

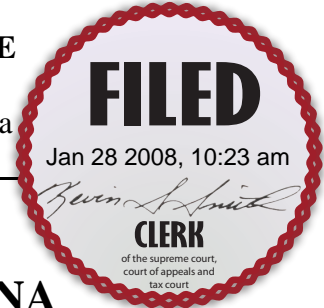
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**IN THE
COURT OF APPEALS OF INDIANA**

PAUL W. GRIM,)
)
Appellant-Plaintiff,)
)
and)
)
GOLDEN RULE INSURANCE COMPANY,)
and GARY M. FRY,)
)
Appellees-Defendants.)

No. 57A03-0708-CV-384

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D01-0012-CP-171

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

This case comes before us again following remand to the trial court with regard to appellant-plaintiff Paul Grim's complaint against appellees-defendants Golden Rule Insurance Company (Golden Rule) and Gary M. Fry,¹ for breach of contract concerning the coverage of claims under Grim's insurance policy and for the alleged breach of Golden Rule's duty to act in good faith.

In this appeal, Grim argues that the trial court erred in granting summary judgment for Golden Rule because the designated evidence established that Grim was entitled to seek damages for breach of Golden Rule's implied covenant of good faith and fair dealing. Grim also asserts that the trial court erred in concluding that an intervening bankruptcy necessarily terminated his action against Golden Rule for breach of contract. Concluding that the trial court properly entered summary judgment for Golden Rule, we affirm.

FACTS

This litigation commenced after Grim submitted two applications to Golden Rule in September 1999 for short-term major medical health insurance coverage. After Golden Rule accepted the applications, Grim suffered a heart attack. Thereafter, Golden Rule refused coverage of the related medical expenses based upon Grim's answer to one of the questions in his application for coverage. Specifically, Grim was asked:

Within the last 5 years, have you or your spouse, or any dependent to be covered, received medical or surgical consultation, advice or treatment, including medication, for: heart or circulatory system disorders, liver disorders, kidney disorders, emphysema, diabetes, cancer, alcohol or drug abuse or immune system disorders including HIV infection?

¹ Fry was the insurance broker who submitted Grim's insurance application to Golden Rule. The trial court granted summary judgment in Fry's favor, and he is not a party to this appeal.

Grim v. Golden Rule Ins. Co., No. 57A03-CV-107, slip op. at 3 (Ind. Ct. App. Feb. 2, 2006).

Although Grim answered “no” to this question, the undisputed evidence established that he suffered from—and had been treated for—hypertension. Id. As a result, Golden Rule informed Grim that it was voiding the policies.

On December 5, 2000, Grim filed a complaint against Golden Rule and Fry, claiming that Golden Rule breached the insurance contract by failing to reimburse and indemnify him for medical and other covered expenses incurred following the heart attack. Grim asserted that Golden Rule “acted with malice, in disregard of Grim’s contractual and other rights and contrary to its own internal policies,” and that Golden Rule’s alleged misconduct was “sufficient to warrant the imposition of exemplary damages.” Appellant’s App. p. 34-36.

On April 26, 2005, the trial court granted Golden Rule’s motion for summary judgment on all claims. In relevant part, the judgment provided:

7. The Plaintiff has not plead [sic] a tort upon which a claim for punitive damages can be based.
8. There is no evidence that Golden Rule’s conduct in denying [Grim’s] claim for medical expenses was anything other than honest judgment . . .

Accordingly, this Court enters judgment against [Grim] on all counts of his Complaint and in favor of Golden Rule on Counts I and II of its Counterclaim, as well as in favor of Gary Fry. . . .

Appellees’ App. p. 24. Thereafter, Grim filed a notice of appeal, and seven days later, he filed for bankruptcy. In the bankruptcy petition, Grim included the existence of the cause of action against Golden Rule and the medical bills and associated expenses in his outstanding debts. On August 1, 2005, Grim was granted a discharge in bankruptcy, thus eliminating his legal obligation to pay the medical bills and expenses.

On February 2, 2006, in an unpublished memorandum decision, this court reversed the trial court's grant of summary judgment for Golden Rule on Grim's breach of contract claim, finding that a genuine issue of material fact existed as to whether the term "hypertension" was a "heart or circulatory system disorder" as defined in the insurance policy. Grim, slip op. at 5. As a result, we remanded the cause to the trial court with respect to Grim's breach of contract claim. Also, after analyzing an insurer's duty to act in good faith and deal fairly with an insured, we affirmed the grant of summary judgment for Golden Rule on this tort claim, concluding that Grim failed to present any evidence to support a punitive damages award. Id., slip op. at 6-7.

Following remand to the trial court, discovery commenced and Grim provided the following answers to Golden Rule's interrogatories:

3. Were all of the incurred medical bills and unpaid balance(s) which are or were the subject of this litigation discharged in bankruptcy?

Answer: Yes.

4. Itemize any damages which you contend are at issue in this litigation and which you further contend were not discharged in bankruptcy?

Answer: Golden Rule's failure to pay Plaintiff's medical expenses necessitated Plaintiff filing bankruptcy. As a result of filing bankruptcy, Plaintiff's reputation and creditworthiness has been damaged.

Appellant's App. p. 57. Thereafter, Golden Rule filed a motion for summary judgment, claiming that because Grim obtained a discharge in bankruptcy, his claim could no longer be pursued. Put another way, Golden Rule argued that Grim's claim for damage to his reputation could be pursued only under a tort theory, and that theory was extinguished when

this court ruled against him regarding his claim for punitive damages. Thus, Golden Rule argued that Grim could not pursue “loss of reputation” damages as a matter of law. Appellant’s App. p. 102. Following a hearing on May 22, 2007, the trial court granted Golden Rule’s motion for summary judgment. In relevant part, the order provided that

The plaintiff acknowledges that because of the discharge of medical bills in bankruptcy the sole remaining claim is in tort of bad faith. The Court of Appeals has previously decided that there was no evidence of bad faith and affirmed a prior summary judgment entered by this court on that issue.

Id. at 9. Grim now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only if the designated evidence shows 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. Ind. Trial Rule 56(C). In reviewing a grant of summary judgment, this court stands in the shoes of the trial court and applies the same standard. Progressive Constr. & Eng’g. Co. v. Ind. & Mich. Elec. Co., 533 N.E.2d 1279, 1282 (Ind. Ct. App. 1989). We will affirm a grant of summary judgment if it is sustainable on any theory found in the evidence designated to the trial court. Jacques v. Allied Bldg. Servs. of Ind., 717 N.E.2d 606, 608 (Ind. Ct. App. 1999).

When the movant’s affidavits and other evidence demonstrate the lack of a genuine issue of material fact, the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial. Id. Any doubt about the existence of a factual issue should be resolved against the movant, with all properly asserted facts and reasonable inferences

construed in favor of the nonmovant. Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (Ind. 1994). Finally, we note that the party appealing the grant of a motion for summary judgment bears the burden of persuading this court that the trial court erred. Foster v. Evergreen Healthcare, Inc., 716 N.E.2d 19, 23-24 (Ind. Ct. App. 1999).

II. Grim's Claims

A. Good Faith and Fair Dealing

Grim argues that the trial court erred in granting Golden Rule's motion for summary judgment because the designated evidence established that he should be permitted to recover damages for the independent tort of breach of an insurer's duty to act in good faith and fair dealing. In essence, Grim maintains that the trial court erred in determining that evidence of misconduct sufficient to warrant the imposition of punitive damages is required to support a claim for breach of the covenant of good faith and fair dealing.

In resolving this issue, we note that the breach of an insurer's duty of good faith and fair dealing toward its insured has been recognized as an independent tort, separate and distinct from an insured's breach of contract claim. Erie v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993). In particular, our Supreme Court in Erie observed that "an insured who believes that an insurance claim has been wrongly denied may have available two distinct legal theories, one in contract and one in tort, each with separate, although often overlapping elements, defenses and recoveries." Id. Moreover, after acknowledging that special contractual remedies had been eliminated in contract cases and recognizing the need to allow

a more generous measure of damages in insurance disputes in light of the relationship between an insurer and its insured, the Erie court commented as follows:

Given the sui generis nature of insurance contracts, then, we conclude that it is in society's interest that there be fair play between insurer and insured. These factors, coupled with our return to the rule of no punitive damages in contract cases, leads us to conclude that recognition of a cause of action for the tortious breach of an insurer's duty to deal with its insured in good faith is appropriate.

Id. at 519.

In light of the pronouncement in Erie, Grim's failure to appeal any breach of duty claim that he may have had against Golden Rule after all of the issues were decided in the initial judgment waives and forever forecloses any tort claim for breach of the duty of good faith and any damages that Grim might have recovered based upon that theory. See Firstmark Standard Life Ins. Co. v. Goss, 699 N.E.2d 689, 696 (Ind. 1993) (observing that without proving that the insurance company committed a violation of the duty to deal in good faith, there is no basis for an award of any damages based upon that tort). Indeed, to accept Grim's claim that the breach of an insurance contract necessarily permits recovery of extra-contractual damages would undermine the clear purpose and mandate of the rule announced in Erie. Therefore, Grim is not permitted to expand the measure of his damages in the breach of contract claim to include damages that he may have been able to recover in tort had he preserved his right to pursue those theories by presenting them in the initial appeal. In essence, the issues between Grim and Golden Rule—except for Grim's breach of contract claim—were resolved in the prior appeal.

In Pinnacle Media, L.L.C. v. Metropolitan Dev. Comm'n of Marion County, 868 N.E.2d 894, 901 (Ind. Ct. App. 2007), trans. denied, this court observed that:

The law-of-the-case doctrine provides that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same case and substantially the same facts. The purpose of the doctrine is to minimize unnecessary relitigation of legal issues once they have been resolved by an appellate court. Accordingly, under the law-of-the-case doctrine, relitigation is barred for all issues decided directly or by implication in a prior decision.

In this case, Grim knew when he filed his first appeal that the tort of bad faith, if proved, might provide him with means to recover punitive damages, that the trial court found that he had not pleaded a tort that permitted such recovery, and that the trial court found "no evidence that Golden Rule's conduct . . . was anything other than honest judgment." Appellees' App. p. 24. As discussed above, we analyzed the tort of breach of an insurer's duty to act in good faith and fair dealing with its insured in Grim's prior appeal. And, as we recently observed in Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007):

A second, or subsequent appeal or review only brings up for review the proceedings subsequent to the reversal or remand, and all questions presented on the first appeal, including jurisdictional questions, will not be considered on the second appeal; also, all rulings on questions not expressly affirmed or reversed will be deemed impliedly affirmed.

In light of this pronouncement, it is apparent that our prior decision foreclosed all issues except for Grim's breach of contract claim, which we remanded to the trial court. Thus, we conclude that the trial court properly granted summary judgment for Golden Rule with regard to Grim's tort claim for breach of the duty of good faith and fair dealing.

B. Breach of Contract Claim

Grim argues that his breach of contract action should be allowed to proceed, notwithstanding the discharge of the medical bills and related expenses in the bankruptcy matter. In essence, Grim asserts that he should be allowed to recover because his bankruptcy and financial “distress [were] among the naturally occurring items of damages” when the insurance carrier has refused to honor its indemnity obligations. Appellant’s Br. p. 11.

Any recoverable damages for Golden Rule’s alleged breach of the insurance contract were discharged in Grim’s voluntary bankruptcy. Hammes v. Brumley, 659 N.E.2d 1021, 1025 (Ind. 1995). Therefore, there are no damages in existence post bankruptcy for Grim to collect. While Grim maintains that damages for loss of reputation are compensable, not only in tort, but also in his breach of contract claim, this court has determined that damages for loss of reputation are only available in actions for libel, slander, abuse of process, malicious prosecution, and third party contract interference. Greives v. Greenwood, 550 N.E.2d 334, 338 (Ind. Ct. App. 1990). As noted above, the original case was remanded to the trial court only on a breach of contract theory and not in tort. Therefore, we can only conclude that the trial court’s entry of summary judgment in Golden Rule’s favor on Grim’s breach of contract claim was proper.

As an aside, we reject Grim’s contention that he should be permitted to proceed on his claim because the bankruptcy was a “foreseeable consequence” of his loss of insurance coverage. Appellant’s Br. p. 11-12. Grim failed to designate any facts that would support a claim that his voluntary bankruptcy was a foreseeable consequence of an alleged breach of

contract by Golden Rule. Also, even if the bankruptcy could be considered a foreseeable consequence of Golden Rule's alleged breach, Grim was nonetheless obligated to prove that he was entitled to recover damages for alleged harm to his reputation and creditworthiness in his breach of contract claim. This, Grim failed to do, and there is no authority that permits such recovery.

The judgment of the trial court is affirmed.

ROBB, J., and MATHIAS, J., concur.