IN THE COURT OF APPEALS OF IOWA

No. 9-342 / 08-1570
Filed July 22, 2009

ADDISON INSURANCE COMPANY,
Plaintiff-Appellant,

vs.

KNIGHT, HOPPE, KURNICK & KNIGHT, L.L.C.,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner, Judge.

Appellant appeals the grant of summary judgment and asserts legal malpractice against its former counsel. **AFFIRMED**.

Robert Hogg and Patrick M. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

James E. Shipman and Chad M. VonKampen of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, and David Macksey and Victor J. Pioli of Johnson & Bell, Ltd., Chicago, Illinois, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Addison Insurance Company (Addison) appeals the grant of summary judgment in favor of its former counsel, Knight, Hoppe, Kurnik & Knight, L.L.C. (Knight) on a legal malpractice claim. We affirm.

I. Background Facts and Proceedings

The underlying lawsuit was brought in New York on March 24, 1995, by the administratrix of the Gary Ketten Estate after Ketten was killed in a vehicle collision on April 2, 1993. The suit generally alleged Knoedler Manufacturing Company (Old Knoedler) was liable for the manufacture of a defective truck seat. Addison insured Old Knoedler at the time of the accident. On December 17, 1993, approximately nine months after the accident, Old Knoedler was sold to Sturhand Investments, Inc., who also purchased the name Knoedler Manufacturers, Inc., (New Knoedler). The sale was made under an asset purchase agreement.[1] Addison also insured New Knoedler from December 18, 1993, to December 18, 1994, but provided no coverage to New Knoedler for the date of the accident, nor was there any assignment of insurance coverage in the asset purchase agreement. The original Ketten lawsuit did not specify whether the suit was against Old Knoedler or New Knoedler, but Addison provided a defense to Old Knoedler for the lawsuit, incurring $419,060 in attorneys' fees, and $250,000 to settle the lawsuit.

Thereafter, Knight representing Addison, filed a declaratory judgment action in Illinois against New Knoedler to recover these costs. New Knoedler

[1] The asset purchase agreement was titled, "Agreement for the Purchase and Sale of the Operating Assets of the Seat Line Division of Knoedler Manufacturers, Inc."

filed a motion to dismiss, claiming Addison could not be subrogated to the collateral contract rights of Old Knoedler. Addison claimed the lawsuit was not based on subrogation rights, but on enforcement of an indemnity clause as detailed in the asset purchase agreement. New Knoedler's motion to dismiss was granted, and Addison filed a motion to reconsider, which was denied. Knight then filed Addison's notice of appeal, but failed to file the record on appeal, a requirement under the rules of the Supreme Court of Illinois. New Knoedler filed a subsequent motion to dismiss, to which Knight did not respond, and the appeal was dismissed in June 2002 for want of prosecution.

Addison then filed suit in the Iowa District Court for Linn County in June 2004, alleging negligent representation by Knight, and seeking to recover the costs and settlement noted above, totaling $669,060.[2] In May 2008, Knight moved for summary judgment and Addison cross-moved for partial summary judgment. Knight argued that although it failed to file a record on appeal, even without this error, Addison would not have succeeded in the appeal such that the judgment of the Illinois district court would have been reversed. The Iowa district court, applying Illinois law, agreed and granted Knight's motion for summary judgment. Addison appeals.

II. Standard of Review

We review the grant or denial of summary judgment for errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate

[2] Addison is an Illinois corporation, with its principal place of business in Cedar Rapids, Iowa. Our supreme court, on interlocutory appeal, held Iowa courts had personal jurisdiction over Knight. *See Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C.*, No. 05-0306 (Iowa June 29, 2007).

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981; *Dudden v. Goodman*, 543 N.W.2d 624, 626 (Iowa Ct. App. 1995). We review the record in the light most favorable to the party against whom the summary judgment was granted. *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 205-06 (Iowa 1995).

III. Legal Malpractice

Addison argues that the district court erred in granting summary judgment, asserting that had Knight perfected the underlying appeal by filing the record, the appeal would have been successful and the district court would have been reversed. Addison claims that by failing to perfect the appeal, Knight committed legal malpractice thereby causing Addison economic damages.

In cases involving litigation, no legal malpractice exists unless the attorney's negligence resulted in the loss of an underlying cause of action. *Governmental Interinsurance Exch. v. Judge*, 850 N.E.2d 183, 187 (Ill. 2006). Accordingly, the burden of pleading and proving actual damages requires establishing that "but for" the attorney's negligence, the client would have been successful in the underlying suit. *Id.* In order to determine whether Knight committed legal malpractice, we must first decide whether the underlying declaratory judgment action in Illinois would have been reversed, had Knight filed a record on appeal.[3]

[3] Both parties agree, and the asset purchase agreement provides, it is to be governed by the laws of the State of Illinois.

IV. Collateral Contract Rights

Addison contends that under the asset purchase agreement, New Knoedler expressly agreed to indemnify Old Knoedler. Specifically, Addison, as the insurer of the indemnitee, Old Knoedler, claims that it was subrogated to the rights of Old Knoedler as it defended and settled the lawsuit against Old Knoedler, and therefore it may recover from New Knoedler, the indemnitor. *Reid v. Bootheel Transp. Co. Inc.*, 771 F. Supp. 237, 240 (N.D. Ill. 1991) ("Illinois courts have uniformly held that an indemnitee's subrogee has the right to recover the amount the subrogee has paid on behalf of the indemnitee."). Knight asserts that Illinois law bars subrogation of Old Knoedler's rights against New Knoedler because the rights arose under a collateral contract, in this case the asset purchase agreement.

Subrogation is the substitution of one individual (or entity) in the place of a claimant to whose rights he (or the entity) succeeds in relation to the debt or claim asserted which he (or the entity) has paid involuntarily. *State Farm Gen. Ins. Co. v. Stewart*, 681 N.E.2d 625, 630 (Ill. App. Ct. 1997). An insurer who indemnifies its insured for a loss may be subrogated to the rights of the insured against the party at fault under the equitable doctrine that the economic burden "should be shifted to the party responsible for the loss." *Id.* The prerequisites to subrogation are: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy; and (3) the insurer must have paid the insured under that policy, thereby extinguishing the debt of the third party. *Id.* at 631. However, when an insurer indemnifies its insured for property damage and then seeks to

be subrogated to the insured's collateral contract rights against the third-party purchaser of that property not responsible for the loss, "the extent of the right to subrogation is . . . difficult to determine . . . [and t]he fact that liability of the third party . . . does not rest upon fault makes the relative equities of the insurer much less appealing." *Id.*

Addison cited various cases asserting that as an insurance company, it had a right to recover the amount that a subrogee has paid on behalf of the indemnitee. *Spurr v. LaSalle Constr. Co*., 385 F.2d 322, 331 (7th Cir. 1967); *Reid*, 771 F. Supp. at 240; *Rome v. Commonwealth Edison Co.*, 401 N.E.2d 1032, 1036 (Ill. App. Ct. 1980). However, in this case, New Knoedler was not "primarily liable" as it was not the party responsible for the manufacture of the faulty seat, and the accident occurred approximately nine months before it purchased that division of Old Knoedler. *Stewart*, 681 N.E.2d at 631.

The district court determined that Addison's payment on behalf of Old Knoedler as its insurer was "wholly separate and unrelated to any obligation" of New Knoedler to indemnify Old Knoedler, and that payment "cannot trigger any right to proceed under subrogation" against New Knoedler. Under Illinois law, an insurer who indemnifies its insured for property damage may not be subrogated to the collateral contract rights of the insured against a third-party purchaser of the subject property. *Id.* Old Knoedler and New Knoedler had an agreement for the sale of the company that was separate, and therefore collateral, to any agreement that Old Knoedler had with its insurance company, Addison. The obligation of an insurer to its insured remains independent of the obligation of a third-party purchaser to the insured, absent an assignment. *Id.* at 632.

Addison asserts the district court erred in applying the rationale of *Stewart*, as there was no indemnification agreement in *Stewart*. Instead, Addison points us to *Shell Oil Co. v. Hercules Construction Co.*, 219 N.E.2d 392 (Ill. App. Ct. 1966), which did contain an indemnification agreement, arising out of a purchase order from Shell to its contractor, Hercules. However, in *Shell*, the court held that the ultimate liability for the injury rested with Hercules, the "active wrongdoer," and therefore the indemnity agreement allowed Shell's insurer to be subrogated to Shell's rights as against Hercules to recover the amount the insurer paid to the injured party. *Shell Oil Co.*, 219 N.E.2d at 394. The facts of *Shell* do not apply to Addison, as New Knoedler, unlike Hercules, was not an "active wrongdoer." While an indemnity provision was involved in *Shell*, as it is in this case, *Shell* turned on the fact that the indemnity provision could be enforced based on the fault of the defendant-indemnitor, a fact lacking in this case.

The *CNA* case, which Knight cites as supporting its position, is similarly distinguishable from the case at hand. *CNA Ins. Co. v. DiPaulo*, 794 N.E.2d 965 (Ill. App. Ct. 2003). CNA, as the homebuyers' insurer, paid the buyers for damages caused by termites. It then sought to be subrogated to the buyers' right to pursue a fraud claim against the sellers for failing to disclose the termite infestation. The court allowed the subrogation as "[t]he [homeowners'] policy contained language whereby CNA obtained the [buyers'] rights to recover against a third party if it paid for damage to the property." *Id.* at 967. By contrast, Addison seeks to be subrogated to the contract rights of Old Knoedler, but does not assert any tort action that Old Knoedler would have had the right to assert against New Knoedler, nor any assignment of such action.

Illinois case law is clear that an insurer may be subrogated to the insured's rights against any person wrongfully causing a compensable loss to the insured. *Stewart*, 681 N.E.2d at 632. But when an insured's claim for subrogation is based solely on a collateral agreement, it can only be enforced under limited circumstances, specifically: where fault is clear or there is an assignment of that right. *CNA Ins. Co.*, 794 N.E.2d at 969. Even with an indemnity provision, as contained in both *Shell* and *CNA*, those respective courts ultimately relied on the fault of the indemnitor to allow subrogation. Without fault playing any role in this case, Addison cannot step into Old Knoedler's role via subrogation by asserting a contract right based on a "wholly unrelated" collateral agreement. We agree with the district court that Addison's payment on behalf of Old Knoedler, in regard to the Ketten lawsuit, was not related to any obligation of New Knoedler to indemnify Old Knoedler. Therefore, Addison did not have a right to proceed as Old Knoedler's subrogee against New Knoedler.

V. Indemnification Under the Asset Purchase Agreement

Aside from striking down Addison's claim under the collateral contract reasoning, the district court found the indemnity agreement of the asset purchase agreement was ambiguous. Addison disagrees and asserts the agreement contains, in plain language, that New Knoedler shall indemnify Old Knoedler for exactly the type of claim as the Ketten lawsuit. The asset purchase agreement contained the following provisions:

> 8.1 Indemnification of Buyer. Except as provided in Section 8.2, Seller shall indemnify, defend, and hold Buyer harmless from and against any and all costs, expenses, losses, damages or liabilities (including, without limitation, reasonable attorneys' fees and accounting fees) incurred by Buyer with respect to or in connection

> with claims of third parties regarding the Division, the underlying facts of which occurred prior to Closing.
>
> 8.2 Indemnification of Seller. Buyer shall indemnify, defend, and hold Seller harmless from and against any and all costs, expenses, losses, damages or liabilities (including, without limitation, reasonable attorneys' fees and accounting fees) incurred by Seller with respect to or in connection with (i) claims of third parties regarding the Division, the underlying facts of which occurred following the Closing, (ii) all product warranty claims made after the Closing with respect to the Division, and (iii) all product liability claims made after the Closing with respect to the Division.
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> . . . .
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> 1.3 Assumed Liabilities. Buyer hereby assumes those liabilities of Seller respecting the Contracts, Offers and all purchase commitments for inventory and finished goods with respect, solely, to the Division (collectively, the "Assumed Liabilities"). Except with respect to the Assumed Liabilities specifically described in this Section 1.3 or otherwise set forth in this Agreement, including Sections 6.2, 7.1 and 8.2, Buyer does not assume, or take subject to, any liabilities or obligations of Seller whatsoever, and any such assumption is hereby expressly disclaimed, and Seller agrees to indemnify and hold Buyer harmless from and against any and all losses, claims, damages and liabilities (including, without limitation, reasonable attorneys' fees and expenses of investigation) arising from or related to any such liability or obligation not assumed by Buyer hereunder.

The district court found these sections to be ambiguous, reasoning:

> In Section 8.1, Old K appears to promise to indemnify New K for claims the underlying facts of which arose prior to closing, except as provided by Section 8.2. In Section 8.2, New K appears to promise indemnification to Old K for claims that arise after closing. If New K were to indemnify Old K for claims arising after closing of the contract, that would seem to render as rather extraneous and empty the promise in 8.1 of Old K to indemnify New K for claims the underlying facts of which arose prior to closing. Pursuant to 8.2, all such claims filed after closing would seemingly become the responsibility of New K. The Court thus finds the provisions of the contract to be ambiguous. Given the ambiguity, the Court finds that Plaintiff cannot show that it would have prevailed on appeal.

Addison argues the plain language in section 8.1 "excepts out" the provisions of section 8.2, thus rendering section 8.2 as the controlling language and under it

"*all*" claims of product warranty and product liability are to indemnified by New Knoedler.

However, even within section 8.2, there is conflicting language. In the first subpart of 8.2, New Knoedler promised to indemnify Old Knoedler against any "(i) claims . . . the underlying facts of which occurred following the Closing." It then continues on to state that it will indemnify Old Knoedler against, "(ii) all product warranty claims made after the Closing . . . and (iii) all product liability claims made after the Closing . . . ." We agree with the district court that the provisions of the asset purchase agreement are not "plain" as Addison asserts, but ambiguous as to the indemnity language.

In addition to agreeing with the district court that Addison cannot be subrogated to Old Knoedler's rights as against New Knoedler under a collateral contract, we also agree the indemnity agreement is ambiguous. Without either basis, Addison cannot show it would have prevailed on the appeal of the declaratory judgment action had Knight perfected the appeal. We therefore find the district court did not err in granting Knight's motion for summary judgment.

AFFIRMED.