STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Westfield Insurance Company,
Plaintiff Below, Petitioner

vs) No. 11-1245 (Monongalia County 09-C-848)

Michael Azumah,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner Westfield Insurance Company's appeal, by counsel Ryan Marsteller, arises from the Circuit Court of Monongalia County, wherein the circuit court granted Respondent Michael Azumah's motion for judgment as a matter of law by order entered on August 1, 2011. Respondent Michael Azumah, by counsel Lance E. Rollo, has filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In January of 2009, Respondent Michael Azumah was out of the country for an extended period and the pipes in the apartment he rented burst, flooding the rental property. Respondent rented the apartment from the property's owners, Dean and Karen Starkey. Petitioner asserts that it insured the property for the Starkeys, and after the incident filed a negligence suit against respondent to recover the costs of the repairs and the replacement items under a theory of subrogation. Prior to trial, the matter was consolidated with a related breach of contract action the Starkeys brought against respondent, though the respondent and the Starkeys settled that matter on July 27, 2011, the first morning of trial. Also that morning, prior to the commencement of trial, the circuit court denied petitioner's motion to substitute a witness and motion to continue. Following the presentation of petitioner's case-in-chief, respondent moved for judgment as a matter of law, which the circuit court granted. On appeal, petitioner alleges three assignments of error that are addressed below.

Petitioner first argues that the circuit court erred in denying its motion to substitute a witness because the prejudice caused by the denial far outweighed any prejudice respondent would have suffered had the motion been granted. Petitioner sought to replace one Westfield representative with a second Westfield representative who was going to testify to business records, including the subject policy and payments petitioner made to its insured. According to

petitioner, respondent would not have been prejudiced because he conducted no discovery on the witness being replaced, so the individual identity of the witness was inconsequential because the testimony would have been identical.

The respondent argues that petitioner essentially ignored its responsibility to file a witness list and intended to rely solely on the work of counsel representing the Starkeys. Further, respondent argues that petitioner failed to fully inform the circuit court of the circumstances surrounding its witness's unavailability in its motion to substitute a witness, as it did not state that the unavailable witness was vacationing in Myrtle Beach. Respondent argues that the witness was unavailable despite knowledge of the trial date several months in advance. According to respondent, it would be inherently unfair to allow petitioner to substitute a witness on the morning of trial when he was fully prepared to defend the case.

We have previously held as follows:

> "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. pt. 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

Syl. Pt. 3, *Barlow v. Hester Indus., Inc.*, 198 W.Va. 118, 479 S.E.2d 628 (1996). Upon our review of the record, the Court finds no error in the circuit court's denial of petitioner's motion to substitute a witness. As noted above, the witness in question was a Westfield representative and despite the advance notice of the trial date, petitioner failed to secure the witness's testimony. The circuit court noted that it denied petitioner's motion because it failed to file a pre-trial memorandum, a final witness and exhibit list, and that the motion to substitute was not filed in a timely fashion. The circuit court also noted that it was "simply unwilling to allow a party to announce a change of witnesses, quite literally on the eve of trial, when that party's witness (an employee) decides to spend vacation time in Myrtle Beach during trial. . . ." For these reasons, we find no error in the circuit court's denial of petitioner's motion.

Petitioner next argues that it was error for the circuit court to deny its motion to continue following the denial of the motion to substitute because it caused petitioner substantially more prejudice than granting it would have caused respondent. According to petitioner, the circuit court could have considered sanctions or other remedies against petitioner's counsel in regard to the motion to substitute instead of denying the motion to continue. Respondent argues that he expended considerable sums in airfare, lodging, food, and other travel from Texas just to attend the trial. He further argues that petitioner was not prejudiced by the circuit court denying the motion to continue, as petitioner lost a relatively small sum of money in relation to its overall revenue. Upon our review, the Court finds no error in the circuit court's denial of petitioner's motion to continue. In denying this motion, the circuit court noted that respondent "traveled from Texas, at considerable cost, to defend [petitioner's] action . . .," and further relied on the same

factors related to petitioner's non-compliance with the pre-trial order as outlined above. For these reasons, the Court finds no error in the circuit court's decision.

Lastly, petitioner argues that the circuit court erred in granting respondent's motion for judgment as a matter of law because the trial testimony of petitioner's insured, Karen Starkey, and others supports its proposition that a prima facie case of negligence was established against respondent. According to petitioner, Karen Starkey provided competent testimony as to respondent's negligence and payments she received under an insurance policy with petitioner. Petitioner argues that the jury could have reasonably inferred that a policy of insurance existed that covered the damage, and also that petitioner had both an obligation to pay the Starkeys and a right to recover from respondent.

Respondent argues that petitioner failed to offer even one piece of evidence to support its claim for damages, despite the requirement that a plaintiff must prove by explicit calculation allegations of damages that are a "sum certain." According to respondent, this Court has held that damages are not "sum certain" when the amount "is largely a matter of opinion on which qualified persons might fairly and honestly differ." *Farm Family Mut. Ins. v. Thorn Lumber*, 202 W.Va. 69, 74, 501 S.E.2d 786, 791 (1998). Respondent argues that petitioner simply failed to offer into evidence any receipt, invoice, cancelled check, or bill proving its claim that it paid out money to the Starkeys, despite its affirmative duty to produce the same.

We have previously held as follows:

> "The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Syl. Pt. 5, *Smith v. First Cmty. Bancshares, Inc.*, 212 W.Va. 809, 575 S.E.2d 419 (2002). Upon our review of the record, the Court finds no error in the circuit court's granting of respondent's motion for judgment as a matter of law. In granting the motion, the circuit court noted that "[petitioner] presented no evidence to establish the type of coverage afforded, the policy period, the policy limits, or the language of any applicable subrogation clause." Further, the circuit court noted that "[n]o other witness testified as to these issues, and the policy purportedly endowing [petitioner] with subrogation rights was neither introduced, nor admitted, for evidentiary purposes." In short, the circuit court found that petitioner failed to introduce any evidence (1) that it was obligated to pay the Starkeys for damage to the property, (2) that is was entitled to reimbursement from respondent, or (3) upon which a jury could determine compensatory damages with reasonable certainty. For these reasons, the Court finds that the circuit court did not err in granting respondent's motion for judgment as a matter of law.

For the foregoing reasons, we find no error in the decision of the circuit court, and the order granting respondent's motion for judgment as a matter of law is hereby affirmed.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh