1990

Fay I. Pixton v. State Farm Mutual Automobile Insurance Co. of Bloomington, Illinois, and International Rehabilitation Associates, Inc.: Reply Brief

Utah Court of Appeals

Philip R. Fishler; Stephen J. Trayner; Strong & Hanni; Attorney for Respondents.
Matt Biljanic; Attorney for Appellant.

DOCKET NO. 900119-CA

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

FAY I. PIXTON,

Plaintiff/Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. OF BLOOMINGTON, ILLINOIS, and INTERNATIONAL REHABILITATION ASSOCIATES, INC.

Defendants/Respondents.

CASE No.900119

Priority 16

REPLY BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE MICHAEL R.MURPHY PRESIDING

Matt Biljanic
Attorney for Appellant
7355 South 9th East
Midvale, Utah 84047

Philip R. Fishler
Stephen J. Trayner
Attorneys for Respondents
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

FAY I. PIXTON,	:	
Plaintiff/Appellant,	:	
vs.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. OF BLOOMINGTON, ILLINOIS, and INTERNATIONAL REHABILITATION ASSOCIATES, INC.	:	CASE No.900119
Defendants/Respondents.	:	Priority 16

REPLY BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE MICHAEL R.MURPHY PRESIDING

Matt Biljanic
Attorney for Appellant
7355 South 9th East
Midvale, Utah 84047

Philip R. Fishler
Stephen J. Trayner
Attorneys for Respondents
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	Page
Authorities Cited	ii
Introduction	1
Relief Sought on Appeal	1
POINT I Plaintiff has standing to pursue her claims for bad faith and fraud	2,3,4,5
POINT II Settlement of Plaintiff's claim against Davies and Hothan did not constitute a waiver	5,6,7,8
POINT III Plaintiff has not waived any claim of error on the dismissal of her third cause of action	8,9
POINT IV The affidavit of Milton Q. Beck did raise issues of material fact	9
Conclusion	10,11
Certificate of Mailing	11

AUTHORITIES CITED

Page

Beck v. Farmers Insurance Exchange
701 P2d 795, (Utah 1985) 3, 9

Hal Taylor Assoc. v. Union America
657 P2d at 750 3

Lawton v. Great Southwest Fire Ins. Co.
392 A.2d at 580 3

Samms v. Eccles
11 Utah 2d 289, 358 P2d 344 (1961). 3

Wetherbee v. United Ins. Co.
265 Cal. 2d 921, 71 Cal. Rptr. 764 (1968) . . 3, 4

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

FAY I. PIXTON,	:	
Plaintiff/Appellant,	:	
vs.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. OF BLOOMINGTON, ILLINOIS, and INTERNATIONAL REHABILITATION ASSOCIATES, INC.	:	CASE No.900119
Defendants/Respondents.	:	Priority 16

REPLY BRIEF OF APPELLANT FAY I. PIXTON

INTRODUCTION

This reply brief addresses points raised in respondent's brief and attempts to clarify the facts and issues presented in this appeal.

RELIEF SOUGHT ON APPEAL

Appellant, Fay I. Pixton, seeks a reversal of the Order and Judgment of the District Court granting Respondent's Motion for Summary Judgment. Such a reversal would enable Plaintiff to proceed in an action against Defendant on a claim of bad faith and fraud.

ARGUMENT

POINT I

PLAINTIFF HAS STANDING TO PURSUE HER CLAIMS FOR BAD FAITH AND FRAUD

Plaintiff by this Appeal is not seeking additional damages as a result of the actions of Davies and Hothan. That claim was settled for $7,500.00. Plaintiff seeks damages against State Farm for impairing her ability to effectively settle her case personally without the use of counsel. This right to settle her third party claim was adversely affected by State Farm's lack of good faith and fair dealing during the payment of PIP benefits. Defendant's argument that there is no privity of contract between the parties is an incorrect statement.

Defendant in its Argument on Point I cites numerous authorities dealing with first-party claims and third party claims and the duties arising from those relationships. Beck's affidavit in this case dealt as much with the first party claim as the third party claim. His affidavit recognized the "conflict of interest" where both parties are insured by the same company and only one adjuster is assigned to handle both claims. This arrangement was the choice of State Farm not the Plaintiff.

Further, his affidavit dealt with the involvement of IRA, non-disclosure, and the mis-characterization of IRA's charges as file expenses. The District Court should have viewed this evidence in a light most favorable to Plaintiff; however by completely rejecting the affidavit he committed reversible error.

Also, Defendant appears to be arguing that insurance bad faith can only be based on a contract theory to the exclusion of a tort theory. In annotation #3 Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985) the following language by the Court demonstrates a viable cause of action in tort or fraud may be filed in first party cases:

> "We recognize that in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort. Hal Taylor Assoc. v. Union America, 657 P.2d at 750; Lawton v. Great Southwest Fire Ins. Co., 392 A.2d at 580. For example, the law of this state recognizes a duty to refrain from intentionally causing severe emotional distress to others. Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961). Thus, intentional and outrageous conduct by an insurer against an insured, coupled with a failure to bargain, could conceivably result in tort liability independent of (and concurrent with) liability for breach of contract. Additionally, the facts that give rise to a breach of the duty to bargain in good faith could also amount to fraudulent activity, rendering an insurer independently liable for damages flowing from the fraud. See Wetherbee

v. United Ins. Co., 265 Cal. 2d 921, 71 Cal. Rptr. 764 (1968). Also, under various unfair practices acts, there may be statutory requirements that give rise to independent causes of action. E.g., U.C.A., 1953, §§ 31-27-1 to-24".

How could the Court rule that there was no conflict of interest on the part of Felix Jensen handling the claims for both parties, where it appears from the cases and the affidavit of Mr. Beck that its customary in the insurance industry to have two adjusters handle such cases? If the District Court was obligated to view the evidence in a light most favorable to appellant, how could it disregard Beck's affidavit? The fact that the issues involved with the sums paid by State Farm to IRA could have been resolved in Judge Frederick's Court, should not be a basis for denying appellant the right to establish State Farm's bad faith or fraud.

A jury could reasonably infer "bad faith" and "fraud" from the evidence that State Farm's actions in mischaracterizing specials, not advising Pixton about using nurses as non-testimonial experts preparing for trial, not advising Pixton about IRA's actual function of minimizing medical expenses as opposed to providing rehabilitation and not offering the $7,500.00 based upon $871.51 specials when it first offered the $2,500.00 in 1984, rather than some

five (5) years later. The liability in this case was undeniable and clear and the facts known to State Farm at the time it offered $2,500.00 to Plaintiff were identical to those 5 years later when $7,500.00 was offered. This delay was clearly unreasonable based upon the foregoing facts.

POINT II

SETTLEMENT OF PLAINTIFF'S CLAIM AGAINST DAVIES AND HOTHAN DID NOT CONSTITUTE A WAIVER

The Defendant's claim that Plaintiff was given the information concerning the cost of IRA's services more than one year prior to her settlement with Davies and Hothan is partially true. Plaintiff was given copies of the various checks paid by State Farm to IRA but the services for which payments were made were not provided. In order to determine whether the payments were actually "file expenses" rather than "medical specials" the nature of the services had to be identified.

It was because of State Farm's complete control of the first and third party claims that it was able to mis-characterize the IRA payments to the detriment of Plaintiff. State Farm insured both Plaintiff and Defendant and decided to handle the claim using one adjuster contrary to accepted insurance practice. That is of course, if

Beck's affidavit in this case is given any effect.

In an action for failure to settle within the policy limits, the insurance company is charged with acting in a fiduciary capacity as an attorney in fact representing the insured's interest in litigation. The company's interest comes into conflict with that of the insured's while representing him; and arguably, acting in its own interests to the detriment of the insured's interest while acting in such a fiduciary capacity is a tort.

In the present case, State Farm undertook the fiduciary duty to represent the insured's interest by not appointing two adjusters. It did in the course of representing Plaintiff violate its fiduciary duty arising out of sole control of the settlement. This was true at least until Pixton obtained independent counsel, but by then the damage had been done. The IRA employees had completed their task of minimizing medicals and the specials could then be mis-characterized as "file expenses".

There is in the record no factual or legal basis upon which to make a finding or conclusion that Plaintiff waived her claims of "bad faith" and "fraud" against State Farm. The settlement of the Davies and Hothan case occurred June 13, 1989, the day of trial. The affirmative defense in

Defendant's answer dated April 1, 1987 and the second answer dated May 23, 1989, referred to Plaintiff's conduct not the settlement. Obviously, based upon the dates the defense was raised it had to refer to actions or conduct that occurred prior to the settlement. If State Farm had intended the dismissal of this action it could have demanded that as part of the $7,500.00 settlement but that was not done nor did Plaintiff intend such a result.

On page 6 of respondent's brief, respondent states that Plaintiff failed to press for a ruling at trial in Judge Frederick's Court. Plaintiff filed a motion just prior to trial in that case to have the Court review the checks paid by State Farm to IRA to determine their admissibility. The Court refused to hear the motion without giving any reason. The Plaintiff could not attempt to introduce the checks because they contained the insurance company's name and contained no information about services provided. Plaintiff felt constrained to accept the settlement because of those procedural problems. In any event, the $7,500.00 settlement based upon $871.51 medicals was reasonable. At that time Plaintiff agreed to accept $7,500.00 as a settlement of her claim against Davies and Hothan. There was no agreement to dismiss this case against State Farm.

It was because of State Farm's actions of claiming the IRA employees as non-testimonial experts that appellant in this case was unable to obtain discovery. As stated on page 5 of respondent's brief, on May 24, 1988, counsel for Davies and Hothan sent copies of drafts from State Farm to IRA, but those drafts did not identify the services rendered. In this way, State Farm effectively denied Pixton access to information she needed not only to settle her claim but to prosecute the trial itself. This action by State Farm clearly was structured to protect its interests over those of its insured and could be found by a jury to constitute bad faith.

POINT III

PLAINTIFF HAS NOT WAIVED
ANY CLAIM OF ERROR ON THE
DISMISSAL OF HER THIRD
CAUSE OF ACTION

Defendant's statement that Plaintiff's Amended Complaint contained various unfounded allegations of fraud is incorrect. The affidavits of Plaintiff and Beck must, for purposes of Summary Judgment, be taken as true. Consequently, if the affidavits as filed were proper in all respects and admissible Defendant's assertion fails.

Plaintiff failed to brief the issue of fraud and did so in part because the District Court in the Order For

Summary Judgment did not make mention of the Cause of Action In Fraud. However, the exact argument for reversing the District Court's Order regarding the contract and good faith causes of action applies to the claim for fraud. There were genuine issues of material facts which precluded summary judgment.

POINT IV

THE AFFIDAVIT OF MILTON Q. BECK DID RAISE ISSUES OF MATERIAL FACT

In the typical third party claim there is no privity of contract. However, this case involving Pixton obviously differs from the typical third party claim. In the first instance, this case is no different than the Beck v. Farmers case. When that case turned into an uninsured motorist claim the insured's position was identical to that of Pixton and State Farm. Why should this case be treated differently than Beck v. Farmers supra? Mr. Beck's affidavit and that of Pixton clearly dealt with the actions of State Farm during the resolution and payment of PIP benefits. At that point there was obviously privity of contract. Defendant completely disregards the Plaintiff's affidavit and misstates the facts concerning Beck's affidavit.

CONCLUSION

A reasonable expectation of Pixton from her contract with State Farm was to have her PIP benefits paid. Once those benefits are paid does State Farm's duty under the contract end? Is she not entitled to be provided with any information needed to settle her third party claim against Davies? If the services provided by IRA were found by a jury to be medical expenses and not file expenses, wouldn't it follow logically that State Farm had an obligation to provide her with that information so she could intelligently assess the value of her case? Would not the mischaracterization of these expenses and or State Farm's refusal to provide them to Pixton constitute bad faith?

The jury could find that State Farm's conduct of delaying payment, mischaracterizing medical specials, failing to provide copies of bills paid under PIP for claims against the third party, failure to allow Pixton and her attorney to characterize the bills, failure to inform Pixton that the purpose of obtaining the medical release was in preparation for defense of the third party claim and not treatment, constituted intentional and outrageous acts, justifying an award of consequential and punitive damages.

The foregoing actions of State Farm are not just

failures to perform obligations under its contract with Pixton but are violations of duties set forth by statute and custom in the industry. Consequently, Pixton should not be limited to damages recoverable in contract. The District Court's Summary Judgment should be reversed and the Plaintiff allowed to proceed with her claim for "bad faith" and "fraud".

Respectfully submitted this 27th day of August, 1990.

Matt Biljanic
MATT BILJANIC

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellant to Philip R. Fishler, Stephen J. Trayner, Attorney's for Respondents, Strong & Hanni, Sixth Floor Boston Building, Salt Lake City, Utah 84111, postage prepaid, this 27th day of August, 1990.

Matt Biljanic
MATT BILJANIC