

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001148-MR

EXEL, INC.

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 04-CI-01144

LIBERTY MUTUAL FIRE
INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT AND VANMETER, JUDGES.

VANMETER, JUDGE: Exel, Inc. (Exel) appeals from the Laurel Circuit Court order granting summary judgment in favor of Liberty Mutual Fire Insurance Company (Liberty). For the following reasons, we affirm.

Exel agreed to provide logistic services to Borden Chemical, Inc. (Borden) for a product called Durite. The agreement required Exel to name Borden as an additional insured under Exel's insurance policy with Liberty, and defend and

indemnify Borden in connection to any personal injury or property damages claims caused by the negligence or tortious acts of Exel. On February 20, 2003, Durite caused an explosion at CTA Acoustic, Inc. (CTA) in Corbin, Kentucky, resulting in several deaths, personal injuries and property damage. Personal injury actions, as well as a property damage suit filed by CTA, were brought against Borden. In the CTA case, Borden filed a third-party complaint against Exel, alleging Exel's negligence caused the explosion. CTA filed a cross-claim against Exel seeking the right to recover against Exel if Borden were permitted to recover from Exel.

At the time of the explosion, Exel's policy with Liberty provided for a \$1 million per occurrence limit and a \$4 million aggregate limit. The policy obligated Liberty to defend Exel against all covered claims up to the \$1 million policy limit, or until Liberty settled the underlying claims up to the \$1 million limit. The policy also required Liberty to pay "[a]ll reasonable expenses incurred by the insured at Liberty Mutual's request to assist it in the investigation or defense of the suit, including actual loss earnings up to \$250 a day because of time off work."

By letter, Borden requested Exel to defend and indemnify it from the various lawsuits that arose regarding the explosion, and notify Exel's insurers that Borden sought coverage. Exel notified Liberty of Borden's request, but explained that Exel had no obligation to defend or indemnify Borden and requested Liberty not to respond to Borden's request. Exel then rejected Borden's request for a defense and indemnity. Nonetheless, Liberty agreed to defend Borden under the terms of Exel's policy, stating that its obligations to Borden were separate from Exel's

contractual obligations to Borden because Borden was named as an additional insured under the policy. Liberty then filed the underlying complaint against Exel and Borden seeking a determination of each party's rights under the insurance policy purchased by Exel. Exel filed a counterclaim against Liberty, alleging Liberty acted in bad faith by assuming Borden's defense under the policy.

Borden settled numerous personal injury claims brought against it, agreeing to pay in excess of \$1 million. Liberty offered to send either Exel or Borden a check for \$1 million, which was rejected by both Exel and Borden. Liberty then sent Borden a check for \$1 million for the prior settlements and moved for summary judgment, arguing that its duty under the policy ceased upon its payment of a settlement which exhausted the policy limit. The motion was denied on the basis that Borden had already made the settlement payments prior to Liberty's tender of a settlement. Subsequently, Borden entered into additional settlements with injured parties from the explosion. Liberty and Borden then entered into a settlement agreement dismissing all claims between the parties. Per the agreement, Liberty paid Borden an additional \$2 million, and Borden stipulated that it had accepted the \$1 million check previously sent by Liberty. Liberty notified Exel that its obligation to defend it had concluded upon payment of the policy limit.

Exel was granted a directed verdict in the property damage case brought by CTA, in which the trial court found that Exel was not responsible for the explosion. Following the directed verdict, Great American Alliance Insurance Company (Great American), Exel's excess insurance carrier, filed suit against

Liberty to recover its costs expended to defend Exel following Liberty's denial of Exel's defense. Ultimately, Liberty and Great American settled the action.

Thereafter, Exel amended its counterclaim against Liberty, asserting that by defending Borden, Liberty breached its duty of good faith and fair dealing under the Unfair Claim Settlement Practice Act (UCSPA)¹ and tortiously interfered with the contract between Exel and Borden.

Liberty filed a motion for summary judgment, arguing that a condition precedent to a claim of bad faith is proof of actual damages, which it claimed Exel failed to demonstrate. In addition, Liberty claimed Exel admitted that it terminated its contractual relationship with Borden because of ethical concerns with Borden, and that Exel failed to show how Liberty's actions interfered with the contract to cause Exel injury. The trial court granted Liberty's motion for summary judgment, finding that Exel failed to show, and cannot show, that Liberty caused Exel any damage, injury or harm.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR² 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.

¹ Kentucky Revised Statutes (KRS) 304.12-230 - 235.

² Kentucky Rules of Civil Procedure

1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

Our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996)). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

On appeal, Exel first argues that the trial court erred by granting Liberty’s motion for summary judgment because proof of actual damages is not necessary to sustain a claim of bad faith. We disagree.

To establish a private cause of action for a claim of bad faith under the UCSPA, one cannot rely merely upon a “technical violation” of the UCSPA. *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993). Indeed, “a condition precedent to bringing a statutory bad faith action is that the claimant was damaged by reason of the violation of the statute.” *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997). Absent actual damage, there can be no cause of action premised upon an allegation of bad faith under the UCSPA. *Id.* at 454. (citation omitted).

Exel directs this court to *Commonwealth Dept. of Agric. v. Vinson*, 30 S.W.3d 162 (Ky. 2000), in which the Kentucky Supreme Court stated,

“compensatory damages are not an essential element of an intentional tort[.]” *Id.* at 166. In *Vinson*, the Department of Agriculture (Department) was sued by former employees who alleged bad faith under KRS 61.103(2), which specifically provides for the right to file a civil action for punitive damages independently of one for compensatory relief. The Department argued the statute should be interpreted in accordance with Kentucky common law, thereby requiring actual compensatory damages before a party is entitled to punitive damages. In reconciling the statute with the common law, the Court noted, “[w]here the plaintiff has suffered an injury for which compensatory damages, though nominal in amount *may be awarded*, the jury may in a proper case, award punitive damages as well.” *Id.* (emphasis added). Under the facts of *Vinson*, the Court found there to be a possibility of compensatory damages, although none were addressed by the claimants.

We find *Vinson* to be factually different from the instant case. Here, the UCSPA contains no provision permitting a claim for punitive damages absent a showing of compensatory damages, or absent a showing that the claimant was injured by actions that violated the statute. Rather, case law suggests that in order for a claimant to succeed on a claim of bad faith, they must allege actual injury. Thus we conclude that in order for Exel to defeat Liberty’s motion for summary judgment, it must allege injuries on which compensatory damages may be awarded.

Next, Exel contends the trial court erred by finding that it failed to present evidence to support a finding that Liberty's actions caused actual damage or injury to Exel. Specifically, Exel alleges it suffered compensable damages in the form of attorney fees in regards to the underlying action, the expenses associated with Exel's attorney's time spent assisting Liberty in its defense of Exel, the loss of coverage under its policy with Liberty, and its increased loss experience resulting from Liberty's settlement with Borden. We disagree.

The goal of compensatory or actual damages is to compensate a plaintiff for injuries and make the plaintiff whole by awarding a monetary amount to equal the wrong by the defendant. *Jackson v. Tullar*, 285 S.W.3d 290, 297-98 (Ky.App. 2007). Here, Exel's claims of damages do not specifically allege any compensable injuries to support its claim of bad faith. The insurance policy with Liberty held by Exel contained no provision permitting Exel to recover attorney fees in such an instance. *See Glass*, 996 S.W.2d at 455 (absent a written agreement or statute, parties are generally not allowed to recover attorney fees) (citation omitted). Further, Exel failed to provide any evidence of the expenses incurred by its general counsel while assisting Liberty in its defense of Exel besides the counsel's salary paid by Exel, which would have been paid despite Liberty's actions. In addition, Exel's claim that it incurred actual injury as a result of its policy limit being exhausted is also without merit. Exel suffered no actual injury as a result of Liberty paying out the policy limit because its defense costs were entirely paid by either Liberty or Great American. Lastly, Exel did not provide any evidence that it

suffered an increased loss expectancy or that an increased loss expectancy could be attributed to Liberty's actions which are alleged to be in bad faith. Accordingly, the trial court did not err by granting Liberty's motion for summary judgment.

Finally, Exel maintains that the trial court erred by granting Liberty's motion for summary judgment regarding its claim of tortious interference with a contract. We disagree.

To prevail on a claim of tortious interference, one must show improper interference with a contractual relationship. *Nat'l Collegiate Athletic Ass'n By and Through Bellarmine Coll. v. Hornung*, 754 S.W.2d 855, 858 (Ky. 1988). In determining whether an actor's conduct is improper, courts consider the following:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interest sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

E. Kentucky Res. v. Arnett, 892 S.W.2d 617, 619 (Ky.App. 1995) (citing Restatement (Second) of Torts § 767 (1979)).

Here, the record reveals that in-house counsel for Exel admitted that Exel terminated its contractual relationship with Borden because Borden sued Exel after Exel refused to defend and indemnify Borden from claims arising from the explosion at CTA. Exel argues that Borden sued Exel because Liberty assumed the defense of Borden, and that Liberty's decision to defend Borden constitutes an improper interference with a business relationship. Exel does not express any interest or motive of Liberty to interfere with the business relationship between Exel and Borden. We fail to appreciate how Liberty's actions could be viewed as an improper interference with the contract between Exel and Borden.

The order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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