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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000852-MR

FIRST FINANCIAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 95-CI-002932

AGENCY SPECIALTY OF KENTUCKY, INC.
AND WESSEL INSURANCE AGENCY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: First Financial Insurance Company (First Financial) appeals from a judgment of the Jefferson Circuit Court, which dismissed its complaint against Agency Specialty of Kentucky, Inc. (Agency Specialty) and the Wessel Insurance Agency (Wessel), for breach of contract and negligence following a jury trial in favor of the appellees. After reviewing the record and the arguments of counsel, we affirm.

First Financial is an insurance company located in North Carolina that underwrites insurance coverage for commercial businesses. In July 1986, Agency Specialty, through its predecessor company, entered into a general agency contract to

act as the general insurance agent for First Financial in the Commonwealth of Kentucky. The General Agency Agreement authorized Agency Specialty to solicit, receive and accept applications; issue and countersign binders; and effect cancellation of binders and policies. General Agency Agreement § 3.1. Agency Specialty could not appoint any local agents except with the prior written approval of First Financial. Id. at § 1.5. The Agreement also included an indemnification provision whereby Agency Specialty agreed to indemnify First Financial against liabilities or losses resulting from or arising out of acts or omissions by Agency Specialty or any other person for whom it may be responsible. Id. at § 19.1.

In late January 1989, James Rhodes, on behalf of Bob Lowery, the owner of the Arcade Bar, contacted Lori Harlow, an agent with the Wessel Insurance Agency, an independent insurance agency, about obtaining premises liability insurance coverage. Harlow in turn solicited quotes from several insurance companies including Agency Specialty. Lowery decided to accept coverage through First Financial as quoted by Agency Specialty. On February 9, 1989, Harlow issued an insurance binder as a temporary insurance contract for the Arcade Bar for commercial general liability that stated there were "No Special Conditions." The binder also stated, however, on the back side, that it was subject to the terms, conditions and limitations of the policy in current use by the Company (First Financial). At that time, First Financial's policies for taverns excluded coverage for assault and battery. Harlow did not tell Rhodes about the

exclusion prior to issuing the binder. Harlow gave the binder to Rhodes and mailed it to Agency Specialty, who received it on February 10, 1989. On February 13, 1989, Agency Specialty issued and mailed to Harlow a full policy containing the assault and battery exclusion. On February 16, 1989, Harlow mailed the policy to Rhodes.

Meanwhile, on February 12, 1989, Donald Hargrove was shot in an altercation while patronizing the Arcade Bar and died two days later. Hargrove's estate filed a wrongful death action against the person who shot Donald Hargrove and the Arcade Bar, which filed a claim under its liability insurance policy. First Financial provided legal representation in the suit under a reservation of rights and filed a declaration of rights action against the Arcade Bar and the Hargrove estate concerning its obligations under the policy.[1] First Financial denied coverage based on the assault and battery exclusion contained in the policy. In July 1992, the circuit court held that First Financial was obligated to provide a defense and to indemnify the Arcade Bar up to the limits of the policy based on the insurance binder issued by Wessel. In January 1993, a jury found in favor of the Hargrove estate and apportioned causation to the Arcade Bar of 33 1/3%. Pursuant to the jury verdict, the circuit court entered a judgment on January 28, 1993, against the Arcade Bar for $143,373.19. On August 6, 1993, this Court affirmed the circuit court's judgment in the declaration of rights action. On September 14, 1994, First Financial satisfied its portion of the

[1] First Financial Ins. Co. v. Hargrove, 90-CI-4339.

monetary judgment in the wrongful death action by payment to the Hargrove estate.

On May 25, 1995, First Financial filed its complaint in the current action against Agency Specialty and Wessel seeking indemnification for $210,515.79 for costs, expenses and attorney fees paid in relation to the Hargrove litigation. It raised claims of breach of contract under the General Agency Agreement against Agency Specialty for authorizing an insurance binder without the assault and battery exclusion and appointing Wessel as a local agent without prior approval, and negligence for allowing Wessel to issue the insurance binder without the policy exclusions. First Financial also raised a claim of negligence against Wessel for issuing the insurance binder without the proper exclusions. On June 12, 1995, Wessel filed an answer denying liability based on alleged authorization from Agency Specialty to issue the insurance binder. On June 30, 1995, Agency Specialty filed an answer denying any breach of contract or negligence, a counterclaim asserting First Financial failed to raise all meritorious defenses in the declaration of rights action, and a cross-claim seeking indemnity for negligence by Wessel in issuing the insurance binder.

On January 26, 1996, First Financial filed a motion for summary judgment against both defendants pursuant to CR 56. It stated that Agency Specialty had breached its duty under the general agency agreement to ensure the insurance binder contained the proper exclusions. Agency Specialty responded that there was no breach of contract because Wessel was not an agent, employee,

or party for which it was responsible. It also stated material factual issues existed concerning the issuance of the insurance binder. Wessel filed a response to First Financial's motion and also requested summary judgment in its favor. On August 6, 1996, the circuit court entered an opinion and order denying First Financial's motion stating whether Wessel was an agent of Agency Specialty and whether Agency Specialty breached any duty under the general agency agreement were factual issues not susceptible to summary judgment. It also denied Wessel's motion for summary judgment stating that Wessel assumed a duty to First Financial in issuing the insurance binder, but whether it acted negligently and whether Agency Specialty authorized the binder were disputed factual issues for a jury to determine.

On January 21, 1997, Agency Specialty filed a motion for summary judgment arguing the insurance binder was adequate because it had incorporated the policy exclusions. First Financial responded by asserting the decision by this Court in the declaration of rights action that the insurance binder was inadequate could not be readjudicated under the doctrines of law of the case and stare decisis. It also renewed its motion for summary judgment based on language in the general agency agreement providing for indemnification for losses resulting from or arising out of any transaction on the part of Agency Specialty. On April 25, 1997, the circuit court denied both motions stating neither law of the case nor stare decisis applied to this Court's unpublished opinion in another lawsuit and

whether Agency Specialty's action or inaction resulted in or caused the loss to First Financial was a disputed factual issue.

On August 5, 1996, First Financial filed its third request for summary judgment against Agency Specialty. It contended that Agency Specialty was liable under the General Agency Agreement for its failure to correct the inadequacies in the insurance binder after it had notice of the binder. On October 22, 1998, the circuit court denied the renewed motion for summary judgment stating that Agency Specialty could not be held liable based on ratification of Wessel's conduct for failing to revoke or change the inadequate binder because a party may not ratify an act which it could not have originally authorized.

On August 24, 2000, the circuit court held a jury trial involving whether Agency Specialty and Wessel were negligent and, if so, whether the negligence of either or both caused damages to First Financial. During the trial, Wessel called Harold W. Birchfield, over the objection of First Financial, as an expert witness on the standard of care for issuing insurance binders. The jury returned a verdict in favor of Agency Specialty and Wessel. On August 31, 2000, the circuit court entered a judgment dismissing the action. On September 8, 2000, First Financial filed a CR 50.02 motion for judgment notwithstanding the verdict and a CR 59.01 motion for a new trial, which were denied. This appeal followed.

First Financial raises several issues dealing with the denial of its summary judgment motions and its motion for directed verdict; the testimony of Harold Birchfield, Wessel's

expert; portions of Wessel's closing argument; and the role of this Court's opinion in the prior declaration of rights action.

First Financial's first complaint concerns the trial court's denial of its summary judgment motions and its motion for directed verdict. The party moving for summary judgment must establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. CR 56.03; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Summary judgment should be cautiously applied and should not be used as a substitute for trial unless it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. Id. at 482, 483. Generally, an order denying a motion for summary judgment is not appealable because it is interlocutory and not a final judgment. See CR 54.01; Ford Motor Credit Co. v. Hall, Ky. App., 879 S.W.2d 487, 489 (1994). Moreover, an appellate court will not review a trial court's decision to deny summary judgment based on a perceived dispute of material fact. Bell v. Harmon, Ky., 284 S.W.2d 812 (1955). Denial of summary judgment does not prejudice a party because he still has the opportunity to establish the merits of his motion at trial. Id. at 814. There is an exception to this rule of nonreviewability where the facts are not in dispute, the basis for the ruling involved only a matter of law, the court denied the motion for summary judgment, and the court entered a final judgment that the moving party appealed. See Transportation Cabinet, Bureau of Highways v. Leneave, Ky. App., 751 S.W.2d 36, 37 (1988)(citing Gumm v. Combs, Ky., 302

S.W.2d 616 (1957)); Midwest Mut. Ins. Co. v. Wireman, Ky. App., 54 S.W.3d 177, 179 (2001).

In this case, the trial court denied the motions for summary judgment based on its belief there were disputed issues of material fact and not solely on the basis of matters of law. Consequently, the trial court's decisions to deny First Financial's summary judgment motions are not subject to appellate review.

First Financial also argues the trial court erred in denying its motion for directed verdict. We believe First Financial failed to properly preserve the arguments raised in this appeal challenging the trial court's action on this issue. In its appellate brief, First Financial asserts there were no disputed issues of material fact and the matters of agency and ratification were matters of law. It basically restates the arguments it provided in its summary judgment motions that Agency Specialty's failure to seek modification of the insurance binder after receiving it constituted ratification of an inadequate binder.

At trial, however, in response to the oral motions for directed verdict by Agency Specialty and Wessel at the close of First Financial's case, which were based on the same arguments presented in their summary judgment motions, First Financial stated the issues raised by the appellees were factual issues for the jury. The trial court basically agreed with First Financial and denied the appellees' motions because the issues involved factual questions. At the close of all the evidence, First

Financial merely stated that it "would move for a directed verdict." Counsel gave no arguments or basis for its motion. The trial court stated that it was denying First Financial's motion, as well as the renewed directed verdict motions of the appellees, for the same reasons it denied the initial directed verdict motions. It is well-established that a party moving for a directed verdict must "state the specific grounds therefor." CR 50.01. See also Hercules Powder Co. v. Hicks, Ky., 453 S.W.2d 583 (1970). Failure to specify each ground supporting a directed verdict forecloses appellate review of the trial court's denial of the motion. Id. Barnett v. Stewart Lumber Co., Ky. App., 547 S.W.2d 788 (1977). First Financial's position in this appeal on the denial of its directed verdict motion that only legal and no factual issues are involved is directly contrary to its stated position during the trial.

Even if the ratification argument had been properly preserved, First Financial would not have been entitled to a directed verdict on this ground. The standard of review of a denial of a directed verdict requires reversal only if the jury verdict is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion and prejudice after viewing all the evidence and any reasonable inferences drawn from the evidence favoring the prevailing party as true. See USAA Casualty Ins. Co. v. Kramer, Ky., 987 S.W.2d 779, 781-82 (1999)(quoting Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459, 461 (1990)). We agree with the trial court that whether Agency Specialty's conduct constituted a breach of duty

by ratification of the insurance binder was a factual issue for the jury. The cases cited by First Financial in support of its position are distinguishable.

First Financial also contends the trial court erred by failing to grant its motion for mistrial for comments made by Wessel's attorney in closing argument that his client did not "have the money to pay this type of claim. It's not fair to put that claim on him now." It maintains that counsel's comments were improper and false representations that Wessel was financially unable to pay any monetary judgment against it. See, e.g., Triplett v. Napier, Ky., 286 S.W.2d 87 (1955). First Financial believes these statements were intended to induce sympathy with the jury and were outside the scope of the evidence. The trial court denied the motion for mistrial but admonished the jury not to consider the relative size or wealth of the parties and base their decision solely on the facts of the case.

A trial court may declare a mistrial based on manifest urgent or real necessity. Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 906 (2000). In Gould v. Charlton Co., Ky., 929 S.W.2d 734 (1996), the Court stated:

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way. "Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous

> error where prejudice cannot otherwise be removed."

Id. at 738 (internal citations omitted). See also Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 814 (2001). A trial court has discretion in deciding whether a particular situation constitutes sufficient manifest necessity to justify declaring a mistrial. Id. It is ordinarily presumed that a jury will follow an admonition or curative instruction and it will remove any prejudice caused by an offensive argument unless it appears the argument was so prejudicial under the circumstances that an admonition will not cure it. See Price v. Commonwealth, Ky., 59 S.W.3d 878, 881 (2001); Hayes v. Commonwealth, Ky., 58 S.W.3d 879, 882 (2001).

The trial court held that while Wessel's counsel's comments may have been improper, they did not result in manifest injustice. It noted that the comments were brief and were part of the description of the risks assumed by the various parties in providing liability insurance. Counsel described Wessel as a small independent broker acting as a middleman while First Financial was the actual underwriting insurer who received premiums in return for the risks of unexpected loss such as a court decision determining the scope of liability for a policy. We agree with the trial court that these comments did not create such grievous prejudice that it denied First Financial a fair and impartial trial. The trial court did not abuse its discretion in refusing to declare a mistrial.

First Financial raises two issues with respect to evidence associated with the arguments raised and the appellate

opinion rendered in the declaration of rights action. First Financial contends the trial court improperly allowed Wessel and Agency Specialty, over its objection, to elicit testimony and documentary evidence about the position taken by First Financial in the declaration of rights action. Frank Dent, First Financial's claims vice-president, admitted during cross-examination that the company argued in the declaration of rights action that the actual insurance policy containing the unambiguous assault and battery exclusion controlled over the insurance binder. First Financial asserts that its position in the earlier action was not relevant in the negligence action because the declaration of rights case merely concerned coverage under the insurance policy, not the conduct or responsibility of Wessel and Agency Specialty with respect to the insurance binder. It states the appellees could have moved to intervene in the declaration of rights action if they so desired.

First Financial also criticizes the trial court's decision to prohibit it from introducing this Court's entire opinion from the declaration of rights action as an exhibit. It maintains that allowing the appellees to present evidence that First Financial did not challenge the propriety of the insurance binder in the declaration of rights action without allowing it to show that in the negligence action it was adopting the appellate court's rationale in finding it liable on its policy created confusion and was unfair. First Financial maintains that the trial court should have taken judicial notice of the entire appellate court opinion.

Agency Specialty argues that First Financial's failure to challenge the propriety of the insurance binder and raise the responsibility of the appellees in the declaration of rights case was relevant to whether First Financial raised all possible defenses and could have avoided suffering an "actual loss" because of the appellate court decision. Wessel and Agency Specialty argue that First Financial's belief that the insurance binder was adequate prior to the appellate decision was consistent with their defense that they were not negligent because they reasonably also believed the binder was adequate. Agency Specialty also asserts this evidence was relevant to its defense that it did not ratify Wessel's issuance of an improper binder by failing to insist the binder be modified or revoked.

We find no error by the trial court. First Financial's position in the declaration of rights action was relevant and admissible with respect to the appellees' negligence, i.e., breach of the standard of care, and whether First Financial sufficiently challenged the propriety of the insurance binder in the earlier action. First Financial admitted at trial that it intentionally chose not to add Wessel or Agency Specialty as parties in the declaration of rights action. Because the declaration of rights action did not include the appellees as parties, the appellate decision was not binding on them under res judicata or collateral estoppel. See Yeoman v. Commonwealth, Health Policy Board, Ky., 983 S.W.2d 459 (1998); Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997). Also, it was not the law of the case because it was not

an opinion in the same case. See Roberson v. Commonwealth, Ky., 913 S.W.2d 310 (1994). The trial court stated it would take judicial notice of the appellate decision and allowed First Financial to elicit testimony from its witnesses on the basis for the decision. In fact, Frank Dent read verbatim that portion of the opinion that stated Wessel had failed to notify the Arcade Bar of the exclusions in the binder. First Financial was allowed to argue to the jury that it changed its position based on the appellate court decision. The trial court's decision not to include the entire appellate court opinion as an exhibit was reasonable and First Financial was not unduly prejudiced by the trial court's handling of this matter. First Financial's assertion that KRE 201 mandated that the entire appellate court opinion be submitted to the jury is erroneous and unsupported.

First Financial also complains about a jury instruction concerning the effect of the prior appellate court decision. The trial court used the first sentence of First Financial's proposed instruction stating that the appellate court had ordered First Financial to pay any judgment to the Arcade Bar, but the trial judge added a section stating that the jury was to determine the appellees' negligence based on the evidence in that case and was not bound by the appellate court decision on the issue of negligence. First Financial argues the latter provision erroneously gave the jury the impression they could disregard the appellate decision. We disagree.

The instruction accurately states the legal effect of the appellate court decision. A review of the entire instruction

shows that it clearly required the jury to accept the appellate court's decision imposing responsibility on First Financial under the insurance policy and it narrows the non-binding nature of the decision to the issue of negligence by Wessel and Agency Specialty. As stated earlier, the appellate decision was not binding on the appellees under res judicata or the law of the case. The question of negligence by the appellees was not decided in or at issue in the declaration of rights action. The trial court understandably was concerned that the jury would give undue weight to the appellate court decision. Thus, the instruction was not erroneous.

Finally, First Financial contends the trial court erred in allowing Harold Birchfield to testify as an expert witness for Wessel. Under KRE 702, a witness qualified as an expert by knowledge, skill, experience, training or education may testify as to his opinions of scientific, technical, or other specialized knowledge if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. "Application of KRE 702 is addressed to the sound discretion of the trial court." Farmland Mut. Ins. Co. v. Johnson, Ky., 36 S.W.3d 368, 378 (2001). See also Owensboro Mercy Health System v. Payne, Ky. App., 24 S.W.3d 675, 678 (1999). Likewise, the trial court's decision on qualifying a witness as an expert should not be overturned absent an abuse of discretion. Farmland, supra; Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 935 (1999). In order to constitute an abuse of discretion, a trial court's decision must be arbitrary, unreasonable, unfair, or

unsupported by sound legal principles. Farmland, 36 S.W.3d at 378; Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). In addition to being qualified to testify, an expert's testimony must be both relevant and reliable. Goodyear, 11 S.W.3d at 578.

First Financial argues that Birchfield was not qualified to testify as an expert and that his testimony did not assist the jury to determine a fact in issue. Birchfield's qualifications included over twenty years as a practicing insurance agent, certification as a chartered property and casualty underwriter, various honorary awards, and fifteen years service as an instructor of insurance agents in the certified insurance counselor program. Birchfield testified about the process for issuing insurance binders. He stated that the binder issued by Wessel was a standard binder produced with an insurance document computer program commonly used in the industry. He said the use of the term "no special conditions" in the restrictions section of the binder was common practice and binders did not and were not intended to include policy coverage exclusions. Birchfield opined that Wessel had acted reasonably and in a prudent manner under the standard of care in the insurance industry.

First Financial asserts that Birchfield was not qualified because he authored no publications and that he was nothing more than an insurance agent as were several other trial witnesses. Birchfield's background, however, includes extensive experience as an instructor conducting seminars throughout the

United States and as a member of industry governing boards. He also was independent and not connected with any of the parties. We believe Birchfield was sufficiently qualified to give an expert opinion on the practices of issuing binders in the insurance industry.

First Financial also challenges the relevance and reliability of Birchfield's testimony. It states he offered no methodology which could be analyzed, no theories or techniques that could be evaluated, and had no literature to support his opinions. It maintains that his testimony did not assist the jury because it did not involve complex issues that the jury could not determine from the evidence offered by the other witnesses.

While we agree with First Financial that Kentucky has adopted the analysis enunciated in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the factors set out in Daubert relied upon by First Financial are "neither exhaustive nor exclusive." Goodyear, 11 S.W.3d at 478. "[T]he inquiry into reliability and relevance is a flexible one." Id. The factors emphasized by First Financial are clearly more applicable to scientific and technical areas. The area of insurance industry practices falls more appropriately within the rubric of "specialized knowledge." It is an area of specialized terminology, procedures, and unique relationships. It is a field that few lay persons know well and is not an area of general knowledge. Birchfield offered testimony dealing

specifically with the customary practices and understanding of the agents in the issuing of insurance binders.

The standard of care with respect to the judgment of Wessel's and Agency Specialty's agents on the sufficiency of the insurance binder issued to the Arcade Bar was a central issue of the case that was a proper subject for expert testimony. See, e.g., Golembiewski v. Hallberg Ins. Agency, 262 Ill.App.3d 1082, 635 N.E.2d 452 (1994)(insurance agent allowed to testify on insurance industry practices with respect to oral binder for automobile insurance). Cf. Frank W. Schafer, Inc. v. C. Garfield Mitchell Agency, 82 Ohio App.3d 322, 612 N.E.2d 442 (1992) (insurance agents allowed to testify as experts on standard of care in insurance industry for recommending stopgap insurance to client); Kabban v. Mackin, 104 Ore.App. 422, 801 P.2d 883 (1990)(expert testimony admitted on standard industry practice in obtaining liability coverage for client); Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985)(standard of care related to notifying client of gap in insurance coverage should be established by expert testimony). Under the circumstances of this case, Birchfield's testimony was relevant and did assist the jury. Consequently, we find the trial court did not abuse its discretion in allowing Harold Birchfield to testify as an expert.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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