

# IN THE SUPREME COURT OF TEXAS

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No. D-4095  
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STATE FARM FIRE & CASUALTY COMPANY, PETITIONER

v.

JAMES AND CYNTHIA SIMMONS, RESPONDENTS

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS  
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**Argued October 8, 1997**

JUSTICE ENOCH, dissenting.

I agree with the Court that an insurer cannot avoid bad-faith liability by refusing to investigate a claim. However, I disagree that there is legally sufficient evidence in this case to support the jury's bad-faith finding, because there is no evidence that a reasonable insurer could not deny the Simmons'es' claim based on the investigation State Farm performed. Accordingly, I respectfully dissent.<sup>1</sup>

## I

This Court has struggled with the tort of bad faith. *See Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 79-80 (Tex. 1997) (Enoch, J., concurring). In attempting to "clarify" no evidence review of a bad-faith finding, the Court has recast the tort, abandoning the "no reasonable basis" standard and replacing it with a "liability has become reasonably clear" standard. *Id.* at 80. I continue to believe that this "change" is no change at all. *Id.* ("[T]his semantic recasting of the elements of bad faith in no way alters the character of proof necessary for a plaintiff to prevail, nor does it change the manner in which an appellate court ought to conduct a legal sufficiency review in a bad-faith case.").

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<sup>1</sup> Because I would hold that there is no evidence of bad faith, I concur in the Court's judgment that the Simmons'es are not entitled to punitive damages. *See* \_\_\_ S.W.2d at \_\_\_.

Today's decision purports to turn on a different standard — that an insurer may breach the duty of good faith and fair dealing if it "investigat[es] a claim in a manner calculated to construct a pretextual basis for denial." \_\_\_ S.W.2d at \_\_\_. While I agree that an insurer has a duty to investigate its insureds' claims, this duty can form the basis of bad-faith liability only if the plaintiff presents evidence that the insurer's breach of this duty results in denial of a claim that no reasonable insurer could have denied. The problem with the Court's analysis is that it does not link the duty to investigate to the objective element of the bad-faith tort — whether the insurer's liability is reasonably clear. It is not enough that the investigation was "outcome-oriented," \_\_\_ S.W.2d at \_\_\_; there must be some evidence that a reasonable insurer could not have denied the claim, the particular insurer's subjective orientation notwithstanding. *See Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995) (noting that first element of bad-faith test — whether a reasonable insurer under similar circumstances might deny the claim — requires an objective determination).<sup>2</sup>

## II

Such evidence simply is missing in this case. In their pleadings in this Court, the Simmonses do not dispute that a reasonable insurer could conclude that *someone* intentionally set fire to the Simmonses' home. Our no evidence review must consist of a search of the record for some evidence that State Farm could not have reasonably concluded that the Simmonses set the fire. Close analysis of the evidence cited by the Court reveals that there is no evidence that a reasonable insurer could not have denied the Simmonses' claim.

First, the Court points to evidence that "[t]he Simmonses' fire loss claim was immediately deemed 'suspicious' because of [an] earlier theft claim." \_\_\_ S.W.2d at \_\_\_. I fail to see how this constitutes evidence of bad faith. Surely insurers are not precluded from being "suspicious" of

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<sup>2</sup> Of course, the insurer's orientation in investigating is highly relevant to the subjective prong of bad faith — whether the insurer knew or should have known that liability was reasonably clear — as well as to a punitive damages analysis. But an insurer's desire to deny a claim has no bearing on an objective analysis of whether a reasonable insurer could deny the claim.

claims. In any event, the insurer's subjectively-held suspicions are irrelevant to the objective determination of whether a reasonable insurer could have denied the claim.

Second, the Court holds that State Farm's "fail[ure] to investigate the possibility that other potential suspects might have started the fire" is some evidence of bad faith. \_\_\_ S.W.2d at \_\_\_. What is missing, however, is some evidence that a reasonable insurer could not deny coverage without performing such an investigation. An aspirational statement by a State Farm representative that "'it was important for [him] to do everything [he] could to get information with regard to th[e] claim before [he] made a final decision,'" \_\_\_ S.W.2d at \_\_\_ (quoting trial testimony), is no evidence that a reasonable insurer could not deny coverage without doing more.<sup>3</sup> The Court cites evidence that "State Farm did not pursue [other suspects] because of the physical evidence; *i.e.*, the house was locked and there was no evidence of forced entry." \_\_\_ S.W.2d at \_\_\_. If a reasonable insurer could deny coverage on this basis, then there is no bad faith. In the absence of some evidence that no reasonable insurer could deny coverage for this reason, State Farm's failure to conduct further investigation of other suspects is no evidence of bad faith.

Finally, the Court states that the purported absence of six of eight "common indicators of insurance fraud by arson" is some evidence of bad faith. \_\_\_ S.W.2d at \_\_\_. First, there is no evidence indicating that a reasonable insurer could not deny a claim if six of these eight criteria are not met. What is the standard for a reasonable insurer? Is it these criteria alone, or are there others? Would denial of a claim be reasonable if four of the eight criteria are present? How about six? The absence of evidence of this character — linking these eight criteria to what a reasonable insurer might do — is fatal to a bad-faith claim.

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<sup>3</sup> Similarly, statements by State Farm representatives that "policyholders reasonably expect insurers to thoroughly and adequately investigate claims, to disclose material facts, and to give policyholders the benefit of the doubt," and that "an adjuster should approach a policyholder to help resolve apparent conflicts," \_\_\_ S.W.2d at \_\_\_, are no evidence that a reasonable insurer could not deny coverage based on the investigation State Farm actually performed. These aspirational statements do not establish legal standards of reasonableness. Otherwise, an insurer could not deny a claim when there is a bona fide dispute about coverage without incurring bad-faith liability. Indeed, the Court acknowledges in this case that "[e]vidence establishing only a bona fide coverage dispute does not demonstrate bad faith." \_\_\_ S.W.2d at \_\_\_ (citing *Transportation Ins. Co. v. Moriel* 879 S.W.2d 10, 17 (Tex. 1994)).

Second, even as to the two criteria about which the Court acknowledges a dispute in the evidence, there is no evidence that a dispute over these criteria amounts to bad faith. For example, there was evidence that the Simmonses removed a lot of clothes from the home just shortly before the fire. However, there is no evidence that a reasonable insurer could not deny the Simmonses' claim in the face of a dispute about how much clothing was taken and how much was left behind. Moreover, when it denied the Simmonses' claim, State Farm had before it evidence that suggested that the Simmonses had such difficulty in making their mortgage payments that they had to strike a special deal with the Veterans Administration. There is no evidence that a reasonable insurer could not rely on this evidence in assessing the claim, nor is the fact that State Farm was mistaken as to the exact structure of the mortgage payments evidence of bad faith. *See Stoker*, 903 S.W.2d at 340 (stating that objective prong of bad-faith test "assures that a carrier 'will not be subject to liability for an erroneous denial of a claim,' as long as a reasonable basis for denial of the claim exists") (quoting *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988) (citation omitted)).

### III

An insurer's duty to investigate claims arises from, and must be construed in light of, its duty to pay claims when liability is reasonably clear. Bad-faith liability can exist only when there is some evidence that a reasonable insurer could not have denied the claim. A breach of the duty to investigate should give rise to bad-faith liability only when there is evidence connecting that breach to the conclusion that a reasonable insurer could not have denied the claim. Because there is no such evidence in this case, I respectfully dissent.

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Craig T. Enoch  
Justice

Opinion delivered: February 13, 1998