RENDERED: NOVEMBER 4, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002155-MR
AND
NO. 2004-CA-000219-MR

JEFF AND TRACY YAZELL — APPELLANTS

v.

APPEALS FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
CIVIL ACTION NOS. 03-CI-00297 AND
01-CI-00401

FOREMOST INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.[1]

PAISLEY, SENIOR JUDGE: This is an appeal from certain orders of the Grant Circuit Court. Jeff and Tracy Yazell had filed suit against Foremost Insurance Company, claiming breach of contract, common law bad faith, and violations of the Unfair Claims

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Settlement Practices Act (UCSPA), Kentucky Revised Statutes (KRS) 304.12-230. The action arose out of Foremost's denial of the Yazells' claim under a homeowner's insurance policy following a fire that destroyed their mobile home. The trial court granted Foremost summary judgment on the Yazells' bad faith and UCSPA claims prior to trial, and also granted Foremost's motion to strike the Yazells' expert witness. Following a jury trial on the remaining claim of breach of contract, the circuit court entered judgment in favor of Foremost. This appeal has been consolidated with the appeal of an earlier order of the court dismissing a separate complaint that the Yazells had filed against Foremost under the Consumer Protection Act. See KRS 367.170.

On May 14, 1998, Tracy Yazell and her father James purchased a mobile home for $29,500.00. The purchase was made under a land contract that required installment payments of $306.00 per month. James and his wife lived in the home for about two years, but he was unable to continue making the payments, so he sold his share in the property to Tracy for $5,000.00 and she took over the payments under the contract. Tracy, her husband Jeff and their four children moved into the home. In early November 2000, they bought a mobile homeowner's insurance policy from a local Foremost agent. They made the purchase on the advice of Tracy's father who had maintained a

similar policy on the home. The home structure was insured for $50,000.00, the personal property contents for $30,000.00 and additional living expenses for $10,000.00. The Yazells lived in the home until it was destroyed by fire on November 25, 2000, about two weeks after they took out the policy.

After investigating the fire for several months, Foremost informed the Yazells that the company was denying their claim because Foremost's arson investigator had determined that there was sufficient evidence to demonstrate that the fire was intentionally set, and that the Yazells were involved.

The Yazells filed suit against Foremost in Grant Circuit Court on November 21, 2001, alleging breach of contract, common law bad faith and violations of Kentucky's Unfair Claims Settlement Practices Act, KRS 403.12-230.[2] The complaint requested punitive damages, alleging that Foremost had acted in an "oppressive, fraudulent and malicious [manner] with reckless disregard for the consequences [of their actions]" and had "been grossly negligent toward the plaintiffs."

Foremost took the deposition of the Yazells' proffered bad faith expert, Douglas Koliboski, on April 23, 2003. On August 1, 2003, Foremost filed a motion to strike Koliboski on the grounds that his opinions were neither relevant nor

[2] KRS 446.070 authorizes a private cause of action for damages arising from a violation of the UCSPA. See State Farm Mutual Automobile Insurance Co. v. Reeder, 763 S.W.2d 116, 117 (Ky. 1988).

reliable. The circuit court held a hearing in the matter which is not included in the record, and thereafter granted Foremost's motion to strike Koliboski.

The court also granted Foremost's motion to exclude evidence of emotional distress; it ordered that no party or witness be allowed to make any reference to polygraph or voice stress tests; and it granted Foremost's motion for partial summary judgment on the Yazells' bad faith and UCSPA claims. It also denied the Yazells' motion to amend their complaint to add a claim under the Consumer Protection Act, KRS 367.170. The Yazells thereafter filed a second complaint, alleging violations of the Consumer Protection Act. The court denied their motion to consolidate the two actions, and granted Foremost's motion to dismiss the second complaint.

The jury trial commenced on November 19, 2003, solely upon the Yazells' remaining claim for breach of contract. The jury rendered a verdict in favor of Foremost by responding "Yes" to the following question: "Do you believe from the evidence that the Yazells or someone on their behalf brought about the destruction of the property by fire?"

After the trial, the Yazells filed a motion for a mistrial on the grounds that the jury had mistakenly been allowed to see evidence of the Yazells' refusal to take a

polygraph test. The circuit court denied the motion and entered judgment in favor of Foremost. This appeal followed.

I.

The Yazells' first claim on appeal is that the trial court erred in granting Foremost's motion to strike Douglas Koliboski as their expert witness on bad faith.

After holding an evidentiary hearing on September 10, 2003, the circuit court granted Foremost's pretrial motion to strike, on the grounds that it had been shown that

> Mr. Koliboski's proffered testimony violates the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S.579, and *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, as well as violates the Kentucky Rules of Evidence, including KRE 702, as Mr. Koliboski is not qualified to render such opinions and proffered testimony is unreliable and inadmissible.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), the United States Supreme Court held that scientific expert testimony is admissible only if it is both inherently reliable and relevant to the case at hand. Id. at 589, 113 S.Ct. at 2795. Relevance means that the proposed testimony "must assist the trier of fact to understand the evidence or to determine a fact in issue." Id. at 591, 113 S.Ct. at 2795-96.

The task of determining whether an expert's testimony was reliable and relevant was assigned to the trial judge, and a nonexhaustive list of factors was provided to assist the courts in assessing the reliability of such testimony. These include whether the theory or technique can be or has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; and whether it has general acceptance within the relevant scientific, technical, or other specialized community. Id. at 593-94, 113 S. Ct. at 2797.

In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Court extended this "gatekeeping" function of the trial judge to apply to testimony based on technical or other specialized knowledge. "[W]here such testimony's factual basis, data, principles, methods, or their application" are called into question, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." Kumho Tire, 526 U.S. at 149, 119 S. Ct. at 1175 (citations omitted).

The Kentucky Supreme Court has similarly stressed that the trial court has broad discretion in deciding both how reliability is to be assessed, and whether the testimony of an expert meets this standard.

> The test of reliability is "flexible," and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants [the trial] court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.

Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577-78 (Ky. 2000).

In determining whether the trial court erred in excluding the testimony of an expert witness, our review is performed in two stages. First, the trial court's findings of fact are reviewed under the clearly erroneous standard. Then, the trial court's ultimate decision as to admissibility is reviewed under the abuse of discretion standard. Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004).

In performing the first step of this analysis, we note that although the record indicates that a Daubert hearing was held, the videotape of this hearing was not designated as part of the record, and the trial judge made no written findings of fact.

> While we prefer that trial courts include findings of fact and conclusions of law in their Daubert rulings . . . failure to include those findings and conclusions is not automatically indicative of arbitrariness, unreasonableness, unfairness, or application of the wrong legal standard. Such a failure, absent a motion at trial

> requesting findings of fact, is not grounds for reversal.

Id. at 921-22 citing CR 52.04.

No such motion requesting findings of fact was made by the plaintiffs in this case. Under these circumstances,

> [t]he proper appellate approach when the trial court fails to make express findings of fact is to engage in a clear error review by looking at the record to see if the trial court's ruling is supported by substantial evidence.

Id. at 922.

We have performed such a review of the record and determined that the trial court's ruling that Koliboski's testimony was not reliable was supported by substantial evidence.

Koliboski was formerly a licensed insurance adjuster in Kentucky, but at the time of the deposition his license had expired and he had been operating a window cleaning business for almost four years. Koliboski was employed as a claims adjuster for Ohio Casualty until 1989. He then became a litigation manager. In his years of working for Ohio Casualty, he was never involved in a SIU ("Special Investigation Unit") investigation; nor was he ever involved in the investigation and adjustment of arson property claims. He had served as an expert in three prior lawsuits that involved attorney malpractice, toxic mold, and an underinsured motorist claim.

Koliboski's work has never been published or peer-reviewed. Furthermore, he openly admitted that the opinions he gave were not based on any documented, generally-accepted standards. At his deposition, defense counsel asked:

> So there is nothing that you can point this court to show in any type of publications, treatises, any type of documentation that the opinions you're giving and want to give in this case are generally accepted within the insurance industry; is that true?

Koliboski replied: "Certainly that is true."

His testimony also indicated that he was not familiar with the elements necessary to prove a claim of bad faith in Kentucky. The report submitted by Koliboski makes no reference whatsoever to any violations of the UCSPA; and he admitted at the deposition that he had only printed out the text of the Act the day before and had not reviewed it for the report.

Koliboski's record, deposition and report provide substantial evidence to support the trial court's finding that his testimony was not sufficiently reliable to be admitted into evidence.

II.

We are next asked to determine whether the trial court erred in granting summary judgment to Foremost on the Yazells' common law and statutory bad faith claims on the grounds that, under the facts of the case, expert testimony was required. The

appellants have not challenged the award of summary judgment on any other terms.

Summary judgment "shall be rendered forthwith 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." Kentucky Rules of Civil Procedure (CR) 56.03. The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991)(citations omitted). On appeal, the standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Furthermore, "the inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). "It is not necessary to show that the respondent has actually completed discovery, but

only that the respondent has had an opportunity to do so." Hartford Ins. Group v. Citizens Fid. Bank & Trust Co., 579 S.W.2d 628, 630 (Ky. App. 1979).

On November 14, 2003, the trial court entered an order granting Foremost's motion for partial summary judgment as to the common law and statutory bad faith and punitive damages claims, concluding "that the Plaintiffs must have expert testimony to present their common law and statutory bad faith claims under the facts of this case."

The Yazells have drawn our attention to cases from other jurisdictions where it has been held that expert testimony is not necessary to prove bad faith insurance claims. But the trial court was not, as appellants suggest, mistakenly assuming that expert testimony is required in all bad faith insurance cases. Rather, the court decided that under the specific facts of this case, an expert was required to articulate for the jury what constituted a bad faith claim, and how Foremost's conduct could be shown to meet the standard for such a claim.

To maintain a bad faith action against an insurer, whether premised upon common law theory or a statutory violation, the insured must prove three elements:

> (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[.]

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993); Kentucky Nat. Ins. Co. v. Shaffer, 155 S.W.3d 738,741-42 (Ky. App.,2004). Furthermore, an insurer is entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts. Wittmer at 890.

A cause of action for statutory bad faith premised on a violation of the UCSPA may be maintained only if the evidence suffices to justify punitive damages. "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." Motorists Mutual Ins. Co. v. Glass, 996 S.W.2d 437, 452 (Ky. 1997) citing Wittmer v. Jones, 864 S.W.2d 885, 890-91 (Ky. 1993).

"An action for bad faith . . . requires something more than mere negligence. The term itself implies some intentional wrongful conduct . . . Mere errors in judgment should not be sufficient to establish bad faith." Blue Cross & Blue Shield of Ky., Inc., v. Whitaker, 687 S.W.2d 557, 559 (Ky. App. 1985)(citations omitted).

Bearing these standards in mind, we see in the record that the Yazells' proffered expert, Doug Koliboski, stated in

his deposition: “It’s my understanding that the company believes they had reasonable justification [to deny the Yazells’ claim].” He also answered “yes” to the following question from Foremost’s counsel: “[N]ow, giving every benefit of the doubt in this case, the most you can say is that you believe that Foremost made a mistake and should have paid this claim, fair statement?”

Clearly, if the Yazells’ own proffered expert did not hold the opinion that Foremost had acted in bad faith, the court was right to infer that another expert was necessary in order to demonstrate that the claim had some factual support. What would have been essential for the jury would have been an expert elucidation of the claims review process specifically for claims where arson is suspected, and in what manner Foremost’s conduct apparently failed to meet this standard. The trial court did not therefore err in granting summary judgment on these grounds.

III.

The Yazells’ third claim is that the trial court erred in failing to grant their motion for a mistrial on the ground that the jury was inadvertently permitted to review, as part of the trial exhibits, a document indicating that the Yazells had refused to take a polygraph test.

The evidence of their refusal is contained in a fire investigation report by Kentucky State Police officer Curtis S.

Combs. Combs attached a statement to his report that he had contacted Tracy Yazell to ask if she and her husband would submit to a polygraph test. She advised him to contact Bill Adkins, an attorney whom they had retained in connection with the matter. Combs accordingly met with Adkins who informed him that he was advising the Yazells to refuse a polygraph. Combs asked him whether "this could be considered a formal refusal" and Adkins said yes.

Approximately two years later, the Yazells took a "voice stress analysis" test that purported to indicate that they were telling the truth about their noninvolvement in the fire.

The admissibility of these two pieces of evidence: (1) the page attached to Combs' report indicating the Yazells' refusal to take a polygraph, and (2) the results of the "voice stress analysis" test, was a continuing point of contention between the parties.

Foremost made a motion in limine at the final pre-trial conference to exclude the voice stress analysis test report (and related proposed expert testimony) at trial. The motion was granted by the court in an order which also stated that

> No party or witness shall make any reference to polygraph tests or voice stress tests including Plaintiffs' refusal or willingness

> to take the polygraph. COUNSEL SHALL ADVISE ALL WITNESSES IN THIS REGARD AND SHALL DELETE ANY SUCH REFERENCES FROM DEPOSITIONS TO BE READ OR VIEWED.

(Emphasis and capitals in the original.)

During discussions in chambers, and in the period before the jury was instructed, the trial court also verbally directed the parties to delete or redact any references to the polygraph and voice stress tests from the exhibits. Nonetheless, Combs' report made its way into the trial exhibits, and was seen by the jury.

After the jury rendered its verdict in favor of Foremost, the Yazells filed a motion for a mistrial or hearing, asserting that the presence of the exhibit had decisively influenced one of the jurors in favor of Foremost. An affidavit from the juror was attached. Counsel for the plaintiffs subsequently submitted two more affidavits from jurors who also maintained that the polygraph evidence had had a decisive effect in swaying the verdict of the jury in favor of Foremost.

The trial court denied the motion for a mistrial in a lengthy order that stated in relevant part:

> It is the Court's belief that the Plaintiffs should not be permitted to create their own mistrial, even through inadvertence, and be rewarded for their negligence by being given another trial. The Court had cautioned the parties about eliminating all such references and redacting such items from anything to be presented to the jury and

> Plaintiffs' Counsel simply failed to do that with the exhibit that was viewed by the jury. Having failed to do so, and having further vehemently argued for the admission into evidence of this exhibit, which was opposed by Defendant, the Court finds that Plaintiffs cannot now benefit from their neglect.

The Yazells argue that it is not possible to determine how the report came to form part of the trial exhibits. But our review of the record shows that the report in question was labeled "Plaintiff's Exhibit 59" and is contained in a folder marked "TRIAL EXHIBITS." Although the Yazells insist that the report was also part of defendant's Exhibit "H," that particular exhibit is not in the "TRIAL EXHIBITS" folder.

Foremost has drawn our attention to the principle of Kentucky law which states "that one cannot complain of an invited error." Miles v. Southern Motor Truck Lines, 173 S.W.2d 990, 998 (Ky. 1943). "We have often held that a party is estopped to take advantage of an error produced by his own act." Wright v. Jackson, 329 S.W.2d 560 (Ky. 1959)(plaintiff not entitled to award for pain and suffering when plaintiff's proffered jury instructions contained the phrase "if any" that led to this outcome.) In this case, the record shows that counsel for the plaintiffs was responsible for this evidence making its way to the jury.

The Yazells nonetheless argue that based upon the jurors' affidavits, a new trial should have been granted. They contend that it was impossible to undo the adverse effects of this disclosure, and that certainly it was not intentionally created error. "The bottom line is that the evidence was so favorable to Appellants, but for the jury seeing an exhibit the Court ordered they not receive." Appellants' Reply Brief at 2.

The standard of review for denial of a motion for a mistrial is abuse of discretion. Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky. App. 1993). Furthermore,

> [i]t is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way. . . . Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed.

Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996).

Foremost has questioned the propriety of allowing jurors to impeach their own verdict following trial. The Yazells claim, however, that the rule that a juror may not impeach his or her verdict is "old and dated."

The general rule that a juror may not impeach his or her verdict is still in effect in Kentucky, however, see e.g., Gall v. Commonwealth, 702 S.W.2d 37, 44 (Ky. 1985) (juror's testimony that jury improperly considered defendant's mental illness and parole eligibility during deliberations was incompetent). Moreover, the case relied upon by the Yazells, In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1981), stands for a different proposition: that a juror may impeach a verdict if extraneous evidence or influence was brought to bear upon the jury's deliberations.[3] In this case, the police report formed part of the evidence properly considered by the jury. Although it may have been included as a result of counsel's error, it did not constitute an improper outside influence.

[3] This principle is codified in Fed. R. Evid. 606(b):

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The trial court did not, therefore, abuse its discretion in denying the motion for a mistrial, as there was no fundamental defect in the proceedings.

IV.

The Yazells' fourth argument concerns the trial court's refusal to allow them to bring a consumer protection claim. The Yazells initially filed a motion to amend their complaint to add a claim under KRS 367.170, a provision of the Consumer Protection Act,[4] on June 2, 2003.[5] The motion was denied. The Yazells thereafter filed a separate action against Foremost alleging violations of the Consumer Protection Act and moved to consolidate it with the existing action. The trial court denied the motion to consolidate.

While Kentucky Rule of Civil Procedure (CR) 15 "provides that leave to amend 'shall be freely given when justice so requires,' it is still discretionary with the trial court, whose ruling will not be disturbed unless it is clearly an abuse." Graves v. Winer, 351 S.W.2d 193, 197 (Ky. 1961).

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[4] KRS 367.170 states:

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

(2) For the purposes of this section, unfair shall be construed to mean unconscionable.

[5] The Appellants' brief incorrectly gives September 19, 2003, as the date the motion was filed.

The Yazells' motion to amend their complaint stated that:

> The facts are the facts are the facts in this case. This cause of action does not effect [sic] discovery or the remaining 5 months prior to the trial. The claim does require intentional or grossly negligent conduct which is alleged and supported by the facts.

We have reviewed the record and find that the trial court did not abuse its discretion in denying the motion to amend the complaint. "[S]ignificant factors to be considered in determining whether to grant leave to amend are timeliness, excuse for delay, and prejudice to the opposite party." Lawrence v. Marks, 355 S.W.2d 162, 164 (Ky. 1961). The Yazells provided absolutely no explanation as to why this claim could not have been included in the initial complaint which was filed over eighteen months before. Furthermore, Foremost argued convincingly that the amendment could cause prejudice in that the deadline for the close of all discovery was only 1 ½ months away; the deadline for exchange of all trial materials had already passed; and Foremost's expert witnesses had already issued their reports.

The Yazells also claim that the trial court abused its discretion in not allowing the consolidation of the complaints. In its order dismissing the second complaint, the trial court explained that

> [t]his action violates the law of the Commonwealth regarding splitting a cause of action and is therefore barred by the principle of res judicata.

The filing of a separate complaint and the attempt to consolidate it with the earlier action appears to have been an attempt on the Yazells' part to make an end run around the court's earlier ruling denying the motion to amend the complaint. The trial court correctly decided that the issue had already been conclusively resolved by its earlier order denying the motion to amend.

V.

The final claim is that the trial court erred by granting Foremost's motion in limine to exclude evidence and testimony concerning the Yazells' allegations of intentional infliction of emotional distress.

The basis for the motion, which was made on October 22, 2003, was that no separate count for intentional infliction of emotional distress was pleaded by the plaintiffs in their complaint, and that the plaintiffs did not have an expert witness to present such a claim to a reasonable degree of medical and scientific certainty. The only testimony to be offered by the Yazells was that of Brenda Elkins Davis, a volunteer with the Red Cross who assisted the Yazells after the fire.

The trial court granted the motion on November 14, 2003, one week before trial. In the same order, it also granted partial summary judgment to Foremost on the Yazells' claims for common law and statutory bad faith and punitive damages.

On appeal, the Yazells argue that they were not required to plead intentional infliction of emotional distress as a separate claim. But the Yazells themselves acknowledge that any damages for emotional distress would stem from the bad faith and UCSPA claims. As we have already determined that the trial court properly granted summary judgment on these claims, leaving only the breach of contract claim, the point is moot.

For the foregoing reasons, the orders and judgment of the Grant Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Eric C. Deters
Fort Mitchell, Kentucky

BRIEF FOR APPELLEE:

Matthew J. Smith
Carmen C. Sarge
Cincinnati, Ohio