

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001355-MR

EQUITANIA INSURANCE CO.,
ROBERT B. CONGLETON, ROBERT P. LEVY,
DONALD G. FRALEY and RICHARD E. VIMONT APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 97-CI-00604

SLONE & GARRETT, P.S.C.
and
LAUREL L.F. GARRETT, APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: The appellants (Equitania Insurance Co., Robert B. Congleton, Robert P. Levy, Donald G. Fraley, and Richard E. Vimont) appeal from a final judgment of the Fayette Circuit Court resulting from a jury verdict rejecting their claim of legal malpractice against the appellees (Sloan & Garrett, P.S.C. and Laurel L.F. Garrett). We affirm.

While the facts underlying this case are extremely complicated, it is not necessary to this opinion that they be fully explained herein. Thus, we will only state the facts to the extent necessary for this opinion.

The appellants ("the Vimont Group") were shareholders in Equitania Insurance Co., a privately held Kentucky corporation which provided insurance coverage to horse owners. In 1993, disputes between the Vimont Group and a group of Equitania shareholders led by Johann Pavenstedt ("the Pavenstedt Group") arose. The two groups of shareholders began to vie for control of the corporation. Eventually, the Vimont Group bought out the Pavenstedt Group.

After the Vimont Group bought out the Pavenstedt Group, Equitania continued its trend of not returning a profit. The Vimont Group eventually entered into an agreement with Markel Insurance Co. to sell the "book of the business." In effect, Markel would obtain the right to renew all Equitania policies, and Equitania agreed to a five-year non-compete clause.¹ This deal closed in January 1995.

In March 1995, the Vimont Group filed a civil complaint in the Fayette Circuit Court seeking to rescind the agreement between them and the Pavenstedt Group wherein the

¹ Markel did not buy Equitania stock.

Vimont Group bought out the Pavenstedt Group. The case was assigned to Fayette Circuit Judge Gary Payne. Ruling that the stock purchase agreement between the Vimont Group and the Pavenstedt Group should not be set aside, a judgment against the Vimont Group was rendered by Judge Payne. The judgment was upheld by this court on appeal in an unpublished opinion.

Laurel L.F. Garrett and the law firm of which she was a member had represented the Vimont Group in its attempt to gain control of Equitania prior to the Vimont Group buying out the shares of the Pavenstedt Group. As a result of that representation, the Vimont Group filed a civil complaint against Garrett in the Fayette Circuit Court in February 1997. The complaint essentially alleged legal malpractice by Garrett in connection with her representation. This case was assigned to Fayette Circuit Judge John R. Adams.

The Vimont Group's complaint contained two main allegations of negligence against Garrett, one of which was effectively eliminated by Judge Adams' interpretation of a contract. The other portion of the claim was resolved in Garrett's favor by a jury verdict. Following the entry of a final judgment, the Vimont Group appealed to this court.

The Vimont Group's first argument is that Judge Adams erred by not following Judge Payne's interpretation of a

contract.² The Vimont Group does not specifically argue that Judge Adams' interpretation of the contract was incorrect. Rather, it argues that Judge Adams was bound to follow Judge Payne's interpretation due to the legal principles of *stare decisis* and collateral estoppel.

Concerning the argument of *stare decisis*, Garrett first urges this court to reject the argument on the ground that the Vimont Group did not preserve it by arguing the point to the trial court. A review of the record indicates that the Vimont Group's attorney first argued to Judge Adams that the issue of the interpretation of the contract was an issue of fact for the jury. Later in the hearing before Judge Adams, the Vimont Group cited Judge Payne's prior findings and conclusions. The Vimont Group never raised the doctrine of *stare decisis* in support of its argument to Judge Adams that he should yield to Judge Payne's interpretation of the contract.

In Abuzant v. Shelter Ins. Co., Ky. App., 977 S.W.2d 259 (1998), this court held that the failure of a party to raise certain arguments before the trial court constituted a waiver of such arguments and precluded appellate review. Id. at 262. Similarly, in Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985), this court stated that "if the trial court had no opportunity to

² This was the ruling by Judge Adams that effectively destroyed the Vimont Group's first allegation of negligence against Garrett.

rule on the question, there is no alleged error for this court to review." Id. at 763. We agree with Garrett that, because the Vimont Group did not raise the *stare decisis* argument before the trial court, the argument is not subject to our review.

Assuming, without deciding, that the Vimont Group preserved error in this regard, we nevertheless conclude that the doctrine of *stare decisis* is neither applicable nor grounds for reversal. "Under the doctrine of *stare decisis*, once a point of law has been established by a court, that point of law will, generally, be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised." 5 Am Jur 2d APPELLATE REVIEW § 559 (1995). Likewise, "[u]nder the doctrine of *stare decisis*, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same." 20 Am Jur 2d COURTS § 147 (1995). Kentucky courts follow the doctrine of *stare decisis*. See Yeoman v. Commonwealth, Health Policy Bd., Ky., 983 S.W.2d 459, 469 (1998).

We conclude that Judge Adams was not bound by the doctrine of *stare decisis* to follow Judge Payne's interpretation of the contract. We know of no authority, nor has the Vimont Group cited us to any, that holds that one circuit judge is bound by a contract interpretation by another circuit judge.

They are not the same court nor is one lower in rank to the other. Furthermore, to the extent that this court affirmed Judge Payne's ruling on appeal, it cannot serve as authority for the Vimont Group's argument because the opinion was unpublished. See CR³ 76.28(4)(c). Simply put, *stare decisis* does not apply in situations such as this.⁴

We also reject the Vimont Group's argument that the doctrine of collateral estoppel bound Garrett to Judge Payne's interpretation of the contract. Under the doctrine of collateral estoppel, a judgment on the merits in a prior suit involving the same parties or their privies precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Napier v. Jones, Ky. App., 925 S.W.2d 193, 196 (1996). Because Garrett and her law firm were not parties to the earlier suit, Judge Payne's ruling on the contract interpretation issue is not binding on them.

The Vimont Group's second argument is an alternative to its first argument. Therein, the Vimont Group argues that, even if the doctrines of *stares decisis* and collateral estoppel were not applicable, then the court should have allowed the

³ Kentucky Rules of Civil Procedure.

⁴ Likewise, the "law of the case" doctrine is not applicable because Judge Payne's decision and Judge Adams' decision were made in different cases.

parties to litigate the facts of the contract. In support of this argument, the Vimont Group cites Hunter v. Wehr Constructors, Inc., Ky. App., 875 S.W.2d 899 (1993), and Cook United, Inc. v. Waits, Ky., 512 S.W.2d 493 (1974).

Generally, "interpretation of contracts is an issue of law for the court to decide." Fay E. Sams Money Purchase Pension Plan v. Jansen, Ky. App., 3 S.W.3d 753, 757 (1999). Also, where a contract is not ambiguous, "it needs no construction and will be performed or enforced in accordance with its express terms." First Com. Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829, 836 (2000), citing Ex Parte Walker's Ex'r, 253 Ky. 111, 68 S.W.2d 745, 747 (1933). "The intention of the parties to a written instrument must be gathered from the four corners of that instrument." Hoheimer v. Hoheimer, Ky., 30 S.W.3d 176, 178 (2000).

Despite these general principles of law, the Vimont Group has accurately cited authority to support their argument.

In the Cook United case, the court stated as follows:

The interpretation of an integrated agreement is directed to the meaning of the terms of the writings in the light of the circumstances. The question of interpretation in these circumstances is to be determined by the trier of fact if it depends on a choice among reasonable inferences to be drawn on the extrinsic evidence admissible apart from the application of the parol evidence rule.

Otherwise, the question of interpretation is a question of law.

512 S.W.2d at 495. This principle was again cited in the Hunter case wherein the court reiterated that "if there is more than one reasonable inference to be drawn . . . the question should be submitted to the jury." 875 S.W.2d at 901. The court therein further explained, "in other words, if the writing is ambiguous, the factual question of what the parties intended by it is for the jury." Id.

The Vimont Group points to circumstances surrounding the contract which would indicate that it should be construed in accordance with Judge Payne's ruling rather than Judge Adams' ruling. The fallacy of this argument is that the Vimont Group failed to demonstrate to Judge Adams that there was any ambiguity in the contract. Furthermore, the Vimont Group has not argued in its brief to this court that such an ambiguity exists. As there was no ambiguity in the contract, we agree with Judge Adams that the interpretation of this contract was a matter of law.

The Vimont Group's third argument is that the trial court erred in excluding a portion of the testimony of its expert witness regarding legal malpractice by Garrett. The Vimont Group was required by court order to identify its expert witnesses and their opinions by no later than October 1, 1999.

It missed that deadline, but it identified its experts and opinions in disclosures served on December 6, 1999. One of the Vimont Group's expert witnesses was Professor Manning Warren III. Despite the late disclosure, the court allowed Warren to testify as an expert witness but limited his opinions to the allegedly negligent actions identified in the Vimont Group's complaint. A new deadline of January 14, 2000, was set for expert disclosures.

Over one month after the new deadline, the Vimont Group filed a supplemental disclosure at which time it raised new allegations of negligence against Garrett that had not been addressed in its prior pleadings or during discovery. Less than a week before the scheduled trial date of April 3, 2000, a hearing was held and the court limited Warren's testimony to theories of negligence that had been previously identified in pleadings or discovery responses but excluded testimony regarding new theories of negligence.

The Vimont Group then attempted to appeal an earlier ruling by the court, and the court granted a continuance of the trial scheduled for April 3, 2000, so that the Vimont Group could proceed with its appeal. The appeal was dismissed by this court as being an appeal from an interlocutory order or judgment. After the case was remanded to the circuit court, a new trial date was assigned. Despite the fact that the Vimont

Group made no effort to have the court alter or amend its pretrial order regarding the amendment of pleadings, identification of experts and their opinions, or discovery deadlines, it now argues that the court erred in not allowing additional testimony by Professor Warren as to theories of liability not initially alleged.

It is within the court's discretion to establish pretrial orders governing pretrial procedure. CR 16. The parties are bound by such pretrial orders. Marcum v. Smith, Ky., 375 S.W.2d 386 (1964). We will examine whether the trial court abused its discretion in requiring the Vimont Group to comply with the pretrial order.

Where a party attempts to shift its theory and where the other party objects and would be prejudiced by the shift in theory, then the trial court is authorized to deny the admission of such evidence. United Pac. Ins. Co. v. Collins, Ky., 389 S.W.2d 242, 243 (1964). Similarly, it has been held that it is not error for a trial court to refuse to permit an amended pleading, which substantially changed the defense after proof had been taken, to be filed. Harding v. Kentucky Title Trust Co., 269 Ky. 622, 108 S.W.2d 539, 547-48 (1937).

In the case *sub judice*, it was not an abuse of discretion for the court to refuse to allow the Vimont Group's expert witness to add new theories of negligence at such a late

date. Although discovery depositions had been taken, the Vimont Group sought to inject new theories of negligence into the case shortly before trial. The attempt to add the new theories at the late date would have been prejudicial to Garrett.

Furthermore, the Vimont Group has not shown that the new theories were previously unavailable and has not shown why the witness could not have come to those conclusions in a timely manner. In short, the trial court did not abuse its discretion in requiring the Vimont Group to comply with the pretrial order since no justification or adequate explanation was given for its failure to do so.

The Vimont Group also argues that the continuance of the case due to the appeal cured any prejudice against Garrett that might otherwise exist in this regard. Therefore, it argues that the trial court erred in not allowing a supplementation of Professor Warren's opinions at the later second trial date. The fallacy of this argument is that the Vimont Group never attempted to later amend their initial pleadings or responses or otherwise seek relief from the court based on the continued trial date. In short, their argument in this regard is without merit.

The Vimont Group's fourth argument is that the trial court made multiple errors in the written instructions given to the jury at the conclusion of the evidence. Because the jury

rendered a verdict in favor of Garrett under Instruction No. 2, it went no further and did not address the remaining instructions. Thus, any error in the subsequent instructions is harmless error, and the issues raised by the Vimont Group as to those instructions are moot.

Instruction No. 2 read as follows:

It was the duty of Defendant, Laurel Garrett, in undertaking the legal representation of the Plaintiffs, to possess to an ordinary extent the technical knowledge commonly possessed by those in her profession, to exercise that degree of care and skill which an ordinary, reasonably competent lawyer would exercise under the same or similar circumstances. Provided, however, a lawyer cannot be held responsible for errors in judgment or for advising of a course of action even if that course of action ultimately proves to be unsuccessful.

Following the instruction, the court submitted a written question to the jury asking it whether it believed from the evidence that Garrett failed to comply with these duties and that such failure was a substantial factor in causing the Vimont Group damages. The jury responded "No."

The Vimont Group argues that the court should have given the jury the instruction that it tendered rather than Instruction No. 2. Its tendered instruction included the language in Instruction No. 2 that required Garrett "to exercise that degree of care and skill which an ordinary, reasonably competent lawyer would exercise under the same or similar

circumstances." However, the Vimont Group's tendered instruction did not contain the language that required Garrett "to possess to an ordinary extent the technical knowledge commonly possessed by those in her profession," nor did the tendered instruction contain the language that "a lawyer cannot be held responsible for errors in judgment or for advising of a course of action even if that course of action ultimately proves to be unsuccessful." The Vimont Group argues that these portions of the instructions are not accurate statements of the law and do not comply with the requirement that instructions should only provide "the bare bones." See Cox v. Cooper, Ky. App., 510 S.W.2d 530, 535 (1974).

First, we agree with Garrett that the challenged portions of Instruction No. 2 accurately reflect the applicable law. See Daugherty v. Runner, Ky. App., 581 S.W.2d 12, 15-16 (1978). Second, although jury instructions in Kentucky usually follow the "bare bones" approach, the inclusion of additional portions which accurately reflect the law does not constitute reversible error unless they are prejudicial. See Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y., Ky., 303 S.W.2d 319, 321 (1957); and Ruehl v. Houchin, Ky., 387 S.W.2d 597, 600 (1965). The portions of the instruction to which the Vimont Group object are accurate statements of the law and are neither

misleading nor prejudicial. Thus, we find no error in the instructions.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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