RENDERED: DECEMBER 21, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001747-MR

MICHAEL MARTINDALE
AND VELICIA MARTINDALE — APPELLANTS

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 04-CI-00317

FIRST NATIONAL INS. CO. OF AMERICA,
SAFECO INS. CO. OF AMERICA, AND
LAURA HARP — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, TAYLOR AND VANMETER, JUDGES.

NICKELL, JUDGE: Michael Martindale, and his wife, Velicia Martindale, appeal from an opinion and order entered by the Woodford Circuit Court on August 29, 2011, dismissing them from a bad faith claim[1] they had filed against First National

[1] On April 15, 2010, Hon. J. James Rogan, Bankruptcy Trustee, was added to the circuit court bad faith case as a co-plaintiff with the Martindales. Summary judgment was entered against

Ins. Co. of America, Safeco Ins. Co. of America and insurance adjuster Laura Harp (referred to collectively as "Safeco"). Having reviewed the record, the briefs and the law, we affirm.

This case began with a motor vehicle accident in December 2000. Michael was driving south on Big Sink Pike in Woodford County while Mickey Taylor[2] was attempting to pull out of a driveway on the east side of the road. In an attempt to avoid Taylor's car, Michael ran off the west side of the road and sideswiped a fence before hitting a tree. The two vehicles did not collide. Velicia and the couple's six-year-old daughter were passengers in the truck.

Michael, who was not wearing a seatbelt, sustained a lower back injury and was ultimately terminated from his job as an HVAC technician due to medical restrictions and inability to perform the job. Velicia sustained injuries to her mouth and ultimately underwent TMJ[3] surgery. Their child was unharmed.

The Martindales tried to settle the personal injury case with Safeco, but could not reach an agreement and the case was tried by a jury in April 2004.[4] The jury found for the Martindales, apportioning 80% of the fault to Taylor and the

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Rogan in the order dated August 29, 2011, the circuit court believing there was no scenario under which the bankruptcy estate could prevail. Rogan has not appealed the trial court's decision.

[2] Taylor is insured by Safeco.

[3] Temporomandibular joint disorder.

[4] The record of the personal injury case is not before us. It is styled *Michael Martindale v. Mickey W. Taylor,* Woodford Circuit Court Case No. 02-CI-00217. A separate case, *Velicia Martindale v. Mickey W. Taylor,* Woodford Circuit Court Case No. 02-CI-00249, was ordered consolidated with Michael's case on March 12, 2003.

remaining 20% to Michael. The jury awarded Michael $190,005.94 in damages,[5] but also determined his injuries were 10% worse because he was not wearing a seatbelt. The jury awarded Velicia $67,752.68 for past medical expenses and past, present and future physical pain and suffering. Ultimately, Safeco paid the Martindales $185,804.97, from which $88,572.43 in attorney's fees and costs were deducted.

Following the trial, in December 2004, the Martindales filed a bad faith complaint against Safeco alleging in part that it had:

> 13. . . . [i]nstituted a war of attrition against the Martindales, both before and after suit was filed, filing numerous vexatious and frivolous motions and procedures that prolonged the litigation and cost the [Martindales] time and attorneys' fees. During the litigation, [Safeco] refused to offer Michael any money as damages, effectively forcing a trial.
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> 14. [Safeco's] conduct during the adjustment of the claims and in failing to make a reasonable settlement offer to the Martindales for the value of their claim was so violative of [Safeco's] duty to act in good faith that it shocks the conscience, and constitutes gross negligence and a reckless disregard of [the Martindale's] rights.
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> 15. [Safeco] had a duty to act in good faith in their dealings with [the Martindales], both directly and with their attorney, and to attempt to effectuate a fair and reasonable settlement of their claims under KRS[6] 304, including the Unfair Claims Settlement Practices Act.[7]

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[5] Included in this amount was money to pay for medical services provided by Dr. Morrow. However, Dr. Morrow was not paid directly by the Martindales, his fee was discharged in a subsequent bankruptcy proceeding.

[6] Kentucky Revised Statutes (footnote added).

[7] UCSPA.

> Further, [Safeco's] actions constitute common law bad faith.
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> 16. [Safeco in its] grossly unfair, unconscionable, inadequate, egregious, and reckless handling of [the Martindale's] claims, have committed unfair claims settlement practices in violation of Kentucky statutory law, including but not limited to KRS 304.12-230.

The complaint alleging bad faith is styled *Michael Martindale, et. al. v. First National Insurance Co. of America, et.al.,* Woodford Circuit Court Case No. 04-CI-000317.

Thereafter, on August 13, 2005, the Martindales filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Kentucky. Question 4 of the petition required the listing of all "Suits and administrative proceedings, executions, garnishments and attachments," and specifically directed the petitioner to "a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case." (emphasis in original). The Martindales checked the box titled "None," and made no mention of the recently concluded personal injury suit; the sizeable jury award; nor the pending bad faith claim. The petition was signed under penalty of perjury.

On September 20, 2005, the Martindales were questioned on the record by Bankruptcy Trustee Rogan. When asked how they were supporting themselves, Velicia responded, "Student loans," and Michael agreed. Although not reflected on the bankruptcy petition—it was divulged during the hearing that

Velicia was working toward her master's degree in accounting and Michael was attending a community college—together they owe about $56,000.00 in student loans. Rogan made it clear to the Martindales that the student loans were "nondischargeable in bankruptcy" and directed their attorney to "amend the petition and list the student loans." When asked whether they were owed money "for anything," the Martindales both responded, "No." At the conclusion of the hearing, Rogan stated, "It appears to me that all the property of the debtors is exempt and I'm going to close this out[. I]t's a no asset case."

On November 13, 2009, the Martindales filed an amendment to Schedules B and C of the bankruptcy petition to list the pending bad faith claim as an asset. Curiously, the amendment identified the pending bad faith claim with the case style and number assigned to the personal injury action. The same mistake was made on an amendment to the Statement of Financial Affairs filed the same date. There was still no mention of the personal injury case nor the jury award. The amendments were again signed by the Martindales under penalty of perjury.

The crux of this appeal is that in August 2010, Safeco moved to dismiss the Martindales from the bad faith claim on the grounds of judicial estoppel and to grant summary judgment against the bankruptcy estate because there were no genuine issues of material fact. Without elucidating all that transpired after the filing of the motion, on March 11, 2011, the trial court entered an opinion and order granting Safeco its requested relief. Specifically, the trial court found the Martindales, despite opportunities to correct their pleadings, had

committed fraud by concealing the tort litigation and jury award from the Bankruptcy Court and dismissed their bad faith claim under the doctrine of judicial estoppel which requires litigants to be consistent in their pleadings. In evaluating the bad faith claim for purposes of the bankruptcy estate, the trial court concluded Safeco's skepticism about the veracity of the Martindale claims resulted in a hard fought battle but did not rise to the level of proof required to succeed on a claim of bad faith under the UCSPA. It is from this interlocutory opinion and order, as well as a subsequent order denying a motion to alter, amend or vacate the order of March 11, 2011, that this appeal flows. We affirm.

LEGAL ANALYSIS

The first question is whether the trial court correctly dismissed the Martindales from the bad faith case on the grounds of judicial estoppel due to their concealment from the Bankruptcy Court and Trustee of the personal injury lawsuit and resulting jury award. The Martindales claim they concealed nothing from the Bankruptcy Court and Trustee because the jury award had been dissipated by the time they filed the bankruptcy petition.

Judicial estoppel is an equitable remedy that binds a party by its fraudulent conduct in subsequent litigation arising from the same event. Here, the personal injury action, the bad faith claim and the bankruptcy petition all emanated from the same motor vehicle accident. The doctrine of judicial estoppel is intended to protect "the integrity of the judicial process" by barring a party "from taking inconsistent positions in judicial proceedings." *Hisle v. Lexington-Fayette*

Urban County Government, 258 S.W.3d 422, 434-35 (Ky. App. 2008) (internal quotations omitted).

The trial court found the Martindales did not divulge the state court litigation to the Bankruptcy Court until September of 2009, even though the personal injury action had been filed in 2002 and concluded in 2004, just nine months before the bankruptcy petition was filed in August of 2005. The pending bad faith claim, which was also omitted from the petition, was filed in December 2005. From these facts, the trial court concluded the omission was not "inadvertent" and characterized it as "deliberate." Therefore, it found dismissal on grounds of judicial estoppel to be appropriate. *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010).

We have carefully examined the bankruptcy petition and amendments provided to us and never do we see specifics about the underlying litigation in this case so as to fully apprise the Bankruptcy Court and Trustee of the complete scenario. Even after reopening the case in October 2009 and filing amended schedules to mention the "possible bad faith claim," the Martindales still did not provide wholly accurate details. However, we find perplexing an affidavit from Rogan stating in part, "As the Bankruptcy Trustee, I was informed of the Martindales' pending bad faith action in the Woodford Circuit Court and the Martindale's receipt of $184,888.00, prior to the filing of the Defendants' Motion to Dismiss/Summary Judgment." Rogan's affidavit was filed with the trial court after entry of the order dismissing the Martindales from the bad faith claim, but

prior to entry of the court's denial of their motion to alter, amend or vacate the order entered on March 11, 2011. Because we would have expected some comment about the impact, or lack thereof, of Rogan's affidavit in the court's final opinion and order, we would have been inclined to remand this matter to the trial court for a specific finding on this issue. However, the Martindales chose not to seek a specific finding as permitted by CR[8] 52.01 and we are not inclined to obtain such a clarification for them. Furthermore, in light of our resolution of the summary judgment issue, remanding the case for a specific finding would be a waste of judicial time and resources.

The second issue is whether the Martindales could prevail on the merits if the bad faith claim were allowed to go forward. We already have the benefit of the trial court's analysis of this issue because it granted Safeco summary judgment against Rogan who, as Bankruptcy Trustee, stood in the same shoes as the Martindales. Thus, if the trial court correctly granted summary judgment to Safeco against Rogan, the same reasoning and result would apply to the Martindales.

> Pursuant to CR 56.03, summary judgment:
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> > shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[8] Kentucky Rules of Civil Procedure.

As further explained in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 480 (Ky. 1991), summary judgment should be granted cautiously and only after viewing the record:

> in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Dossett v. New York Mining and Manufacturing Co*., [451 S.W.2d 843 (Ky. 1970)]; *Rowland v. Miller's Adm'r*, [307 S.W.2d 3 (Ky. 1956)]. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. *Puckett v. Elsner*, Ky., 303 S.W.2d 250 (1957). The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try.

The Martindales maintain Safeco treated them so egregiously during the claims adjustment process that they violated the UCSPA. As proof, they argue that no offer was made to Velicia before suit was filed, but discount Velicia's decision not to negotiate until she had undergone TMJ surgery. As further proof, they argue that an initial offer of $40,000.00 to Velicia after suit was filed was reduced to $20,000.00 just before trial, and that an offer of $33,000.00 to Michael was reduced to $5,000.00 just before trial. In response, Safeco argues it doubted its insured's liability for the wreck and the severity of the Martindales' injuries, especially Michael's injuries which were described as soft tissue and difficult to prove, and the strong possibility that his pains were more attributable to his weight

rather than the accident. Safeco continued re-evaluating the claim as discovery progressed.

For a bad faith cause of action to exist against an insurance company, there must be "evidence sufficient to warrant punitive damages." *Wittmer v. Jones,* 864 S.W.2d 885, 890 (Ky. 1993). As explained in greater detail in *Wittmer*,

> "The essence of the question as to whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages depends first on whether there is proof of bad faith and next whether the proof is sufficient for the jury to conclude that there was 'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.' Restatement (Second) Torts, Sec. 909(2) (1979), as quoted and applied in *Horton v. Union Light, Heat and Power Co.*, Ky., 690 S.W.2d 382, 388–90 (1985)." *Federal Kemper* [*Ins. Co. v. Hornback*, 711 S.W.2d 844, 848 (Ky. 1986)].
>
> This means there must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury. If there is such evidence, the jury should award consequential damages and may award punitive damages. The jury's decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion.

We agree with the trial court. At most, the Martindales demonstrated a disparity in the jury's award and Safeco's offers—but such disparity alone is insufficient to establish bad faith. Even an insurance company's erroneous evaluation of a case will not trigger an automatic finding of bad faith. *See United Servs. Auto. Ass'n v.*

Bult, 183 S.W.3d 181, 189 (Ky. App. 2003). Therefore, if the issue were before us, we would affirm the trial court's grant of summary judgment against Rogan. Ergo, if the Martindale's bad faith claim were allowed to go forward, we are confident they could not prevail at trial for the same reasons. *Blackstone Mining Company v. Travelers Insurance Company,* 351 S.W.3d 193, 200-01 (Ky. 2011).

While we would not have dismissed the Martindales under the doctrine of judicial estoppel without a better understanding of how Rogan learned about the state court litigation, we will not order remand for a meaningless task because ultimately the case would be affirmed on the issue of summary judgment. Furthermore, as an appellate court, we may "affirm the trial court for any reason sustainable by the record." *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991). Thus, the opinion and order entered by the Woodford Circuit Court on August 29, 2011, is AFFIRMED.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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