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JUNE 8, 2005 (2004-SC-0699-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001031-MR

JIM HURST, d/b/a JIM HURST INSURANCE — APPELLANT

APPEAL FROM WASHINGTON CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 97-CI-00031

JOHNNY CURTSINGER AND
MARGARET C. BRITTON,
ADMINISTRATRIX FOR ESTATE OF
DELCIA CURTSINGER, DECEASED — APPELLEES

NO. 2002-CA-000054-MR

AGWAY INSURANCE COMPANY — APPELLANT

APPEAL FROM WASHINGTON CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 97-CI-00031

JIM HURST, d/b/a JIM HURST INSURANCE — APPELLEE

NO. 2002-CA-001918-MR

JOHNNY CURTSINGER AND
MARGARET C. BRITTON, ADMINISTRATRIX
FOR ESTATE OF DELCIA CURTSINGER, DECEASED — APPELLANTS

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 97-CI-00031

JIM HURST, d/b/a JIM HURST INSURANCE
AND CELESTE HURST (NOW RAPIER) — APPELLEES

OPINION

AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE. These consolidated appeals arise out of a fire loss for which the insurer refused to pay a claim because of the failure of the agent to timely forward premiums to the insurer to reinstate the plaintiffs' homeowners policy. The insurer, agent, and homeowners all appeal from various judgments in the action. We reject plaintiffs' argument that they were entitled to attach the wife's interest in an account jointly owned by the agent husband and wife, who was employed by the insurance agency

at issue, to satisfy its judgment against the agent and, thus, affirm the order denying the non-wage garnishment. However, we agree with the insurer that they were entitled to indemnity from the agent and therefore reverse the order denying same. We also agree with the agent that plaintiffs were not entitled to punitive damages because plaintiffs failed to specify the amount sought pursuant to CR 8.01(2). Accordingly, we must reverse the judgment awarding punitive damages.

In 1995, Agway Insurance ("Agway") entered into an agency agreement with Jim Hurst d/b/a Jim Hurst Insurance Company ("Hurst Insurance") whereby Hurst could sell insurance on behalf of Agway. In June 1995, Johnny and Delcia Curtsinger applied for a farm/homeowners policy with Agway through Hurst. The Curtsingers' policy became effective in June of 1995. Agway issued a bill to the Curtsingers for a one-year renewal of their policy on May 21, 1996, and thereafter on June 18, 1996, Agway mailed the Curtsingers a reminder notice advising them that the renewal premium was due on or before June 30, 1996. On June 28, 1996, the Curtsingers hand-delivered a check for their renewal premium to Celeste Hurst, Jim Hurst's wife who was employed by Hurst Insurance. However, that check was not forwarded to Agway by the June 30, 1996, deadline. Consequently, Agway issued a notice to the Curtsingers on July 9, 1996, that their policy had been terminated. Hurst Insurance also received a copy of this

notice. Approximately a week later, Agway received the Curtsingers' renewal check and a copy of the renewal bill payment stub. Although the check was dated June 28, 1996, the payment, which was mailed by Jim Hurst, was postmarked July 12, 1996, three days after the July 9 notice of termination. On July 17, 1996, Agway returned the Curtsingers' uncashed check and again advised them that the policy had been cancelled. Agway also sent Hurst Insurance another notice that the Curtsingers' policy had been terminated. After receiving notice that their policy had been terminated, the Curtsingers made a cash payment to Celeste Hurst on July 23, 1996, in an effort to reinstate the policy. Celeste Hurst represented that the policy was reinstated and the Curtsingers were given a receipt for said payment, but Hurst Insurance failed to ever forward this payment to Agway. Jim Hurst did, however, contact Agway on July 23, 1996, requesting that Agway provide coverage to the Curtsingers. In that telephone conversation, Agway's underwriter, Sue Burns, instructed Jim Hurst that to reinstate coverage for the Curtsingers, Hurst Insurance must provide Agway with a statement affirming that the Curtsingers suffered no loss during the period of the policy lapse.

On or about November 7, 1996, the Curtsingers made a second cash payment to Hurst Insurance. Again the Curtsingers were given a receipt with "Agway" on it. As with the July 23

payment, Hurst Insurance never forwarded it to Agway and never returned the funds to the Curtsingers. Further, Hurst Insurance never sent the requested no loss statement to Agway.

On December 19, 1996, the Curtsingers suffered a fire loss and thereafter contacted Jim Hurst regarding coverage. Jim Hurst informed the Curtsingers that their policy had long been terminated. The Curtsingers directly contacted Agway in January 1997, requesting payment of the claim for the fire. Agway denied the claim on grounds that their policy had been terminated as of July 1996 and never reinstated.

On March 4, 1997, the Curtsingers filed an action against Jim Hurst d/b/a Jim Hurst Insurance Company and Agway seeking compensatory and punitive damages as a result of the denial of their fire claim. In that complaint, the Curtsingers alleged breach of the insurance contract, fraud, and violation of the Kentucky Consumer Protection Act ("KCPA"). Agway filed a cross-claim for indemnification against Hurst Insurance. The contract claim determining whether the Curtsingers had coverage was bifurcated from the other claims and tried before a jury on February 25-26, 1999. The jury found that the Curtsingers had coverage for the loss through Agway based on the representations of Hurst Insurance. Based on the jury's findings, the court entered a judgment against Agway and Jim Hurst d/b/a Hurst Insurance Company in the amount of $96,560.

Agway thereafter filed a motion for summary judgment on their indemnity claim against Hurst Insurance relative to the above judgment. The court denied the motion, adjudging that Agway was not entitled to indemnification because the Curtsingers made their renewal payment to Hurst Insurance, which was explicitly allowed by Agway, in a timely manner on June 28, 1996. From the order denying Agway's claim for indemnity against Hurst Insurance, Agway now appeals.

The Curtsingers' claims against Jim Hurst d/b/a Jim Hurst Insurance Company for fraud and violation of the KCPA were tried on March 13-14, 2001. The jury returned a verdict awarding the Curtsingers $50,000 in compensatory damages and $80,000 in punitive damages. Jim Hurst/Hurst Insurance now appeals from that portion of the judgment awarding punitive damages.

At some point during the litigation of the Curtsingers' claims, Celeste Hurst filed for divorce from Jim Hurst and obtained a decree of dissolution without a division of property. Pursuant to the dissolution proceeding, the Hursts sold their marital residence, and the proceeds from the sale were placed in a joint bank account pending the circuit court's property division. It is undisputed that other than the proceeds in this bank account, Jim Hurst is insolvent as is Hurst Insurance.

Subsequent to the judgments against Jim Hurst d/b/a Hurst Insurance, the Curtsingers delivered a non-wage garnishment order to the court for attachment of the bank account holding the proceeds from the sale of the Hurst residence. The court declined to enter the garnishment order, instead directing the Curtsingers to join Celeste Hurst (who was never named a party in the insurance complaint), individually, as a party to defend any interest she claimed in the account that was not subject to the garnishment. The Curtsingers thereafter filed a motion to join Celeste Hurst as a necessary party to determine her interest in the bank account sought to be garnished. As a result of a hearing on the garnishment motion on February 18, 2002, the court entered an order granting the garnishment of the account in question subject only to a determination of child support arrearages accrued as a prior lien against the account. Subsequently, Celeste Hurst and Jim Hurst filed motions to alter, amend or vacate the garnishment order. After a hearing on this motion, the court reversed in part its earlier order and determined that Celeste's interest in the account could not be garnished because she was never named a party to the action filed by the Curtsingers and was not an owner or operator of Hurst Insurance. From this order, the Curtsingers now appeal.

We shall first address the Curtsingers' appeal from the order denying garnishment of Celeste's interest in the bank account. The trial court based its decision on the holding in Strong v. First Nationwide Mortgage Corporation, Ky. App., 959 S.W.2d 785 (1998). In Strong, the husband and wife owned a body shop together, out of which the husband was operating a chop shop. After the husband filed for dissolution, he was indicted for his illegal activities related to the chop shop. Thereafter, two customers who had purchased vehicles containing stolen parts sued the husband and obtained judgments against him. The marital residence was subsequently sold and the issue on appeal was whether the claims of the husband's two judgment creditors had priority over the wife's interest in the proceeds of the sale of the residence pursuant to the dissolution proceedings. This Court found that the wife's interest in the proceeds had priority and could not be attached by the plaintiffs in the suit against her husband. Likewise, in the instant case, since Celeste was not a party to the action, the Curtsingers could not attach her interest in the proceeds resulting from the sale of the parties' real property.

The Curtsingers urge us to distinguish Strong by the fact that the husband only, and not the business, was sued in Strong and there was no evidence that the wife had any involvement in the chop shop activities. They point out that

the business (Hurst Insurance Company) was made a party and that it was a family business operated by both Celeste and Jim Hurst. Most significant, they argue, was Celeste's actual participation in the fraudulent scheme, which was not the case in Strong. As noted by the trial court in the case herein, although Celeste was employed by Hurst Insurance, the only licensed auto and property insurance agent for the business was Jim Hurst. Other than the fact that she was married to Jim Hurst, there was no evidence that she was anything other than an employee of the business. While it is true that there was certainly evidence of Celeste's participation in the wrongdoing, the Curtsingers did not get a judgment against her and cannot now attach her interest in the property in question via the judgment against Jim Hurst and Hurst Insurance.

The Curtsingers also argue the presumption enunciated in Brown v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky. App., 40 S.W.3d 873 (1999), that a joint account holder owns the entire account such that the entire account can be attached by a judgment creditor of that joint account holder. However, that presumption can be rebutted by proof that the other joint account holder made separate contributions to the account and that the joint account holder was sufficiently removed from the indebtedness or that each joint account holder understood that their respective

contributions would not be subject to the indebtedness of the other. Id. at 882. Although the Curtsingers properly cite this general rule, the distinguishing factor in the instant case is that the proceeds in the bank account were the result of the sale of real property pursuant to a dissolution action. Celeste's interest in the funds is thus governed by domestic law, in particular, KRS 403.190 (the disposition of marital property statute), not by property law. Accordingly, the trial court properly ruled that Celeste's interest in the funds at issue was not subject to attachment by the Curtsingers.

We now turn to Hurst's appeal of the punitive damage award. Hurst maintains that the Curtsingers were not entitled to punitive damages because they failed to specify the amount they were seeking in response to Hurst's interrogatory.

On April 11, 2000, Hurst served an interrogatory upon the Curtsingers, asking, "What is the amount of damages Plaintiffs claim entitlement to under each count of the Second Amended Complaint?" The Curtsingers listed the specific amount of compensatory damages sought, but as to punitive damages, the Curtsingers replied, "In such amounts as determined appropriate by the jury." Subsequently, on February 1, 2001, the Curtsingers filed a pre-trial memorandum which stated that they were seeking $50,000 in punitive damages for the fraudulent misrepresentations and $25,000 in punitive damages for the

violations of the Consumer Protection Act. However, in another pre-trial memorandum filed just 18 days later, the Curtsingers gave no specific amount of punitive damages sought. They again stated they were seeking "[p]unitive damages as determined appropriate by the jury." After all the proof was closed and before the jury was instructed, Hurst objected to any punitive damages instruction based on the fact that the Curtsingers had not stated any amount of punitive damages in answer to interrogatories as required by CR 8.01(2) and Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999). The trial court overruled the objection, adjudging that punitive damages are not unliquidated damages and thus the above law would not apply. Consequently, the jury was instructed on and awarded the Curtsingers $80,000 in punitive damages.

CR 8.01(2) provides:

> In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories.

The above rule has been interpreted such that a plaintiff must specify the amount of unliquidated damages sought in response to an interrogatory in order to recover those damages at trial. Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999); LaFleur v. Shoney's, Inc., Ky., 83 S.W.3d 474 (2002). "The language of the rule is mandatory and gives a trial court no discretion as to its application." Fratzke, 12 S.W.3d at 273. The Court in Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136, 141 (1991), explained the difference between liquidated and unliquidated damages:

> [I]n general "liquidated" means "[m]ade certain or fixed by agreement of parties or by operation of law." *Black's Law Dictionary* 930 (6th ed.1990). . . . "[U]nliquidated[]" [damages are] defined in Black's as "[d]amages which have not been determined or calculated, . . . not yet reduced to a certainty in respect to amount. *Black's supra* at 1537.

"Punitive damages are damages other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." Ashland Dry Goods Co. v. Wages, 302 Ky. 577, 195 S.W.2d 312, 315 (1946); KRS 411.184(1)(f). As conceded by the Curtsingers, the determination of whether punitive damages are to be awarded and, if so, the amount, is up to the jury. KRS 411.186. Hence, "[p]unitive damages 'by their very nature are unliquidated.'" Bailey v. Container Corp. of America, 660 F.Supp. 1048, 1056 (S.D. Ohio 1986) (quoting Gray

v. Allison Division, General Motors Corp., 52 Ohio App.2d 348, 358, 370 N.E.2d 747 (1977)).

The Curtsingers argue that the term "unliquidated damages" in the beginning of CR 8.01(2) speaks only to the amount of compensatory damages necessary to establish jurisdiction. Hence, it follows that the term "unliquidated damages" in the second sentence of the rule must likewise be referring to only compensatory damages and not punitive damages. We disagree. As pointed out by Hurst, punitive damages alone can establish jurisdiction. See Commonwealth Dept. of Agriculture v. Vinson, Ky., 30 S.W.3d 162 (2000). Further, the purpose of the latter part of the rule is "to allow a party to discover the *amount* an opposing party is seeking for unliquidated damage claims." Fratzke, 12 S.W.3d at 273. Thus, the party would be entitled to discover the claimed amounts for all unliquidated damage claims. There is no logical reason why punitive damage claims would be excluded from this discovery.

The Curtsingers also cite Louisville & Nashville Railroad Co. v. Taylor, Ky., 237 S.W.2d 842 (1951), for the proposition that they were not required to give the specific amount of punitive damages sought. The Curtsingers' reliance on that case is misplaced as it merely held that a party need not expressly plead the fact that it is seeking punitive damages if the wording of the pleading (allegations constituting gross

negligence) is such that the opposing party would be put on notice that punitive damages are being sought. Id. at 843-844. Taylor did not address CR 8.01(2) and whether the amount of punitive damages must be given in response to an interrogatory regarding unliquidated damages.

Accordingly, since the Curtsingers did not give a specific amount of punitive damages they were seeking in response to the interrogatories, they were barred from recovering any punitive damages. Hence, we must reverse the award of punitive damages.

We now turn to the third appeal, Agway's appeal of the denial of their indemnity claim. Agway maintains that indemnity from Hurst was warranted pursuant to its agency agreement with Hurst as well as under common law. In adjudging that Agway was not entitled to indemnity from Hurst, the court stated at the hearing on the matter:

> The loss did not stem from [Hurst's] failure to send the [no loss] information [to Agway]. The loss came from a fire and a failure to recognize the policy that [Agway] knew that they would have to stand good for because payment had been timely made to their agent. So, I don't think that the things stand separate and apart by themselves in the actions of either party. For that reason, the Court's going to deny both motions for indemnity.

In essence, the trial court found that Agway contributed to the loss by wrongfully failing to reinstate the Curtsingers' policy when the renewal payment was paid to Hurst in a timely manner.

The right to indemnity can be based on common law and principles of equity or by reason of a contractual relation. Ashland Oil & Refining Co. v. Bertram & Thacker, Ky., 453 S.W.2d 591, 595 (1970). If it is based on contractual relation, "[t]he nature of an indemnitor's liability under an indemnity contract shall be determined by the provisions of the indemnity agreement itself." U.S. Fidelity & Guaranty Co. v. Napier Electric & Construction Co., Inc., Ky. App., 571 S.W.2d 644, 646 (1978). The agency agreement between Hurst and Agway specifically provided that Agway was entitled to indemnity from Hurst 1) if Agway was held liable for Hurst's actions or omissions and Agway did not contribute to the error or omission; or 2) Agway suffered losses as a result of Hurst's violations of the agency agreement or Agway's instructions. The agreement further provided that the agent was required to forward to Agway all premiums collected within three business days of receipt thereof. Agway contends that its liability to the Curtsingers arose from both Hurst's errors and his violation of the above provision of the agency agreement. We agree.

Pursuant to the jury instructions in this case, the jury specifically found that Hurst represented to the

Curtsingers that they had coverage, that the Curtsingers relied on said representation, and that Hurst was acting within his apparent authority as agent of Agway when he made this representation. Thus, Agway's liability was solely based on the (mis)representation by Hurst and it was Hurst's failure to timely forward the Curtsingers' renewal payment(s) to Agway which caused Agway to not renew the policy in the first place. In essence, had Hurst not misrepresented that the policy had been renewed (an error on his part), when in fact it had not due to Hurst's failure to timely forward the premiums (an undisputed violation of the agency agreement), Agway would not have been liable to the Curtsingers.

It was Hurst's position below and now on appeal that because the Curtsingers actually did pay their premium on time to Hurst as was specifically allowed by language in Agway's billing notices, Agway had a duty to renew the policy and, thus, contributed to the loss by not renewing their policy. In support of this argument, Hurst cites to KRS 304.20-320(3)(c) which allows payment to the agent or the insurer. This argument ignores the fact that because Hurst did not timely forward the first premium payment and failed to ever forward the subsequent payments or the no loss statement, Agway had no knowledge that the premium had been paid at the time the policy lapsed. Agway cannot be required to renew a policy when, to the extent of its

knowledge, no renewal payment has been made. Regardless of whether payment to Hurst was timely, the fact is that Agway would have reinstated the policy and not allowed it to lapse had Hurst forwarded the renewal payment in a timely manner.

Interestingly, Hurst as much as admits indemnification from him to Agway is warranted in the following language in his appellee's brief:

> Agway might punish Hurst, its agent, under these circumstances. However, Agway chose instead to punish the Curtsingers and thereby launch the entire unfortunate set of circumstances surrounding this case.

This was exactly what Agway sought through indemnification from Hurst. Agway does not deny that it was bound by the misrepresentations of coverage by its agent; it simply seeks indemnification from the agent for its liability resulting from those misrepresentations.

We also agree that under common law, Agway was entitled to indemnification from Hurst. The right to indemnity "is available to one exposed to liability because of the wrongful act of another with whom he/she is not in pari delicto." Degener v. Hall Contracting Corp., Ky., 27 S.W.3d 775, 780 (2000). The two situations where indemnity is permitted are:

> (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an

> innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.

Id. (quoting Louisville Ry. Co. v. Louisville Taxicab & Transfer Co., 256 Ky. 827, 77 S.W.2d 36, 39 (1934)).

The issue of whether indemnity is warranted is a question of law to be decided once the fact finder has determined any factual issues surrounding the indemnity claim. Robinson v. Murlin Phillips & MFA Ins. Co., Ky., 557 S.W.2d 202, 204 (1977). We see the case at hand as a classic case where indemnity is warranted. As discussed above in the analysis of indemnity claimed under the agency agreement, Hurst committed two wrongful acts which caused the loss to Agway - failing to forward the collected premiums or the no loss statement and the subsequent misrepresentation of coverage. Agway's liability was solely based upon the jury's factual finding that Hurst, acting as an agent of Agway, misrepresented that the Curtsingers had coverage. Contrary to the trial court's finding, we adjudge that Agway in no way contributed to the loss by failing to renew the policy when no renewal payment, as far as it knew, had been paid therefor. Thus, Agway did not act in pari delicto with Hurst to cause the loss.

Hurst's final argument in defending the indemnity claim is that because Agway would have continued to insure the Curtsingers had they received the renewal premium, Agway cannot show that Hurst's actions were the proximate cause of their loss. The cases cited in support of this argument are from other jurisdictions and thus are not binding on us. Further, accepting this argument would, in essence, allow Hurst to benefit from his fraudulent conduct. He could simply pocket the premiums collected, misrepresent coverage, and not have any responsibility to Agway therefor in the event of a loss. One will not be permitted to profit from his own wrong. Webster County v. Nance, Ky., 362 S.W.2d 723 (1962). We decline to absolve Hurst from responsibility to Agway for his fraudulent conduct. Accordingly, Agway is entitled to full indemnity from Hurst for its liability to the Curtsingers.

For the reasons stated above, the judgment in favor of the Curtsingers for punitive damages is reversed, as is the judgment denying Agway's indemnity claim, while the judgment in favor of Celeste Hurst denying attachment of her interest in the joint bank account is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, AGWAY INSURANCE COMPANY:

David K. Barnes
Deanna M. Tucker
Louisville, Kentucky

BRIEF FOR JIM HURST, d/b/a JIM HURST INSURANCE:

Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
Louisville, Kentucky

BRIEF FOR JOHNNY CURTSINGER AND MARGARET C. BRITTON, ADMINISTRATRIX FOR THE ESTATE OF DELCIA CURTSINGER, DECEASED:

Bradley S. Guthrie
Harrodsburg, Kentucky

BRIEF FOR APPELLEE, CELESTE HURST RAPIER:

Lola P. Lewis
Lexington, Kentucky