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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001470-MR

HAROLD MERRITT, INDIVIDUALLY, AND AS COURT-APPOINTED ADMINISTRATOR OF THE ESTATE OF KIMBERLY MERRITT, AND AS COURT-APPOINTED ADMINISTRATOR AND NEXT FRIEND OF THE ESTATE OF HAROLD MERRITT, III — APPELLANTS

v.

CATHOLIC HEALTH INITIATIVES INC., AND FIRST INITIATIVES INSURANCE, LTD. — APPELLEES

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 15-CI-03690

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Harold Merritt et al., appeal the Fayette Circuit Court's orders denying his motion for declaratory judgment, denying his motion to

reconsider the denial of a declaratory judgment, and granting Catholic Health Initiatives, Inc., and First Initiatives Insurance, Ltd.'s motion for summary judgment.

Kentucky Revised Statutes (KRS) 304.49-010 through KRS 304.49-230 exempts captive insurers from Kentucky's Unfair Claims Settlement Practices Act ("UCSPA"). Captive insurance is a form of risk-financing or self-insurance involving the establishment of a subsidiary corporation or association to provide insurance. First Initiatives Insurance, Ltd. ("First Initiatives") is a foreign captive insurance entity that provides self-insurance for Catholic Health Initiatives, Inc. ("CHI"). The issue presented is whether UCSPA applies to CHI and First Initiatives.

After careful consideration, we affirm the trial court's decisions denying a motion for declaratory judgment and granting summary judgment.

BACKGROUND

Harold Merritt, Jr. filed a complaint on October 7, 2015, alleging negligence on the part of the medical providers and "bad faith" on the part of CHI and First Initiatives. This matter tragically arises from the death of a mother, Kimberly Merritt, and her son, Harold Merritt, III, following complications from pregnancy.

Merritt contended that Dr. Anthony Smith breached the medical standard of care and is responsible for the untimely deaths of his wife and infant child. Kimberly's pregnancy was considered high-risk since she had developed placenta previa, a condition which can cause severe bleeding during pregnancy. Merritt alleges negligence on the part of Dr. Smith since he did not schedule a caesarian at the 37th week of the pregnancy; Merritt noted that another high-risk obstetrics physician had made this recommendation.

Merritt named the following defendants in the complaint: CHI; Dr. Smith; KentuckyOne Health Medical Group, Inc.; KentuckyOne Health Obstetrics and Gynecology Associates; St. Joseph Obstetrics and Gynecology; St. Joseph's Hospital; and, First Initiatives. (The defendants will be collectively referred to as the "medical defendants.") The defendants were all insured by First Initiatives.

Dr. Smith was employed by KentuckyOne Health Obstetrics and Gynecology Associates, which is part of KentuckyOne Health, a non-profit Kentucky corporation. CHI sponsors KentuckyOne Health and its affiliates. Further, CHI is the parent company to First Initiatives, which provides insurance coverage to CHI, its affiliates, and employees including KentuckyOne Health and Dr. Smith.

A claim under Kentucky's declaratory judgment act was not originally pled, but approximately a month after the filing of the original complaint, Merritt

filed an amended complaint averring bad faith on the part of CHI and First Initiatives. The motion for a declaratory judgment emanated from the settlement negotiations between Merritt, CHI, and First Initiatives. Merritt maintained that First Initiatives violated the UCSPA for refusing to negotiate the claims for the mother and the son separately and offering a consolidated settlement for both. Further, Merritt believes that First Initiatives violated the UCSPA by not providing a reasonable explanation for the denial of the separate claims. In the amended complaint, he sought a declaratory judgment holding that First Initiatives is subject to the UCSPA, must comply with it, and will incur civil liability for any violations of the Act.

Nonetheless, Merritt concedes that UCSPA is only applicable to those entities engaging in the "business of insurance" and does not apply to captive insurance companies. In fact, Merritt sought a declaratory judgment to clarify that, according to him, First Initiatives was involved in the "business of insurance," and hence, not covered by the exclusionary clause of KRS Chapter 304.49, and as such, under the auspices of UCSPA. To counter, First Initiatives asserted that it is a foreign captive insurance entity, and hence, not subject to the liability of the UCSPA because it is not involved in the business of insurance.

On June 14, 2016, the trial court denied Merritt's motion for declaratory judgment. The trial court held First Initiatives is a captive insurance

company, that is, provides self-insurance for CHI; and, self-insurers and self-insured are not subject Kentucky's UCSPA because they are not engaged in the business of insurance.

Next, on July 20, 2016, the trial court granted CHI and First Initiatives' motion for summary judgment; and, on August 24, 2016, the trial court denied Merritt's motion to reconsider. Again, the trial court made these decisions based on the logic that First Initiatives is a captive insurance company; CHI is self-insured by First Initiatives; and, self-insurers and self-insured are not subject Kentucky's UCSPA because they are not engaged in the business of insurance.

Merritt settled his claims against the medical defendants. Nonetheless, he continued the bad faith claim against CHI and First Initiatives. Accordingly, Merritt appeals the June 14, 2016, order denying his motion for declaratory judgment; the July 20, 2016, order denying his motion to reconsider the denial of motion for declaratory judgment, granting CHI and First Initiatives' motion for summary judgment, and dismissing with prejudice all his claims against CHI and First Initiatives; the August 24, 2016, order denying his motion to reconsider the July 20, 2016, order; and, the September 27, 2016, agreed order of dismissal. In addition, Merritt appeals the September 27, 2016, order because this order makes all the previous orders final and appealable, and thus, constitutes the final order of the trial court.

ANALYSIS

Merritt argued in his motion for declaratory judgment that First Initiatives is subject to UCSPA because it is in the "business of insurance" under Kentucky law. He reasons that because First Initiatives participates in the "business of insurance," the exemption from UCSPA provided to captive insurers is not available to it. Thus, Merritt requested that the trial court declare that First Initiatives must comply with the duties and obligations under UCSPA and is subject to civil liability for violations of UCSPA. This makes the question before us whether First Initiatives is a captive self-insurer entitled to an exemption from the UCSPA.

Merritt supports his contention that First Initiatives is in the "business of insurance" and not exempt from UCSPA since it has an independent corporate identity from CHI, which negates its ability to self-insure CHI and its subsidiaries. Further, he maintains that insurance should be defined by Kentucky law, not federal tax law. Since Kentucky law necessitates that insurance implicates risk-sharing and risk distribution, Merritt maintains that the transactions between CHI and First Initiatives involved the shifting of risk, and thus, satisfied Kentucky's definition of insurance. In addition, Merritt suggests that the trial court erred in not permitting him additional discovery on this issue.

I. Efficacy of Declaratory Judgment

Definitions

To begin, we review important definitions for the analysis. A "captive insurance company" is a risk-financing method or form of self-insurance involving the establishment of a subsidiary corporation or association organized to write insurance. Steven Plitt et al., 3 *Couch on Insurance* § 39:2 (3d ed. & June 2017 update).

The Kentucky legislature defines "captive insurer," "pure captive insurer," and "foreign captive insurer.

> "Captive insurer" means any pure captive insurer, consortium captive insurer, sponsored captive insurer, special purpose captive insurer, agency captive insurer, or industrial insured captive insurer formed or issued a certificate of authority under the provisions of KRS 304.49-010 to 304.49-230. For purposes of KRS 304.49-010 to 304.49-230, a branch captive insurer shall be a pure captive insurer with respect to operations in Kentucky, unless otherwise permitted by the commissioner[.]

KRS 304.49-010(3).

> "Pure captive insurer" means any company that insures risks of its parent and affiliated companies or controlled unaffiliated business[.]

KRS 304.49-010(12).

> "Foreign captive insurer" means any insurer formed to write insurance business for its parents and affiliates and licensed pursuant to the laws of any state other than

> Kentucky which imposes statutory or regulatory standards in a form acceptable to the commissioner on companies transacting the business of insurance in that jurisdiction. Under KRS 304.49-010 to 304.49-230, captive insurers formed under the laws of any jurisdiction other than a state of the United States shall be treated as a foreign captive insurer unless the context requires otherwise[.]

KRS 304.49-010(14). First Initiatives is a foreign captive insurer under KRS 304.49-010(14). It is wholly owned by CHI and its only purpose is to insure the risks of CHI and its affiliates. Further, it is a foreign captive insurer because it is located in Grand Cayman, Cayman Islands, and consequently, subject to the laws of the Cayman Islands. Again, Merritt agrees that the trial court correctly ruled that First Initiatives is a foreign captive insurer under these statutes.

Significantly, pure and foreign captive insurance companies are excluded from the auspices of Kentucky's UCSPA. KRS 304.49-150. In fact, UCSPA has no impact on any self-insured entity in Kentucky. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000).

Organization of CHI and First Initiatives

Next, we consider the formation and make-up of CHI and First Initiatives. CHI is a nonprofit, tax-exempt health-care entity, and First Initiatives is a pure captive subsidiary wholly owned by CHI, its parent company. These organization qualities are corroborated in the affidavit of Philip L. Foster, the Senior Vice President and Chief Risk Officer of CHI. Therein, it is noted that CHI

qualifies under Section 501(c)(3) of the Internal Revenue Code as a nonprofit, tax-exempt health-care entity. And the affidavit states that First Initiatives is a pure captive subsidiary wholly-owned by CHI, its parent company. First Initiatives operates as a captive self-insurer for both the parent company and its affiliates. The purpose of its formation was to create the most efficient risk-financing program available and maximize CHI's limited nonprofit resources.

Because First Initiatives is a foreign, captive self-insurer, it is not registered nor does it do business in Kentucky, and First Initiatives is not registered and does not do business in any other state in the United States. Furthermore, First Initiatives is not licensed by the Kentucky Department of Insurance or any state department of insurance. Unlike commercial insurance companies, it does not pay premium taxes in Kentucky or any other state.

As a foreign captive insurance company, CHI does not administer it like a commercial insurance company. First Initiatives has specific characteristics that support its pure, captive insurance status. First Initiatives has no employees; owes no duty to provide claims or risk management services to CHI or its affiliates; and, does not adjust or investigate professional liability claims against CHI or its affiliates. Instead, as authorized by its self-insurance agreement, "[i]t is understood and agreed that all claims and risk management services will be provided by Catholic Health Initiatives." *See* "First Initiatives Insurance, Ltd.,

Hospital Professional, Commercial General, and Employment Practices Liability Policy, July 1, 2014 to July 1, 2015, Endorsement #5." Under the policy, CHI manages, coordinates, investigates, and settles any claims for damages brought against it.

Moreover, the financial statements of CHI and all its organizations are consolidated. Thus, First Initiatives' financial statements are consolidated with CHI's audited financial statements as are the financial statements of other CHI wholly-owned affiliates. Further, the financials of the medical defendants—KentuckyOne Health and KentuckyOne Health Medical Group, Inc.—are consolidated into CHI's audited financials. Claim payments affecting First Initiatives' net income affect CHI's net income dollar for dollar. Hence, under CHI's self-insurance arrangement with First Initiatives, every professional liability claim paid by it reduces the assets of CHI and its affiliates. There is no risk-shifting or risk distribution.

First Initiatives does not provide insurance to CHI, its parent company, but instead provides a captive arrangement for self-insurance. This self-insurance agreement covers all of CHI, its subsidiaries, and employees. It is designed to cover employment activity for CHI and its subsidiary affiliates and protect CHI from any kind of strict liability, *respondeat* superior-type claims. Only CHI pays assessments to First Initiatives for the self-insurance program.

Indeed, CHI affiliates are not permitted to seek insurance from commercial insurance companies.

Merritt argues that First Initiatives is in the business of insurance because of its use of "indemnify" and "you" and "we" in the self-insurance contract. This accusation is a red-herring since the words are used in an agreement that is clearly self-insurance by a wholly-owned captive of its parent company. The language used is common to any pure captive self-insurance agreement and logically includes certain words, which are necessary to describe both insurance and self-insurance.

In addition, Merritt's argument that CHI and First Initiatives are separate corporate persons is not convincing. First, the aforementioned organization and business model between CHI and First Initiatives supports that CHI is the parent company and First Initiatives is the captive insurance entity. Second, Merritt acknowledges that First Initiatives is a pure foreign captive insurer. Based on this concession, there is no need to analyze piercing the veil of a subsidiary. A captive insurer, by definition, is an entity created to provide insurance of its parent and affiliated companies. It has no separate corporate identity.

Kentucky's statutory provisions for captive insurance

Kentucky has explicit statutory captive provisions, which state that pure captive insurance companies—foreign and domestic—are excluded from the coverage of UCSPA. KRS 304.49-150. Consequently, First Initiatives is not covered by UCSPA because it is captive self-insurance company operated for and by its parent company.

To recap, pure captive insurer is defined in KRS 304.49-010(12) and "means any company that insures risks of its parent and affiliated companies or controlled unaffiliated business." First Initiatives meets the requirements to be considered a pure captive insurance company. It is completely owned by CHI and exists only to insure the risks of CHI and its affiliates consistent with the definition of a pure captive insurer. Additionally, it was formed under the laws of the Cayman Island, and therefore, is a foreign captive insurance company. KRS 304.49-010(14).

The reason Kentucky's insurance code does not apply to captive insurers is that insurance involves two parties entering into a contract. *See* KRS 304.1-040. Under the UCSPA, neither a self-insured nor a self-insurer can be held liable for bad faith because the arrangement does not involve a true "insurance contract." *See Davidson*, 25 S.W.3d at 100. Neither CHI nor First Initiatives is "in the business of entering into contracts of insurance." KRS 304.1-040.

First Initiatives is not "insurance" under Kentucky Chapter 304

Having determined that First Initiatives is not in the business of entering into contracts of insurance as required under Kentucky's Insurance Code, we continue the review of whether First Initiatives is engaged in the "business of insurance." As noted, this factor is cogent because the UCSPA is only pertinent if a person or entity engages in the "business of insurance." But First Initiatives is not in the "business of insurance," but rather in the business of captive self-insurance for its parent company.

A review of the concept of the "business of insurance" provides numerous definitions. A common denominator for a definition of "insurance" is that it is an economic term for the transferring of risk and reducing the uncertainty of risk by risk distribution. For instance, on its web page, www.naic.org, the National Association of Insurance Commissioners ("NAIC") defines insurance as "an economic device transferring risk from an individual to a company and reducing the uncertainty of risk via pooling." Black's Law Dictionary describes insurance as "A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency. An insured party usually pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk." *Black's Law Dictionary*, (10th ed. 2014).

Turning to the judicial realm, federal courts have held that insurance contracts involve risk-shifting and risk distribution. *See Humana Inc. v. C.I.R.*, 881 F.2d 247, 250 (6th Cir. 1989.) In Kentucky, insurance is defined by KRS 304.1-030 as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks,' or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety."

In addition, Kentucky has adopted the United States Supreme Court's definition of insurance in interpreting its insurance code. For instance, the Kentucky Supreme Court stated, "the shifting of risk from one party to another was a necessary component of an insurance contract." *Commonwealth v. Reinhold*, 325 S.W.3d 272, 276 (Ky. 2010) (quoting *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 211, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

Interestingly, Merritt, while maintaining the trial court was wrong in determining that First Initiatives was not involved in the "business of insurance," states on page 22 of appellant's brief that "Kentucky's definition of insurance is controlling." If so, then, our interpretation of Kentucky law is that insurance encompasses risk-shifting and risk distribution, which a captive insurance company or self-insurance provider does not do. Therefore, under Kentucky's definition, First Initiatives is not in the business of insurance.

We observe that the arrangement between First Initiatives and CHI (and its affiliates) lacks the defining aspects of insurance, risk-shifting and risk distribution. In contrast, self-insurance describes insurance whereby an entity bears all its own risks and purchases no insurance. This factor, the assumption of all risk on the part of the self-insurer, means that self-insurance is not "insurance" within the meaning of Kentucky law because it does not involve "a contract whereby one undertakes to pay or indemnify another as to loss from . . . 'risks.'" KRS 304.1-030. The captive insurance arrangement between CHI and First Initiatives does not involve risk-shifting and risk distribution. Thus, it is not insurance within the meaning of Kentucky law.

Because self-insured companies do not assume risk, the UCSPA is not pertinent to self-insurance including captive insurance. Indeed, Kentucky courts have held that UCSPA does not apply to captive insurance since a self-insurer "does not engage in risk-shifting." *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000). Consequently, First Initiatives, which is not involved in the business of risk-shifting and risk distribution, is not bound by UCSPA.

Merritt asserts that the only authority provided by CHI and First Initiatives that self-insurance is not the "business of insurance," was federal tax cases. This assertion is incorrect as shown by the discussion above. Nonetheless, it is intriguing that for-profit companies may deduct insurance premiums as

ordinary business expenses but no such deduction is allowed for self-insurance payments. *Malone & Hyde, Inc. v. C.I.R.*, 62 F.3d 835, 838 (6th Cir. 1995). The differences in tax implications for insurance and self-insurance expenses provide additional support that self-insurance is not analogous with insurance.

To summarize, CHI, First Initiatives, and CHI affiliates retain the entire financial stake in the self-insured, professional liability claims paid to claimants, and risk is never shifted as would occur with commercial insurance. Moreover, risk is not disturbed across a diverse market. These factors, risk-shifting and risk distribution, are not implicated by CHI's self-insurance through First Initiatives' captive insurance framework. Hence, First Initiatives is not in the "business of insurance."

KRS 304.49-230

Merritt declares that the trial court erred in ascertaining that the exclusion of foreign captive insurance companies provided in KRS 304.49-230 did not impact First Initiatives. He based this assertion on KRS 304.49-230, which states:

> This subtitle shall not apply to any foreign captive insurer lawfully transacting the business of insurance in Kentucky prior to July 14, 2000, unless the foreign captive insurer petitions the commissioner requesting that this subtitle be applicable to the foreign captive insurer.

Therefore, the exemption from UCSPA only applies to foreign captive insurers if they transacted business in Kentucky prior to July 14, 2000, and petitioned the insurance commissioner to fall under this provision. Merritt reasons that First Initiatives is not eligible for the exclusion from UCSPA because it operated in Kentucky prior to 2000 and did not petition the insurance commissioner for inclusion in the province of the subtitle. According to Merritt's tautology, First Initiatives is liable under the UCSPA.

However, our understanding of the statute and its implications differs from Merritt's interpretation. Indeed, First Initiatives was operating before 2000, but it never engaged in the "business of insurance." Because First Initiatives was never in the "business of insurance," it was not required to register with the department of insurance to qualify for the exemption from UCSPA found in KRS 304.49-10 – KRS 304.49-230.

First Initiatives is a wholly-owned subsidiary of CHI formed for the purpose of self-insurance. It does not enter into contracts of insurance, which involve risk-shifting or risk distribution. Therefore, the exclusion clause of KRS 304.49-230 does not apply because First Initiatives did not engage in the "business of insurance," and consequently is exempt from the UCSPA.

Contrary to the Merritt's assertion that the trial court conflated two mutually exclusive issues—foreign captive insurer and the "business of

insurance"—these two issues are not mutually exclusive, that is, one can be a foreign captive insurer and not in the "business of insurance" or vice versa. Here, First Initiatives was not engaged in the "business of insurance." It is exempt from the UCSPA.

II. Discovery

Merritt contends that the trial court improperly limited his right to discovery regarding whether CHI and First Initiatives were in the "business of insurance," and thus, subject to UCSPA. He moved for a declaratory judgment under KRS 418.040 through KRS 418.050. Merritt argued that after the denial of the declaratory judgment that additional discovery was necessary to establish his case. Nonetheless, Merritt never moved prior to the trial court's ruling to delay the ruling to conduct additional discovery.

Specifically, Merritt maintained that additional evidence was necessary to counter the Foster affidavit. But while making this argument, Merritt asserted that even without additional evidence, he already demonstrated that Foster's affidavit was incorrect by using publicly-sourced information.

The standard of review in matters involving a trial court's rulings on evidentiary issues and discovery disputes is abuse of discretion. *Sexton v. Bates*, 41 S.W.3d 452 (Ky. App. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound

legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted).

In the case at bar, we disagree that the trial court abused its discretion in denying additional discovery. First, when a party moves for declaratory judgment, it is claiming that a real and immediate controversy exists that is ready for a decision. The issue proffered for a declaratory judgment, therefore, should require no additional discovery. The controversy should be real, substantial, and posed so that the trial court may determine the legal relations of the parties and render a specific adjudication of their rights. *Healthamerica Corp. of Kentucky v. Humana Health Plan, Inc*., 697 S.W.2d 946 (Ky. 1985).

In the motion for declaratory judgment, Merritt contended that a real and immediate actual controversy existing as to whether CHI and First Initiatives were subject to the UCSPA. He claimed that these entities were in the "business of insurance." Because of the alleged status of CHI and First Initiatives, he moved for the trial court to declare that CHI and First Initiatives must comply with UCSPA and are subject to civil liability for any violations of it. Still, Merritt acknowledged that UCSPA only applies to those entities in the "business of insurance" and does not apply to captive insurance companies.

While it is true that Merritt is entitled to some discovery, it is within the trial court's discretion to determine the appropriate discovery. *See Sexton*, 41

S.W.3d at 452. Here, Merritt filed his initial motion for declaratory judgment in November 2015, amending the complaint, which had only been filed a month or so before. Thus, by choice, he moved for a declaratory judgment very early in the litigation. After amending his complaint and seeking declaratory relief on this issue, Merritt filed five briefs and had four hearings to discuss the issue.

Interestingly, here Merritt does not ask that the matter be remanded for additional discovery but instead asks that our Court reverse the trial court and hold that CHI and First Initiatives are subject to UCSPA. This request weakens Merritt's argument for the need of additional discovery.

We conclude that the trial court did not abuse its discretion when it failed to permit additional discovery. Since the motion was made under the declaratory provisions, it must be justiciable, that is, ready to be decided when made. When Merritt made the motion, he was tacitly agreeing that the UCSPA issue was ripe for a ruling without the need for further discovery. A trial court has a great deal of discretion in monitoring evidentiary and discovery issues. In the case at bar, the trial court's decision was not an abuse of discretion since it was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *See Goodyear Tire* at 581.

CONCLUSION

CHI operated First Initiatives as a pure foreign captive insurance entity, which is exempt from UCSPA under KRS Chapter 304.49 because it is not in the "business of insurance." Using the definition of "insurance" found in the Commonwealth's statutory and case law, First Initiatives was not in the "business of insurance" since the relationship between it and CHI did not involve the shifting or distribution of risk. And because First Initiatives is not in the "business of insurance," the exclusionary provision in KRS 304.49-230 is not relevant to First Initiatives. Finally, the trial court did not abuse its discretion by not permitting additional discovery on the declaratory judgment matter.

We affirm the decisions of the Fayette Circuit Court that denied Merritt's motion for declaratory judgment and the motion to reconsider the denial of declaratory judgment, and we also affirm the Fayette Circuit Court's grant of summary judgment to CHI and First Initiatives. The trial court correctly held that First Initiatives is not subject to bad faith liability under the UCSPA.

ALL CONCUR.

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