IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Ciavarella and Margaret Ciavarella, Appellants	:	
v.	:	No. 37 C.D. 2009
Erie Insurance Exchange and Ridgewood Country Estates Homeowners Assn., Inc.	:	Argued: February 8, 2010

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: April 28, 2010**

This is the fourth appeal in a long-running dispute involving fire-damaged property located in the Ridgewood Country Estates, Harmony Township, Carbon County. John and Margaret Ciavarella (Owners) appeal pre-trial and post-trial orders of the Court of Common Pleas of Carbon County (trial court) which resulted in judgment in favor of Erie Insurance Exchange (Insurer), issuer of a homeowners' insurance policy for the property.

The essence of the current controversy is as follows. In 2001, Owners instituted a declaratory judgment action seeking a declaration that they are the legal owners of 20 acres of land in Ridgewood Country Estates, which was improved with a clubhouse and pool (Property). Owners also sought a declaration that they had an insurable interest in the Property on October 25, 2001, the date upon which a fire destroyed the clubhouse. Finally, Owners sought a declaration

that a homeowners' policy issued by Insurer covered the loss of their real and personal property. After several years of pre-trial litigation, the matter proceeded to a bench trial. The trial court determined that Owners failed to prove a loss of personal property as a result of the fire and that Insurer proved Owners filed a fraudulent loss claim.

I. Background

The foregoing summary notwithstanding, this case has a significant history. In November, 1996, Owners purchased the Property. At the time of purchase, the Property was subject to an ongoing dispute between Owners' predecessor-in-interest and the Ridgewood Country Estates Homeowners' Association (Association). The Association was seeking title to the land under a Declaration of Easements, Covenants, and Restrictions of Ridgewood Country Estates. Once Owners purchased the Property, the Association discontinued its suit against the predecessor-in-interest and initiated a similar action against Owners.

In August, 2000, the trial court found in favor of the Association and required Owners to transfer title to the Property to the Association for no consideration. In February, 2001, the Association filed writs of execution and possession. Owners filed for stay, which was denied as untimely because the period for compliance with the trial court's order lapsed. On appeal, this Court

affirmed the trial court's August, 2000 order.[1] This Court's affirming order was filed October 19, 2001.

Significant for current purposes, a fire destroyed the clubhouse and its contents on the Property a few days later, on October 25, 2001. Also, in September, 2002, Owners transferred title to the fire-damaged Property to the Association, thereby complying with the trial court's August, 2000 order.

Meanwhile, in November, 2001, Owners filed the current declaratory judgment action against Insurer and the Association in neighboring Luzerne County. They sought a declaration that they were the legal owners of the Carbon County Property when it was destroyed by fire, that they had an insurable interest in the Carbon County Property, and that they were entitled to recover their loss under a policy of insurance issued by Insurer. After two rounds of preliminary objections, the Luzerne County Court transferred the matter to Carbon County.

Upon consideration, the trial court sustained Insurer's and the Association's preliminary objections in the nature of a demurrer. The trial court determined that since Owners were legally bound to transfer title to the Property to the Association, they could not derive any pecuniary benefit from the existence of the Property or suffer a pecuniary loss resulting from its destruction. The court further observed equitable principles required transfer of title to the Property to be

[1] See Ridgewood Country Estates Homeowners['] Ass'n, Inc. v. John Ciavarella and Margaret Ciavarella, (Pa. Cmwlth., No. 1327 C.D. 2001, filed October 19, 2001), appeal denied, 569 Pa. 712, 805 A.2d 528 (2002). This appeal was initially filed with the Superior Court, which transferred the matter to this Court. All subsequent appeals have been filed with this Court.

effective as of this Court's October 19, 2001 order affirming the trial court. Otherwise, Owners would benefit from their obstinacy and leave the Association with title to a fire-ravaged Property.

Owners appealed a second time. In January, 2005, this Court reversed the trial court's order sustaining Insurer's preliminary objections and remanded the matter for consideration of any outstanding preliminary objections.[2] We concluded Owners had an insurable interest in the Property as trustees for the Association and as mortgagors.[3]

On remand, the trial court subsequently granted summary judgment in favor of Owners, concluding they have an insurable interest as trustees for the Association but not as mortgagors. The trial court also granted partial summary judgment in favor of Insurer, concluding Owners are not entitled to retain the proceeds of the homeowners' policy for real property loss. The trial court determined the issue of whether Owners could recover for any personal property loss would be decided at trial. These orders are among those at issue in this appeal.

---

[2] See John Ciavarella and Margaret Ciavarella v. Erie Ins. Exchange and Ridgewood Country Estates Homeowners' Ass'n, Inc., (Pa. Cmwlth., 2442 C.D. 2003, filed January 20, 2005) (Ciavarella II).

[3] Owners purchased the property for $80,000 in 1996. Thereafter, they executed two mortgages on the Property totaling $125,000: a $95,000 mortgage in favor of Ciavarella Construction Company and a $30,000 mortgage in favor of a bank. They insured the property with Insurer for $665, 925. Ciavarella II.

A bench trial was held on nonconsecutive days in August and September, 2009. The trial court ultimately determined that Owners failed to prove any resulting personal property loss as a result of the October 25, 2001 fire and that Insurer proved Owners filed a fraudulent loss claim. Owners filed post-trial motions, seeking a new trial or judgment in their favor. The trial court denied Owners' motions. Owners now appeal.

II. Manner of Review

Our appellate role in cases arising from non-jury trial verdicts is to determine whether competent evidence supports the trial court's findings or whether the court committed an error of law. Nevyas v. Morgan, 921 A.2d 8 (Pa. Super. 2007). The trial court's findings must be given the same weight and effect on appeal as the verdict of a jury. Id. Further, we consider the evidence in a light most favorable to the verdict winner. Id.

When presented with an appeal from the denial of a motion for new trial, appellate courts must not interfere with the trial court's authority to grant or deny a new trial. McNanamon v. Washko, 906 A.2d 1259 (Pa. Super. 2006). The trial court must follow a two-step process, first determining whether factual, legal or discretionary mistakes were made. Id. If the trial court determined that one or more mistakes were made, it must then evaluate whether the mistake provided a sufficient basis for granting a new trial. Id. A new trial is not warranted merely because some irregularity occurred during the trial or another judge would have ruled differently; the moving party must demonstrate to the trial court that he suffered harm. Id.

Similarly, this Court follows a two-step analysis: we must review the trial court's decision to determine whether that court agrees a mistake was made. Id. In doing so we must scrutinize the court's decision for legal error or an abuse of discretion. Id. A trial court abuses its discretion by rendering judgment that is patently unreasonable, arbitrary or capricious, or fails to apply the law, or was motivated by partiality, prejudice, bias or ill will. Id.

Moreover, the admission or exclusion of evidence is within the sound discretion of the trial court and, reviewing a challenge to the admissibility of evidence, we will only reverse the trial court upon a showing that it abused its discretion or committed an error of law. Id.

III. Issues

Owners raise five issues:

- Whether the trial court erred in concluding that Owners lacked an insurable interest in the real estate, thereby precluding their retention of insurance proceeds for real property loss;

- Whether the trial court abused its discretion by permitting a defense witness to testify as an expert, even though Insurer violated the trial court's order closing discovery;

- Whether the trial court erred in determining Owners failed to sustain their burden of proving fire loss of personal property;

- Whether the trial court erred in concluding Insurer sustained its burden of proving Owners committed fraud, in light of problems with Insurer's proof; and

- Whether the trial court abused its discretion by permitting a defense witness to offer an expert opinion, where Insurer failed to qualify the witness as an expert.

The "Concealment, Fraud and Misrepresentation" clause of the homeowners' policy at issue provides in pertinent part and with emphasis added:

> This entire policy is void as to you and anyone we protect if, whether before or after a loss:
>
> 1. you … have intentionally concealed or misrepresented any material fact or circumstance concerning this insurance; or
>
> 2. there has been fraud or false swearing by you or anyone we protect as to any matter that relates to this insurance or the subject thereof; or
>
> 3. you … engage in fraudulent conduct as to any matter that related to this insurance or subject thereof.
>
> In the event of 1., 2., or 3 above, we will not pay for any loss.

Pls.' Ex. 20, at 19. This clause provides a complete defense to payment under the insurance policy. The trial court, as fact-finder, determined Insurer met its burden of proof on the application of this clause, essentially because Owners greatly exaggerated the amount of personal property lost in the fire. Therefore, we will first address Owners' issues as they relate to Insurer's proof.

IV. Burden of Proof for Fraud; Testimony of Investigator

A. Contentions

Owners assign error in the trial court's reference to a burden of proof of fraud by a preponderance of the evidence. Relying on Tudor Insurance Company v. Township of Stowe, 697 A.2d 1010 (Pa. Super. 1997), they assert that the proper burden is by clear and convincing evidence.

Owners also decry the trial court's acceptance of the testimony of Michael Hartley, a former Pennsylvania State Police Fire Investigator (Investigator), who testified for Insurer. Owners note that Investigator identified items in the fire debris consistent with the testimony of Owners' witnesses.[4] In addition, Investigator did not testify as to the effect of fire on personal items. Insurer originally contacted Investigator to investigate the cause and origin of the fire, and not to dissect the post-fire debris. It was only years later that Investigator prepared a report identifying the fire debris. The trial court disregarded Investigator's concession that he could not testify with any degree of certainty as to whether Owners' inventoried personal property was in the fire debris.

Insurer asserts it proved by a preponderance of the evidence that Owners committed fraud in making their claim of personal property loss. Insurer relies on Greenberg v. Aetna Insurance Company, 427 Pa. 494, 235 A.2d 582 (1967), in which our Supreme Court recognized the distinction between fraud in the making of a contract and, as here, a fraudulent claim of loss under the contract. Insurer's assertions are consistent with the general rule in Pennsylvania that an insurer must only prove affirmative defenses to its policy obligations by a preponderance of the evidence. See Seals, Inc. v. Tioga County Grange Mut. Ins. Co. 519 A.2d 951 (Pa. Super. 1986).

[4] Investigator identified the following items: two torpedo-type kerosene heaters; metal cans; liquid petroleum cylinders; lawn mower; metal chairs; building equipment; metal chair backs; scaffolding; stove pipe; frame of a love seat; hand truck; stove; washer; and small appliances.

Insurer also contends the trial court properly relied on Investigator's expert testimony. Investigator conducted over 660 fire investigations, previously investigated whether insured individuals made claims for items which did not exists, and attended training courses on the effect of fire on personal property. Pennsylvania Rule of Evidence 702 permits any person who by knowledge, skill, experience, training or education, has specialized knowledge beyond that of a layperson to testify as an expert.

Additionally, Insurer argues that the trial court accepted Investigator's testimony that the 12 inches of fire debris could not support Owners' claims of personal property valued at close to $200,000. According to Investigator, the lack of significant debris did not support Owners' claim of personal property loss. The court further relied on Investigator's expert testimony in part to conclude Owners committed fraud by materially misrepresenting the amount of personal property destroyed by the fire.

B. Discussion

1. Burden of Proof

As noted above, the homeowners' policy at issue specifically provided that misrepresentation on part of the insured in submitting a claim rendered the policy void. An insurer may defend against a breach of contract claim by asserting the affirmative defense of fraud. An insurer must prove: the representation was false; the representation was made in bad faith or with knowledge of its falsity; and the representation was material to risk being insured. Tudor.

Here, the trial court properly relied on Greenberg to conclude Insurer had to show by a preponderance of the evidence that Owners submitted a fraudulent loss claim. In Greenberg, the plaintiff alleged the loss of personal property as a result of a fire in his drug store. The insurer filed an answer alleging the fire resulted from arson, in which the plaintiff participated. The plaintiff agreed arson caused the fire, but vehemently denied any participation in it. The trial judge charged the jury that the insurance company had to prove by "clear, precise and indubitable" evidence that the plaintiff conspired with others to present a false claim. The Supreme Court reversed, relying on the general rule that in civil cases where a criminal act is charged as part of the case, the rule is the criminal act need only be established by a fair preponderance of the evidence. Greenberg clearly supports the trial court's use of the preponderance of the evidence standard.

2. Testimony of Investigator

As to whether Insurer proved by a preponderance of the evidence Owners filed a fraudulent loss claim, we reference the testimony of Investigator. Learned in the amount, consistency, and type of debris resulting from residential fires, he noted a general lack of debris resulting from the October, 2001 fire. To Investigator, this signified a lack of contents in the clubhouse. Investigator did identify several items among the debris: distorted metal, an extension ladder, and a stepladder. Reviewing Owners' personal property inventory, Investigator noted noncombustible items would survive a fire, such as box springs, a stainless steel range hood, metal patio umbrella stands, stainless steel chaffing dishes, and a commercial grade soda machine. These items, identified on Owners' inventory, should have survived the fire, but Investigator saw no evidence of those items at

the fire scene. Investigator further testified that while he can identify an item as a certain object, he cannot verify that the item viewed at the scene is the exact item listed on the inventory.

The trial court found Investigator credible. Martin v. Evans, 551 Pa. 496, 711 A.2d 458 (1998) (credibility determinations are within the sole province of the fact-finder). Substantial evidence supports the trial court's credibility determinations in that Owners' Ex. 23 (Personal Property inventory), Reproduced Record (R.R.) 1930a-39a, identifies a number of items which would survive a fire but where not among the debris. Accordingly, we discern no error in the trial court's conclusion Insurer proved Owners filed a fraudulent loss claim.

In addition to Investigator, Insurer presented Ms. Maseychik, an insurance agent. In June, 2001, Maseychik visited the Property for purposes of issuing an insurance policy to the Association. At that time, "[t]here was very little of anything inside of the clubhouse." R.R. at 1595a. The kitchen did not have any type of commercial appliances, and she did not see any beds in the bedrooms. R.R. at 1597a, 1612a. She did not see any deck furniture. Id. It did not appear that someone lived at the clubhouse. R.R. at 1599a, 1618a-25a.

Thus, the testimony of Ms. Maseychik, which the trial court implicitly found credible, also supports the trial court's finding that all the items alleged to be in the Property at the time of fire were not in fact on the premises. In particular, their testimony directly rebuts Owners' testimony that they fully moved into the Property in 1998. Therefore, the record supports a finding Owners filed a fraudulent loss claim.

V. Testimony of Insurer's Financial Expert

A. Contentions

Owners challenge the testimony of defense witness Joseph Yanushefsky (Insurer's financial expert). Insurer's financial expert reviewed Owners' financial situation prior to the fire. His expert report was delivered to Owners after the close of discovery, 17 days before the first day of trial. In the expert report Insurer's financial expert offered opinions regarding Owners' financial problems in general and cash flow problems in particular during the year of the fire. His proposed testimony was challenged by a motion *in limine*, which the trial court denied.

Owners argue that in January, 2007, the trial court ordered discovery closed within 90 days of the order, approximately April 26, 2007. However, Insurer did not provide Owners with a copy of its financial expert's report until July 23, 2007, well beyond the discovery deadline.

The Rules of Civil Procedure require a party to supplement its responses to discovery requests for the identification of experts expected to testify at trial and the subject matter upon which the expert is expected to testify. Pa. R.C.P. No. 4007.4. Because Insurer failed to supplement its discovery responses, Owners were denied the opportunity to obtain their own expert report, resulting in extreme prejudice to Owners. Owners assert the trial court relied on the expert's report when concluding Owners' testimony regarding their financial situation at the time of trial was not credible.

In addition, Owners challenge the trial court's reasoning that they had adequate time to rebut Insurer's expert report. Owners should not have been expected to rebut Insurer's expert's report in 17 days where the trial court found it reasonable for Insurer to obtain the report four months after Owners turned over its discovery.

Insurer, reviewing the four factors discussed in Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 517 A.2d 1270 (1986), concludes the trial court did not abuse its discretion in permitting its financial expert to testify. First, there was no surprise or prejudice to Owners. In their motion *in limine*, Owners failed to explain how the expert's testimony would prejudice them. On appeal, they alleged prejudice on the basis the trial court relied on the expert's testimony. However, the expert's testimony provided only one reason the trial court found Owners not credible.

Also, Owners could cure the prejudice. They received the financial expert's report 17 days before trial. In Curran v. Stradley, Ronon, Stevens & Young, 521 A.2d 451 (Pa. Super. 1987), the Superior Court found disclosure of an expert's report 13 days prior to trial provided a party with sufficient time to cure any prejudice. Here, Insurer delivered the expert's report to Owners 17 days before trial. In addition, the expert did not testify for an additional five days after the first day of trial (the trial was held on non-consecutive days). Owners chose not to request a continuance.

Insurer also notes that Owners failed to claim the financial expert's testimony somehow disrupted the orderly presentation of the trial.

Further, Insurer argues it did not engage in bad faith. Owners created the problem when they refused to comply with Insurer's discovery request on two occasions in 2003 and 2004. In March, 2007, Owners finally executed a release allowing Insurer to request documents from the IRS. The IRS complied and supplied some, but not all, of the requested documents. After reviewing the documents, Insurer promptly retained its financial expert in early July, 2007. Insurer delivered the expert's report to Owners within three days of receiving it. Had Owners turned over the requested documents sooner, Insurer would have retained the expert sooner, and disclosed his report at an earlier date.

Finally, Insurer argues it would have been prejudiced if the trial court excluded its financial expert's testimony. Preclusion of a party's only expert witness in a particular field constitutes prejudice. Curran.

B. Trial Court Opinion

The trial court concluded it did not abuse its discretion in permitting Insurer's financial expert to testify. Insurer presented its expert's report 17 days prior to the first day of trial. The fact that Insurer submitted the report beyond the discovery deadline does not result in automatic exclusion.

The trial court cited Pennsylvania Rule of Civil Procedure 4003.5(b), pertaining to discovery of expert testimony, which provides that an expert whose identity is not disclosed in compliance with the rules of discovery shall not be

permitted to testify. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

The trial court acknowledged that the obvious intent of the discovery rules is to prevent surprise at trial and to provide the parties ample opportunity to present their positions in the fullest form. See Daddona v. Thind, 891 A.2d 786 (Pa. Cmwlth. 2006). The court then considered: Owners' prejudice or surprise in allowing the expert to testify; Owners' ability to cure the prejudice; the extent to which waiver of the discovery rule would disrupt the orderly and efficient operation of the court; and, Insurer's bad faith or unwillingness to comply with the trial court's order. Feingold.

The trial court concluded Owners demonstrated no prejudice. Owners learned of the expert's report 17 days before trial and, therefore, had sufficient time to prepare cross-examination and rebuttal. Had Owners asserted an undue burden, the court would have entertained a motion for continuance. However, Owners filed a motion *in limine* and, when denied, proceeded to trial. In addition, the court did not rely solely on Insurer's financial expert's testimony in rendering its verdict, as Owners contend.

Moreover, there was no showing the expert's testimony disrupted the efficiency and administration of the court.

Finally, the trial court found no bad faith on part of Insurer. The court observed Owners fully complied with the trial court's discovery order in March,

2007, just four months prior to trial, despite Insurer's numerous production requests in the previous four years. Insurer's submission of its expert's report cannot be deemed an attempt to pull one over on Owners.

C. Discussion

The Superior Court's decision in Curran is persuasive. In that case, the insurer's expert became unavailable to testify shortly before the scheduled trial. The insurer found a substitute expert and delivered an unsigned copy of the expert's report eight days before trial. The plaintiff attempted to preclude the expert from testifying pursuant to Pa. R.C.P. No. 4003.5(b). Relying on Feingold, the Superior Court remanded for a new trial to allow the insurer to present its expert witness. The Court noted that the insurer informed the plaintiff of its expert witness at least two weeks before trial, and the plaintiff could have used that time to investigate the expert's qualifications. The plaintiff did nothing, which the Court believed mitigated any claim of prejudice.

Here, Owners filed a motion *in limine* to preclude the expert's testimony. At oral argument, the trial court gave Owners two options: they could proceed to trial as scheduled or they could have a continuance. Hr'g Transcript, Motion *in Limine*, 8/8/07, at 39-40. After time to consider the trial court's options, Owners stated they would proceed to trial. Id. at 43.

Owners' claims of prejudice must fail, for several reasons. First, the trial court offered Owners a continuance to adjust their strategy after receiving Insurer's financial expert's report. Owners received Insurer's expert report 17

days prior to trial and, in that time, could have investigated the expert, his report, and retain their own expert to rebut Insurer's expert's testimony. Curran. There was no surprise to Owners, and there was ample opportunity to cure any prejudice.

In addition, the trial court determined Insurer did not act in bad faith. As far back as August 2006, Insurer sought copies of Owners' tax returns. R.R. at 900a-04a. In March, 2007, Owners finally executed a release allowing Insurer to request the tax returns from the IRS. Id. at 905a. Although there is no indication when Insurer received the IRS's response, Insurer asserted in its answer to Owners' motion *in limine* that it promptly retained a financial expert to review Owners' tax returns and promptly turned over his report. This weighs against a finding of bad faith by Insurer.

Further, Insurer presented only one expert witness regarding Owners' financial condition in support of its claim Owners made a fraudulent loss claim. The prejudice to Insurer if its financial expert was precluded from testifying is obvious. In sum, no abuse of discretion is apparent in the trial court's handling of this issue.

VI. Testimony of Excavator

A. Contentions

Owners challenge the testimony of Paul Mancuso (Excavator), who excavated the Property after the fire at the direction of Fire Investigator. Owners assert that the trial court impermissibly allowed Excavator to offer an expert opinion regarding the type and amount of debris at the scene of the fire where the witness was not qualified as an expert. The witness simply excavated the fire

debris during Investigator's investigation. In addition, the witness testified he did not leave the backhoe or enter the basement area of the Property. The witness stated he observed propane tanks, space heaters, ladders, metal chairs, cabinets and small metal items in the debris.

Insurer contends that it did not offer Excavator as an expert witness, nor did he testify as such. Excavator testified regarding his observations when excavating the clubhouse after the fire. Insurer argues a lay person may testify to matters of which he has first-hand knowledge.

B. Discussion

Excavator testified regarding his observations of the fire debris and nothing more. Excavator limited his testimony to who hired him, his duties, and his observations. R.R. at 1674a-1722a. He named readily-identifiable items in the fire debris: a cabinet, ladders, metal chairs, and space heaters. R.R. at 1699a. He also recalled some metal objects in the debris, but he but did not attempt to identify them. His duties were limited to lifting the debris with the backhoe and placing it in an average-size pile. Id.

Excavator did not testify as to the effect of fire on objects. As noted by the trial court, the Rules of Evidence permit any lay witness to testify to matters of which he has first-hand knowledge. Pa. R.E. 701. As Excavator's testimony was limited to his observations regarding the fire debris, we discern no merit in Owners' contention.

VII. Other Assignments of Error

As discussed above, we reject all assignments of error with regard to Insurer's proof. Because the affirmative defense established by Insurer renders the homeowners' policy void, Owners cannot recover regardless of their insurable interest in the real estate, and regardless of the trial court's rulings on their proof of loss of personal property. We therefore decline to discuss these issues at length, because they will not change the result.

It is sufficient for current purposes to note that we discern no error in the trial court's decision regarding Owners' proof. Indeed, the trial court's disposition is entirely consistent with its determinations regarding the fraud issue. With regard to an insurable interest, however, the trial court erred in concluding that Owners did not have an insurable interest as mortgagors. See John Ciavarella and Margaret Ciavarella v. Erie Ins. Exchange and Ridgewood Country Estates Homeowners' Ass'n, Inc., (Pa. Cmwlth., 2442 C.D. 2003, filed January 20, 2005). This error could support a new trial on the ability of Owners to recover for fire damage to the clubhouse, but the finding of fraud precludes any recovery under the homeowners' policy.

For all these reasons, we affirm the trial court.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Ciavarella and Margaret Ciavarella, Appellants	:	
v.	:	No. 37 C.D. 2009
Erie Insurance Exchange and Ridgewood Country Estates Homeowners Assn., Inc.	:	

O R D E R

AND NOW, this 28th day of April, 2010, the Order of January 5, 2009, denying Plaintiffs' Motion for Post-Trial Relief and entering judgment in favor of Defendants, Erie Insurance Exchange and Ridgewood Country Estates Homeowners Association, Inc., is **AFFIRMED**.

ROBERT SIMPSON, Judge