FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-94 / 89-735

**LUCILLE K. WOODYARD,** Executor of the Estate of **BILLY M. WOODYARD,** and **LUCILLE K. WOODYARD,** Individually,

Appellant,

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vs.

**FIRESTONE TIRE AND RUBBER COMPANY,**

Appellee.

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Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

Appellant appeals the district court's granting of appellee's motion for summary judgment. **AFFIRMED.**

Stephen D. Lombardi of the Lombardi Law Firm, Des Moines, and Robert A. Nading II, Ankeny, for plaintiff-appellant.

Joseph G. Van Winkle and W. Scott Simmer of Gamble, Riepe, Webster, David & Green, Des Moines, for defendant-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

**HABHAB, J.**

Appellant appeals the district court's granting of appellee's motion for summary judgment. We affirm.

Appellant Lucille Woodyard is the executor of the estate of her late husband, Billy Woodyard. Billy was employed by appellee Firestone Tire & Rubber Company from November 12, 1964, until his death on July 27, 1984. As an employee, he was covered by a pension and insurance agreement which provided that appellee would pay those medical expenses due to accident or sickness which were not covered by the Worker's Compensation Act. On January 2, 1984, Billy was hospitalized and treated for a hernia. Complications from the surgery subsequently arose, and Billy died on July 27, 1984.

On October 5, 1984, appellant filed a claim for worker's compensation benefits with the Industrial Commissioner. On April 3, 1987, appellant submitted a written claim under appellee's group insurance agreement. Appellant asserted on this claim form that Billy's injury was work related. On February 29, 1988, appellant settled her worker's compensation claim with appellee's worker's compensation carrier. Appellant subsequently filed, on March 22, 1988, the present lawsuit alleging appellee had acted in bad faith in refusing to pay Billy's medical expenses under the group health coverage while appellant's worker's compensation claim was still pending. The district court, in granting appellee's motion for summary

judgment, determined that there was no factual dispute as to whether a reasonable basis existed for appellee's denial of benefits under the group health plan. Appellant appeals from that determination.

Initially, we consider appellee's motion to strike two exhibits from appellant's reply brief and appellant's motion to add these exhibits to the appendix.[1] Rule 15(a), Iowa R. App. P., provides in relevant part: "In absence of agreement or after assignment, the appendix may be amended only with leave of the appropriate appellate court." Appellant's failure to seek leave of court to amend the appendix requires us to strike from consideration the two exhibits in dispute.

Our review is on assigned errors of law. Iowa R. App. P. 4. In ascertaining whether summary judgment under Iowa Rule of Civil Procedure 237(b) is appropriate, we must apply the following standard:

> Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.

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1. By order of Justice Carter, these motions were submitted with the appeal.

Martinke v. H-N-W Associates, 393 N.W.2d 320, 321 (Iowa 1986) (quoting Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984)).

The Iowa Supreme Court announced in Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988), its recognition of first-party bad faith claims. In order to demonstrate such a claim

> a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Id. (quoting Anderson v. Continental Ins. Co., 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)). Under this test, the insurer is permitted to dispute any claim which is "fairly debatable," regardless of whether the controversy concerns a matter of law or fact. Id.

When we apply the Dolan test to the facts of this case, we conclude the district court was correct in granting appellee's motion for summary judgment. The group insurance plan clearly excluded payment of medical benefits if the employee was entitled to reimbursement under worker's compensation. Appellant consistently alleged that Billy's medical bills were the result of a work-related injury. As such, a fairly debatable issue existed as to whether appellant was entitled to benefits under appellee's group insurance agreement. Appellee could rightfully refuse payment until the issue of whether Billy's injuries were covered under appellee's worker's compensation

coverage was determined. We hold appellant failed as a matter of law to show the absence of a reasonable basis for appellee's denial of benefits. In conclusion, we limit this ruling to those circumstances where the claimant at the time he makes claim under his group policy specifically states that the medical bills submitted for payment were incurred as a result of work-related injuries.

**AFFIRMED.**