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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002352-MR
AND
NO. 2005-CA-002378-MR

MICHELLE THOMAS, ADMININSTRATRIX OF THE ESTATE OF MARK J. THOMAS, JR. — APPELLANT/CROSS-APPELLEE

v.

GRANGE MUTUAL CASUALTY COMPANY — APPELLEE/CROSS-APPELLANT

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This appeal and cross-appeal arise from a jury verdict awarding $150,000.00 in punitive damages for a third-party bad faith insurance claim, which was reduced to $15,000.00 by the trial court. We affirm.

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A full exposition of the facts underlying this case was recounted in this Court's previous opinion in case no. 2003-CA-000449-MR and we adopt it here:

"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 $300.00 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 $300.00 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 KRS 304.12-230. 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 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 Court reversed the judgment in favor of Grange. Upon remand, the jury awarded Michelle Thomas (Thomas) $150,000.00 in punitive damages. The trial court reduced that amount to $15,000.00. This appeal and cross-appeal followed.

Thomas argues that the original jury award should be reinstated as it does not violate due process, while on cross-appeal Grange argues that the trial court should have reduced the award further.

The award of punitive damages is reviewed under the de novo standard. State Farm Auto Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). The reviewing court must evaluate the award under these three factors: "1) the degree of reprehensibility of the defendant's conduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive

damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id. We now look to the three factors.

The degree of reprehensibility of the defendant's conduct is the most important indicium when determining the reasonableness of a punitive damages award. Id. (citing BMW of N. Amer., Inc. v. Gore, 517 U.S. 559 (1996)). In determining reprehensibility, courts should consider whether: "the harm was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Campbell at 419.

Applying these factors to the present case, we find that there is a sufficient degree of reprehensibility to sustain the punitive damages award. Although the harm to Thomas was purely economic, payment on her claim was delayed for almost two years without a reasonable basis to deny the claim, without any investigation, and without any attempt to settle the claim in good faith. The evidence shows that these actions and omissions were an intentional violation of Kentucky law.

Next, we look to the difference between the actual or potential harm suffered by Thomas and the award of punitive damages. There is no bright-line limitation on the ratio between harm or potential harm and punitive damages. Campbell at 424. In practice however, single-digit ratios are more likely to satisfy due process than ratios in excess of 500 to 1. Id. at 425. That being said, higher ratios may be upheld "where a particularly egregious act has resulted in only a small amount of economic damages." Id.

In this case, the jury awarded $150,000.00 in punitive damages without an award of compensatory damages. The trial court reduced that award to $15,000.00. The harm to Thomas was the unpaid property damage claim of approximately $1,500.00. The ratio between the harm suffered and the actual award is, therefore, 10 to 1. Considering the circumstances surrounding Grange's actions and that the harm suffered was only economic in nature, we conclude that the award of $15,000.00 was appropriate.

The third factor is the difference between any civil penalties authorized and the punitive damages award. The civil penalties authorized for violation of the insurance code include the revocation of an insurer's license to do business and/or a fine of not more than $10,000.00 per violation. KRS 304.99-020. Grange argues that Department of Insurance approved of their

course of action in this case and, therefore, no civil penalties were authorized. However, it is the range and possibility of a civil penalty rather its actual imposition on the tortfeasor in a particular case that serves as the basis for comparison under this factor. Here, KRS 304.99-020 clearly authorizes the imposition of civil penalties on insurance companies. Whether such penalties were or were not imposed has no bearing on the issue of the reasonableness of a punitive damage award. Instead, the courts look to the range of penalties authorized compared with the punitive damages award. We find that the punitive damages award of $15,000.00 is reasonable in light of the civil penalty of $10,000.00 per violation as authorized by Kentucky law.

Thomas next argues that the trial court erred in denying her claim for attorney fees. While Thomas acknowledges that Motorist Mutual Ins. Co, v. Glass, 996 S.W.2d 437 (Ky. 1997), prohibits the award of attorney fees in a third-party bad insurance claim, she argues that pre-suit attorney fees are available pursuant to KRS 446.070. We disagree.

KRS 446.070 provides as follows:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty of forfeiture is imposed for such violation.

This section read alongside KRS 304.12-230 creates the statutory bad faith cause of action. State Farm Mut. Auto. Ins. Co. v. Reeder, 763 S.W.2d 116, 117-18 (Ky. 1988). Attorney fees are generally not available in the absence of a statute or contract expressly authorizing them. Kentucky State Bank v. AG Services, Inc., 663 S.W.2d 754, 755 (Ky.App. 1984). Because KRS 446.070 does not contain such language, there was no error.

Thomas next claims that she was entitled to pre-judgment interest. She argues that the $1,500.00 claim was liquidated and that she was entitled to pre-judgment interest on that amount under Reeder, supra. However, Thomas did not receive the $1,500.00 from a judgment. The underlying property damage claim was settled out of court. Clearly, the punitive damages sought by Thomas were not ascertainable by computation. The trial court properly denied the award of pre-judgment interest.

On cross-appeal, Grange argues that the trial court erred by striking eight jurors for cause because they refused to consider a punitive damages award exceeding $100,000.00. Grange further argues that the refusal of the jurors to consider such an award amounted to a layperson’s version of the holding of Campbell, supra, and a dismissal on that basis constituted an abuse of discretion. We disagree.

During voir dire, a litigant may properly inquire into whether the prospective jurors have any conscientious scruples that would prevent them from considering the full amount of damages sought regardless of the evidence. Temperly v. Sarrington's Administrator, 293 S.W.2d 863, 868 (Ky. 1956). In this case, eight of the prospective jurors stated that they could not consider a punitive damage award in excess of $100,000.00 regardless of the evidence presented. We cannot conclude that the trial court abused its discretion in striking these jurors for cause.

Grange next argues that the trial court erred by excluding evidence that Thomas failed to mitigate her damages by failing to pursue a judgment against the Dolsons in small claims court. Grange argues that this evidence should have been allowed to contradict Thomas's focus on the delay in payment of her claim.

Any evidence may be introduced to demonstrate the mitigation of punitive damages so long as the evidence is not otherwise objectionable. Gum v. Coyle, 665 S.W.2d 929, 932 (Ky.App. 1984). However, the evidence that Thomas failed to proceed against the Dolsons in small claims court is not relevant to the claim of bad faith against Grange. Generally, evidence of actual damage amounts paid by settlements or judgments is not admissible to mitigate punitive damages. Am.

Jur. 2d *Damages* § 725 (2003). The trial court did not abuse its discretion by excluding this evidence.

Finally, Grange argues that the trial court erred by failing to grant a new trial because the damages awarded were clearly excessive. This claim is premised not on the constitutionality of the award, but rather under the common law.

The determination of whether to grant a new trial because of excessive punitive damages will not be overturned on appeal unless the decision was clearly erroneous. Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 413-14 (Ky. 1998). The trial court must determine whether the award appeared "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). Here the reduction in damages was made solely on the basis of constitutional considerations and the trial court upheld the punitive damages award in all other respects. Based upon our review of the record, we cannot conclude that the trial court committed clear error by refusing to grant a new trial.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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