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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002416-MR

FRED ISAAC AND WENDY ISAAC — APPELLANTS

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 00-CI-00079

STATE FARM INSURANCE COMPANY — APPELLEE

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

BEFORE: JOHNSON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Isaacs appeal from a declaratory judgment from the Rowan Circuit Court claiming the trial court's findings on the habitability of their home went beyond what it was asked to decide. In addition, the Isaacs assert the judgment does not have a res judicata effect on their future claims of personal injury and bad faith with regard to toxic mold and the repair of their home after a fire. We disagree and affirm.

On June 4, 1994, a fire damaged the home of Fred and Wendy Isaac (the "Isaacs"). At the time of the fire, the Isaacs had homeowner's insurance with State Farm Insurance Company ("State Farm"). State Farm paid to have the home repaired, and

also paid for the Isaacs's living expenses for the three months they were forced to live outside their home. After the repairs were made and the Isaacs moved back into the home, they discovered that water had been left standing in the air vents beneath the floor. State Farm was notified, and its contractor proceeded to clean up the water.

For the next five years, the Isaacs had no contact with State Farm. However, between 1994 and 1999, the Isaacs claim they began suffering from physical problems such as difficulties in breathing, flu like symptoms, and rashes. In 1999, Fred Isaac was told his home may have a potential toxic mold problem, and as a result, the Isaacs informed State Farm and moved out of their home.

The Isaacs employed William Croft, a veterinarian, to inspect and test their home. Croft collected samples and tested them under a microscope. He found evidence of the toxic mold stachybotrys, however, he did not submit any of the samples to a laboratory and said his conclusions were based solely on his visual inspection.

State Farm employed Tencon, Inc., a technical environmental consulting firm, to test the home for toxic mold. Tencon inspected the home twice, and on both occasions, found there was no toxic mold present in the home. The first inspection was done by Tencon's environmental expert Karen Lenihan. Although she observed discolored areas on the walls and ceilings, she did not believe it was due to the presence of mold or fungus, but was a result of smoking or a former roof leak. She noted a new roof had recently been installed on the home.

Her samples were submitted to the laboratory, and it indicated a very low concentration of fungi and bacteria. Tencon's second inspection essentially came to the same result, which was no finding of the fungi stachybotrys or any other type of mold or fungi. The samples from the second inspection were tested in a separate laboratory. These two tests led Tencon's president, Mary Malotke, to testify that she believed, with a reasonable degree of scientific probability, that no toxic mold existed that would prevent the Isaacs from living in their home.

The last piece of evidence the trial court used was a deposition from Karen Lee Early, an industrial hygienist. Ms. Early was critical of Tencon's testing procedures, and is of the opinion that Tencon should have taken its samples from different areas of the house. Nevertheless, Ms. Early performed no tests on the Isaacs's home.

The Isaacs filed a verified petition for declaration of rights in the Rowan Circuit Court on March 10, 2000, and they amended it on April 27, 2000. A hearing was held on August 15, 2000. The court heard testimony from the Isaacs and State Farm and determined the most credible evidence was the test results submitted by Tencon, Inc. Therefore, the court found the toxic stachybotrys fungi did not exist in the home. The court strongly suspected the roof the Isaacs had recently placed on their house in 1999 was the culprit for the apparent water stains. In addition, the court found the Isaacs's expert, William Croft, was not credible because he never submitted his findings for a laboratory analysis. As a result, the trial court concluded

State Farm did not owe the Isaacs "for any further losses, including living expenses" under the policy in question.

The Isaacs's first contention is that the trial court went beyond what was requested in the petition for declaratory judgment. At the end of its judgment, the court stated that "the policy in question does not provide coverage to the plaintiff for any further losses, including living expenses." The Isaacs claim this statement is ambiguous and that the court is making a judgment that exceeds the purpose of the declaratory judgment. We disagree. It is well established that a declaratory judgment should not go beyond the pleadings and questions being asked of it, and they do so when "they embrace possible controversies that do not now or may never exist." Louisville and Jefferson County Metropolitan Sewer District v. Douglass Hills Sanitation Facility, Ky., 592 S.W.2d 142, 144 (1979). However, in the case at hand, we believe the court is explicitly addressing the policy and its applicability to the alleged toxic mold. The statement was simply saying that since there was no evidence of toxic mold, then the policy does not cover damages or actions resulting from its alleged existence. We believe the trial court's use of the words "further losses" was meant to address different aspects of the policy, such as replacement costs to the home and other losses normal to homeowner's policies. Therefore, since no toxic mold was found, the trial court was correct in ruling the policy did not cover the Isaacs's additional nine months of living expenses or new theories of recovery for damages caused by toxic mold.

The Isaacs's second argument is that State Farm's assertion that the declaratory judgment has a res judicata effect on their new causes of actions is wrong because declaratory judgments do not have a res judicata or collateral estoppel effect. We disagree. Declaratory judgments that have "pleadings filed and the practice resorted to by the parties have in reality converted the case into an ordinary action" will be considered as an "ordinary" trial. Commonwealth v. Givens, Ky., 299 S.W.2d 799, 802 (1957). Thus, the declaratory judgment will have a res judicata effect. Id. at 802. In the present case, like Givens, there were pleadings and each party was given an opportunity to present their evidence during the hearing. In addition, each side was allowed to produce and have an expert witness testify on their behalf. Therefore, since both parties had a full opportunity to litigate their case, we hold the declaratory judgment in the present case can have a res judicata and collateral estoppel effect.

State Farm argues the Isaacs may not bring additional claims for personal injury and bad faith based on the presence of toxic mold because the claims should have been asserted in the first cause of action which only asked for living expenses. State Farm believes res judicata prevents the Isaacs from bringing the two claims. We agree with State Farm that the Isaacs's claim for personal injuries resulting from toxic mold is barred under res judicata. To prove a cause of action under res judicata, it must be shown that a previous judgment on the merits between the same parties exists and that the concerns of the previous cause of action are the same as those presently

asserted. Napier v. Jones, Ky. App., 925 S.W.2d 193 (1996). See also City of Louisville v. Louisville Professional Firefighters Assn., Ky., 813 S.W.2d 804 (1991). See also Newman v. Newman, Ky., 451 S.W.2d 417 (1970).

In the case at hand, the first two elements of res judicata are fulfilled. The declaratory judgment put the Isaacs in opposition to State Farm, and the case was decided on its merits when the court ruled there was no toxic mold present in the Isaacs's home. The only question is whether the third element, identity in the causes of action, is met.

State Farm argues the third criteria was met because the subsidiary rule of res judicata prevents the Isaacs from splitting their cause of action. Egbert v. Curtis, Ky. App., 695 S.W.2d 123 (1985). The subsidiary rule in Egbert, 695 S.W.2d at 124 states:

> Stated another way the subsidiary rule makes res judicata applicable not only to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time.

Using this definition, we believe the Isaacs should have brought forward their personal injury and bad faith causes of action when their other causes of action against State Farm were brought. Both essentially derive from an issue that was litigated and decided in the declaratory judgment, i.e., whether there was toxic mold. The declaratory judgment established that there presently was no toxic mold in the Isaacs's home. To determine this, they used evidence gathered and tested in a laboratory by

experts. The Isaacs argue their second cause of action is a different issue because it involves determining whether toxic mold existed prior to the finding that there currently was no toxic mold. However, we disagree that there is a difference because the claims appear to be determinable by the same evidence; thus the two claims should have be asserted in the first cause of action. The evidence used to determine the presence of toxic mold during the declaratory judgment would have been the same evidence used to determine if mold had been present from 1994 to 2000. As a result, since the additional claims should have been brought in the original action, the Isaacs are barred under the doctrine of res judicata from bringing the two claims.

While the doctrine of res judicata does bar the Isaacs from bringing further action against State Farm for damages resulting from the alleged toxic mold, we believe the doctrine of collateral estoppel is also applicable in the current case. Although collateral estoppel and res judicata are very similar in nature, the effect of collateral estoppel is different from that of res judicata:

> The basic distinction between the doctrines of *res judicata* and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment 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.

City of Louisville, 813 S.W.2d at 807, quoting Lawlor v. National Screen Service Corporation, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955). Kentucky adopted the use of collateral estoppel or claim preclusion in Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 559 (1970). Collateral estoppel "serves to prevent parties from relitigating issues necessarily determined in a prior proceeding." Gregory v. Commonwealth, Ky., 610 S.W.2d 598, 600 (1980). Thus, even when the "second action between the same parties is upon a different claim or demand," the prior judgment acts as an estoppel to all theories or claims revolving around issues already litigated. City of Louisville, 813 S.W.2d at 807.

We believe the doctrine of collateral estoppel prevents the Isaacs from bringing the second cause of action because the issue about the presence of toxic mold has already been litigated and any theory of recovery or claim for damages should have been presented in the original suit. Both sides had an opportunity to prove the toxic mold existed and any problems arising thereafter. Therefore, if the Isaacs were permitted to file a new claim for relief and then be allowed to establish the mold existed between 1994 and 1999, they would essentially be getting another chance to prove an issue that has already been litigated. The doctrine of collateral estoppel prohibits a new theory of liability on the same facts, thus, the Isaacs cannot bring the additional claims.

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

ALL CONCUR.

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