REL: December 21, 2018

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170907

GEICO General Insurance Company

v.

Gainer Curtis

Appeal from Mobile Circuit Court
(CV-18-900352)

THOMAS, Judge.

On February 4, 2016, Bonnie S. Busby was injured in a collision between her automobile and an automobile driven by Gainer Curtis. GEICO General Insurance Company ("GEICO") is Busby's insurer; pursuant to its contract with Busby, GEICO is

required to provide underinsured-motorist ("UIM") benefits to Busby. In the summer of 2017, Busby notified GEICO that Curtis's insurer, Allstate Insurance Company ("Allstate"), had offered to settle her claim for Curtis's policy limits of $25,000. In compliance with the procedure set out in Lambert v. State Farm Mutual Automobile Insurance Co., 576 So. 2d 160 (Ala. 1991), GEICO refused to consent to the proposed settlement and paid Busby $25,000.[1] Busby died in September 2017.

On February 5, 2018, GEICO sued Curtis in the Mobile Circuit Court ("the trial court"), seeking as damages reimbursement of the $25,000 Lambert advance it had made to Busby. Curtis filed a motion to dismiss pursuant to Rule 12(b)(6), Ala. R. Civ. P., or, in the alternative, a motion for a summary judgment, asserting that Busby had died in September 2017, that Busby's personal-injury claim had expired with her, and therefore that GEICO, which had sued as Busby's subrogee, could not maintain a claim against Curtis. Curtis

[1]In brief, the procedure set out in Lambert requires that a UIM insurer desiring to preserve its subrogation rights in the face of its insured's desire to settle with the tortfeasor advance the amount of the settlement to its insured.

attached to his motion the complaint, a copy of Busby's obituary, and a copy of the $25,000 check GEICO had issued to Busby. GEICO responded to Curtis's motion, relying on Safeway Insurance Co. of Alabama v. State Farm Mutual Automobile Insurance Co., 980 So. 2d 414, 416 (Ala. Civ. App. 2007), to argue that its claim survived Busby's death.

The trial court held a hearing on Curtis's motion on June 1, 2018; no transcript of that hearing was provided to this court. On June 5, GEICO filed a supplemental response to Curtis's motion; in that supplemental response, GEICO explained that it had a right of reimbursement not from Curtis but from Allstate. Contemporaneously with the supplemental response, GEICO filed a motion for leave to amend its complaint to name Allstate as a defendant, to which it attached, among other things, a proposed amended complaint; the trial court did not rule on GEICO's motion for leave to amend, and Allstate was not added as a party or served with the amended complaint.

On June 6, 2018, the trial court entered an order dismissing GEICO's complaint against Curtis. However, the trial court expressly stated in its order that it was

dismissing GEICO's complaint because it had been filed outside the applicable two-year statute of limitations. See Ala. Code 1975, § 6-2-38 (prescribing a two-year statute of limitations for tort claims). GEICO timely filed a postjudgment motion, in which it explained that, because February 4, 2018, which was two years after the date of the collision, fell on a Sunday, its February 5, 2018, complaint had been timely filed pursuant to Ala. Code 1975, § 1-1-4. GEICO's postjudgment motion was denied by operation of law; however, in an order entered on July 30, 2018, after recognizing that the postjudgment motion had been denied by operation of law, the trial court indicated that it would have denied the motion because, it stated, "[t]he cases GEICO cited were decided back in the day when we did not have AlaCourt and Alafile. Now that we have 24/7 access, this court is of the opinion that your statute [of limitations] ran." GEICO timely filed a notice of appeal on July 17, 2018.

Curtis's motion sought either a dismissal or a summary judgment and included matters outside of the pleadings; thus, at first glance, it would appear that the motion to dismiss was, in fact, a motion for a summary judgment. Rule 12(b),

Ala. R. Civ. P.; see also Graveman v. Wind Drift Owners' Ass'n, Inc., 607 So. 2d 199, 202 (Ala. 1992) ("[Conversion of a motion to dismiss to a motion for a summary judgment] is proper where, as here, the parties, in support of, or in opposition to, the motion, file matters outside the pleadings and these matters are not excluded by the court."). However, more recently our supreme court has indicated that when a "trial court's order does not refer to or indicate that it considered any document other than the complaint," "refers only to [a] motion[] to dismiss," and "dismisses the complaint," we cannot presume that "the trial court considered the matters outside the complaint" and a "motion[] to dismiss [will] not [be] converted to a motion[] for a summary judgment." Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017). Thus, we will apply the standard of review applicable to a motion to dismiss.

> "The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will

> ultimately prevail, but only whether [he] may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v. United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993).

On appeal, GEICO raises four arguments. First, GEICO argues that the trial court erred by dismissing its complaint on the ground that the statute of limitations had expired before the complaint was filed. Secondly, GEICO complains that the trial court erred by not considering its motion for leave to amend its complaint before dismissing the action. GEICO next contends that it has a valid claim for subrogation against either Curtis or Allstate. Finally, GEICO complains that the trial court erred in denying its postjudgment motion.

Because it might implicate the subject-matter jurisdiction of this court, we first address GEICO's argument that the trial court erred by failing to consider its motion for leave to amend its complaint before dismissing its action against Curtis. Although GEICO was entitled to amend its

complaint without seeking leave of court, it did not do so.[2] Instead, GEICO sought leave to amend its complaint, which motion had not been granted at the time the trial court dismissed GEICO's action. Even were we to consider GEICO's filing of the motion for leave to amend as equivalent to the filing of an amended complaint, Allstate had not been served with process, and would have been, at best, an unserved defendant at the time the trial court entered its order dismissing the action against Curtis. According to Rule 4(f), Ala. R. Civ. P.,

> "[w]hen there are multiple defendants and the summons (or other document to be served) and the complaint have been served on one or more, but not all, of the defendants, the plaintiff may proceed to judgment as to the defendant or defendants on whom process has been served and, if the judgment as to the defendant or defendants who have been served is final in all other respects, it shall be a final judgment."

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[2]Rule 15(a), Ala. R. Civ. P., provides, in pertinent part:

> "Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court's own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires."

GEICO's action had not yet been set for trial.

The order dismissing the complaint against Curtis is, therefore, a final judgment capable of supporting an appeal. See Glasgow v. Jackson Land Surveying, LLC, 236 So. 3d 111, 114 (Ala. Civ. App. 2017) (determining that a judgment in favor of the only served defendant was final despite the fact that the plaintiff had recently amended his complaint to name two additional defendants but had not yet served those defendants with process); and Harris v. Preskitt, 911 So. 2d 8, 14 (Ala. Civ. App. 2005) (stating that an unserved defendant had never been a party to the action and that the judgment was final as to the served defendants without need for a judgment dismissing the unserved defendant). Regarding GEICO's argument that the trial court was required to consider the motion for leave to amend before proceeding to consider Curtis's motion to dismiss, we note that GEICO has provided no authority supporting such a conclusion and that we know of no such authority. See White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008). ("Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments

are waived."); see also Rule 28(a)(10), Ala. R. App. P. (requiring an appellant to provide authority for the legal arguments asserted in his or her brief). Accordingly, we cannot conclude that the trial court's order dismissing GEICO's action against Curtis should be reversed on this ground.

We turn now to GEICO's argument that the trial court incorrectly concluded that its claim against Curtis was time-barred. On this point, we agree with GEICO. As noted earlier, the accident giving rise to this action occurred on February 4, 2016, and the two-year statute of limitations governing tort claims applies. February 4, 2018, was, as GEICO pointed out to the trial court in its postjudgment motion, a Sunday. Thus, pursuant to § 1-1-4, which provides that "if the last day [upon which any act is provided by law to be done] is Sunday, or a legal holiday as defined in [Ala. Code 1975 §,] 1-3-8, or a day on which the office in which the act must be done shall close as permitted by any law of this state, the last day also must be excluded, and the next succeeding secular or working day shall be counted as the last day within which the act may be done," GEICO's complaint was,

in fact, filed within the statute of limitations on Monday, February 5, 2018. Contrary to the trial court's stated belief otherwise, the advent of electronic filing did not repeal § 1-1-4.[3]

However, as Curtis reminds us, this court may affirm a trial court's judgment if it is supported by another valid, legal basis. See Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988) (quoting Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983)) (indicating that an appellate court "'will affirm the judgment appealed from if supported on any valid legal ground'"). Curtis asserted in his motion to dismiss or, in the alternative, for a summary judgment that GEICO's claim against him should be dismissed because, as

[3]Although GEICO does not contest on appeal the trial court's apparent sua sponte application of the statute of limitations to dismiss its complaint, we would be remiss if we did not point out that "a trial court errs when it dismisses a case on the basis of an affirmative defense not asserted by the defendant." Ex parte Beck, 988 So. 2d 950, 955 (Ala. 2007). This is so because affirmative defenses, like the statute of limitations, see Rule 8(c), Ala. R. Civ. P. (setting out affirmative defenses), may be waived if not raised by a defendant. See Smith v. Combustion Res. Eng'g, Inc., 431 So. 2d 1249, 1251 (Ala. 1983) (explaining that the failure to plead an affirmative defense results in waiver of that defense). We presume that Curtis asserted the affirmative defense at the June 1, 2018, hearing on his motion.

subrogee, GEICO had only those rights that Busby would have had, see Ex parte Webber, 157 So. 3d 887, 896 (Ala. 2014), and Busby's death had extinguished her claim for damages against Curtis. See Ala. Code 1975, § 6-5-462; Malcolm v. King, 686 So. 2d 231, 236 (Ala. 1996) ("The general rule is that under Ala. Code 1975, § 6-5-462, an unfiled tort claim does not survive the death of the person with the claim."); see also Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1037 (Ala. 2005) (explaining that "the failure of [an insured's] tort cause of action to survive her death provides a complete defense for the uninsured motorist ... against an action filed by [the insured's] estate after her death," which, in turn, prevents the insured's estate from recovering UIM benefits, because it cannot prove that it is "'legally entitled to recover'" from the uninsured motorist). Curtis asserts on appeal that the trial court's dismissal order may be affirmed on this legal ground. Although GEICO concedes that an unfiled tort claim expires upon the death of the claimant, GEICO argues that its claim for reimbursement of the $25,000 it advanced to Busby sounds in contract. See Nationwide Mut. Ins. Co. v. Wood, 121 So. 3d 982, 984 (Ala. 2013) ("A claim on

a contract, on the other hand, survives in favor of a decedent's personal representative, regardless of whether the decedent had filed an action before his death ....").

In support of its contention, GEICO relies on Ex parte Allstate Property & Casualty Insurance Co., 237 So. 3d 199 (Ala. 2017), and Safeway Insurance Co. of Alabama v. State Farm Mutual Automobile Insurance Co., 980 So. 2d 414 (Ala. Civ. App. 2007). According to GEICO, our supreme court recognized in Ex parte Allstate that an insurer in GEICO's position has a "right of reimbursement, irrespective of whether [the insurer] had [a] viable subrogation claim[]," and focused on the insurer's "contractual rights." Thus, GEICO contends that its claim against Curtis is contractual in nature. In addition, GEICO contends that, in Safeway, this court explained that, "even if a tortfeasor or his insurer have not agreed to protect the subrogation interest of an injured party's insurer, the subrogation claim will survive a settlement in which the subrogation interest is not protected if the tortfeasor or his insurer have notice or knowledge of the subrogation claim." Safeway, 980 So. 2d at 416. Based on its reading of Ex parte Allstate and Safeway, GEICO asserts

that Curtis is obligated to reimburse the $25,000 Lambert advance, which represents the policy limits of Curtis's insurance policy with Allstate, to either Busby's estate, for eventual payment to GEICO, or to GEICO directly.[4]

We believe that GEICO reads Ex parte Allstate too broadly. At issue in Ex parte Allstate was whether the Macon Circuit Court and the Jefferson Circuit Court ("the circuit courts") had, in two separate cases, improperly enforced the settlements between the injured plaintiffs and the tortfeasors and whether the circuit courts had improperly dismissed the tortfeasors from the actions brought against them by the injured plaintiffs. Ex parte Allstate, 237 So. 3d at 202-03. Each of the plaintiffs' insurers[5] argued that the circuit court had deprived it of its right to a determination of the extent of the tortfeasor's liability made by a jury free from

[4]In its brief, GEICO discusses what it perceives to be the basis for Allstate's liability to reimburse GEICO the Lambert advance. As explained supra, Allstate was not made a party to the action, and we will therefore confine our discussion to whether GEICO has presented authority from which we can determine that it has a claim against Curtis for reimbursement of the Lambert advance GEICO made to Busby.

[5]The two insurers were, coincidentally, Allstate and GEICO.

knowledge of any insurance benefits available to the parties. Id. at 206. The tortfeasors argued that, because any subrogation claim the insurers might have had not been not timely asserted against them before the running of the statute of limitations, the insurers had not been deprived of any legal right by the circuit courts. Id. at 206-07.

Our supreme court disagreed with the tortfeasors. In its opinion, our supreme court briefly explained the Lambert process, which provides a method by which a UIM insurer can "'protect [its] subrogation rights against the tort-feasor ... [and] protect [itself] against the possibility of collusion between its insured and the tortfeasor's liability insurer ....'" Ex parte Allstate, 237 So. 3d at 206 (quoting Lambert, 576 So. 2d at 167). Our supreme court also explained that a UIM insurer "'need not file a direct action against the tortfeasor to protect [its] rights of reimbursement ... [but] may obtain reimbursement from the insured's recovery against the tortfeasor.'" Ex parte Allstate, 237 So. 3d at 207 (quoting Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Bradford, 164 So. 3d 537, 540 (Ala. 2014)) (emphasis added), thus refuting the tortfeasors' argument that the insurers' failure

to have filed cross-claims extinguished their legal rights to subrogation.

Certainly, our supreme court stressed in its opinion the contractual rights to which the insurers were entitled. Id. However, it did so to explain that the circuit courts had "nullified the insurers' legal right both to withhold consent to settlement and to opt out of further proceedings" when those courts enforced the settlements and dismissed the tortfeasors from the respective actions. Id. Thus, the contractual rights to which our supreme court referred in Ex parte Allstate are those arising out of the contract between an insurer and its insured and do not refer to a right to recover advanced funds from a tortfeasor or the tortfeasor's insurer. The opinion clearly indicated that, in the absence of a direct action against the tortfeasor by the UIM insurer, the UIM insurer's reimbursement could be realized out of its insured's recovery. Id. Nothing in Ex parte Allstate indicates that the UIM insurer has a contractual right of recovery against the tortfeasor. Thus, we cannot find a basis for concluding that GEICO's claim against Curtis sounds in contract based on the language of Ex parte Allstate.

The holding of Safeway also fails to support the conclusion that GEICO can maintain an action against Curtis. Safeway involved an attempt to enforce subrogation rights for $4,205 in medical payments State Farm had paid on behalf of its insured, Ethel Day. Safeway, 980 So. 2d at 415. Day had been injured in an automobile collision between her automobile and one owned by Otis McGuire. Id. McGuire was insured by Safeway Insurance Company of Alabama ("Safeway"), and Safeway ultimately settled Day's claims against McGuire for $15,500. Id. State Farm had notified Safeway of its subrogation claim before Safeway entered into the settlement with Day. Id. Neither Day nor Safeway paid State Farm, and State Farm sued Safeway, arguing that Safeway had been under a duty to protect State Farm's subrogation interest. Id. The circuit court entered a judgment in favor of State Farm, and Safeway appealed. Id. This court affirmed the circuit court's judgment, concluding "that notice or knowledge of a subrogation claim at the time of the settlement places the tortfeasor's insurer under a duty to protect the subrogation interest of the injured party's insurer." Id. at 416. We concluded that any breach of that duty gives rise to a tort

claim in favor of the injured party's insurer. Id. Notably, we did not hold that State Farm had a claim against the tortfeasor, McGuire. Thus, we cannot conclude that Safeway provides a legal basis upon which GEICO can sue Curtis to recover its Lambert advance.

We note that our supreme court has indicated that "a UIM insurer's right to recover its Lambert advance, which is an amount within the tortfeasor's liability limits, is not a subrogation right." Ex parte State Farm Mut. Auto. Ins. Co., 207 So. 3d 734, 739 (Ala. 2016) (plurality opinion). Thus, GEICO's arguments relating to its subrogation rights appear to be misplaced. In any event, GEICO has not provided authority that it has a claim against Curtis that has not been extinguished by Busby's death. Neither Ex parte Allstate nor Safeway provide a basis for characterizing GEICO's claim against Curtis as a contractual claim, and, therefore, GEICO's claim against Curtis sounds in tort and did not survive Busby's death. See § 6-5-462.

Finally, we turn to GEICO's argument that the trial court erred in failing to grant its postjudgment motion. We first note that GEICO characterizes its motion as both a Rule 59,

Ala. R. Civ. P., postjudgment motion seeking to vacate the judgment and as a Rule 60(b), Ala. R. Civ. P., motion for relief from the judgment. Although combining such motions is not prohibited by our rules, see Ex parte Vaughan, 539 So. 2d 1060 (Ala. 1989), a reading of the motion filed by GEICO reveals that it asserted no grounds upon which Rule 60(b) motion could be based; thus, the motion is merely a postjudgment motion requesting that the trial court revisit its decision to dismiss the claim against Curtis. See Ex parte Haynes, 58 So. 3d 761, 765 (Ala. 2010) (explaining that "in order plausibly to be considered a viable Rule 60(b) motion it must ask for relief on grounds that amount to more than a request for a mere reconsideration of the denial of the defendants' original [postjudgment] motion").

GEICO's argument in the portion of its brief addressing this issue is that the trial court should have granted its postjudgment motion so that it could have properly amended its complaint to add Allstate as a defendant. We agree. Rule 78, Ala. R. Civ. P., provides that, "[u]nless the court orders otherwise, an order granting a motion to dismiss shall be deemed to permit an automatic right of amendment of the

pleading to which the motion is directed within ten (10) days from service of the order." As this court explained in United Handicapped Industries of America v. National Bank of Commerce, 386 So. 2d 437, 441 (Ala. Civ. App. 1980), a trial court should refuse an amendment after a dismissal only if it has some valid ground for doing so. In addition, "granting ... leave [to amend] is especially appropriate when the trial court has dismissed the complaint for failure to state a claim." United Handicapped Indus., 386 So. 2d at 442. We have concluded that GEICO's complaint against Curtis was properly dismissed because GEICO could not state a claim against him to recover its Lambert advance. Thus, we conclude that the trial court should have granted GEICO's postjudgment motion insofar as it requested to be allowed to amend its complaint to name Allstate as a defendant.

None of GEICO's arguments on appeal supports a conclusion that it is entitled to maintain a claim against Curtis. However, the trial court erred in not allowing GEICO to amend its complaint to make Allstate a party to this action.[6]

[6]We express no opinion on the issue whether GEICO can succeed on a claim against Allstate.

Insofar as it dismissed GEICO's claim against Curtis, the judgment of the trial court is affirmed. The trial court's denial of GEICO's postjudgment motion by operation of law is reversed, and the cause is remanded to the trial court with instructions that it permit GEICO to amend its complaint.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Moore, and Donaldson, JJ., concur.