NO. COA 08-49

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

PRISCILLA WOODS and
spouse ROBERT WOODS,
Plaintiffs-Appellants,

v. Wayne County
No. 06 CVS 1800

SENTRY INSURANCE A MUTUAL CO., GUARANTY NATIONAL INSURANCE COMPANY, and ROYAL & SUNALLIANCE U.S.A., in their corporate capacity, and MABLE BELL, as the named insured of Guaranty National Insurance Company,
Defendants-Appellees.

Appeal by Plaintiffs from orders entered 29 May and 6 June 2007 by Judge Jerry Braswell in Superior Court, Wayne County.

Heard in the Court of Appeals on 19 August 2008.

Priscilla Woods and Robert Woods, Plaintiffs-Appellants, pro se.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jeffrey T. Ammons and Ron D. Medlin, Jr., for Defendants-Appellees Sentry Insurance A Mutual Co., Guaranty National Insurance Company, and Royal & SunAlliance U.S.A.; Battle, Winslow, Scott, & Wiley, P.A., by M. Greg Crumpler, for Defendant-Appellee Mable Bell.

McGEE, Judge.

Priscilla Woods (Mrs. Woods) and Robert Woods (Mr. Woods) (collectively Plaintiffs) filed a complaint against Guaranty National Insurance Company (Guaranty), Royal & SunAlliance U.S.A.

(Royal), and Mable Bell (Ms. Bell) on 8 August 2006. Plaintiffs alleged claims of breach of contract and personal injury. Plaintiffs dismissed their complaint without prejudice on 8 August 2005, and filed an amended complaint dated 23 April 2007. In their amended complaint, Plaintiffs added Sentry Insurance a Mutual Co. (Sentry) as an additional Defendant, and alleged that Sentry was the parent company of Guaranty. Plaintiffs also alleged claims for bodily injury, breach of contract, and unfair and deceptive trade practices (UDTP).

Plaintiffs alleged that Mrs. Woods was involved in an automobile collision with Ms. Bell on 21 May 2003, and that as a result of the accident, Mrs. Woods incurred medical bills in excess of $8,000.00. Plaintiffs further alleged that: (1) at the time of the accident, Ms. Bell had a valid and enforceable contract of liability insurance with Atlantic Indemnity Company (Atlantic); (2) Atlantic merged with Guaranty on 31 December 2004; and (3) Guaranty became the successor in interest and assumed the liabilities of Atlantic.

Mrs. Woods submitted her medical bills to Atlantic and demanded payment on 19 June 2003. Atlantic sent Mrs. Woods a letter dated 24 July 2003 stating that Atlantic was extending an offer of $15,000.00 for full and final settlement of Mrs. Wood's claim. Atlantic also requested that Mrs. Woods sign a Release of All Claims form if the settlement offer was acceptable. Atlantic also stated in the letter that North Carolina law required Atlantic to pay any outstanding balances owed to Mrs. Woods' medical

providers, and to then issue payment to Mrs. Woods for the remaining balance of the settlement offer.

Mrs. Woods refused to sign the Release of All Claims form because Plaintiffs did not want to release Atlantic from liability, and also because Plaintiffs disagreed with the method of disbursement. However, Mrs. Woods later sent a letter to Atlantic dated 30 September 2003, stating that she "[would] accept [Atlantic's] offer of $15,000.00 to settle this claim[]" and asked Atlantic to notify her of a date and time that she could exchange a Release of All Claims form for the amount offered.

Although Plaintiffs agreed to the $15,000.00 settlement offer made by Atlantic in its 24 July 2003 letter, Atlantic never tendered payment to Plaintiffs because Plaintiffs continued to remain opposed to Atlantic's method of disbursement. Plaintiffs also claimed that Atlantic, in order to support its position that it had to first pay Mrs. Woods' medical providers, was misrepresenting N.C. Gen. Stat. §§ 44-49 and 44-50 and *Smith v. State Farm Mut. Ins. Co.*, 157 N.C. App. 596, 580 S.E.2d 46 (2003).

Atlantic sent a letter to Mrs. Woods dated 31 August 2004, in which Atlantic offered to disburse the $15,000.00 settlement proceeds directly to Plaintiffs in exchange for Mrs. Woods' execution of the Release of All Claims form. Mrs. Woods responded to Atlantic's offer in a letter dated 20 September 2004, in which Mrs. Woods stated that she had incurred additional damages as a result of Atlantic's intentional misrepresentation of the law and Atlantic's refusal to settle the claim in a timely manner.

Ms. Bell had also filed several motions on 11 September 2006, including a Rule 12(b)(6) motion to dismiss for failure of Plaintiffs to state a claim for relief. The trial court entered an order allowing the Rule 12(b)(6) motion and dismissed with prejudice Plaintiffs' action against Ms. Bell on 29 May 2007. We note that Plaintiffs gave notice of appeal from the 29 May 2007 order, but present no arguments regarding this order.

Sentry, Guaranty, and Royal (collectively Defendants) filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted on 17 May 2007. Pursuant to N.C. Gen. Stat. § 1-75.3 and N.C. Gen. Stat. § 1A-1, Rule 12(b)(2),(4)-(5), Defendants also moved to dismiss for lack of personal jurisdiction and insufficient service of process. The trial court concluded, *inter alia*, that Plaintiffs did not allege a valid cause of action against these Defendants and that Plaintiffs made no effort to serve Sentry with a copy of Plaintiffs' amended complaint that added Sentry as a named defendant. The trial court entered an order dismissing with prejudice Plaintiffs' action against Sentry, Guaranty, and Royal on 6 June 2007. Plaintiffs appeal.

I.

Plaintiffs argue that the trial court erred in granting Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted. More specifically, Plaintiffs argue that the trial court failed to treat as true allegations in Plaintiffs' complaint that: (1) Defendants issued knowingly false and materially misleading statements regarding how

insurance companies are required to disburse settlement payments; (2) Mrs. Woods was in contractual privity with Defendants pursuant to a $15,000.00 settlement agreement; and (3) Defendants willfully and maliciously breached said settlement agreement. We disagree.

"When ruling upon a [Rule] 12(b)(6) motion to dismiss, a trial court must determine as a matter of law whether the allegations in the complaint, taken as true, state a claim for relief under some legal theory." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006). "On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court 'conduct[s] a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.'" *Id.* (quoting *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003)).

A.

Dismissal of Plaintiffs' UDTP Claim

The trial court stated in its order that it was granting Defendants' 12(b)(6) motion because North Carolina courts, in the absence of privity of contract, do not recognize a cause of action for third-party claimants against insurance companies of adverse parties based on a UDTP claim pursuant to N.C. Gen. Stat. § 75-1.1. (R. p. 119). We agree.

In *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996), this Court held that "North Carolina does not recognize a cause of action for third-party claimants against the insurance

company of an adverse party based on unfair and deceptive trade practices under N.C.G.S. § 75-1.1." This holding pertains to plaintiffs who are "neither an insured nor in privity with the insurer." *Id.* The rationale underlying our Court's holding is that "allowing such third-party suits against insurers would encourage unwarranted settlement demands, since [the] plaintiffs would be able to threaten a claim for an alleged violation of N.C.G.S. § 58-63.15 in an attempt to extract a settlement offer." *Wilson*, 121 N.C. App. at 666, 468 S.E.2d at 498.

Plaintiffs argue that the *Wilson* rule is not applicable to their claim because there is privity between themselves and Defendants. Plaintiffs argue that Mrs. Woods is a beneficiary of the contract between Ms. Bell and Defendants pursuant to *Murray v. Nationwide Mutual Ins. Co. Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997).

In *Murray*, the plaintiff was involved in an automobile accident. The plaintiff sued the driver who caused the accident and obtained a judgment against the driver, thereby establishing privity between the plaintiff and the defendant insurance companies. *Id.* at 15, 472 S.E.2d at 366. After obtaining a judgment against the driver, the plaintiff brought suit against the defendant insurance companies alleging UDTP. *Id.* at 4-5, 472 S.E.2d at 359-60. Our Court, in allowing the plaintiff to proceed against the defendant insurance companies for UDTP, determined that *Murray* was distinguishable from *Wilson* for the following reasons:

(1) privity of contract existed between the plaintiff and the defendant insurance companies; and (2) all of the conduct complained of in *Murray* occurred after the underlying judgment against the driver was final. *Id.* at 15-16, 472 S.E.2d at 366.

Plaintiffs' case is distinguishable from *Murray*. Because no judgment was obtained against Ms. Bell, Plaintiffs are not in privity of contract with Defendants. Furthermore, Plaintiffs' UDTP claim is based on Defendants' prejudgment behavior, whereas the conduct complained of in *Murray* occurred after the judgment against the tortfeasor was entered. *Id.*

Not only is Plaintiffs' case distinguishable from *Murray*, but the rationale for our Court's holding in *Wilson* is applicable to Plaintiffs' case. In *Wilson*, our Court was concerned that allowing third parties who lacked privity to sue insurance companies based on claims of UDTP could result in undesirable social and economic effects, such as unwarranted bad faith claims. *Wilson*, 121 N.C. App. at 666-67, 468 S.E.2d at 498. As Defendants state in their brief, that is precisely the case here. Initially, when Defendants offered Plaintiffs $15,000.00 to settle Plaintiffs' claim, Plaintiffs and Defendants only disagreed as to the method of disbursement of the funds, not the amount of the settlement. However, after our Supreme Court reversed *Smith*, *see Smith v. State Farm Mut. Auto Ins. Co.*, 358 N.C. 725, 599 S.E.2d 905 (2004), and after Defendants agreed to disburse the entire settlement amount to Plaintiffs, Plaintiffs claimed to have incurred additional damages based on Defendants' alleged unfair and deceptive trade practices.

We hold that the trial court did not err in concluding that Plaintiffs failed to state a UDTP claim against Defendants because, pursuant to *Wilson*, North Carolina does not recognize a cause of action for third-party claimants against insurance companies of adverse parties based on UDTP in the absence of privity. Moreover, Plaintiffs' actions in this case are precisely the actions our Court warned about in *Wilson*.

The trial court also concluded that even if Plaintiffs could bring an UDTP claim against Defendants, the allegations included in Plaintiffs' complaint failed to support Plaintiffs' claim. We agree.

Our Courts have held that in order to prove a claim for unfair and deceptive trade practices, a claimant must show: "'(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.'" *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (quoting *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994)(citation omitted)). "The term 'unfair' has been interpreted by our Courts as meaning a practice which offends established public policy, and which can be characterized by one or more of the following terms: 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (quoting *Miller*, 112 N.C. App. at 301, 435 S.E.2d at 542).

Plaintiffs alleged that Defendants issued knowingly false and materially misleading statements in order to induce, coerce and deceive Plaintiffs. More specifically, Plaintiffs alleged that Defendants willfully and knowingly disseminated false and misleading statements when Defendants claimed to have a legal duty to first disburse settlement proceeds to Mrs. Woods' medical providers pursuant to N.C. Gen. Stat. §§ 44-49 and 44-50 and *Smith v. State Farm Mut. Auto Ins. Co.*, 157 N.C. App. 596, 580 S.E.2d 46 (2003).

N.C. Gen. Stat. § 44-49 creates medical provider liens upon recoveries for personal injuries stating, in pertinent part, that:

> (a) From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services rendered in connection with the injury in compensation for which the damages have been recovered... .
>
> (b) Notwithstanding subsection (a) of this section, no lien provided for under subsection (a) of this section is valid with respect to any claims whatsoever unless the physician, dentist, nurse, hospital, corporation, or other person entitled to the lien furnishes, without charge to the attorney as a condition precedent to the creation of the lien, upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical

> report for the use of the attorney in the negotiation, settlement, or trial of the claim arising by reason of the personal injury, and a written notice to the attorney of the lien claimed.

N.C. Gen. Stat. § 44-49(a)(b) (2007).

N.C. Gen. Stat. § 44-50 creates a lien against settlement proceeds, stating in pertinent part, that:

> A lien as provided under G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. If an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49. Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims.

N.C. Gen. Stat. § 44-50 (2007).

Defendants were correct in their interpretation of controlling law at the time. In *Smith*, our Court, in considering N.C. Gen. Stat. §§ 44-49 and 44-50, held that "a lien against the settlement proceeds received by a *pro se* injured party arises by operation of law, and is perfected when the insurer has 'received notice' of the 'just and bona fide claims' of the medical service provider." *Smith*, 157 N.C. App. at 602-03, 580 S.E.2d at 51. We further held that the "submission of the health insurance claim form to [the] defendant was sufficient to validate the medical service provider lien asserted by [the] plaintiff". *Id.* at 604, 580 S.E.2d at 51.

At the time Plaintiffs and Defendants first entered into

settlement negotiations, *Smith* was applicable. Similar to the plaintiff victim in *Smith*, Mrs. Woods was a *pro se* injured party. Just as the plaintiff in *Smith* submitted a health claim form on behalf of her medical service provider to the adverse party's insurance carrier, in the present case Defendants received notice of the claims of Mrs. Woods' medical providers when Mrs. Woods submitted her medical bills to Defendants. Thus, according to *Smith*, a lien in favor of Mrs. Woods' medical providers arose by operation of law and was perfected when Defendants received notice of the medical providers' claims. Moreover, pursuant to N.C. Gen. Stat. §§ 44-49 and 44-50, Defendants were required to first pay Mrs. Woods' medical providers and then disburse the remaining funds to Mrs. Woods. Defendants' assertions that they had to first pay Mrs. Woods' medical providers cannot be characterized as knowingly false or misleading because Defendants' assertions were based on controlling law at the time. The North Carolina Supreme Court later reversed our Court's decision in *Smith* and adopted the holding of the dissent. *Smith v. State Farm Mut. Auto Ins. Co.*, 358 N.C. 725, 599 S.E.2d 905 (2004). The dissent in *Smith* provided that:

> [W]hen an insurance carrier settles directly with an unrepresented injured party, the carrier does not have valid 'notice' of a 'just and bona fide claim' pursuant to [N.C. Gen. Stat.] § 44-50 unless it receives documentation that (1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting a lien under the provisions of [N.C. Gen. Stat.] §§ 44-49 and 44-50, or language asserting an interest in or claim to settlement proceeds.

Smith, 157 N.C. App. at 608, 580 S.E.2d at 54 (Levinson, J. dissenting). Following the decision of the Supreme Court, Atlantic sent Mrs. Woods a letter dated 31 August 2004 offering to disburse the entire settlement amount to Plaintiffs. Plaintiffs responded by letter dated 20 September 2004 that they had incurred additional damages as a result of Defendants' misrepresentation of the law and Defendants' refusal to settle Plaintiffs' claim in a timely manner.

Plaintiffs' allegations fail to state a cause of action against Defendants for any unfair or deceptive trade practice or act of bad faith. Defendants attempted to comply with the law in effect at the time they refused to disburse the entire settlement amount to Plaintiffs. When the Supreme Court held otherwise, allowing Defendants to disburse the entire settlement amount to Plaintiffs, Defendants notified Plaintiffs in a timely fashion of Defendants' willingness to disburse the entire settlement amount to Plaintiffs. Therefore, we conclude that the trial court correctly held that even if there was a cause of action for an UDTP claim by a third-party against the insurance company of an adverse party, the factual allegations in Plaintiffs' complaint fail to state such a cause of action.

B.

Dismissal of Plaintiff's Breach of Contract Claim

Plaintiffs next argue that the trial court erred when it dismissed Plaintiffs' action although Plaintiffs' amended complaint alleged privity of contract and a subsequent willful and malicious breach thereof by Defendants. We disagree.

Plaintiffs' amended complaint alleged that Mrs. Woods was in privity of contract with Defendants because when Defendants offered to settle Mrs. Woods' claim, Defendants acknowledged that Ms. Bell was liable for Mrs. Woods' injuries. However, the language of the Release of All Claims form stated that the payment made was not to be construed as an admission of liability on the part of Ms. Bell or Defendants. Furthermore, as stated earlier, Plaintiffs were not in privity of contract with Defendants because Plaintiffs failed to establish that Ms. Bell was liable for Mrs. Woods' injuries.

Plaintiffs also argue that Defendants breached the $15,000.00 settlement agreement. However, our review of the record shows that Plaintiffs and Defendants never reached a settlement agreement because they never agreed to the method of disbursement of the settlement proceeds. Because there was no settlement agreement between Plaintiffs and Defendants, Defendants could not have breached the alleged agreement.

We conclude that the trial court did not err in granting Defendants' motion to dismiss because Plaintiffs were not in privity of contract with Defendants and there was no contract between Plaintiffs and Defendants that Defendants could have breached.

II.

In Plaintiffs' final argument, they assign error to the trial court's dismissal of their claims against Sentry for insufficient service of process. However, prior to granting Sentry's motion to dismiss for insufficient service of process, the trial court had

already dismissed Plaintiffs' claims against *all* Defendants for failure to state a claim upon which relief could be granted. We therefore conclude that the trial court's dismissal of Plaintiff's claims against Sentry for insufficient service of process was surplusage. The trial court's order specifically states,

> [T]hat the motions of the corporate defendants, Sentry Insurance a Mutual Co., Guaranty National Insurance Co., and Royal & SunAlliance U.S.A., to dismiss the plaintiffs' causes of action for failure to state a claim shall be and are hereby granted, and the motion of the defendant, Sentry Insurance a Mutual Co., to dismiss for insufficient service of process shall be and is hereby granted[.]

In that we have already held that the trial court did not err in granting Defendants' Rule 12(b)(6) motion for failure to state a claim upon which relief could be granted, we need not address Plaintiffs' final argument.

Plaintiffs did not argue their remaining assignments of error in their brief; thus, pursuant to N.C.R. App. P. 28(a), those assignments of error are deemed abandoned.

Affirmed.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).