RENDERED: MARCH 7, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000616-MR

KAREN OWENS; JOHN OWENS; WILMA OWENS; AND GUY JANTZEN HIBBS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CI-007891

OHIO CASUALTY GROUP AND MARVIN L. COAN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Karen Owens, John Owens, Wilma Owens and Guy Jantzen Hibbs appeal the February 8, 2007, order granting summary judgment in favor of Ohio Casualty Group (hereinafter "OCG") in appellants' motor vehicle collision action against OCG and Daniel Wurfel. We affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On January 17, 2006, a vehicle being driven by Karen collided head-on with a vehicle driven by Daniel. As a result of the collision, Karen and her passenger, Zachary Roesch, suffered numerous physical injuries and Karen's car was deemed a total loss by her insurer, OCG. Karen's vehicle was co-owned by her father, John, and her mother, Wilma, who were joint policy-holders in the insurance policy for the vehicle.

Between January 19, 2006, and August 31, 2006, numerous documents were mailed and faxed from various employees of OCG to the Owenses and their attorney. These documents were all typed on OCG letterhead and/or included a facsimile coversheet of the same. Additionally, a check for $50,000.00 was forwarded to the Owens' attorney, Guy Jantzen Hibbs, representing the offer amount from Wurfel's insurance company. In the left-hand corner of the check, in bold type, were the letters "OCG" and directly beneath were the words "Ohio Casualty Group." The watermark on the check read "OCG Ohio Casualty Group." Also in the left-hand corner was a small box, marked with an "x" beside which was typed "West American."

The correspondence between the Owens' attorney and OCG continued until the parties' settlement negotiations were at a standstill. On September 8, 2006, appellants filed suit in Jefferson Circuit Court against Wurfel and OCG. Process on OCG was returned to appellant's counsel with an explanation that due to very similar names of the two companies, the name of the company for which service was intended must be identical. Counsel for the appellants then redirected service to the corporate officer and address found on the correspondence he had been receiving from OCG, namely Phillip M. Boyd, who was listed as OCG's Regional Vice President on their letterhead. After Mr. Boyd was served, counsel for OCG, Marvin L. Coan, contacted counsel for plaintiffs

and advised that he had not served the proper party. Coan asserted that West American Insurance Company (hereinafter "WAIC") was the proper party and offered to sign an agreed order with Hibbs substituting WAIC for OCG. Coan further advised that he had filed motions to dismiss in other cases in which OCG was improperly named.

Hibbs responded by requesting written information explaining why OCG was not the appropriate party. Coan then sent Hibbs another letter and a draft of an agreed order. Hibbs then requested a copy of a motion to dismiss with supporting documentation that had been filed in other cases, offering proof that OCG was not the appropriate party. As proof that WAIC was the proper party, Coan sent Hibbs an affidavit from Phillip Boyd, the individual who had been served and who was identified as the regional vice president of OCG on their letterhead. In the affidavit, Mr. Boyd stated that he was the regional vice president of Ohio Casualty Insurance Company (hereinafter "OCIC"); that OCG was a subsidiary company of OCIC used for marketing purposes; that OCG was a service mark; that OCG was not a legal entity or an insurance company licensed to do business in Kentucky; and that the appropriate party to the action, besides Wurfel, was WAIC. Accompanying this affidavit was a letter from Coan asking Hibbs to sign the agreed order and warning that a motion to dismiss would be filed if the agreed order was not signed. On October 26, 2006, OCG filed a CR 12.02 motion to dismiss and a CR 11 motion for sanctions. Attached to the motion were: Hibbs and Coan's correspondence; the insurance policy, listing WAIC at the top of the first page; Boyd's affidavit; and several other exhibits. Plaintiffs filed their response and oral arguments were heard before the trial court on December 21, 2006. On February 8, 2007, the trial court entered an order granting the motion to dismiss and the motion for

sanctions. On February 9, 2007, and February 15, 2007, plaintiffs filed a motion for leave of court to file a supplemental exhibit and a motion to amend and/or reconsider, respectively. In an order dated February 20, 2007, the plaintiffs' motions were denied and a motion by OCG for additional attorney's fees was granted. This appeal followed.

Appellant's argue the following: 1) OCG is the proper defendant and therefore the CR 12.02 motion to dismiss, treated as a motion for summary judgment, was inappropriate; 2) the motion to dismiss was improper and therefore CR 11 sanctions are not appropriate; and 3) in the alternative, if the motion to dismiss was proper, the conduct did not violate CR 11.

CR 12.02 states, in part:

> [e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (f) failure to state a claim upon which relief can be granted. . . If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The standard of review of a trial court's grant of summary judgment 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). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St.*

Paul Fire Marine Ins. Co., 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

In support of their first argument, Appellants reference *James v. Wilson*, 95 S.W.3d 875 (Ky.App. 2002), which states in part:

> [t]his Court has said that the standard of review on appeal of a summary judgment 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. . . . In the context of a motion to dismiss for failure to state a claim upon which relief can be granted, the analysis is somewhat different. The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

Id. at 883-884 (internal citations omitted).

In the case before us, we believe the standard laid out in the *James* case is satisfied. If the facts alleged in the Owenses' complaint can be proved, it is possible that they would be entitled to relief, but not against *this* party. OCG is a service mark. The Owenses' policy, although sold by OCG, was issued by WAIC. Therefore, the proper party to be sued in this action is WAIC. We do not believe the court in *James* intended a trial court to allow a case to continue when the wrong party was being sued. To find otherwise would result in an excess of frivolous claims and a deterioration of the time and resources of the judicial system.

While we agree that the manner in which OCG represents itself is in the very least, confusing, this is not the appropriate forum in which to address their business practices. This is a vehicle collision case and the issue at hand is whether OCG should have been dismissed as an inappropriate party. Furthermore, it is the plaintiff's duty to properly identify defendants. After reviewing the record, we have concluded that OCG was not the appropriate party to be sued and therefore the grant of summary judgment was appropriate. Our decision is further persuaded by the fact that, prior to the notice of appeal in this case, an agreed order was entered in the case between intervening plaintiff Anthem and intervening defendant WAIC to substitute WAIC for OCG as the proper party defendant.

In *Clark Equipment Company, Inc., v. Bowman*, 762 S.W.2d 417 (Ky.App. 1988), a panel of this court held that the "test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances ." *Id.* at 420. The Court then set out a 3-tiered standard of review in situations where sanctions were granted: "a clearly erroneous standard to the trial court's findings in support of sanctions, a *de novo* review of the legal conclusion that a violation occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed." *Id.* at 421.

In its order, the trial court stated:

> The Court must also find that Plaintiff's counsel failed to make reasonable inquiry before filing the Complaint as to the proper entity to be sued. That alone would not convince this Court to impose sanctions. However, despite OCG's counsel providing proof (easily accessible to all) that West American Insurance Company was the proper entity and that a substitution of West American for OCG was agreeable,

> Plaintiff's counsel refused to correct the obvious mistake initially made. The Court cannot find good cause or a good faith basis to support this refusal. Therefore, Plaintiff's counsel Hibbs shall be sanctioned to the extent of attorney fees generated by OCG in defending this action.

We have reviewed the record, including the exhibits of both parties, and have determined that the trial court's imposition of Rule 11 sanctions must be upheld. The record clearly supports the trial court's findings that appellants' counsel failed to make reasonable inquiry as to the proper party defendant and, more importantly, did not have a reasonable basis to refuse correcting such. The trial did not commit any error in its conclusion that sanctions were appropriate. As appellants did not raise the issue of the amount or form of sanctions imposed, we need not address that issue.

For the foregoing reasons, the February 8, 2007 and February 20, 2007, orders of the Jefferson Circuit Court are affirmed.

VANMETER, JUDGE, CONCURS.

LAMBERT, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

LAMBERT, JUDGE, CONCURING IN PART AND DISSENTING IN PART: I would affirm the part of the trial court's decision that holds that the Ohio Casualty Group was not the appropriate party to be sued, and accordingly would hold that the grant of summary judgment as to that issue was appropriate.

However, I do not believe the imposition of sanctions is warranted in the instant case. I quote from the majority's opinion:

> Between January 19, 2006, and August 31, 2006, numerous documents were mailed and faxed from various employees of OCG to the Owenses and their attorney. These documents were all typed on OCG letterhead and/or included a facsimile coversheet of the same. Additionally, a check for $50,000.00

> was forwarded to the Owens' attorney, Guy Jantzen Hibbs, representing the offer amount from Wurfel's insurance company. In the left-hand corner of the check, in bold type, were the letters "OCG" and directly beneath were the words "Ohio Casualty Group." The watermark on the check read "OCG Ohio Casualty Group." Also in the left-hand corner was a small box, marked with an "x" beside which was typed "West American."

To further confuse the transaction, it is undisputed that the Owenses' policy which was issued by West American Insurance Company was sold by Ohio Casualty Group.

The manner in which Ohio Casualty Group represents and markets itself is quite confusing – confusing to the extent that sanctions appear inappropriate here. Therefore, in the instant case, I respectfully dissent from the "sanctions" portion of the majority opinion and would remand to the trial court for rulings in conformity with this opinion.

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