IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ADAM COOPER AND KIMBERLY COOPER,

Appellants,

v. Case No. 5D18-2585

FEDERATED NATIONAL INSURANCE COMPANY,

Appellee.
_____/

Opinion filed December 13, 2019

Appeal from the Circuit Court
for Brevard County,
Tonya B. Rainwater, Judge.

Matthew G. Struble, of Struble, P.A., Ft. Lauderdale, for Appellants.

Caryn L. Bellus, Barbara E. Fox and Bretton C. Albrecht, of Kubicki Draper, P.A., Miami, and Ilana Green Kellner, of Green, Ackerman & Matzner, P.A., Boca Raton, for Appellee.

COHEN, J.

Adam and Kimberly Cooper ("the Coopers") appeal a jury verdict in favor of Federated National Insurance Company ("FedNat"). The Coopers raise a number of issues on appeal, only one of which requires reversal: the trial court's refusal to give the Coopers' requested jury instruction. We affirm in all other respects.

The Coopers maintained a homeowner's insurance policy with FedNat and filed an insurance claim related to a small leak in a bedroom window of their home. Before the claim was resolved, the Coopers alleged that mold spread throughout their home as a result of the leak.

During the pendency of their claim with FedNat, the Coopers hired a mold remediation company, who sent FedNat a $13,000 invoice for work it completed at the Coopers' home. The invoice contained no details of the nature or scope of the remediation. FedNat requested that the company provide additional information regarding the work, but the company did not comply. Around that time, the Coopers also hired a public adjuster, who refused to provide FedNat with his estimate of the property damage. As a result, FedNat paid the Coopers what it determined was owed based on its own investigation. FedNat closed the case with the understanding that the claim would be reopened if and when the Coopers' public adjuster provided his damages estimate.

The Coopers filed a civil remedy notice ("CRN"), alleging that FedNat violated section 624.155(1)(b), Florida Statutes (2015), by failing to settle their claim in good faith. They also alleged that FedNat violated several provisions of section 626.9541(1)(i)3., Florida Statutes (2015), by failing to adopt and implement standards for the proper investigation of claims and denying claims without conducting reasonable investigations based upon available information. Further, the Coopers invoked the appraisal provision of their insurance policy.

After the Coopers filed the CRN and invoked the appraisal provision, the public adjuster forwarded his assessment of the damages to FedNat, although he had completed his report weeks earlier. He also provided FedNat with documentation

regarding the scope of the mold inundation. While the appraisal procedure was ongoing, a FedNat engineer sent an internal memorandum to one of FedNat's internal adjusters, acknowledging the extent of the mold in the Coopers' home. FedNat offered the Coopers $35,000 to settle the claim, which the Coopers rejected. At the conclusion of the appraisal process, a neutral referee determined that the Coopers were owed $11,395.56 for mold damage and $72,254.11 for repairs. FedNat paid the Coopers pursuant to the policy.

The Coopers filed the instant suit, alleging that FedNat violated section 624.155(1)(b) by not attempting to settle their claim in good faith when it could and should have done so. Additionally, they asserted that FedNat violated almost every provision of section 626.9541(1)(i)3. through acts such as failing to adopt and implement standards for the proper investigation of claims, misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue, and denying claims without conducting reasonable investigations based upon available information.

At trial, both sides presented conflicting evidence and experts as to the appropriateness of FedNat's handling of the claim. The Coopers submitted a proposed jury instruction related to the alleged violation of section 626.9541(1)(i)3., which provided, in relevant part:

> Bad faith on the part of an insurance company also includes violating Fla. Stat. § 626.9541 by committing any of the following acts:
>
> Failing to adopt and implement standards for the proper investigation of the claim; misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; failing to acknowledge and act promptly upon communications with respect to the claim; denying the claim without conducting reasonable investigations based upon available information; failing to promptly provide a reasonable explanation in writing to the insured of the basis in the

> insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement; failing to promptly notify the insured of any additional information necessary for the processing of a claim; failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

That proposed instruction tracked the language of section 626.9541(1)(i)3. The trial court denied the Coopers' request. Instead, it gave the standard jury instruction for bad faith:

> Bad faith on the part of an insurance company is failing to settle a claim when under all the circumstances it could and should have done so had it acted fairly and honestly toward its insured and with due regard for their interests.

Fla. Std. Jury Instr. (Civ.) 404.4. It also instructed the jury that it may consider evidence of negligence but that mere negligence does not constitute bad faith.

A note to the bad faith standard jury instruction provides that the instruction is not exhaustive on the subject of an insurer's failure to settle a claim. See Fla. Std. Jury. Instr. (Civ.) 404.4 n.2.[1] Although the trial court's instruction was a correct statement of the law, it failed to encompass the pleadings and proof elicited at trial; the Coopers presented evidence that FedNat violated section 626.9541(1)(i)3.a., b., c., and d. See Seaboard Coast Line R.R. v. Clark, 491 So. 2d 1196, 1198 (Fla. 4th DCA 1986) ("All parties are entitled to jury instructions on their theory of the case, even when the defendant offers evidence controverting that theory, where the evidence substantially supports the plaintiffs' theory." (citations omitted)).

[1] "Instruction 404.4 is applicable when the particular matter in issue is the insurance company's failure to settle a claim. This instruction does not exhaust the subject. Other instructions may be necessary if liability is asserted for the insurance company's violations of some other duty." Fla. Std. Jury Instr. (Civ.) 404.4 n.2 (citation omitted).

We recognize that trial courts are afforded broad discretion in instructing a jury and that "appellate courts do not find reversible error unless the error complained of resulted in a miscarriage of justice, or the instruction or failure to give a requested instruction was reasonably calculated to confuse or mislead the jury." Reyka v. Halifax Hosp. Dist., 657 So. 2d 967, 969 (Fla. 5th DCA 1995) (citing Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990)). However, we find that the instruction given in this case resulted in a miscarriage of justice.

The Coopers argued the alleged violation of section 626.9541(1)(i)3., but the jury was not instructed that it could consider whether FedNat committed any act identified in section 626.9541(1)(i)3. in determining whether FedNat acted in bad faith. A party's ability to make an argument to the jury does not substitute the need for a complementary instruction not covered in the standard instruction. R.J. Reynolds Tobacco Co. v. Jewett, 106 So. 3d 465, 470 (Fla. 1st DCA 2012) ("[T]he purpose of closing argument, [] 'is to help the jury understand the issues in a case by applying the evidence to the law applicable to the case.'" (quoting Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000))). "Leaving it to the parties' attorneys to explain to the jury in closing argument what legal principles apply is an inadequate substitute for an accurate, relevant, and complementary instruction that contains legal principles not covered in a standard instruction." Id. Contrary to FedNat's argument, we do not believe that the standard bad faith jury instruction sufficiently informed the jury of all the relevant law regarding bad faith.

Nor do we believe that, under the facts of this case, the acts constituting a violation of section 626.9541(1)(i)3. were subsumed within the standard jury instruction.[2]

FedNat cannot show that the trial court's failure to instruct the jury as the Coopers requested did not contribute to the verdict. Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1253 (Fla. 2014) (holding beneficiary of error must prove that error did not contribute to verdict). Additionally, we find that it is entirely possible that the jury could have found that FedNat settled the Coopers' claim in bad faith pursuant to section 624.155(b) had it been properly instructed on the relevant law. Accordingly, we reverse for a new trial; however, we limit the Coopers' claims to section 626.9541(1)(i)3.a., b., c., and d., and section 624.155(b), as the Coopers' evidence at trial supported only these claims. We affirm the trial court's rulings in all other regards.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

LAMBERT and EDWARDS, JJ., concur.

[2] The approach taken in Kearney v. Auto-Owners Insurance, No. 8:06–cv–00595–T–24TGW, 2010 WL 1507067 (M.D. Fla. Apr. 14, 2010), is instructive. In Kearney, the plaintiff sued its insurer, alleging violations of sections 624.155(1)(b)1. and 626.9541(1)(i)3. Id. at *1. The trial court gave the standard bad faith jury instruction but also instructed the jury that it could consider whether the insurer committed any act in section 626.9541(1)(i)3. in determining whether the insurer acted in bad faith. Id. at *2.