AFFIRM in Part, REVERSE in Part, and REMAND; Opinion Filed November 29, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01033-CV

DEMONDRIA JEFFERSON AND TYSWAYLA MITCHELL, Appellants
V.
GEICO COUNTY MUTUAL INSURANCE COMPANY AND FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY, Appellees

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On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-17-00628-E

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Boatright

Demondria Jefferson and Tyswayla Mitchell appeal take-nothing summary judgments dismissing their claims against appellees Geico County Mutual Insurance Company and Farmers Texas County Mutual Insurance Company. Appellants raise fourteen issues in this Court: ten relate to the appellees' summary judgments; one addresses the trial court's denial of appellants' motion for continuance; and one relates to appellants' own motion for summary judgment. The remaining issues involve an appellee that has been dismissed from this appeal and minor plaintiffs, who are not before this Court. We affirm Farmers's summary judgment in its entirety. We affirm Geico's summary judgment as to Mitchell and as to Jefferson's negligence claims against Geico. We reverse Geico's summary judgment on Jefferson's cause of action for unfair claim settlement practices, and we remand that cause of action for further proceedings.

Background

Appellants' lawsuit arises from a motor vehicle accident in which the vehicle Jefferson was driving, and in which Mitchell was a passenger, was struck by a second vehicle entrusted to the driver by its owner, Cliff Porch. Appellants, appearing pro se, filed an original petition and an original amended petition that included allegations of negligence, negligent entrustment, and negligence per se against the "Defendants" without naming who the defendants were. The factual allegations in those pleadings spoke only to the collision with Porch's vehicle. But the pleadings also included the statement that "[o]ther defendants are liable due to actions which [have] caused further damage as a result of the vehicle operator." In narratives in their subsequent filings, including a July 27, 2017 amended petition directed specifically at Geico—which we will refer to as appellants' Second Amended Petition—appellants added allegations against Farmers and Geico that amounted to unfair claim settlement practices. It is undisputed that, at the time of the accident, Jefferson was insured by Geico and Porch was insured by Farmers. The trial court ultimately granted summary judgment in favor of both insurers, and, in their first issue, appellants argue that the trial court erred by doing so. We review the summary judgments de novo. *Texas Workforce Comm'n v. Wichita County*, 548 S.W.3d 489, 492 (Tex. 2018).

Farmers's Summary Judgment

Farmers filed a traditional motion for summary judgment arguing that appellants—plaintiffs below—could not maintain a direct cause of action against Farmers because they are neither named insureds nor covered persons under any insurance policy with Farmers. Farmers relied on *Allstate Insurance Co. v. Watson*, 876 S.W.2d 145, 149–50 (Tex. 1994), which holds that a third-party claimant lacks standing to sue an insurer directly for unfair claim settlement practices, and on *Chaffin v. Trans America Insurance Co.*, 731 S.W.2d 728, 731 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.), which states the Texas rule that (1) an injured party has no direct

cause of action against her tortfeasor's insurance carrier, and (2) the carrier owes a legal duty only to its insured or to an intended beneficiary of the policy. To allow a direct action by a third party would "undermin[e] the duties owed by an insurer to its insured by creating an inherently conflicting duty to a third party." *Rocor Intern., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 259 (Tex. 2002).

The Texas Supreme Court has imposed a common-law duty on insurers to deal fairly and in good faith with their insureds. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 488 (Tex. 2018). Similar to that common-law duty, chapter 541 of the Texas Insurance Code supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits. *Id*. The purpose of chapter 541 is "to regulate trade practices in the business of insurance by: defining, or providing for the determination of, all such practices in this state that are unfair methods of competition or unfair or deceptive acts or practices; and prohibiting those trade practices." TEX. INS. CODE ANN. § 541.001. Among the unfair or deceptive practices currently identified in and prohibited by chapter 541 are unfair claim settlement practices. *Id.* § 541.060(a). But the Code itself makes clear that section 541.060(a)'s identification of these prohibited practices "does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy." *Id.* § 541.060(b). And Texas courts have held that third-party claimants lack standing to bring extracontractual claims against an insurer. *Landmark Am. Ins. Co. v. Eagle Supply & Mfg. L.P.*, 530 S.W.3d 761, 770 (Tex. App.—Eastland 2017, no pet.).

Appellants did not file a response to Farmers's motion. They did file a motion to continue the hearing, asserting that they had not initially understood its nature and stating that they were "not ready or prepared to properly litigate their concern." The motion went on to say that Farmers had been added to the case in error and that they planned to drop Farmers from the lawsuit, but no

amended pleading was filed before the summary judgment hearing. The trial court denied the continuance and granted Farmers's motion, dismissing all of appellants' claims against it.

Appellants filed no response to Farmers's motion for summary judgment in the trial court. Non-movants who fail to present any issues in their response are limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). A summary judgment must stand or fall on its own merit. *Id.* Appellants' brief contains a number of factual and procedural arguments directed at the summary judgment motions, but it cites no authority that would defeat Farmers's legal argument that appellants lack standing to make direct claims against Porch's insurer. Moreover, we are aware of no such authority. It is undisputed that neither appellant was insured by Farmers. Therefore, neither appellant had standing to sue her tortfeasor's insurer directly. *Landmark Am. Ins. Co.*, 530 S.W.3d at 770. None of appellants' other challenges to Farmers's summary judgment, even if they were successful, could overcome this fundamental impediment to bringing suit against Farmers. We overrule appellants' first issue; we need not address their remaining issues involving Farmers's summary judgment.

Appellants' third issue, which challenges the trial court's denial of their motion for continuance, must also fail. The trial court's decision to grant or deny a motion for continuance is within its sound discretion. *Bank of Texas, N.A., Tr. v. Mexia*, 135 S.W.3d 356, 364 (Tex. App.—Dallas 2004, pet. denied). To establish an abuse of discretion, appellants must show that they were harmed by an inability to prepare further for the summary judgment hearing. *Id.* But we have concluded that, as a matter of law, appellants could not have prevailed at the hearing on Farmers's motion. Accordingly, we conclude that they were not harmed by the trial court's denial of their motion for continuance, and we overrule their third issue.

We affirm the trial court's summary judgment in Farmers's favor.

Geico's Summary Judgment

Geico also filed a traditional motion seeking summary judgment on all claims alleged by appellants. Geico's motion included two grounds: one arguing that Geico could disprove an element of appellants' negligence claims as a matter of law, and one arguing that appellants had no direct cause of action—of any sort—against it based on a lack of standing. Geico relied on all pleadings and documents in the trial court's file, which it incorporated by reference into the motion. It also asked the court to take judicial notice of its file.

Negligence Related to Vehicular Collision

As to appellants' original claims rooted in negligence, Geico relied on appellants' own pleadings to establish that Geico was not driving the vehicle or involved in the collision itself. Thus, Geico asserted, it could not have been "negligent." Nor could it have been the proximate cause of either the accident or appellants' damages. We agree insofar as the negligence claims relate to the actual vehicular collision. Appellants acknowledge in their response to Geico's motion and in their Second Amended Petition that Geico is not liable to them based upon the vehicular collision itself. To the extent that any of appellants' pleadings could be read to allege such liability, the trial court correctly granted summary judgment in favor of Geico on appellants' original negligence claims.

Unfair Claim Settlement Practices

In addition, the Geico motion relied on the same general legal principle argued in Farmers's motion: third parties lack standing to bring suit directly against an insurer other than their own. Geico cited *Jones v. CGU Insurance Co.*, 78 S.W.3d 626, 629 (Tex. App.—Austin 2002, no pet.), for the specific rule that a tort plaintiff has no direct cause of action against the tortfeasor's liability insurer "until the insured-tortfeasor is adjudged liable to the tort claimant." Geico also cited *Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312, 317 (Tex. 1994), for the proposition that a

third party has no direct cause of action at common law against an insurer. And it cited *Watson*, 876 S.W.2d at 149–50, to establish that a third party has no such claim under the Texas Deceptive Trade Practices Act or the Texas Insurance Code, the historic sources for causes of action for unfair claim settlement practices. Notwithstanding this legal argument, Geico acknowledged that appellant Demondria Jefferson was its insured.

Appellants filed a response to Geico's motion. The response identified their claims against Geico as being rooted in the insurer's allegedly tortious claim-settling practices, which initially ascribed twenty percent of fault for the collision to Jefferson and only later concluded that she was free from fault. In the interim, Jefferson alleges, Geico raised her rates, leaving her able to afford only liability coverage on a second car (her other car having been totaled in the collision). That second car was subsequently destroyed by a tornado.

As we noted above, appellants acknowledged that Geico would not be responsible for the damages sustained in the accident itself; the response charged instead that Geico was "responsible for the actions it initiated due to the result of the accident taking place which GEICO of its own volition, initiated." And appellants asserted that they had a direct cause of action for Geico's claim settlement practices alleged in appellants' Second Amended Petition.

While appellants rely on that amended petition, Geico emphasizes appellants' original negligence claims and contends that appellants' Second Amended Petition was untimely. A party filing an amended petition later than seven days before trial must obtain leave to amend. TEX. R. CIV. P. 63. "[L]eave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposing party." *Id.* A summary judgment hearing is a trial for purposes of filing amended pleadings under rule 63. *United Mktg. Tech., Inc. v. First USA Merch. Servs., Inc.*, 812 S.W.2d 608, 610 (Tex. App.—Dallas 1991, writ denied).

Appellants filed their motion for leave to amend their petition the day before the Geico summary judgment hearing. The record does not contain an order granting the motion for leave, which adds a layer to our analysis. We must still determine whether the amended pleading operated as a surprise to Geico, as rule 63 requires. But we must also ensure that the record does not contradict a conclusion that the trial court granted permission to amend. "An appellate court presumes, however, that permission was granted when the order says all pleadings were considered, nothing in the record indicates the amended petition was not considered, and the opposing party does not show surprise." *MacFarlane v. Burke*, 01-10-00409-CV, 2011 WL 2503937, at *4 (Tex. App.—Houston [1st Dist.] June 23, 2011, no pet.) (mem. op.). In this case the trial judge stated at the summary judgment hearing that he would read and consider the motion for leave. Appellants filed the Second Amended Petition before the trial court signed its summary judgment order. That order states that the trial court reviewed the pleadings, and nothing in our record suggests that the trial court did not consider appellant's Second Amended Petition.

We will presume, then, that the trial court granted appellants' motion for leave to amend if the Second Amended Petition did not operate as a surprise to Geico. Geico points to objections it made concerning other documents filed the day before the summary judgment hearing, including (1) a purportedly untimely list of damages, (2) an exhibit identified in, but not attached to, appellants' summary judgment response that was also objected to as hearsay, and (3) appellants' own motion for summary judgment, which had not been on file the required time to be considered. Geico does not identify a place in the record where it argued that allowing the amended petition would be a surprise, and we have found none. Nor would such an argument have been persuasive given that Geico's motion actually addresses the claim that appellants identify in their response and their Second Amended Petition. Geico's argument that appellants had no direct cause of action against it for extracontractual liability at common law or by statute is directly responsive to the

claim made in that pleading. Geico clearly knew the nature of that claim—at a minimum—when it filed its summary judgment motion more than seven weeks before the hearing date. We are not persuaded by Geico's argument that it was surprised by a claim on which it moved for summary judgment. In the absence of surprise, we assume that the trial court granted leave to file appellants' Second Amended Petition. *Id.*

The Second Amended Petition, thus, is appellants' live pleading for purposes of our analysis of Geico's motion for summary judgment. Although we require pro se litigants to comply with applicable laws and rules of procedure, we construe their pleadings and briefs liberally. *Keith v. Wells Fargo Bank, N.A.*, 285 S.W.3d 588, 590 (Tex. App.—Dallas 2009, no pet.). We conclude that the Second Amended Petition is sufficient to raise appellants' claim for unfair claim settlement practices and to support their summary judgment response and their brief in this Court.

Geico's standing argument challenges appellants' ability to sue Geico for its handling of a claim under Jefferson's policy. Just as appellant Mitchell lacked standing to sue Farmers because she was not an insured or beneficiary of a Farmers policy, she has no standing to sue Geico because she is not an insured or beneficiary of a Geico policy. *Landmark Am. Ins. Co.*, 530 S.W.3d at 770. In the absence of a contractual relationship between them, no law gives Mitchell a claim against Geico. Again, none of appellants' challenges to Geico's motion can overcome this fundamental impediment to bringing suit against it.

We overrule appellants' first issue as to Mitchell's claim against Geico for unfair claim settlement practices; we need not consider appellants' other challenges to Geico's summary judgment. We affirm the trial court's summary judgment in Geico's favor on Mitchell's claim.

Jefferson's claim against Geico, however, requires a different conclusion. Geico's summary judgment motion acknowledged that Jefferson was in fact insured by Geico at the time of the collision at issue in this lawsuit. Given this contractual relationship, Jefferson had not only

rights under her policy but also extracontractual rights related to the handling of her claims. Geico had a common-law duty to deal fairly and in good faith with its insureds. *Menchaca*, 545 S.W.3d at 488. In addition, the Texas Insurance Code imposes procedural requirements governing how insurers review and resolve an insured's claim for policy benefits and grants insureds a cause of action against insurers that engage in certain discriminatory, unfair, deceptive, or bad faith practices. *Id.* Although these common law and statutory bad faith claims are rooted in a contractual relationship, they sound in tort. *Id.* at 489.

Geico's legal arguments concerning direct or third-party actions against insurers did not apply to Jefferson, and the trial court erred in granting summary judgment in Geico's favor on Jefferson's cause of action related to Geico's handling of her claim under her policy. While we offer no opinion on the merits of that cause of action, Jefferson may pursue it against Geico on remand.

We sustain appellants' first issue as to Jefferson's cause of action for unfair claim settlement practices, and we reverse the trial court's summary judgment on that cause of action.

Appellants' Summary Judgment Motion

In their thirteenth issue, appellants contend the trial court abused its discretion by failing to set their own summary judgment motion against Geico for hearing. Appellants filed their motion on July 27, 2017, the day before Geico's motion was set for hearing. Our rules of procedure require a motion for summary judgment to be filed and served on the non-movant at least twenty-one days before it can be heard. TEX. R. CIV. P. 166a(c). Thus, the earliest that appellants' motion could have been set for hearing was August 17, 2017. But the trial court granted Geico's motion on August 1, 2017, rendering appellants' motion moot: because the trial court granted Geico's motion on all claims and against all plaintiffs, no issue remained for appellants' motion to resolve.

Accordingly, given the posture of the case at that time, the trial court did not err in refusing to set appellants' motion for hearing.

We overrule appellants' thirteenth issue.

Conclusion

We affirm the trial court's judgment in favor of Farmers. We affirm the trial court's judgment in favor of Geico: (1) on all claims by appellant Mitchell, and (2) on negligence claims related to the vehicular collision itself by appellant Jefferson. We reverse and remand the court's judgment in favor of Geico on Jefferson's cause of action for unfair claim settlement practices.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DEMONDRIA JEFFERSON AND TYSWAYLA MITCHELL, Appellants

No. 05-17-01033-CV V.

GEICO COUNTY MUTUAL INSURANCE COMPANY AND FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY, Appellees

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-17-00628-E.
Opinion delivered by Justice Boatright. Justices Stoddart and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part.

We **AFFIRM** the trial court's summary judgment in favor of Farmers Texas County Mutual Insurance Company.

We **AFFIRM** the trial court's summary judgment in favor of Geico County Mutual Insurance Company:

(1) on all claims by appellant Tyswayla Mitchell, and

(2) on negligence claims by appellant Demondra Jefferson that are related to the vehicular collision.

We **REVERSE** the trial court's summary judgment in favor of Geico County Mutual Insurance Company on appellant Demondra Jefferson' cause of action for unfair claim settlement practice.

We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 29th day of November, 2018.