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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002970-MR
AND
NO. 2000-CA-000044-MR

HASHIM ALSABI AND
BOROWITZ AND GOLDSMITH, PLC APPELLANTS/CROSS-APPELLEES

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 98-CI-001364

ALLSTATE INSURANCE COMPANY
AND PEGGY T. SMITH APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Hashim Alsabi and Borowitz & Goldsmith, PLC (B&G), have appealed from a summary judgment entered in the Jefferson Circuit Court on November 29, 2000, which dismissed their claims under the Unfair Claims and Settlement Practices Act, the Kentucky Consumer Protection Act, and common law fraud. Having concluded that there is no genuine issue as to any

material fact and that the appellees are entitled to summary judgment as a matter of law, we affirm.

The case sub judice has been previously before this Court and the Supreme Court of Kentucky on a statute of limitations issue in Gailor v. Alsabi.[1] For the sake of economy and consistency, we adopt the Supreme Court's version of the facts verbatim:

> This action arises out of an automobile accident which occurred on June 3, 1991 on Taylor Boulevard in Louisville, Jefferson County, Kentucky. Two vehicles were involved in the accident, one owned and operated by Appellee Hashim M. Alsabi and the other owned and operated by Fred Whalen. Appellee was the named insured of a policy of insurance issued by Kentucky Farm Bureau Mutual Insurance Company, which paid $7,238.90 in basic reparation benefits (BRB) for chiropractic bills incurred by Appellee. It is stipulated that the last BRB payment was made on February 4, 1992. Fred Whalen was the named insured of a policy of liability insurance issued by Allstate Insurance Company.
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> Whalen died of natural causes at the age of eighty-two on February 5, 1992. His will was admitted to probate by the Jefferson District Court on March 2, 1992. In her petition for probate, Whalen's widow and sole beneficiary requested that she be appointed executrix of his estate. Instead, the district judge admitted the will to probate without appointing a personal representative. The probated will was filed as a public record in the office of the Jefferson County Court Clerk on March 10, 1992.
>
> On February 3, 1994, Appellee filed this action against Fred Whalen and caused summons to issue against him at 2032 Lytle Street, Louisville, Kentucky, the address listed on

[1] Ky., 990 S.W.2d 597 (1999).

> the accident report. The summons was returned on February 16, 1994 with the notation that Whalen was deceased. Appellee's attorney asserts that he did not learn of Whalen's death until April 6, 1994. He did not move that the public administrator be appointed to administer Whalen's estate pursuant to KRS 395.390 until September 22, 1994. The appointment was made on November 17, 1994. On January 19, 1995, Appellee filed an amended complaint substituting the public administrator as a party defendant in place of Whalen.[2]

Simultaneously to the action in Gailor, Alsabi and B&G filed a complaint on March 10, 1998, alleging the claims that are now before this Court. On November 30, 1999, Allstate filed a motion for summary judgment and on November 29, 2000, the trial court entered an opinion and order granting the motion for summary judgment. This appeal followed.

In their brief, Alsabi and B&G argue that our Supreme Court's decision in Gailor, supra, is inapplicable to the issues now before this Court:

> Notwithstanding the Supreme Court's withdrawl [sic] of its original opinion, in its second Gailor v. Alsabi opinion, the Supreme Court reviewed only the issue of limitations and the effect of CR 15.03(2). 990 S.W.2d at 602. The high Court expressly stated that the issue of estoppel was not preserved for review. Gailor v. Alsabi, 990 S.W.2d at 602. The Supreme Court did not address or decide whether Allstate (1) violated KRS 304.12-230 as alleged in Count I of Plaintiff's complaint; (2) perpetrated a fraud in handling Alsabi's claim as alleged in Count II of Plaintiffs' complaint; or (3) violated KRS 367.170 as alleged in Count III of Plaintiff's complaint. Notwithstanding that, the Trial Court in the case at bar

[2] Id. at 599-600.

sustained the Defendants' motion for summary judgment and dismissed the underlying complaint which is the order appealed from. [citations to the record omitted] [emphases original].

We agree that our Supreme Court in Gailor, supra, expressly stated that these issues had not been properly preserved for appeal by Alsabi and B&G. However, even though the issues had not been properly preserved, the Supreme Court chose to address these issues at length and we are bound to follow the law of the case from Gailor.[3] Moreover, Alsabi and B&G cannot now benefit from their failure to properly preserve the issues during the previous appeal. We will discuss each issue more fully herein.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be

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[3]The "law of the case" doctrine has been broadly interpreted "to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation." Inman v. Inman, Ky., 648 S.W.2d 847 (1982).

[4]CR 56.03.

resolved in his favor."[5] In Paintsville Hospital Co. v. Rose,[6] our Supreme Court held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[7] The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[8]

We will first address Alsabi's and B&G's claim under common law fraud, which was based on their claim that Peggy Smith, while working as an agent for Allstate, made representations to Alsabi and B&G that Whalen was still alive by referring to him as their "insured." Pursuant to Smith v. General Motors Corp.,[9] for Alsabi and B&G to establish an

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[5]Steelvest, supra at 480.

[6]Ky., 683 S.W.2d 255 (1985).

[7]Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480.

[8]Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[9]Ky.App., 979 S.W.2d 127, 129 (1998)(citing Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634 (1997), and (continued...)

actionable case for fraud based upon suppression of a fact, they must establish (1) that Allstate had a duty to disclose a material fact, (2) that Allstate failed to disclose same, (3) that Allstate's failure to disclose the material fact induced them to act, and (4) that they suffered actual damages therefrom.

This Court in Smith stated:

> It is, of course, well established that mere silence is not fraudulent absent a duty to disclose. Hall v. Carter, Ky., 324 S.W.2d 410 (1959). A duty to disclose may arise from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose same. See Bryant v. Troutman, Ky., 287 S.W.2d 918 (1956); Dennis v. Thomson, 240 Ky. 727, 43 S.W.2d 18 (1931); and Faulkner [Drilling Co., Inc. v. Gross, Ky.App.,] 943 S.W.2d [ ] 634 [1997].[10]

Alsabi and B&G have offered no legal support for their argument that Allstate had a duty to affirmatively notify them that Whalen was deceased. In Gailor, the Supreme Court stated:

> We cannot assume in the absence of evidence that Peggy Smith knew that Appellee's attorney was ignorant of Whalen's demise, or that Smith was thus induced to fraudulently conceal that fact from him. There is no evidence in this record of any communication at all between Smith and Appellee's attorney during the period between September 8, 1993 and February 4, 1994, except for Smith's letters of October 15, 1993 and November 22, 1993, requesting that some communication occur. Perhaps, if Appellee's attorney had responded to these requests, Smith, as was

[9](...continued) Wahba v. Don Corlett Motors, Inc., Ky.App., 573 S.W.2d 357 (1978)).

[10]Id.

> suggested in Lingar v. Harlan Fuel Co., [298 Ky. 216, 182 S.W.2d 657 (1944)] might have imparted the crucial information to him. In the absence of any evidence of animus on Smith's part, there can be no claim of fraudulent concealment. In the absence of any evidence of reliance on the part of Appellee's attorney, there can be no estoppel.[11]

Our review of the record reflects that there was very little documented communication between the parties from 1992 through 1994. Alsabi and B&G have failed to establish any genuine issue of material fact which would support their claim that Allstate had a duty to notify them that Whalen was deceased. Furthermore, we cannot accept their argument that Allstate's references in regard to Whalen as its "insured" was an act of fraudulent concealment. Accordingly, we hold that the trial court properly entered summary judgment dismissing Alsabi's and B&G's claim for common law fraud.

Next, we will address Alsabi's and B&G's claim under the Unfair Claims Settlement Practices Act. The pertinent portion of KRS[12] 304.12-230 states:

> It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:
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> (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
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> . . .

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[11]Gailor, supra at 604.

[12]Kentucky Revised Statutes.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become clear;

(7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

. . .

(14) Failing to promptly provide a reasonable explanation 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[.]

From our reading of Alsabi's and B&G's brief, the only allegations of bad faith that we have been able to discern relate to the failure to disclose that Whelan was deceased. Taken in its best light, this allegation does not rise to bad faith. In Motorists Mutual Insurance Co. v. Glass,[13] our Supreme Court addressed this issue and set forth the standard that must be met for a claim under the UCSPA:

> The common law cause of action premised upon an insurance company's bad faith refusal to settle a claim arose initially in the context of an insurer's failure to settle a liability claim against its own insured, which resulted in a verdict in excess of the insured's policy limits. In Manchester, we recognized that under the principle of privity of contract, the cause of action belonged only to the liability insured; but that the insured could assign it to the liability plaintiff in consideration for a release of the insured from any liability in excess of the policy limits. As assignee of

[13] Ky., 996 S.W.2d 437 (1997).

the insured, the successful plaintiff could then bring the "bad faith" action in a derivative capacity against the insurer to recover the excess amount of the verdict. Punitive damages were not recoverable, because the action was considered to be one for breach of contract. This type of action is referred to as a "third-party bad faith" action. Mere negligent failure to settle within the policy limits or errors of judgment are insufficient to constitute bad faith [citations omitted].

. . .

Punitive damages could not be awarded because "punitive damages ordinarily are not recoverable for a breach of contract" [citations omitted].

. . .

[W]e held in <u>State Farm Mutual Automobile Insurance Co. v. Reeder</u>, Ky., 763 S.W.2d 116 (1998), that a violation of the UCSPA could create a private cause of action for a third-party claimant damaged as a result of the violation of one or more of its provisions. <u>Reeder</u> did not address the degree of proof necessary to prevail on such a claim. That issue awaited our decision in <u>Wittmer v. Jones</u>, [Ky., 864 S.W.2d 885 (1993)].

. . .

Those principles were enunciated as follows:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. . . . [A]n insurer

> is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts [citation omitted].[14]
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> Again quoting from the Federal Kemper [Insurance Co. v. Hornback, Ky., 711 S.W.2d 844 (1986)] dissent, we held in Wittmer that in order to justify an award of punitive damages, there must be proof of bad faith sufficient for the jury to conclude that there was conduct that was outrageous, because of the defendant's evil motive, or his reckless indifference to the rights of others. If the evidence suffices to justify punitive damages under this standard, a cause of action for statutory bad faith premised on a violation of the UCSPA may be maintained. If not, the cause of action cannot be maintained. Wittmer, supra, at 890-01. Finally, we held in Wittmer that there can be no private cause of action for a mere "technical violation" of the UCSPA [citation omitted].[15]

In Gailor, the Supreme Court fully addressed whether Smith's acts on behalf of Allstate were misleading or deceptive. The Supreme Court concluded that there was no evidence of Allstate's intent to mislead Alsabi and B&G by referring to Whelan as "Our Insured" in the correspondence between the parties. In fact, the Supreme Court stated that regardless of Whelan's mortal condition he remained Allstate's insured.[16] Accordingly, we hold that the trial court properly entered summary judgment dismissing Alsabi's and B&G claim for bad faith under the UCSPA because there is not genuine issue of material

[14] Id. (quoting Wittmer, supra at 890).

[15] Id. at 451-52.

[16] Gailor, supra at 604.

fact which could rise to the level required by Glass to maintain such an action.

Alsabi's and B&G's final claim of error arises under the Kentucky Consumer Protection Act. KRS 367.170(1) provides:

> Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

In their brief Alsabi and B&G argue:

> Appellants assert that with all due respect to this Court, the logic of the decision in Anderson[17] is unsound and the issue needs to be revisited and altered in accordance with Appellants' position herein for several reasons.

We have reviewed Anderson and we see no justification for overruling it. We believe the reasoning in Anderson is sound and well accepted in this Commonwealth. In Anderson, this Court stated:

> Although Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819 (1988), provides that the purchase of an insurance policy is covered under the Consumer Protection Act, we have found no cases extending coverage of the Act to third-party claims. The insured who purchased the policy is the one who may properly have a claim for unfair practices against the insurer. Stevens, supra. The insured is the consumer and the one within the class of persons protected by the Act. See Brian H. Redmond, Annotation, Coverage of Insurance Transactions Under State Consumer Protection Statutes, 77 A.L.R.4th 991 (1990). Skilcraft Sheetmetal v. Kentucky Machinery, Ky.App., 836 S.W.2d 907 (1992), is a somewhat analogous case in that a subsequent purchaser of a used wheel loader could not maintain an action under the Consumer Protection Act

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[17] Anderson v. National Security Fire & Casualty Co., Ky.App., 870 S.W.2d 432 (1993).

> against a seller with whom he had not dealt and who had made no warranties to subsequent purchasers. "The legislature intended that privity of contract exist between the parties in a suit alleging a violation of the Consumer Protection Act." Id. at 909.[18]

Accordingly, we hold that the trial court properly entered summary judgment dismissing Alsabi's and B&G's claim under the Consumer Protection Act.

In its cross-appeal, Allstate argues that B&G lack proper standing to be a party to this action. We agree that it is highly unusual for the law firm that is representing a plaintiff in a personal injury lawsuit to become a party in that action. However, due to our other holdings, this issue is moot and will not be addressed any further.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

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[18] Id at 435-36.