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MAY 11, 2005 (2004-SC-0611-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000449-MR
AND
CROSS-APPEAL NO. 2003-CA-000505-MR

MICHELLE THOMAS, ADMINISTRATRIX
OF THE ESTATE OF
MARK J. THOMAS, JR.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL
FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CI-008589

GRANGE MUTUAL CASUALTY COMPANY

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE;¹ BUCKINGHAM AND VANMETER, JUDGES.
BUCKINGHAM, JUDGE: Michelle Thomas, administratrix of the estate
of Mark J. Thomas, Jr., appeals and Grange Mutual Casualty

¹ Chief Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

Company cross-appeals from a judgment of the Jefferson Circuit Court in favor of Grange. We reverse and remand.

On January 8, 2000, Daniella Dolson was operating an automobile owned by her mother, Martha Dolson, in Louisville, Kentucky, when she collided with a parked automobile owned by Mark J. Thomas, Jr. Because the Thomas automobile was not occupied at the time of the accident, Daniella left a note apologizing for the accident and requesting the owner to call her. Upon finding the note, Thomas's daughter, Michelle Thomas, the exclusive driver of the Thomas automobile, contacted the Dolson residence and spoke with Daniella's mother, Martha. During their conversation, Martha told Michelle that the Dolsons did not want a damage claim submitted to their insurance company, Grange, and that her husband, James, would be contacting Michelle in the near future in regard to obtaining an estimate for the necessary repairs to her automobile.

On January 21, 2000, Michelle took her damaged automobile to Hall's Collision Center and obtained a repair estimate in the amount of \$1,502.14. On January 24, 2000, at the request of James Dolson, Michelle took her automobile to Senn's Body & Paint Shop and obtained a repair estimate in the amount of \$1,015.14. After receiving these two repair estimates, James informed Michelle that, in his opinion,

Daniella had not caused all the damage listed on the repair estimates.

Claiming that there was pre-existing damage to the rear of the Thomas automobile, the Dolsons offered Michelle only \$300 to settle the matter. She rejected the settlement offer and, on April 10, 2000, she received a letter from the Dolsons' attorney advising her that the \$300 settlement offer had been withdrawn. Further, the letter requested information concerning the nature and extent of any pre-existing damage to the automobile.

Even though the Dolsons did not want the claim submitted to their insurance company, on May 11, 2000, Michelle filed a written claim with Grange and attached the Hall's Collision Center repair estimate of \$1,502.14. The matter was referred to a claim supervisor, Millie Snyder. According to the records of Grange, Snyder received a call from James Dolson on June 1, 2000, reaffirming to her that he did not want Grange involved in the matter. On the same day, Snyder wrote a letter to Martha Dolson advising the Dolsons that Grange would close its file at their request but that Martha Dolson would first have to sign a "waiver of coverage" letter. Martha signed the letter and returned it to Grange on July 17, 2000. Pursuant to the "waiver of coverage" letter and the Dolsons' request that

Grange not be involved in the matter, Grange apparently considered the matter closed.

On December 18, 2000, Michelle wrote Snyder a letter and advised her that her attempts to resolve the matter with the Dolsons had been unsuccessful. She further demanded that Grange immediately pay the amount of \$1,502.14. Further, Michelle stated that a copy of her letter was being sent to the Kentucky Department of Insurance.

Snyder replied to Michelle in a letter dated December 21, 2000. She advised Michelle that Martha Dolson was responsible for the outcome of the claim and that "we will not be making payment to you on behalf of our insured Ms. Martha Dolson." On January 5, 2001, the Kentucky Department of Insurance sent Michelle a letter advising her that the matter was "out of Grange's hands" and that she would have to proceed directly against Martha Dolson to get her money "because Grange is no longer involved." The letter also stated that the Kentucky Department of Insurance "cannot be involved."

Thereafter, Michelle retained an attorney. On January 9, 2001, the attorney sent a letter to Grange demanding payment to Thomas in the amount of \$1,502.14. Snyder responded to the attorney with a letter on January 22, 2001, advising him that Grange would not be issuing payment to his client because "Ms.

Dolson is considered to be self-insured for the alleged accident."

On October 11, 2001, Michelle's attorney again wrote a letter to Snyder advising her of numerous court decisions and treatises which have held that agreements between an insurer and an insured not to pay a claim, entered into after a property damage loss has occurred, are not effective against innocent third-party claimants. On October 19, 2001, Snyder responded with a letter to Michelle's attorney advising him that Grange was denying the claim based on the fact that Martha Dolson had requested that Grange make no payments.

On December 14, 2001, Mark Thomas, Jr., Michelle's father and the owner of the automobile, filed a civil complaint in the Jefferson Circuit Court against Daniella Dolson and Grange. The complaint asserted a property damage claim against Dolson as well as a bad faith claim against Grange under the Unfair Claims Settlement Practices Act. See KRS² 304.12-230.³

On February 14, 2002, Grange's attorney sent a letter to Michelle's attorney offering to settle the property claim against Dolson for \$1,258.64. The offer was refused. On March 6, 2002, Grange paid Mark Thomas, Jr., \$1,502.14, the full

² Kentucky Revised Statutes.

³ Thomas's complaint alleged other causes of action against Dolson and Grange. However, those claims by Thomas were apparently abandoned.

amount of the highest repair estimate, to settle the claim against Dolson. An agreed order was entered dismissing that claim and dismissing Dolson as a defendant. Thomas's claims against Grange remained pending.

On June 11, 2002, Mark Thomas, Jr., died, and Michelle was subsequently appointed as the administratrix of his estate. The action against Grange was revived by Michelle by the filing of an amended complaint pursuant to an order entered by the circuit court on September 3, 2002. The amended complaint set forth the same claims alleged in the original complaint.

The trial of the case began on February 11, 2003. At the close of Michelle's case, Grange moved the court for a directed verdict. The court granted the motion and entered a judgment in Grange's favor dismissing Michelle's complaint. This appeal followed.

Michelle raises several arguments on appeal. Her main argument is that the trial court erred in granting Grange a directed verdict at the close of her proof at trial. When a trial court is confronted with a motion for a directed verdict, it must consider the evidence in the strongest possible light in favor of the party opposing the motion. See Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985). Further, the court must give the party opposing the motion the advantage of every fair and reasonable inference that can be drawn from the evidence.

Id. The court must not grant a directed verdict unless there is a complete absence of proof on a material issue in the action or unless there is no disputed fact issue upon which reasonable minds could differ. Id.

In granting Grange's motion for a directed verdict, the trial court stated that Michelle had not met her burden of proof. In support of this ruling, the court apparently found that Grange had a reasonable basis for denying the Thomas claim and also that Michelle could not recover any damages, including punitive damages, for Grange's alleged bad faith due to her failure to prove compensatory damages. We believe the court erred in granting the directed verdict.

Michelle's bad faith claim was brought pursuant to the Unfair Claims Settlement Practices Act set forth in KRS 304.12-230. That statute states that it is an unfair claims settlement practice for any person to commit or perform any of fifteen enumerated acts or omissions. Id. "Person" is defined as including an insurer. See KRS 304.1-020. A third-party claimant, such as Thomas, has a private right of action for damages against an insurer under the Unfair Claims Settlement Practices Act if the claimant was injured by the insurer's bad faith adjusting of a property claim. See State Farm Mut. Auto. Ins. Co. v. Reeder, Ky., 763 S.W.2d 116, 117-18 (1988). See also KRS 446.070.

First, Michelle argues that she presented sufficient evidence to establish a valid cause of action against Grange for bad faith in the settlement of her claim and that the court thereby erred in granting Grange's directed verdict motion. The three elements of a bad faith claim against an insurance company were set forth by the Kentucky Supreme Court in Wittmer v. Jones, Ky., 864 S.W.2d 885, 890 (1993). They are: "(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed." Id., quoting Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844, 846-47 (1986) (Leibson, J., dissenting).

Michelle clearly proved the first element of the claim because Grange was obligated to pay the claim under the terms of its policy with Dolson. In fact, Grange acknowledged that it was Dolson's insurer. The points of contention are whether Grange lacked a reasonable basis in law or fact for denying the claim and, if so, whether it either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

Throughout its dealings with Michelle prior to the filing of her lawsuit, Grange refused to process the claim or otherwise deal with her because Dolson had "waived coverage." Grange continued to take this position even after Michelle's attorney advised Snyder in his letter of October 11, 2001, of his opinion that it had no legal right to do so. Michelle's attorney clearly stated in his letter his opinion that an insurer and insured have no right to agree to destroy the rights of innocent third parties by mutual consent or agreement once those rights have vested.

KRS 304.20-030 provides as follows:

No insurance contract insuring against loss or damage through legal liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such annulment attempted shall be void.

In our view, this statute prohibited the waiver of coverage agreement between Dolson and Grange and did not constitute a reasonable basis for Grange's denial of Michelle's claim. In fact, Grange does not rely on this waiver of coverage agreement to support its argument that it had a reasonable basis for denying the claim. Rather, Grange asserts that the disagreement over the amount of damages to the Thomas automobile was a valid

reason for denying the claim. However, this overlooks the fact that Grange denied the claim based on the waiver of coverage agreement and not based on the dispute over damages. It also overlooks the fact that Grange had a statutory duty to attempt in good faith to negotiate a settlement of the claim since the liability of its insured was clear. See KRS 304.12-230(6).

Michelle's bad faith claim under the Unfair Claims Settlement Practices Act was based on Grange refusing to pay her claim without conducting a reasonable investigation based upon all available information and Grange not attempting in good faith to effectuate a prompt, fair, and equitable settlement of a claim in which liability had become reasonably clear. See KRS 304.12-230(4) and (6). Michelle's proof at trial was sufficient to establish that Grange had violated these statutes as well as KRS 304.20-030. Furthermore, the reliance upon the waiver of coverage agreement was not a reasonable basis in law or fact for denying the claim. Thus, Michelle presented evidence to support the second element of her bad faith claim against Grange.

The third element of a bad faith claim is that it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. Wittmer, 864 S.W.2d at 890. The claims adjuster, Snyder, testified that she proceeded with the waiver of coverage agreement after seeking legal advice from

Grange's in-house counsel, Lyle Sailer. Sailer worked in Grange's home office in Columbus, Ohio.

According to Snyder, Sailer advised her that if the Dolsons did not want Grange to handle the claim, then Grange would not be responsible for the outcome of any litigation between Thomas and the Dolsons. According to Grange's answers to interrogatories propounded by Michelle, Sailer had no notes of his conversation with Snyder and did not remember any of its details. Regardless of whether Snyder acted on her own or pursuant to legal advice from Grange's in-house counsel, there was sufficient evidence that Grange either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. In short, the evidence presented on behalf of Michelle at trial was sufficient to support her bad faith claim and to overcome Grange's motion for a directed verdict.

The second reason the circuit court gave for granting Grange's motion for a directed verdict was that Michelle failed to prove compensatory damages and therefore was not entitled to the recovery of punitive damages. The court relied on Estep v. Werner, Ky., 780 S.W.2d 604 (1989). Therein, the court stated that the rule of law recognized in Kentucky was that "if the plaintiff has suffered an injury for which compensatory damages might be awarded, . . . he may in a proper case recover punitive

damages." Id. at 607, quoting Lawrence v. Risen, Ky. App., 598 S.W.2d 474, 476 (1980). While Grange agrees with the court that punitive damages may not be awarded when there are no compensatory damages, Michelle counters that Kentucky law now recognizes that punitive damages may be awarded even in the absence of an award of compensatory damages.

In Louisville & N.R. Co. v. Ritchel, 148 Ky. 701, 147 S.W. 411 (1912), the court held that the correct rule "is that if a right of action exists - - that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount - - he may in a proper case recover punitive damages." 147 S.W. at 414. Years later, this court reaffirmed that principle in the Lawrence case. See Lawrence, 598 S.W.2d at 476. Further, this court stated in Lawrence that, because the appellant therein did not assert any claim on which actual or compensatory damages could be awarded, it was precluded from seeking punitive damages. Id. The same principle was again reiterated, this time by the Kentucky Supreme Court, in 1989 in the Estep case. Id. at 607.

Michelle essentially concedes that she did not present proof of compensatory damages during the trial. She argues that she could have been awarded compensatory damages for mental anguish and for prejudgment interest, but she acknowledges that she did not make claims for such damages. Her reliance that she

was entitled to recover punitive damages even in the absence of an award of compensatory damages is based on the recent case of Commonwealth, Dept. of Agriculture v. Vinson, Ky., 30 S.W.3d 162 (2000). On the other hand, Grange argues that the Vinson case is distinguishable because punitive damages were allowed therein based on a statute.

In the Vinson case, two individuals brought a lawsuit against the Kentucky Department of Agriculture for violations of the Kentucky Whistleblower Act set forth in KRS 61.101 *et seq.* The jury in that case awarded a total of \$1,000,000 in punitive damages against the Department of Agriculture, and one of the issues on appeal was whether the plaintiffs were entitled to recover punitive damages in the absence of actual or compensatory damages. The applicable statute, KRS 61.103(2), provided that employees alleging a violation of the act could bring a civil action for appropriate injunctive relief or punitive damages or both. The Kentucky Supreme Court unanimously upheld the punitive damages award and reexamined the applicable principles of law in doing so. Id. at 166-67.

The court noted the trend throughout this nation that allows the recovery of punitive damages even in the absence of a showing of actual or compensatory damages. Id. at 166. Further, the court noted that it was "persuaded by the reasoning of Nappe v. Anschelewitz, 97 N.J. 37, 477 A.2d 1224 (1984), that

compensatory damages are not an essential element of an intentional tort committed willfully and without justification.” Id. The court also held that “[t]he punitive damages provision of the Whistleblower Act is in harmony with the Kentucky common law as to punitive damages.” Id. at 167.

In the Nappe case, the New Jersey Supreme Court was faced with the issues of whether a cause of action for legal fraud exists in the absence of compensatory damages and whether punitive damages may be awarded in the absence of a compensatory damage award in an action for legal fraud. Id. at 1226. The court stated that “the requirement of actual damage to sustain a cause of action for intentional torts no longer serves a useful purpose, at least where a victim of an intentional wrong has suffered some loss, detriment, or injury but is unable to prove that he is entitled to compensatory damages. His rights have been invaded and he should be entitled to vindication in an award of nominal damages.” Id. at 1229. Therefore, the court held that “compensatory damages are not an essential element of an intentional tort committed wilfully and without justification when there is some loss, detriment or injury, and that nominal damages may be awarded in such cases in the absence of compensatory damages.” Id.

Grange urges us to reject the principles concerning compensatory and punitive damages as set forth in the Vinson

case because that case involved a specific statute allowing the recovery of punitive damages, whereas the Unfair Claims Settlement Practices Act contains no similar provision. While we understand the distinction between the facts in Vinson and the facts herein, we cannot overlook our supreme court's statement that it was persuaded by the reasoning of the New Jersey Supreme Court in the Nappe case and by our supreme court's apparent adoption of the national trend allowing punitive damages even in the absence of a showing of actual damages. See Vinson, 30 S.W.3d at 166.

The circuit court should not have granted Grange's motion for a directed verdict even though Michelle failed to present proof of compensatory damages. She presented sufficient proof to support the three elements of a bad faith claim action, and if that claim had been accepted by the jury, Michelle was entitled to seek punitive damages even though she failed to prove compensatory damages. If her bad faith claim is accepted by a jury, then it will have been determined that a wrong has been committed against her. She will therefore be entitled to seek punitive damages, and Grange may not be freed of its responsibility for the wrong it committed even though compensatory damages were not shown. In short, we conclude that the circuit court erred in granting a directed verdict in favor

of Grange based on Michelle's failure to show compensatory damages.

Next, it appears that the circuit court may have granted Grange's motion for a directed verdict based on a conclusion that Michelle had not proven oppression or fraud. KRS 411.184 provides a statutory right to recover punitive damages. It states in relevant part that "[a] plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.184(2).⁴ Even though KRS 411.184(5) states that the statute "is applicable to all cases in which punitive damages are sought," Michelle asserts that the statute is not applicable to bad faith claims. She relies on the Wittmer case in this regard.

We agree with Michelle. In the Wittmer case the Kentucky Supreme Court stated as follows:

Throughout this litigation State Farm has presented various arguments against submitting the issue of punitive damages to the jury based on its interpretation of statutory language found in the new punitive damages statute enacted in 1988, now codified as KRS 411.184. It suffices to say that this Court could not interpret KRS

⁴ To the extent this statute requires a plaintiff to show malice on the part of the defendant in order to recover punitive damages, it has been held unconstitutional. See Williams v. Wilson, Ky., 972 S.W.2d 260, 265-69 (1998).

411.184 to destroy a cause of action for punitive damages otherwise appropriate without fatally impaling upon jural rights guaranteed by the Kentucky Constitution, Sections 14, 54, and 241.

Wittmer, 864 S.W.2d at 890. The Wittmer case also involved a bad faith claim. In short, Michelle was not required to prove oppression or fraud pursuant to KRS 411.184(2) in order to establish her bad faith claim.

Grange's first argument in its brief is that Michelle's claim should have been dismissed due to her failure to comply with CR⁵ 8.01(2). That rule provides in pertinent part that "[w]hen 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 answers to interrogatories." Id. Grange asserts that Michelle never filed interrogatory answers which complied with the mandatory requirements of CR 33.01 and, therefore, that she did not comply with CR 8.01(2). CR 33.01(2) states in pertinent part that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them."

⁵ Kentucky Rules of Civil Procedure.

During the discovery phase of this litigation, Grange served Michelle with interrogatories. Michelle failed to comply with the requirements of CR 33.01(2) in that she failed to sign her answers to them. Rather, they were signed by her attorney. Based on this defect and the cases of Fratzke v. Murphy, Ky., 12 S.W.3d 269 (1999), and LaFleur v. Shoney's, Inc., Ky., 83 S.W.3d 474 (2002), Grange argues that Michelle was prohibited from being awarded any damages during the trial and that the trial court erred in not granting its motion to dismiss the case for this reason alone. The trial court offered to grant a mistrial due to the defect, but Grange declined the offer.

In the Fratzke case, Murphy served Fratzke with a set of interrogatories requesting that she identify and quantify each of her claims for damages. Fratzke filed timely answers to the interrogatories, but her answers omitted an amount for any damage claim other than medical expenses. The case proceeded to trial, and defense counsel objected to Fratzke recovering any unliquidated damages as she had failed to include the amount of any unliquidated claims in her answers to the defendant's interrogatories. The trial court in Fratzke allowed her to seek damages for her unliquidated claims, but this court ultimately reversed the award of unliquidated damages and the Kentucky Supreme Court subsequently affirmed the reversal. The supreme court reasoned that "[b]y omitting an amount for any damage

claim other than her medical expenses incurred to date, Fratzke effectively stated that her claim for her unliquidated damages was nothing. Thus, under the rule, Fratzke's claim for unliquidated damages at trial could not exceed \$0.00." Id. at 271.

In the LaFleur case Shoney's served written interrogatories on LaFleur. In her answers to the interrogatories, LaFleur claimed specific amounts for medical expenses and lost wages but not specific amounts for either special damages or unliquidated damages. She stated that any special damages were undetermined and that she would supplement her information as to unliquidated damages prior to trial.

On the morning of the trial, Shoney's made a motion *in limine* to preclude any evidence on LaFleur's claims for damages which exceeded the damages claimed in her interrogatory answers. The jury awarded LaFleur damages for past and future pain and suffering and past medical expenses. Shoney's appealed to this court, which reversed and remanded the case. This court instructed the trial court on remand to enter a judgment limited to medical expenses and lost wages in the same amounts as claimed by LaFleur in her answers to interrogatories. The Kentucky Supreme Court affirmed this court and stated that the Fratzke case held that the plain language of CR 8.01(2) "places

a duty on the plaintiff to seasonably supplement her answers to interrogatories." LaFleur, 83 S.W.3d at 480.

In the case *sub judice*, Interrogatory No. 5 stated, "Please state, pursuant to CR 8.01(2), the exact amount of damages which you are seeking from the Defendant." Michelle's answer stated, "Subject to completion of discovery relevant to how many other legitimate claims Grange has wrongfully denied in the recent past in order to maximize its profits, as of now, \$150,000.00." Further, Michelle answered in her interrogatories that she would comply with the Rules of Civil Procedure regarding the supplementing of her answers.

The facts in this case are distinguishable from the facts in the Fratzke and LaFleur cases. In the Fratzke case, the plaintiff did not identify each item of damage sought to be recovered other than providing an itemized list of medical expenses incurred to that time. In the LaFleur case, the plaintiff stated that the amounts of her specific damages were "undetermined" and that she would supplement information concerning her claim for unliquidated damages. In this case, Michelle stated that she would seek to recover \$150,000 in damages, although the answers to the interrogatories were not signed by her but by her attorney.

In the Fratzke case, the court stated that "the purpose of the rule is to allow a party to discover the *amount*

an opposing party is seeking for unliquidated damage claims." Id. at 273. The court reaffirmed this principle in the LaFleur case. Id. at 477. The court in the LaFleur case further engaged in an analysis of the role of CR 8.01(2) in the discovery process. The court stated that "[t]he role of CR 8.01(2) in this process is to provide notice of the damages at stake." Id. at 478. The court further explained that "[t]he purpose of the rule is to put a party on notice as to the amount of unliquidated damages at stake to allow that party to make economically rational decisions concerning trial preparation and trial strategy." Id. at 481.

We conclude that Michelle's failure to sign her answers to interrogatories did not constitute a Fratzke violation so as to preclude her from seeking damages at trial. Her answers accomplished the purpose of giving Grange notice of the amount of damages at stake so as to allow it to make appropriate decisions concerning possible settlement and/or trial preparation and strategy. Furthermore, as stated by the Kentucky Supreme Court in Thompson v. Sherwin Williams Co., Inc., Ky., 113 S.W.3d 140 (2003), "[t]he remedy for a violation of CR 33.01 is found in CR 37.01 and CR 37.02, not in CR 8.01(2)." Id. at 144. The trial court did not err in denying Grange's motion to dismiss for Michelle's failure to comply with civil discovery rules.

Grange's next argument is that the trial court properly granted its motion for a directed verdict because no punitive damages could have been properly awarded to Michelle due to Grange not being liable for the acts of its agent or employee, Snyder. In support of this argument, Grange cites KRS 411.184(3) which states that "[i]n no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question." See also Berrier v. Bizer, Ky., 57 S.W.3d 271, 283-84 (2001).⁶ Grange argues that its board of directors or principal officers did not have any knowledge of Snyder's actions and had no reason to anticipate them.

In response to this argument, Michelle refers to Snyder's testimony at trial. Snyder testified that, prior to drafting the waiver of coverage letter, she sought legal advice from Grange's in-house counsel, Lyle Sailer, who worked in Grange's home office in Columbus, Ohio. Snyder testified that Sailer advised her that if the Dolsons did not want Grange to handle the claim, then Grange would not be responsible for the outcome of any litigation between Thomas and the Dolsons. Snyder also testified that she again sought legal advice from

⁶ Therein, the Kentucky Supreme Court stated that "Kentucky is the only state with a statute that so broadly limits vicarious liability for punitive damages." Id. at 283.

Grange's in-house counsel in October 2001 after she received the letter from Michelle's attorney. Snyder testified that she forwarded the letter to in-house counsel, Lavonne Coleman, who directed her to respond to the letter as she sought fit. We conclude that this testimony was sufficient to prove that Grange authorized or ratified Snyder's conduct in connection with the waiver of coverage agreement. Thus, Grange's argument that the court properly granted it a directed verdict for this reason is without merit.

Grange next argues that Michelle was not entitled to punitive damages in light of KRS 411.184(2), which states that "[a] plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Grange reasons that since any actions on its part were against Mark Thomas, Jr., who is now deceased, and not against the plaintiff, then the statute precludes a recovery of punitive damages. In support of its argument, Grange cites Stewart v. Estate of Cooper, Ky., 102 S.W.3d 913 (2003).

In the Cooper case our supreme court held that the statute precludes a recovery of punitive damages against a defendant tortfeasor's estate since the estate itself did not commit the acts against the plaintiff. Id. at 916. In other

words, the Stewart case involves facts that are directly opposite from those in this case. In the case *sub judice* punitive damages are sought by the estate of the party suffering damages against the tortfeasor not the tortfeasor's estate. We believe there should be a distinction between the way the two situations are treated.

In the Stewart case the court noted that the injured party was not entitled to an award of punitive damages because such damages were recoverable only after proof that "the defendant from whom such damages are sought"—i.e., *the Estate itself*—acted toward the plaintiff with oppression, fraud or malice." Id. at 916. Obviously, the tortfeasor's estate had not committed a wrong against the injured party and could not have any liability for punitive damages under the statute. However, in this case the party committing the wrong was still a party to the case. Only the party suffering damages had been replaced as a party by his estate following his death.

The public policy considerations for the two situations are different. Punitive damages are damages "awarded against a person to punish and to discourage him and others from similar conduct in the future." KRS 411.184(1)(f). The purpose of a punitive damages award is defeated where the tortfeasor dies as was the case in Stewart, but it remains where only the injured party dies.

The parties have not cited any authority concerning the issue of whether a claim for punitive damages survives the death of the injured party. However, most states addressing the issue have concluded that the claim does survive in a tort action. See Jay M. Zitter, Annotation, Claim for Punitive Damages in Tort Action as Surviving Death of Tortfeasor or Person Wronged, 30 A.L.R. 4th 707 (1984).

More importantly, the Kentucky statutes address what actions shall survive. The pertinent statute states:

No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury. For any other injury an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract.

KRS 411.140. Pursuant to this statute, the weight of authority from other states, and public policy considerations, we conclude the claim for punitive damages survived following Thomas's death.

We turn now to Michelle's final two arguments, each of which involve the admissibility of evidence. First, Michelle argues that the trial court erred in denying portions of her motion to exclude Grange's expert witness testimony. Grange

retained retired Judge Michael McDonald to testify as an expert witness concerning the issue of bad faith. In addition to having been a judge for a number of years in this state, Judge McDonald had practiced law in the field of insurance issues and had been employed as an insurance adjuster handling property damage claims.

Judge McDonald did not have the opportunity to testify on behalf of Grange during the trial because the trial court directed a verdict at the close of Michelle's proof. However, Judge McDonald gave a deposition prior to trial, and Michelle moved the court to restrict his testimony on a number of subjects that she felt required no specialized knowledge to assist the jury in understanding. The trial judge entered an order restricting Judge McDonald from testifying as to some matters but not others.

Grange urges us not to address this issue since neither the deposition of Judge McDonald nor his live testimony was offered at trial. On the other hand, Michelle urges us to address the issue in the event we reverse the judgment and remand for a new trial since the matter is likely to arise at that time. For that reason, we will do so.

KRE⁷ 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to

⁷ Kentucky Rules of Evidence.

understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In reviewing whether the trial court erred in its rulings concerning Judge McDonald's testimony, we must determine whether the court abused its discretion. See Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577-78 (2000). Michelle maintains that Judge McDonald's opinion testimony should be excluded because it is not based on any specialized knowledge and that it would not be helpful to the jury in resolving the bad faith issue. She asserts that his testimony is nothing more than his lay opinion of what result the jury should reach based upon the evidence it will hear at trial. We conclude that the trial court did not abuse its discretion in the manner in which it ruled on the admissibility of Judge McDonald's testimony.

Finally, Michelle argues that the trial court erred by denying her motion to admit the Hall's Collision Center repair estimate into evidence. The court denied the motion to admit the estimate into evidence on the ground that it was hearsay and not subject to any other exception to the hearsay rule. We find no error in this ruling. At any rate, since this case is being remanded for a new trial, Michelle will have the opportunity to introduce property damage evidence in an appropriate manner.

The judgment of the Jefferson Circuit Court is reversed, and this case is remanded for a new trial.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT/CROSS-APPELLEE:

John R. Shelton
Louisville, Kentucky

BRIEFS AND ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT:

Kim F. Quick
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