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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001101-MR
AND
NO. 2005-CA-001111-MR

UNITED PROPANE GAS, INC. — APPELLANT

v.

APPEALS FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CI-00217

FEDERATED MUTUAL INSURANCE COMPANY; LAW FIRM OF SCOTT B. YOUNG; THE LAW FIRM OF RENDIGS, FRY, KIELEY & DENNIS — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND EMBERTON, SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: United Propane Gas, Inc. (UPG), appeals from orders of the McCracken Circuit Court granting summary judgment to Federated Mutual Insurance Company (Federated) (Appeal No. 2005-CA-001111-MR) and the law firm of

[1] Senior Judges David C. Buckingham and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Rendigs, Fry, Kieley, & Dennis (Rendigs, Fry) (Case No. 2005-CA-001101). UPG alleges that Federated, UPG's insurance company, breached the insurance policy and acted in bad faith by settling a lawsuit filed by a UPG customer following a propane gas explosion and that Rendigs, Fry engaged in professional malpractice in its representation of UPG in the lawsuit. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gasper River Propane Gas, Inc. (Gasper River), is a subsidiary of UPG. On November 19, 2001, Gasper River made a propane gas delivery of 300 gallons to one of its customers, Joe Brown, in Simpson County, Kentucky. The delivery was made by Gasper River employee Bud Davenport. Shortly after the delivery, Brown attempted to light his water heater and an explosion and fire occurred.[2] Brown was seriously injured as a result of the incident and suffered second and third degree burns over 30 percent of his body, including his face and hands.[3] The residence was also totally consumed by the fire.

Brown and his wife, Dorothy, filed a personal injury lawsuit naming, as amended, Gasper River and UPG as defendants. The Browns sought damages as follows: past medical expenses - $260,000; future medical expenses - $100,000; past pain and suffering - $3,500,000; future pain and suffering - $2,000,000; loss of consortium -

[2] It is alleged by UPG that Brown had illegally bought and installed the water heater and that this would be a significant factor in allocating fault for the explosion.

[3] The record also refers to an amputation; however, the details of the amputation are not clear from the record.

$1,000,000; property damage – unknown; punitive damages - $2,800,000. Thus, the Browns sought damages of $9,660,000 plus an additional amount for property damages.[4]

At the time of the accident, the propane companies were covered by a commercial general liability policy issued by Federated providing $2,000,000 in coverage and a commercial umbrella liability policy, also issued by Federated, providing $20,000,000 in coverage. The policy also provided that Federated would supply legal counsel to defend in the event of a lawsuit covered under the policy. The Brown lawsuit was so covered.

In compliance with its obligation to provide legal counsel, Federated hired the law firm of Rendigs, Fry, whose offices are located in Cincinnati, Ohio. At UPG's suggestion that local counsel should also be assigned to the case, Federated hired the law firm of English, Lucas, Priest, and Owsley of Bowling Green, Kentucky. Later, UPG, at its own expense, hired the law firm of Stinson, Morrison, and Hecker, LLP, of Kansas City, Missouri, a firm specializing in propane gas litigation.

The matter went through mediation, at which time the Brown's sought $4,500,000 to settle. On February 13, 2003, Federated settled the lawsuit filed by the Browns for $2,500,000. Following the settlement, Federated cancelled UPG's insurance policy, and UPG's replacement insurance with another carrier was at a significantly higher premium because of the Brown settlement.

On March 1, 2004, UPG filed a lawsuit in the McCracken Circuit Court. Named as defendants were Federated; Scott B. Young, a claims adjuster for Federated;

[4] The destroyed residence is described in the record as "modest."

and Rendigs, Fry. As against Federated, the complaint alleged (1) breach of contract for "failing to properly investigate the Brown claim, improperly refusing UPG to retain independent counsel, [and] unreasonably settling a claim for an amount far in excess of its value knowing that UPG would be damaged when future coverage was obtained" and (2) bad faith based upon substantially the same reasons. As against Rendigs, Fry, UPG alleged legal malpractice for providing legal services in the Brown litigation in a negligent manner. As against Young, the complaint alleged agent malpractice for breaching his duty to properly process the Brown claim. Damages were identified as the increased annual insurance premiums in the amount of $1,600,000 UPG was required to pay following the Brown settlement. The defendants answered, denying liability under the claims.

In due course the defendants moved for summary judgment. On May 3, 2005, the circuit court, by separate orders, granted summary judgment to Federated and Rendigs, Fry.[5] UPG filed separate notices of appeal to the orders. Because the two appeals involve the same circuit court case number and the same factual background, we address them together.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules

[5] The summary judgment orders do not reference Young, and UPG raises no issues concerning him in this appeal. We accordingly presume that UPG has abandoned its claim against Young.

of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because, summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres*, *supra*.[6]

[6] UPG contends that these appeals should be reviewed pursuant to the judgment on the pleadings standard applicable to CR 12.03. However, because the motions for summary judgments, and the responses thereto, contained matters outside of the pleadings, and were therefore considered by the circuit court in its decision, the appeals should be reviewed pursuant to the summary judgment standard. When matters outside the pleadings are considered in ruling on a motion to dismiss, the motion is converted to one for summary judgment. See Bowlin v. Thomas, 548 S.W.2d 515, 516 (Ky.App. 1977).

APPEAL NO. 2005-CA-001111-MR

In Appeal No. 2005-CA-001111-MR, UPG contends that the circuit court erred by granting summary judgment to Federated upon its claims of breach of contract and bad faith.

Breach of Contract

Interpretation and construction of an insurance contract is a matter of law for the court. *See Stone v. Kentucky Farm Bureau Mutual Ins. Co.*, 34 S.W.3d 809, 810 (Ky.App. 2000). In the absence of ambiguities that call the meaning of the policy into question or a statute to the contrary, the terms of a policy of insurance are to be enforced as written. *Goodman v. Horace Mann Insurance Company*, 100 S.W.3d 769, 772 (Ky.App. 2003). Unless the terms employed in the policy have acquired a technical meaning in law, they are to be interpreted "according to the usage of the average man and as they would be read and understood by him in light of the prevailing rule that uncertainties must be resolved in favor of the insured." *Fryman v. Pilot Life Insurance Company*, 704 S.W.2d 205, 206 (Ky. 1986).

UPG's Commercial General Liability Coverage policy with Federated contains the following provision:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. **We may, at our discretion,**

> **investigate any "occurrence" and settle any claim or "suit" that may result**. . . . (Emphasis added).

The policy language "We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result," according to the usage of the average man and as it would be read and understood by him, vests Federated with the right to settle a claim according to its best judgment.[7]

When the policy contains a right to settle clause such as the policy at issue here, the insurer is authorized to compromise or settle any claim it considers just and advantageous providing it acts in good faith in so doing. *American Sur. Co. of N.Y. v. J. F. Schneider & Son, Inc.*, 307 S.W.2d 192, 195 (Ky. 1957), *overruled on other grounds by Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1976).

Under Kentucky law, in order to recover in any action based on breach of a contract, a plaintiff must show the existence and the breach of a contractually imposed duty. *Strong v. Louisville & Nashville R. Co.*, 240 Ky. 781, 43 S.W.2d 11, 13 (1931). UPG cites us to no specific contract provision it alleges Federated to have breached; however, "[i]n every contract, there is an implied covenant of good faith and fair dealing." *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154, 156 (Ky. 1991). The covenant imposes a duty on the parties to do everything necessary to carry out the purposes and provisions of the contract. *Id.*, citing *Beech Creek Coal Co. v. Jones*, 262 S.W.2d 174 (Ky. 1953). However, the covenant of good faith and fair dealing does not

[7] The umbrella policy contained the language "[w]e may make any investigation and settlement of any claim or suit we deem expedient." This language would likewise be understood by the average person as vesting Federated with the discretion to settle a claim according to its best judgment.

prevent a party from exercising its contractual rights. *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005). Since Federated had a right to settle under the contract and therefore was merely exercising a contractual right, and UPG has otherwise cited us to no specific policy provision alleged to have been breached, we affirm the circuit court's award of summary judgment on the breach of contract claim.

Bad Faith

As concerns UPG's bad faith claim, we can find no Kentucky case corresponding to the claim as raised by UPG. However, the elements of a bad faith claim under the more common situation - an insurer's failure to pay a claim to a third party - is stated as follows:

> "[A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (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. . . .

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993).

From the foregoing we may extrapolate the following test for the type of case involved herein:

> "[A]n insured must prove three elements in order to prevail against an insurance company for alleged settlement in bad faith of a claim against the insured over its objection: (1) the insurer must have settled the claim over the insured's objection; (2) the insurer must have lacked a reasonable basis in law or fact for settling the claim, both as to liability and

> amount; and (3) it must be shown that the insurer either knew there was no reasonable basis for settling the claim, both as to liability and amount, or acted with reckless disregard for whether such a basis existed.

Under the foregoing test, we believe the circuit court properly granted summary judgment in favor of Federated. The present record is replete with information and facts from the Brown case that demonstrate that Fidelity had a reasonable basis for settling the Brown claim based upon the liability of UPG. For example, in response to a discovery request by UPG seeking identification of the negligent acts of UPG/Gasper River, the Browns responded as follows:

> 1. Defendants did not properly educate their employees about their customer's equipment and needs, in that they did not have any practice in place to verify safe equipment, the age of equipment, the condition of elements of the system, etc. A fairly minimal inspection of each new customer's systems, from the tank to the appliances, would have provided a baseline with which individual delivery persons could compare what they observe. Bud Davenport's testimony points this out very clearly.
>
> 2. Defendants failed to identify and act with respect to out-of-date and dangerous equipment in the Browns' propane system. Whether Defendants wish to be in the service business or not, they did not meet the standard of care when Bud Davenport failed to take steps he was trained to take, including a check for the existence of a second stage regulator. Defendants <u>are</u> in the safety business.
>
> 3. Defendants' agent did not inspect the Browns' tank, let alone the rest of the system. The basis for this contention is the testimony of Bud Davenport and the company documents produced by counsel. Defendants should have addressed the flow of propane into a "T" intersection underground, which would not normally advise the average customer of a problem. One properly trained in propane systems would have immediately perceived the configuration of the piping

around the low pressure regulator as a problem. According to Mr. Small, President of UPG and Gasper River, it "wasn't pretty." It is unacceptable in the industry for delivery persons to have ignored the collar and lid above the underground tank, which, according to Mr. Davenport, would have caused him to be curious and investigate. The plain presence of another vessel opposite the service line leading to the house, should point up several other potential problems, including another source for leaks and odorant fade.

4. Defendants did not adequately train their employees, including Mr. Davenport and, as of the time of this writing, Mr. Steve Perdue. Davenport was not properly trained to respond to information from customers concerning propane safety issues. Davenport's testimony reveals his negligence in responding to the Browns' out of gas situation. He did not properly respond to other statements he recalls Mr. Brown making.

5. Defendants' safety training program is inadequate and does not meet the standard of care among reasonably prudent propane distributors because it was not carried out in practice, but existed almost completely on paper. Defendants did not insure that employees like Bud Davenport stayed current with company policies and stated company safety philosophy.

6. Bud Davenport took no steps to identify the destination of the service line, or observe the presence of another, underground storage vessel tied together with the above-ground vessel. These simple steps are required by safe practice and well-known to the industry. There was pressure on the underground tank at the time of delivery, and this would have been easily visible to someone curious about the route the propane would take once it was out of the tank. This would have been further reason not to fill the tank, but instead, to investigate the integrity and the extent of the system.

8. Defendants' refusal to perform service functions, even in situations where their internal standards and industry standards call for it; and in situations where it is clear a customer cannot safely burn the propane Defendants deliver, is a breach of the standard of care. That standard is embodied

> in the Codes and industry standards and the Defendants have adopted that standard in their publications. The depositions of Eric Small and Bud Davenport bear this out.
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> 9. Defendants did not instill in their employees the importance of thorough customer education and training when delivering propane. Had Mr. Davenport offered even to show Mr. Brown how to light pilots, the incident may well not have occurred. In this set of circumstances, however, it was incumbent on Mr. Davenport to go into the dwelling and take several active steps, including lighting the water heater and furnace. Defendants' practice of compensating delivery drivers in part by commission (override on number of gallons delivered), created an atmosphere in which drivers like Mr. Davenport have no incentive to spend necessary time with customers. Instead, the exact opposite motivation is pressed on them by the Defendants.
>
> 10. There is no evidence the propane Bud Davenport delivered to the Browns was sufficiently odorized, so as to meet industry and governmental standards. There is no objective evidence that Mr. Davenport verified the smell of the propane at the Browns. In addition, one ancillary benefit of requiring the distributor's personnel to enter the residence is that he may have several exposures to the fuel as he is closing and re-opening the valves at the various appliances. This is a very useful exercise to gauge the presence of air in lines, dilution of propane with air, etc., in a system that has been dormant and is freshly pressurized. This was not done.
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> 11. Defendants breached the provisions of KARS Title 815, Chapter 10:06, specifically, but not limited to, Section 9. Defendants may have violated provisions of Chapter 234 of Kentucky Revised Statutes relating to propane safety.

While we recognize that the foregoing is limited to a presentation of the plaintiffs' theory of the case, nevertheless, their theory sets forth, at a minimum, a reasonable basis for Federated to conclude that a jury might assign fault to UPG/Gasper River for the occurrence.

Also contained in the record is an e-mail dated December 4, 2002, from counsel of the Kansas City law firm Stinson, Morrison, and Hecker, a firm retained by UPG at its own expense which specializes in propane gas litigation, to in-house counsel for UPG. The e-mail expresses concern that UPG had failed to provide a particular manual to Gasper River. The e-mail further states, "[t]he more I think about it the more I am concerned about UPG and punitives." Hence, counsel for the law firm retained by UPG specializing in propane gas litigation is concerned not only with a jury finding of liability based upon negligence, but punitive damages based upon gross negligence. Further, the record discloses that Davenport's supervisor believed that the company had a duty to inspect a customer's propane system and that he would have "red tagged" Brown's tank because it was empty when the propane delivery was made. In summary, Federated had a reasonable basis for settling the claim based upon its determination that UPG was subject to liability.

The record also demonstrates that Federated had a reasonable basis for settling for the amount of $2,500,000. Brown's burns were serious. The record discloses that as a result of the fire and explosion Brown suffered second and third degree burns over 30% of his body including his face and hands. Such burn injuries would palpably result in significant pain and suffering and thereby risk a significant jury award for those injuries. Moreover, there is a reference in the record that Brown underwent an amputation, though it is not clear what the amputation involved. In addition, Brown incurred over $260,000 in medical expenses. Further, the residence was totally consumed by the fire. And finally, as previously noted, counsel for Stinson, Morrison,

and Hecker, a law firm specializing in propane litigation, expressed a concern that UPG was at risk for punitive damages.

While UPG asserts that the settlement amount was clearly excessive, a party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present "some affirmative evidence showing that there is a genuine issue of material fact for trial." *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 704 (Ky.App. 2004).

We note that there is an inherent safeguard against excessive settlement in a case like this because of the insurance company's economic self-interest in not entering into a settlement unless it would be financially advantageous to do so. Further, UPG has cited to no evidence of record that the sum settled for, $2,500,000, was unreasonable. For example, it has cited us to no jury award studies or expert legal testimony which would demonstrate that the settlement amount was excessive. At best, UPG has merely identified a difference in opinion as to the worth of the Brown lawsuit. A difference of opinion, however, does not demonstrate bad faith. Rather, this difference of opinion simply underscores the facts that the policy provision provided Federated the discretion to settle and that Federated was merely exercising its rights under that provision.

Moreover, as noted by Federated, and unrebutted by UPG, UPG, for an additional premium, could have obtained a term in the policy which would have given it the right to approve a settlement. Having not done so, and having adduced no objective evidence that the settlement amount was excessive, it should not now be heard to complain over a mere difference of opinion concerning the worth of the Brown lawsuit.

In light of the foregoing, as a matter of law, Federated had a reasonable basis for settling the claim - both as to liability and amount - instead of risking a jury trial with the attendant possibility of a greater award. UPG has presented no affirmative evidence demonstrating that Federated did not have a reasonable basis for settling the Brown's claim. As such, the circuit court did not err by granting Federated summary judgment on UPG's bad faith claim.

APPEAL NO. 2005-CA-001101-MR

In Appeal No. 2005-CA-001101-MR, UPG contends that the circuit court erred in granting summary judgment to Rendigs, Fry. UPG argues that there are genuine issues of material fact concerning whether Rendigs, Fry breached its duty to UPG in providing legal representation in the Brown case.

A plaintiff in a legal malpractice case has the burden of proving: "1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client." *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). Based on these factors, a legal malpractice case is the "suit within a suit." *Id*. "To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." *Id*.

In its motion for summary judgment before the circuit court, and before us, Rendigs, Fry contends that because Federated independently chose to exercise its right

under the insurance policy to settle the claim, UPG is unable to establish causation for the damages alleged in its lawsuit against the law firm (an increase in premiums as a result of the settlement). We agree.

UPG cites to various factors in support of its allegation of breach of duty; however, as noted in our discussion in Appeal No. 2005-CA-00111-MR, Federated lawfully exercised its right to settle the case under the terms of the insurance policy. Consequently, causation for the increase in premiums - the damages claimed in the present lawsuit - cannot be attributed to the representation provided by Rendigs, Fry. UPG cites us to nothing in the record which would support the notion that Rendigs, Fry had the authority to prevent Federated from settling the lawsuit. Since Federated could settle the Brown lawsuit under the terms of the policy, Rendigs, Fry's representation of UPG in the Brown litigation was not a cause of its subsequent increase in insurance premiums. *See New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron*, 99 Cal.App.4th 799, 802 (Cal.App.4.Dist. 2002).

As a separate basis for affirming summary judgment, we note that UPG has failed to provide expert testimony that Rendigs, Fry breached the standard of care owed to UPG in the Brown litigation. We acknowledge that the rule in this Commonwealth is that expert testimony is not essential in malpractice cases where the negligence is sufficiently apparent that a layman using his own general knowledge would have no difficulty recognizing it. Stephens v. Denison, 150 S.W.3d 80, 82 (Ky.App. 2004). However, this is not such a case, and expert testimony would have been necessary to

assist the jury in assessing UPG's allegations concerning Rendigs, Fry's negligence in the Brown litigation.

CONCLUSION

For the foregoing reasons, the orders of the McCracken Circuit Court granting summary judgment to Federated Mutual Insurance Company and the law firm of Rendigs, Fry, Kieley & Dennis are affirmed.

ALL CONCUR.

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