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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001690-MR

REPUBLIC WESTERN INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 05-CI-00895

JOSEPH ANTHONY WEST; MARY ANN WEST; AND JOHN S. GILLUM — APPELLEES

AND

NO. 2008-CA-001691-MR

U-HAUL INTERNATIONAL, INC. — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 05-CI-00895

JOSEPH ANTHONY WEST; MARY ANN WEST; AND JOHN S. GILLUM — APPELLEES

<u>OPINION</u>
<u>AFFIRMING IN PART,</u>
<u>REVERSING IN PART, AND VACATING</u>

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

STUMBO, JUDGE: Republic Western Insurance Company, U-Haul International, Inc., and Doug Sewell, d/b/a Sewell Rentals (hereinafter collectively referred to as Appellants) appeal from a jury verdict and order denying their motions to alter, amend, or vacate the judgment.[2] In a trial by jury, Joseph and Mary Ann West were awarded $90,000 in compensatory damages against the Appellants and $1.7 million in punitive damages against Republic Western individually. The punitive award was later reduced to $729,000. Appellants appeal the verdict with a variety of arguments. We find that one of Republic Western's arguments has merit and therefore reverse and vacate the punitive damages award. The Judgment is in all other respects affirmed.

On May 7, 1994, the Wests rented a U-Haul truck from Sewell. They also purchased a SafeMove insurance policy offered by Republic Western. Sewell indicated that the policy would cover everything.[3] The Wests were moving from Kentucky to Florida and packed the entire contents of their household into the U-

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[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Mr. Sewell's appeal was later dismissed.

[3] It is worth noting that Sewell had never read the policy or been informed as to what it covered and the Wests did not read the policy.

Haul truck. On the way to Florida, the Wests stopped at a hotel in Georgia for the night.

During the night, the truck and all its contents were stolen from the hotel parking lot. The truck was eventually located, but all the Wests' possessions had been removed and were never recovered. The Wests contacted U-Haul[4] and filed an insurance claim for the loss of their possessions. The agent they spoke to at U-Haul indicated they would be covered under the SafeMove insurance policy. Republic Western ultimately refused the claim because the terms of the insurance policy specifically excluded recovery for burglary or theft of the cargo.

After the claim was denied, the Wests brought suit against U-Haul, Republic Western, and Sewell alleging breach of contract, fraud, negligent misrepresentation, and violation of the Unfair Claims Settlement Practices Act (UCSPA). The case was tried before a jury on February 13 and 14, 2008. At the close of the Wests' evidence, the Appellants and Wests moved for directed verdicts on all claims. The trial court granted a directed verdict for Appellants on the breach of contract claim. Motions for directed verdicts were again made at the close of Appellants' evidence, but they were all denied.

The jury found that all three Appellants had committed negligent misrepresentation and that Republic Western had violated the UCSPA. The jury returned a verdict awarding the Wests $90,000 in compensatory damages. The compensatory damage award was reduced to $81,000 due to the jury's finding of

[4] U-Haul and Republic Western are part of the same parent corporation.

comparative negligence on the part of the Wests. This award was apportioned as follows: 10% liability to Mary Ann West, 0% liability to Joseph West, 10% liability to Sewell, 40% liability to U-Haul, and 40% liability to Republic Western. The jury also awarded the Wests $1.7 million in punitive damages against Republic Western for violating the UCSPA.

Appellants each moved to alter, amend or vacate the judgment, for a judgment notwithstanding the verdict, and for a new trial. The Wests also filed motions for attorney's fees and prejudgment interest based on the UCSPA violation. The result of these motions was the trial court reduced the punitive award to $729,000, the trial court granted the motion for prejudgment interest assessed solely against Republic Western, and granted the motion for attorney's fees in the amount of $255,000 against Republic Western. Appellants' other arguments for a new trial were dismissed by the trial court and the jury verdict was confirmed. This appeal followed.[5]

U-Haul and Republic Western both argue that they should not have been found liable for negligent misrepresentation. The elements of negligent misrepresentation are:

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

[5] The Wests filed a cross-appeal in this case, but it was dismissed as untimely.

Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 580 (Ky. 2004). If a jury verdict is supported by substantial evidence, this Court shall not disturb it. *Southern Railway Co. v. Kelly Const. Co.*, 406 S.W.2d 305, 306 (Ky. 1966).

Appellants argue that they cannot be liable for negligent misrepresentation because the Wests had the insurance documents which specifically stated that any loss due to theft was not covered. They also argue that because the misrepresentation could have been avoided had the Wests actually read the insurance policy, the Wests cannot have justifiably relied on the misrepresented information.

We first note that an "insured's failure to read and comprehend the policy has no legal effect: it may not serve as a sword for the insured nor as a shield for the agency." *Grisby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W.2d 372, 374 (Ky. 1990). Further, whether the Wests justifiably relied on the misrepresentation was a question for the jury. We find that the jury's finding that the Wests justifiably relied on the misrepresentation was supported by substantial evidence.

The evidence presented to the jury was that Sewell had been an agent for U-Haul for over 24 years and in all that time he had never read any of the insurance literature and was not sure of the scope of coverage of the SafeMove policy. Sewell further admitted that he made the false statements to the Wests.

Also, after the loss, both Sewell and the agent the Wests spoke to when the loss was first reported stated that the loss would be covered by the SafeMove policy. Evidence was also produced that U-Haul and Republic Western had never provided any education or training to its agents regarding the SafeMove policy. Finally, George Olds, an officer and representative of the Appellants, testified that he has taken out insurance policies in the past and never read them. We conclude that this evidence is sufficient to support the jury's findings. We therefore affirm the verdict finding Appellants liable for negligent misrepresentation.

Appellants also argue that the compensatory award was excessive. U-Haul claims that the proper measure of damages for the items lost by the Wests is fair market value. Fair market value of the stolen possessions was not introduced by the Wests at trial. Instead, the Wests presented evidence of either the purchase price or replacement cost of each item. Usually, fair market value is the proper measure for damages, but not in this case. For the purposes of valuing household goods and clothing, "the proper measure [is] 'the actual value in money . . . to the owner for the purpose for which they were intended and used . . . excluding sentimental or fanciful value which for any reason he (the owner) might place upon them.'" *Columbia Gas of Kentucky, Inc. v. Maynard*, 532 S.W.2d 3, 6 (Ky. 1976) (quoting *Davis v. Rhodes*, 206 Ky. 340, 266 S.W. 1091 (1925)). We find the Wests fairly represented the value of the property they lost and that the evidence was sufficient to support the verdict.

Appellants also argue that the amount of compensatory damages should have been limited to the $25,000 SafeMove policy limit. We find this argument is without merit. Had this been a breach of contract verdict, the policy limit may have been relevant. However, as this was a negligent misrepresentation case, the damages are based on the loss suffered by the Wests. We therefore affirm the jury's compensatory award.

U-Haul, individually, argues that the post-judgment interest rate, which the trial court set at 12%, should have been lower. Kentucky Revised Statute (KRS) 360.040 states:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. . . . Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

U-Haul argues that due to the current recessionary climate, the trial court abused its discretion in not lowering the interest rate. This argument has been specifically refuted by the case of *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009), which states:

> the fact that a trial court could have chosen to impose a lower interest rate does not necessarily mean that its decision to impose a higher rate was an abuse of discretion. Moreover, the fact that a twelve percent interest rate in today's economic climate may be well above the marketplace norm is a matter properly to be considered by the General Assembly because that body

> has the power and discretion to lower the de facto legal interest rate contained in KRS 360.040.

Id. at 644. U-Haul presents no evidence that the trial court abused its discretion in this instance.

The majority of Republic Western's appeal concerns the jury's finding that it violated the UCSPA. Because the jury concluded that Republic Western violated the UCSPA, the Wests were awarded punitive damages, attorney fees, and prejudgment interest. These awards are all solely against Republic Western. Republic Western argues that the UCSPA claim should fail as a matter of law. We agree.

> "[A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim *under the terms of the policy*; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. . . . [A]n insurer is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts." (Emphasis Added.)

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993)(quoting *Federal Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844 (Ky. 1986)). It is the first element that the Wests cannot satisfy.

> The gravamen of the UCSPA is that an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which the insurance company is *contractually obligated* to pay. Absent a contractual obligation, there

simply is no bad faith cause of action, either at common law or by statute.

Davidson v. American Freightways, Inc., 25 S.W.3d 94, 100 (Ky. 2000).

In the case at bar, Republic Western has argued at every turn that they were not contractually obligated to pay the claim. The contract specifically excluded theft coverage. In fact, the breach of contract claim was dismissed by directed verdict. A UCSPA violation must arise from a contractual obligation to pay the claimant. There was no contractual obligation in the case *sub judice*. The only issue presented to the jury was that of negligent misrepresentation. "Evidence of mere negligence . . . will not suffice to support a claim for bad faith." *United Services Auto. Ass'n v. Bult*, 183 S.W.3d 181, 186 (Ky. App. 2003).

As a matter of law, Republic Western could not have violated the UCSPA. Republic Western did not act in bad faith when dealing with a contractual obligation. We therefore reverse the jury's finding as such. We also vacate the punitive damages award, the award of attorney's fees, and the prejudgment interest. These awards were premised on the violation of the UCSPA. Absent a UCSPA violation, these awards cannot stand.

For the foregoing reasons, we affirm the finding that Appellants were liable for negligent misrepresentation. We also find that there was no error in the compensatory damages award or the post-judgment interest rate. Finally, we find that Republic Western could not have violated the UCSPA as a matter of law. We

therefore reverse the judgment in part and vacate the award of punitive damages, attorney's fees, and prejudgment interest.

NICKELL, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTS: Respectfully, I dissent from that portion of the majority opinion by which the punitive damage award is reversed.

The flaw I see in the majority opinion is in its failure to recognize that Mr. Sewell was an agent of Republic Western as well as an agent of U-Haul. The majority has properly recognized that Sewell's false and misleading statements to the Wests were sufficient to impose liability on U-Haul. It follows that those same statements were sufficient to trigger application of the UCSPA.

I have not overlooked the *Whittmer v. Jones* quotation contained in the majority opinion. Slip op. pp. 9-10. However, as Republic Western's agent, Sewell effectively modified the policy and imposed on Republic Western an obligation to "pay the claim *under the terms of the policy* [as modified by Sewell]."

When an insurance agent orally modifies a policy by misrepresenting its terms to a proposed insured, it follows that the insurer is bound by those terms and is thereby subject to the provisions of the UCSPA. In my view, the question of punitive damages was properly submitted to the jury and properly addressed by the trial court. I would affirm in all respects.

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