AII, of the August 1989 accident. AII paid for the damage to Swails' truck and retained William H. Petty, Jr.(Petty) to defend Swails in the wrongful death suit. Petty subsequently filed an interpleader action and paid the policy limit of $10,000.00 into the court. This amount was subsequently released to the estate of Gregory Harper.

DISCUSSION

A motion for summary judgment should not be lightly granted. M.R.C.P. 56 provides that a court may grant summary judgment "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 judgment as a matter of law." *Short v. Columbus Rubber and Gasket Co.*, 535 So. 2d 61, 63-64 (Miss. 1988). In making this determination, this Court must view the evidence in the light most favorable to the non-moving party. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1988). Additionally, AMI has the burden of demonstrating that no genuine issue of fact exists. *Short*, 535 So. 2d at 63-64. The decision of whether the actions of American Mutual constituted a defense should have been submitted to the finder of fact and the motion for summary judgment denied.

The record reveals that John Crowell was retained by AMI in mid-1990 in connection with the Swails litigation. Although AMI contends that Crowell was only to investigate the coverage claim, the record contains a letter from Crowell clearly stating that he was retained to defend Swails. Additionally, Crowell admits to entering an appearance on behalf of Swails and meeting with Swails to discuss the case.

Despite AMI's contentions, the record is replete with actions by Crowell that support Swails' position that he was represented by Crowell. In a multi-person transaction such as insurance litigation, with the possibility of multiple conflicting interests, Crowell had a duty to disclose to Swails that he only represented AMI. *Tyson v. Moore*, 613 So. 2d 817, 827 (Miss. 1992). Although Crowell claims that he made his position known to Swails, he admits that he cannot recall specifically disclosing this unilateral loyalty. Furthermore, Crowell did not suggest to Swails that he should seek advice from other counsel to protect his interests as to coverage. A review of the record indicates that there is substantial evidence which would have led Swails to reasonably believe that Crowell was his attorney and retained to protect his interests. Thus, there are several acts by Crowell contained in the record which could be persuasive to a jury in deciding the assumption of a defense by American Mutual on behalf of Swails. As with the coverage issue, the trial court is the proper forum for determining breach of fiduciary duty and bad faith. The record contains a plethora of disputed facts concerning these issues and a jury trial should be ordered to determine the liability of AMI, if any. We find that the summary judgment was erroneously granted and we, therefore, reverse and remand.

THE JUDGMENT OF THE LOWNDES COUNTY CIRCUIT COURT IS HEREBY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

BRIDGES, P.J., BARBER, COLEMAN, KING, AND PAYNE, JJ., CONCUR.

MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY FRAISER, C.J., THOMAS, P.J., AND SOUTHWICK, J.

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McMILLIN, J., DISSENTING:

I respectfully dissent from the majority's opinion in this case. In all honestly, I find it extremely difficult to determine on what basis this Court proposes to reverse the trial court and upon what theory Swails may proceed to trial upon remand.

Swails filed his counterclaim on the basis of a bad faith claim against American Mutual for its wilful failure to provide coverage. Though bad faith claims sound in tort, nevertheless, it is clear that the tort arises out of a contractual relationship. It is the alleged wilful disregard of an existing contractual obligation that constitutes the tort. In point of fact, "bad faith" is but a conveniently shortened version of the actual cause of action which is "bad faith breach of contract." *See Andrew Jackson Life Ins. Co. v. Williams,* 566 So. 2d 1172, 1188 (Miss. 1990). Thus, in the absence of a contractual relationship, the tort of bad faith cannot exist.

In this case, the trial court adjudicated as a matter of law that Swails was not an insured under the American Mutual policy. Swails did not even bother to perfect an appeal from that adjudication and is bound by it. There can be no breach of a contractual relationship that does not exist, bad faith or otherwise.

The majority, rather than addressing this obvious defect in Swails's theory, proceeds to discuss at some length the proposition that an attorney retained by American Mutual may have led Swails to believe that he was an insured under the policy. It is impossible to review the uncontroverted facts of

this case and conclude that such a proposition could be sustained. The attorney's involvement in the case consisted of filing a motion for enlargement of time to answer the wrongful death claim filed against Swails as an accommodation for an out-of-town attorney retained by American Interstate to defend the suit. It is undisputed that Swails had no knowledge whatsoever of that limited appearance by the American Mutual attorney. Any notion that Swails was relying upon American Mutual's attorney to provide him a defense in this case is belied by the letter from his American Interstate-provided counsel to American Mutual's attorney, written on Swails's behalf, that Swails "is hereby demanding a defense from your Carrier, in addition to the defense we are providing under American Interstate's policy." In response to that letter, American Mutual's attorney replied, "As I indicated to you, we are perfectly willing to provide a defense to Mr. Swails III, reserving all rights concerning payment of any damages." On these facts, it is ludicrous to suggest that a justiciable issue exists as to whether there is some claim for coverage by waiver or estoppel.

Even conceding, for sake of argument, the existence of a justiciable issue of coverage by waiver or estoppel, there is still no rational basis to disturb the trial court's decision. What seems to have escaped the majority is that a liability policy, unlike a life insurance policy or a health insurance policy, does not obligate the company to pay a claim until the issue of liability has been resolved against the insured in some manner, an event that never occurred in this case. Until the issue of liability is resolved, the only contractual duty of the insurance carrier is to defend the claim. In this case, there was never a resolution of the issue of Swails's liability on the wrongful death claim, so that the extent of his claim, if one existed, arose out of American Mutual's refusal to defend. The trial court's unappealed adjudication that Swails was not an insured under the terms of the policy defeats a claim that American Mutual had a duty to defend. However, to establish a contested issue of fact, the majority suggests that a contractual relationship by estoppel may have arisen by virtue of the fact that American Mutual was, in fact, providing a defense. Thus, the majority finds the possibility of a cause of action for bad faith failure to defend to exist solely by virtue of the very act whose alleged absence constitutes the cause of action. The illogic of that proposition seems to me self-evident.

This case is readily distinguishable from those cases where the insurance company provides a defense and then is estopped to deny its obligation to apply policy limits against a judgment recovered against its insured-by-estoppel. I would hold that the adjudication of a lack of coverage under the terms of the insurance contract, an issue not appealed and thus the law of the case, makes impossible the existence of a bad faith claim for failure to defend, the only claim that could exist on these facts. I would, for that reason, affirm the trial court.

FRAISER, C.J., THOMAS, P.J., AND SOUTHWICK, J., JOIN THIS SEPARATE OPINION.