Tinsley v. State Farm Lloyds

Not Reported in S.W.3d, 2005 WL 2675024
Tex.App.-Houston [14 Dist.],2005.
October 20, 2005 (Approx. 7 pages)

Not Reported in S.W.3d, 2005 WL 2675024 (Tex.App.-Hous. (14 Dist.))

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Houston (14th Dist.).
John T. TINSLEY, Appellant
v.
STATE FARM LLOYDS, Appellee.
No. 14-04-00255-CV.
Oct. 20, 2005.

On Appeal from the 151st District Court Harris County, Texas, Trial Court Cause No. 02-28487.
Toby C. Easley, for John T. Tinsley.
Brian M. Chandler and **Ronald** P. **Schramm** , for State Farm Lloyds, Inc. and State Farm Lloyds.

Panel consists of Justices FROST, SEYMORE, and GUZMAN.

MEMORANDUM OPINION

EVA M. GUZMAN, Justice.
*1 In this insurance coverage dispute, appellant John T. Tinsley challenges the trial court's summary judgment in favor of appellee State Farm Lloyds, [FN1] arguing the trial court erred (1) because genuine issues of material fact exist as to each of his causes of action, and (2) by impliedly overruling his special exceptions to State Farm's summary judgment motion. Because we conclude that genuine issues of material fact exist regarding whether the damage to Tinsley's home is covered under his policy and on Tinsley's extra-contractual claims, we reverse the trial court's summary judgment and remand for proceedings consistent with this opinion.

> FN1. "State Farm Lloyds, Inc." was incorrectly included as a party to the suit; judgment was rendered in favor of State Farm Lloyds.

I. FACTUAL AND PROCEDURAL BACKGROUND

In December 2000, Tinsley discovered cracks in the drywall and brick exterior of his home, and other indications of foundation problems. He contacted his insurer, State Farm Lloyds, and made a claim under his homeowner's policy on January 2, 2001. Shortly thereafter, in accordance with a request from State Farm, Courtney Plumbing conducted leak detection tests at Tinsley's residence. Based on its static testing, Courtney discovered the following six leaks within the plumbing system:

(1) in the main trunk line underlying bedroom No. 1

(2) in an abandoned kitchen and washer drain line

(3) on the shower riser to the strainer in bathroom No. 1

(4) in the branch drain to the lavatory in bathroom No. 1

(5) in the main trunk line underlying bedroom No. 2

(6) the toilet drain in bathroom No. 2 FN2

FN2. According to the record, four of these leaks-numbers three through six-are located in the front half of the house and on the right hand side of the residence. The remaining leaks, numbers one and two, are located in the rear half of the home and also lie towards the right half of the residence.

Courtney also performed three flow tests on the following fixtures: the shower in bathroom No. 1 (leak number 3 above), the toilet in bathroom No. 2 (leak number 6), and the lavatory in bathroom No. 1 (leak number 4). The flow tests indicated no measurable loss of water.FN3 The plumbing tests conducted by Courtney were the only plumbing tests conducted at the residence.

FN3. Under static testing, the main sewer line is blocked with an inflatable rubber ball and the sewer system is filled with water to floor level. A drop in the water level indicates the system leaks. Flow testing involves pouring a known amount of water into the leaking fixtures and collecting water that accumulates outside the foundation. The difference between the amount poured and the amount collected is the estimated loss under normal conditions.

Under Tinsley's homeowner's policy, damage to his residence resulting from foundation movement is covered to the extent the damage results from an "accidental discharge, leakage, or overflow of water or steam from within a plumbing, heating or air conditioning system or household appliance." Thus, following Courtney's testing, State Farm hired Charles Mgbeike with MCA Engineering to conduct an inspection to determine if the leaks caused or contributed to the foundation movement. Based on Courtney's findings and his inspection, Mgbeike concluded in his report dated March 1, 2001, that the foundation had moved due to seasonal changes in the moisture content of the soil, the movement prompted past foundation repairs, but "[a]pparently, the foundation was not adequately supported." Mgbeike also stated that "[a]lthough some leaks were found, the flow tests revealed no measurable loss at the leak locations." Further, Mgebeike noted that the elevation survey he conducted revealed no measurable upward movement, or heave, at the leak locations, indicating the sewer leaks had not caused the foundation's movement.FN4 Quoting from Mgebeike's report, State Farm sent a letter to Tinsley, dated March 13, 2001, denying his claim.

FN4. The elevation survey revealed that much of the foundation's deflection had occurred under the front portion of the house, on the right hand side.

*2 Subsequently, Tinsley requested that soil sampling be done and in May 2001, Mgbeike hired A & R Engineering and Testing, Inc. to conduct the soil testing.FN5 Based on A & R's soil sample report, Mgbeike issued another report to State Farm in which he stated that Tinsley's residence had a history of foundation problems, noted the previous owner had perimeter piers installed, and concluded that the "plumbing leaks did not cause the re-settling of the existing piers along the front and left walls." FN6

FN5. The soil samples were taken from three areas of the home: under bathroom No. 1 (B2), bathroom No. 2(B1), and the garage (B3). The borings were drilled to a depth of eight feet below the existing ground surface. The report contained measurements regarding the percentage of the soil's moisture content, plasticity and liquidity indices, and shear strength measurements. A & R's report described the soil as "expansive clays" with a high shrink/swell potential. As stated in A & R's report, there were variations within the samples, but A & R did not interpret the data to indicate what, if any, significance there may have been to these variations.

FN6. Leak numbers 3, 4, and 5 in Courtney's report were located on what Mgbeike refers to in his second report as the left wall of the residence. In his elevation survey, Mgbeike referred to this area of the home as the "front right" portion and noted that the survey revealed the lowest elevation of the home was in this area.

In August 2001, Tinsley hired Taylor Sealy, with Sealy Engineering, to conduct an inspection of the residence. In addition to Mgbeike's report, Sealy also relied on Courtney's testing and an inspection report prepared in 1999 by Newman Inspectors and Engineers Inc., apparently prepared in connection with Tinsley's purchase of the residence. Sealy concluded that the vast majority of the foundation damage was due to the underslab sewer leaks and not to the surrounding trees. He also opined that moisture withdrawal from the soil was not the cause of the damage, contrary to Mgebeike's conclusion, because the damage was occurring at a rapid rate despite recent heavy rainfall.

Tinsley sued State Farm, alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act ("DTPA"). State Farm moved for summary judgment on both traditional and no-evidence grounds. The trial court granted summary judgment, and this appeal ensued.

II. DISCUSSION

In two issues, Tinsley claims the trial court improperly granted summary judgment because genuine issues of material fact exist on each element of his causes of action, and that the trial court erred in impliedly overruling his special exceptions to State Farm's motion for summary judgment. We first address Tinsley's special exceptions issue.

A. Special Exceptions to the Summary Judgment Motion

Tinsley filed special exceptions to State Farm's motion, claiming State Farm failed to specify whether it was a traditional motion, a no-evidence motion, or both, and further, that as a no-evidence motion, State Farm failed to challenge specific elements of Tinsley's causes of action. On appeal, Tinsley makes this same argument.

Under Rule 166a(i), a no-evidence summary judgment motion must "state the elements as to which there is no evidence." TEX.R. CIV. P. 166a(i). This requirement prohibits conclusory no-evidence motions or general no-evidence challenges to the non-movant's case. *See id.* cmt.; *Cuyler v. Minns,* 60 S.W.3d 209, 212 (Tex.App.-Houston [14th Dist.] 2001, pet. denied).

In its motion, State Farm asserted both traditional and no-evidence grounds for summary judgment. Regarding Tinsley's breach of contract action, State Farm asserted there was no evidence that Tinsley's claim for foundation coverage was in fact covered under his insurance policy. Specifically, State Farm stated, "[t]here is no evidence that the foundation damage alleged by [ ] Tinsley was caused by accidental discharge, leakage or overflow of water or seen from within a plumbing, heating or air conditioning system." As noted, if the foundation damage was not caused by an accidental discharge, leakage or overflow, there would be no coverage under the policy and consequently, no breach of the insurance contract. *See Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 17 (Tex.1994) (noting that nonpayment of a *covered* claim may be a breach of contract). Thus, State Farm asserted Tinsley had no evidence that the damage to his home was caused by a plumbing leak, an element of his breach-of-contract action. We conclude that State Farm's no-evidence challenge to Tinsley's breach-of-contract claim was sufficiently specific.[FN7] *See* TEX.R. CIV. P. 166a(i). We overrule Tinsley's second appellate issue, and examine whether summary judgment in State Farm's favor was error.

FN7. State Farm also claimed that, as a matter of law, because there was no evidence of coverage it was also entitled to summary judgment on Tinsley's Insurance Code violation claims and his DTPA claim. Because this "no evidence" assertion is no more than a

restatement of State Farm's no-evidence of coverage argument, we do not address separately the specificity of its claim regarding these causes of action.

B. Summary Judgment Standard of Review

*3 The standard of review for a traditional summary judgment is well established. *See* Schneider Nat'l Carriers, Inc. v. Bates, 147 S .W.3d 264, 290 (Tex.2004). We review a summary judgment under a de novo standard, viewing all evidence in a light favorable to the non-movant and indulging every reasonable inference in his favor. *Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex.2003).

The party moving for summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX.R. CIV. P. 166a(c); *Provident Life,* 128 S.W.3d at 215-16. Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery, or pleads and conclusively establishes each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 911 (Tex.1997).

A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 750-51 (Tex.2003). We sustain a no-evidence issue when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 751. If the non-movant brings forth more than a scintilla of probative evidence raising a genuine issue of material fact, a no-evidence summary judgment is improperly granted. *Id.; see* TEX.R. CIV. P. 166a(i). Less than a scintilla of evidence exists when the evidence offered is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *King Ranch,* 118 S.W.3d at 751 (quoting *Kindred v. Con/Chem, Inc.,* 650 S.W.2d 61, 63 (Tex.1983)). More than a scintilla of evidence exists when it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997)).

When the trial court's order does not specify the grounds for its summary judgment, we will affirm the judgment if any of the theories presented to the trial court are meritorious and preserved for appeal. *Provident Life,* 128 S.W.3d at 216.

C. State Farm's Summary Judgment Grounds

There is no dispute between the parties that Courtney Plumbing conducted the only plumbing tests on the residence, nor do they dispute the validity of Courtney's report that six leaks were detected in the plumbing system. Also, acknowledging *Balandran v. Safeco Ins. Co.,* State Farm agrees that, if the damage to Tinsley's home was caused by the sewer leaks, Tinsley's policy provides coverage for the damages. *See* 972 S.W.2d 738, 742 (Tex .1998). [FN8] We begin with Tinsley's contractual claim.

FN8. In *Balandran,* the Texas Supreme Court construed language in a homeowners' policy similar to the language in Tinsley's policy and determined that if the property loss caused by foundation movement was due to a plumbing leak it was not excluded under the policy. 973 S.W.2d at 739-40.

1. The Contractual Claim

*4 In response to State Farm's no-evidence challenge, Tinsley provided a report prepared by Sealy, a registered professional engineer, which stated in pertinent part the following:

It is my opinion that all of the foundation related damage observed in the house with the exception of that in the vicinity of the northwest corner within range of the pecan tree, [FN9] is due to the under slab sewer leaks and not due to the effect of the surrounding trees or weather conditions.

FN9. The pecan tree is located in the rear left portion of the home.

In his report, Sealy also stated he observed damage to the home and noted that Mgebeike's report had indicated there was no significant damage. This indicated to Sealy that the damage was occurring at a fairly rapid rate. Further, Sealy asserted that when the home was inspected in 1999, Newman Engineering stated that the maximum slab height variation was 2.5 inches; in Mgebeike's report, the variation was listed as 4.32 inches, and Taylor had measured a variation of 4.8 inches. The discrepancies between these variations again indicated to Sealy that the amount of settlement was occurring at a fairly rapid rate. He opined that the rapid rate of settlement, despite heavy rainfall, further evidenced that moisture withdrawal from the soil was not the cause of the foundation's settlement.FN10 Sealy's statements controvert Mgebeike's conclusions regarding the cause of the foundation movement.

FN10. Attached to Sealy's report is a copy of a study indicating that heaving of the foundation is not always present when underslab sewer leaks cause foundation movement.

Included in Tinsley's evidence was a letter from Sealy written in response to Mgebeike's critique of Sealy's conclusions.FN11 Sealy stated that the sewer leaks had caused the foundation movement by washing away the sub-slab fill, which created a void underneath the slab. He suggested that under these circumstances, a flow test would not detect the problem. Attached to his letter were copies of publications to support his contention. Tinsley also argued that the invoices from Village Plumbing, indicating they had cleaned mud out of Tinsley's sewer lines on several occasions, also bolstered Sealy's conclusions concerning the leaks. Further, Tinsley furnished Mgebeike's deposition testimony in which he stated that the foundation's movement was caused primarily by the drying of the soil, but when questioned by Tinsley's counsel as to the type of research he conducted to determine the amount of rainfall in the two years that Tinsley owned the home, Mgebeike stated he had done no specific study and that it was common knowledge Texas experienced a drought in 1999 and 2000.

FN11. The record contains letters or reports from both experts questioning the validity of the other's conclusions.

In sum, we conclude that Tinsley's summary judgment evidence constitutes more than a scintilla of evidence that the sewer leaks may have caused the damages to Tinsley's residence, raising a genuine fact issue on this element of Tinsley's contract claim.

State Farm, however, argues that Tinsley failed to provide evidence of "any measurable loss of water from the plumbing system." In fact, throughout the record and in its brief, State Farm repeatedly asserts that there is no evidence the damage was caused by sewer leaks because the plumbing tests revealed "no measurable loss of water." There is no evidence in the record, however, to suggest that Tinsley's proof of causation in this case was limited only to establishing a measurable loss of water through flow tests. Further, in his additional report, Sealy indicates the sewer leaks in this case would not necessarily be detected through a flow test.

5 It is undisputed that Courtney discovered six leaks within the plumbing system through static testing, two of which are in the main trunk lines. There is nothing in the record to demonstrate that "no measurable loss of water" through the fixtures tested equates to no plumbing leaks within the entire plumbing system, nor any evidence suggesting that flow tests are definitive in determining causation in a case such as this. It is true that, during his deposition, Sealy agreed with State Farm's counsel that "flow testing most closely simulates everyday usage" and also agreed that the flow tests conducted by Courtney revealed no measurable loss of water. But, as Tinsley noted, this is not to say

there were no leaks within the plumbing system that could have caused the foundation movement. *Cf. United Servs. Auto. Ass'n v. Gordon,* 103 S.W.3d 436, 439 (Tex.App.-San Antonio 2002, no pet.) (concluding under similar circumstances that whether "evidence of plumbing leaks based on hydrostatic tests should be rejected because those tests do not reflect normal conditions is a fact question for the jury.").

State Farm further argues that in his report, Sealy stated his theory of causation was rainwater migrating underneath the foundation and, because the policy does not cover that type of peril, there is no coverage and no breach of contract.

Sealy's report contained the following:

The [Mgebeike] report states that sewer leaks can only result in heave of foundation and if heave is not present then the sewer leaks did not cause the problem. It has been my experience that the sand fill which usually consists of 4-5 inches of sand underneath the foundation is readily capable of being washed into a damaged sewer line from rain water flowing from the perimeter of the house. It was also stated by the [Mgebeike] report that flow tests showed no loss of water and therefor [sic] the sewer leaks could not have affected the foundation in a significant way. This neglects the affect of the previously mentioned rain water which obviously has been running underneath the foundation.... Water does not flow under foundations under ordinary conditions unless sewer leaks are present to which the water can flow. A sewer leak must be present for settlement to occur due to this cause.

Considering the entire report, we cannot say that Sealy's theory of the cause of the foundation movement was rainwater. In a subsequent letter, Sealy stated that the holes along the perimeter of the foundation, which allowed the surface water to migrate down, were due to the holes in the sewer lines, noting that if the rainwater had no sewer leaks to seep into, it would not migrate under the foundation.

In its reply to Tinsley's response to the summary judgment motion, State Farm included additional deposition testimony from Sealy and argued this testimony demonstrated Sealy's theory that "the problems at the Tinsley residence was not water leaking from the plumbing system but rather particles going into the pipes." Sealy's testimony, in response to questioning by State Farm's counsel, follows:

*6 Q. So but for the rain, there shouldn't be this problem at the house?

A. And the rain and the sewer breaks. Because one without the other isn't going to-isn't going to happen.

Q. Right. But if you didn't have the rain, you wouldn't have the foundation problems is the point I am trying to make.

A. That's right. It requires both.

This testimony merely indicates that Sealy's theory of the foundation problems involves both the sewer leaks *and* the rainwater. As noted, Sealy also stated that the rainwater was able to migrate under the foundation *because* of the sewer leaks within the plumbing system. According to the record, Sealy's theory of the foundation problems was that, due to sub-slab fill being washed away, a void was created, which collapsed and caused damage to the structure. The Village Plumbing reports, indicating mud was present in the sewer lines, appear to support Sealy's theory.

Finally, Sealy reiterated his opinion regarding the cause of the damage in an affidavit attached to Tinsley's response, stating:

My opinion remains that once the break in the sewer pipe occurred, water washed out portions of the surrounding soil creating a void under the slab. When this void expanded, surface water was then allowed to flow beneath the slab to continue the erosion. The sub-slab soil was allowed to wash out through the break in the sewer line. These conditions caused the foundation to subside and led to the

problems of cracking walls and sticking doors in the house.

The deposition testimony that State Farm relies on does not controvert this opinion. Moreover, even if a combination of factors caused the damages, under the doctrine of concurrent causes, Tinsley is entitled to recover the portion of damages caused by the covered peril.[FN12] *See Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.,* 130 S.W.3d 181, 198 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

> FN12. To recover under an insurance policy for damages caused by concurrent factors, the insured must present some evidence upon which the jury can allocate the damages attributable to the covered peril. *Comsys,* 130 S.W.3d at 198. But the insured is only required to present some reasonable basis on which the jury can allocate the damages. *Wallis v. United Servs. Auto. Ass'n,* 2 S .W.3d 300, 304 (Tex.App.-San Antonio 1999, pet. denied). He is not required to allocate the plumbing leak damage with mathematical precision. *Id.*

Construing the summary judgment evidence in Tinsley's favor, as we must, we conclude a genuine issue of material fact exists regarding the cause of the damages to Tinsley's residence. Therefore, we hold the trial court erred in granting summary judgment in favor of State Farm on Tinsley's contract claim and sustain his first appellate issue as to that cause of action.

2. The Extra-Contractual Claims

In his pleadings, Tinsley alleged causes of action for breach of the common law duty of good faith and fair dealing and violations of Insurance Code articles 21.21, sections 3 and 4, and 21.55.[FN13] Tinsley also pleaded a cause of action under the DTPA and sought to recover damages under that statute. Tinsley alleged that State Farm improperly denied his claim and failed to conduct a reasonable investigation by "engaging biased engineers to perform investigations and make specious conclusions about the cause of the damage." On appeal, Tinsley argues the trial court erred in granting summary judgment on these claims because fact issues exist regarding whether State Farm conducted a reasonable investigation into his claim. We address these causes of action collectively [FN14] in our discussion.

> FN13. *See* TEX. INS.CODE art. 21.21, §§ 3-4, art. 21.55 (Vernon Supp.2003), *repealed and recodified by* Act of 2003, 78th Leg., ch. 1274, § 2, 2003 Tex. Gen Laws 3641 (recodified as TEX. INS.CODE §§ 541.051-.061 (Vernon Pamphlet 2004-05)).

> FN14. *See generally Higginbotham v. State Farm Mut. Auto. Ins. Co.,* 103 F.3d 456, 459 (5th Cir.1997) (noting extra-contractual tort claims under the Insurance Code and the DTPA require the same predicate for recovery as a common law bad faith cause of action, and if there is no merit to the bad faith claim, there will be no liability on the statutory claims); *Mid-Century Ins. Co. v. Boyte,* 80 S.W.3d 546, 549 (Tex.2002) (stating the statutory standards and common law bad faith standard regarding breach of duty of good faith and fair dealing are the same).

***7** Generally, there can be no claim for bad faith when an insurer promptly denies a claim that is in fact not covered. *Republic Ins. Co. v. Stoker,* 903 S.W.2d 338, 341 (Tex.1995). State Farm relied on this premise in the trial court and, in addition to its no-evidence challenge to Tinsley's breachofcontract action, State Farm argued that, because there was no evidence of coverage, it was entitled to summary judgment as a matter of law on the extra-contractual claims. Likewise, noting the trial court granted judgment in its favor on the contract cause of action, State Farm asserts on appeal it was therefore entitled to summary judgment on Tinsley's extra-contractual claims. Alternatively, State Farm argues that its evidence showed it had a reasonable basis to deny Tinsley's claim-reliance on Mgbeike's report. Because we have determined that a fact issue exists concerning Tinsley's breachof-contract claim, the only question is whether State Farm's evidence disproved an

element of Tinsley's extra-contractual claims as a matter of law. *See* City of Houston v. Clear Creek Basin Auth ., 589 S.W.2d 671, 678 (Tex.1979) (stating that a defendant as movant for summary judgment must either disprove at least one element of each of the plaintiff's causes of action or plead and conclusively establish each element of an affirmative defense); *cf.* Saunders v. Commonwealth Lloyd's Ins. Co., 928 S.W.2d 322, 324 (Tex.App.-San Antonio 1996, no writ) (noting insurer moving for traditional summary judgment on insured's bad faith and DTPA claims had burden to prove it had a reasonable basis to deny the claim).

An insurer breaches its duty of good faith and fair dealing by denying or delaying payment of a claim when the insurer's liability has become reasonably clear. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55 (Tex.1997). Thus, an insurer will be liable for breach of the duty if it knew or should have known that it was reasonably clear the claim was covered. *Id.* at 56. Determining whether a breach has occurred focuses on the reasonableness of the insurer's conduct in handling the claim and not on whether the claim was valid. Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 601 (Tex.1993). Whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a fact question. [FN15] *Giles,* 950 S.W.2d at 56.

> FN15. A court can decide an issue as a matter of law when there is no conflict in the evidence, but when there is evidence on either side, the issue is a fact question. *Giles,* 950 S.W.2d at 56. In this case, Tinsley pointed to evidence in the record that he claimed was some evidence of State Farm's bad faith; therefore, whether State Farm's liability had become reasonably clear cannot be determined as a matter of law in this case.

State Farm argues that its summary judgment evidence conclusively established the investigation it conducted was reasonable and appropriate because it included hiring a plumber (Courtney), a professional engineer (Mgebeike), and a geotechnical engineer (A & R). State Farm further asserts that the plumbing tests established "there was no measurable loss of water" at Tinsley's residence and "the foundation problems at the Tinsley residence were not caused by plumbing leaks." As determined above, however, a fact issue remains as to whether there is a bona fide dispute concerning coverage. Moreover, an insurer's reliance upon an expert's report, standing alone, will not necessarily shield the insurer if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 448 (Tex.1997). Here, Tinsley relies on the following as evidence that a fact issue exists regarding the reasonableness of State Farm's reliance on Mgebeike's report.

***8** In response to the summary judgment motion, Tinsley pointed to the Village Plumbing invoices, claiming that because Mgbeike's report was written without "access to all the relevant data," it was unreasonable for State Farm to rely on the report in denying his claim. He also claims bad faith is shown by the fact soil samples of the property were not taken until approximately two months after State Farm denied his claim based on Mgbeike's seasonal changes conclusion. Tinsley further asserts that the deposition testimony of State Farm's claims adjuster, Keith Bruce, is evidence of bad faith because Bruce agreed with Tinsley's counsel that it was reasonable for Tinsley to ask State Farm to have the soil tested as part of its investigation. Most importantly, Tinsley provided an affidavit from Sealy which stated, in part, the following:

In reviewing the analysis and conclusions of [Mgebeike's report] it is my opinion that it was not reasonable for the insurance adjuster to rely on the report from [Mgebeike]. My original opinion and rebuttal letter state the problems with the analysis of [Mgebeike] and the lack of data to support the conclusion that the foundation deflection was caused by seasonal changes. This conclusion also ignored the data from Courtney Plumbing and Village Plumbing as well as the nature of the deflection.

In all, a fact issue exists concerning Tinsley's extra-contractual claims. [FN16] State Farm does not refer us to any authority to support the proposition that because it relied on Mgebeike's report, there can be no bad faith here as a matter of law. *See generally* Nicolau, 951 S.W.2d at 448 ("We have recognized that evidence showing only a bona fide coverage dispute does not standing alone, demonstrate bad faith.... But we have never held that the mere fact that an insurer relies upon an expert's report to deny a claim automatically forecloses bad faith as a matter of law."). And Tinsley's

evidence raises a fact issue as to the reasonableness of State Farm's reliance on Mgebeike's report. We sustain Tinsley's first issue.

> FN16. This is not to say that when a trial court's summary judgment as to a coverage claim is reversed, the court's summary judgment on the extra-contractual claims must also be reversed. *See De Laurentis v. United Servs. Auto. Ass'n,* 162 S.W.3d 714, 726 (Tex.App.-Houston [14th Dist.] 2005, pet. filed). We recognize that an insured's claims for breach of contract and breach of the duty of good faith and fair dealing are separate and distinct causes of action. *See Moriel,* 879 S.W.2d at 17-18. But under the circumstances of this case, fact issues exist on both the contractual and extra-contractual claims.

V. CONCLUSION

In conclusion, State Farm's no-evidence challenge to Tinsley's breach of contract claim was sufficiently specific to comply with Rule 166a(i), and we therefore overrule Tinsley's second appellate issue. However, because the record evidence indicates a fact issue exists as to the cause of the damage to Tinsley's home and whether it was reasonable for State Farm to rely on Mgebeike's report, we sustain Tinsley's first issue on appeal. Accordingly, we reverse the trial court's summary judgment in favor of State Farm and remand for further proceedings consistent with this opinion.

Tex.App.-Houston [14 Dist.],2005.
Tinsley v. State Farm Lloyds
Not Reported in S.W.3d, 2005 WL 2675024 (Tex.App.-Hous. (14 Dist.))

Briefs and Other Related Documents (Back to top)

- 2004 WL 2020052 (Appellate Brief) Appellees' Brief (Aug. 24, 2004) Original Image of this Document (PDF)
- 2004 WL 1590417 (Appellate Brief) Appellant's Brief (Jun. 24, 2004) Original Image of this Document with Appendix (PDF)
- 14-04-00255-CV (Docket) (Mar. 16, 2004)

END OF DOCUMENT