

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAY - 7 2013

MICHAEL S. RICHIE
CLERK

DIVISION I

OPITZ INC., d/b/a 5 STAR STORAGE,)
an Oklahoma Corporation,)

Plaintiff/Appellee,)

vs.)

Case No. 109,456

LE MARS INSURANCE COMPANY,)
a Foreign Corporation,)

Defendant/Appellant.)

APPEAL FROM THE DISTRICT COURT OF
CANADIAN COUNTY, OKLAHOMA

HONORABLE GARY E. MILLER, JUDGE

AFFIRMED

Jack Stipe,
James A. Belote,
STIPE, HARPER, LAIZURE, USELTON,
BELOTE, MAXCEY & THETFORD,
Oklahoma City, Oklahoma,

For Plaintiff/Appellee,

Thomas Edward Mullen,
FENTON, FENTON, SMITH, RENEAU
& MOON,
Oklahoma City, Oklahoma,

For Defendant/Appellant.

OPINION BY ROBERT D. BELL, JUDGE:

¶1 In this action for breach of an insurance contract and tortious bad faith in handling a claim, Defendant/Appellant, Le Mars Insurance Company, a Foreign Corporation (Insurance Company), appeals from the trial court's judgment entered upon a jury's award of \$225,000.00 in punitive damages to Plaintiff/Appellee, Opitz, Inc., d/b/a 5 Star Storage (5 Star). Insurance Company does not appeal from the actual damage award. We affirm the trial court's judgment.

¶2 5 Star operates a mini-storage facility for personal property and recreational vehicles. 5 Star's storage facility consists of metal buildings with metal roofs. 5 Star purchased a commercial insurance policy from Insurance Company whereby it insured the buildings for \$1,653,000.00 and the whole property for \$1,793,700.00. On February 10, 2009, 5 Star's storage facilities sustained hail damage. Insurance Company's independent adjusting firm, Central Oklahoma Claims (COC), hired Bill Bean of Berryman Enterprises, a contractor with experience in repairing metal buildings and roofs, to do a repair estimate and a replacement cost evaluation. Based on Mr. Bean's repair estimate and replacement cost evaluation, Insurance Company tendered a payment of \$602,491.14 for repair costs, less a \$94,000.00 co-insurance penalty and deductible. Insurance Company penalized 5 Star based on Insurance Company's assertion that 5 Star was under-insured.

¶3 5 Star hired Daniel Bowlware to prepare an estimate and evaluation. Mr. Bowlware testified the costs of repairs were more than Mr. Bean's estimate. Eight (8) months after the hailstorm, 5 Star sued Insurance Company for actual damages asserting Insurance Company intentionally underpaid and improperly penalized 5 Star. 5 Star also sought punitive damages for Insurance Company's bad-faith handling of the claim. At the conclusion of trial, the jury awarded actual damages of \$415,000.00 and punitive damages of \$225,000.00. Insurance Company satisfied the actual damage judgment amount, but appealed the trial court's award of punitive damages.

¶4 "This court does not weigh evidence or correctness of findings of fact by the jury, but examines only to determine whether the evidence, together with permissible inferences to be drawn therefrom, reasonably sustains the jury's verdict and the judgment based thereon." *McCorkle v. Great Atlantic Ins. Co.*, 1981 OK 128, ¶15, 637 P.2d 583, 586 (citation omitted).

¶5 On appeal, Insurance Company claims the evidence fails to support the jury's punitive damage award because there was a legitimate dispute as to the value of the buildings and whether the policy's under-insured penalty was applicable. Insurance Company contends the buildings' value at the time of the loss was determined according to a formula outlined in the policy. That formula also calculated the

amount of the penalty due to 5 Star's failure to fully insure the buildings. Insurance Company argues a dispute as to the repairs and the value of the buildings may create a breach of contract claim, but it does not support the tort of bad faith.

¶6 5 Star counters sufficient evidence supports the jury's award of punitive damages. 5 Star points out the evidence demonstrated Insurance Company improperly penalized 5 Star with the co-insurance clause and intentionally and unreasonably undervalued the costs required to repair the storm damage to 5 Star's storage facilities. 5 Star asserts its evidence showed that Insurance Company paid 5 Star less per square foot than it paid its other insureds for damages caused by the same hailstorm to their metal roofs. 5 Star also challenged the credibility of Insurance Company's witnesses.

¶7 "[A]n insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive, damages may be sought." *Christian v. American Home Assur. Co.*, 1978 OK 141, ¶25, 577 P.2d 899, 904.

We do not hold that an insurer who resists and litigates a claim made by its insured does so at its peril that if it loses the suit or suffers a judgment against it for a larger amount than it had offered in payment, it will be held to have breached its duty to act fairly and in good faith and thus be liable in tort. We recognize that there can be disagreements between insurer and insured on a variety of

matters such as insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured.

Id. at ¶ 25-26, 577 P.2d at 904-905.

¶8 Under the applicable standard of review and based on the record, we find the jury's punitive damage award was supported by sufficient evidence demonstrating Insurance Company unreasonably and in bad faith underpaid the instant claim. Even though there was conflicting evidence with regard to the reasonableness of Insurance Company's conduct, that issue was a question to be determined by the trier of fact after consideration of the circumstances of the case. *McCorkle* at ¶21, 637 P.2d at 587.

¶9 Insurance Company next contends the punitive damages award must be reversed because 5 Star failed to submit evidence of Insurance Company's net worth to the jury. 5 Star counters evidence of a defendant's *net worth* is not mandatory but is only one of seven factors that a jury may consider under 23 O.S. 2011 §9.1(E). See *Timmons v. Royal Globe Ins. Co.*, 1982 OK 97, ¶40, 653 P.2d 907, and *Capstick v. Allstate Ins. Co.*, 998 F.2d 810 (10th Cir. 1993). Both *Timmons* and *Capstick* held that under Oklahoma law, the defendant's economic resources and net worth *may* be

considered in assessing punitive damages. 5 Star submits the punitive damage award was based on other aspects of Insurance Company's financial condition.

¶10 We recognize a defendant's wealth is a consideration when a jury is deciding the amount of punitive damages. *Rodebush by and through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, ¶35, 867 P.2d 1241, 1251. However, we reject Insurance Company's argument that the record must contain evidence of a defendant's net worth before the jury's punitive damage award may be affirmed. The purpose of determining the defendant's net worth is to ascertain whether the amount of the punitive damages award is sufficient to restrain and serve as a warning to the wrongdoer. *Id.* We also review the size of the punitive damages award in relation to the defendant's financial condition to safeguard against an excessive verdict.¹ *Gilbert v. Sec. Fin. Corp. of Oklahoma, Inc.*, 2006 OK 58, ¶35, 152 P.3d 165, 178.

¶11 After reviewing the record, we find the punitive damage award was sufficiently large enough to punish Insurance Company, but was not so disproportionately large compared to the amount already paid by Insurance Company to its insured or the amount guaranteed under the \$1,793,300.00 policy limits. Therefore, we hold the

¹ When this Court reviews a punitive damages award, we consider the level of reprehensibility of the defendant's misconduct; the ratio of punitive damages awarded to the actual damages awarded; and the comparison of the punitive damages awarded and the civil penalties authorized. *Gilbert* at ¶35, 152 P.3d at 178

amount of punitive damages was reasonably related to the breach of contract claim and Insurance Company's financial condition.

¶12 We hold the trial court's judgment entered upon the jury's award of punitive damages is supported by the evidence. We further hold the amount of the punitive damage award was reasonable. Accordingly, the trial court punitive damage award is affirmed.

¶13 AFFIRMED.

JOPLIN, C.J., concurs, and BUETTNER, P.J., dissents.