

88-LW-1549 (10th)

GREAT OAKS COMPANY, INC., Plaintiff-Appellee,

v.

CINCINNATI INSURANCE COMPANY et al., Defendants-Appellees,

[LaFayette Insurance Agency, Inc., d/b/a] Richard R. Willis Insurance, Inc., Defendants-Appellants.

No. 87AP-717.

10th District Court of Appeals of Ohio, Franklin County.

Decided on April 5, 1988.

Appeal from the Franklin County Court of Common Pleas.

Michael J. Petrucci and Arthur Graves, for appellee Great Oaks Company, Inc.

Lane, Alton & Day, and John M. Alton, for appellee Cincinnati Insurance Company.

David L. Day, for appellants.

OPINION

REILLY, Judge.

This is an action for money damages by plaintiff, Great Oaks Company, Inc. (hereinafter "plaintiff"), against defendant, Cincinnati Insurance Company, based upon a builder's risk policy, or in the alternative against defendant, LaFayette Agency, dba Richard R. Willis Insurance, Inc. (hereinafter "LaFayette"), for negligent failure to secure builder's risk insurance for a specific construction project called Peebles Family Health Center, which was damaged by fire on July 17, 1979 while being constructed. There was a jury trial. The jury returned a verdict for defendant Cincinnati Insurance Company, which is not directly involved in this appeal.

Plaintiff's complaint alleged in the first cause of action that it was insured by defendant Cincinnati Insurance under a policy issued through LaFayette, which customarily handled all of plaintiff's insurance for construction projects and that builder's risk coverage for individual projects was provided by endorsement for which a separate premium was charged. Plaintiff alleged that in July 1979, it had three properties under construction, including Greenfield Children's Home, an office building, and the Peebles Family Health Center; that prior to July 1979, plaintiff requested \$200,000 builder's risk coverage from defendants for the health center and relied on LaFayette to find coverage; that on July 17, 1979 plaintiff suffered a fire loss at the health center in the amount of \$117,390; that proof of loss was duly submitted to defendant Cincinnati Insurance, which denied plaintiff's claim and refused to pay the claim.

Plaintiff further alleged that as a direct and proximate result of such refusal to pay, plaintiff was required to obtain a loan to reconstruct the project at a cost of \$131,926.49, with interest to date of \$5,494.80 and expects future interest expense of \$43,550 during a five-year period; that because of such expense plaintiff's financial condition is impaired, its line of surety credit was reduced and its bonding capacity and ability to bid on construction contracts were limited, which resulted in \$300,000 loss of profits.

Plaintiff in its second cause of action alleged in the alternative that if it should be determined that coverage did not exist under the policy and endorsements, then LaFayette and its principal officers were negligent in failing to exercise the degree of care, skill and diligence ordinarily exercised by persons in the same or similar situation, as they failed to find coverage for the health center project; that plaintiff relied on defendants to find such coverage; that defendants were informed about the particulars of the project in the usual custom.

LaFayette answered by general denial and pleaded additional affirmative defenses.

The jury determined that plaintiff was fifty percent negligent; that LaFayette did not find coverage and that LaFayette was fifty percent negligent. The total amount of damages awarded was \$209,169. The division of that amount was \$133,400 for the fire loss and \$74,015 for prejudgment interest.

LaFayette provided plaintiff with property damage casualty insurance coverage for its own buildings and construction projects, and with liability insurance coverage. LaFayette was an agent of Cincinnati Insurance from sometime prior to 1976, to and after the time of the Peebles Family Health Project. During that time, Cincinnati Insurance would not provide builder's risk coverage to plaintiff under a blanket builder's risk policy but would provide specific coverage for construction projects when advised of the date coverage was needed.

Plaintiff bid on the Peebles Family Health Center project and allegedly advised LaFayette at that time about the bid, including a requirement of approximately \$200,000 for insurance coverages. Plaintiff entered a construction contract with Southern Ohio Health Services National to construct the health center. Plaintiff assumed the risk of loss during construction and was obliged to purchase risk insurance for the project.

LaFayette inquired about the status of the bid but was told the project was not ready. The project was delayed because of changes in the plans and specifications.

A representative of the Ohio Department of Health, the agency expediting the paper work and qualifications of the project for federal financing, contacted plaintiff's president, John Bottom, now deceased, in March 1979 to obtain confirmation of liability insurance coverage. That question was satisfied by correspondence of March 16, 1979 and a certificate of insurance was issued.

John Bottom claimed he thought the project was covered because of corrective endorsements sent to LaFayette in June of 1979 and forwarded to plaintiff. He contended he did not call LaFayette and the endorsements confused him. LaFayette apparently did not learn the starting date until after the fire.

The incompleting structure of the Peebles Family Health Center project caught fire and burned on July 17, 1979, as indicated above. Plaintiff completed the project at its own cost.

The trial court sustained plaintiff's motion for prejudgment interest and overruled LaFayette's motion for judgment notwithstanding the verdict.

LaFayette advances three assignments of error:

"1. The trial court erred in refusing to give defendant's proposed special Instruction No. 10 on primary/secondary liability.

"2. The trial court erred in overruling defendant's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

"3. The trial court erred in granting plaintiff's motion for prejudgment interest, as a matter of law, and contrary to the manifest weight of the evidence."

LaFayette's first and second assignments of error are interrelated and considered together. The jury found from the previous testimony of John Bottom, read in court, that the commencement date for the health center was not communicated; that the reliance upon the incorrect endorsements was error; and that the insured plaintiff was equally negligent with its agent in expediting the health center endorsements.

LaFayette contends that even if negligent, that should have no legal effect as it was passive for which there is no legal responsibility. Further, it maintains that it was not negligent since it was never aware of the commencement date for the coverage; and that communication concerning that time was plaintiff's responsibility.

Plaintiff presented expert testimony that LaFayette failed to use the degree of reasonable skill and care generally required of insurance agents under the same or similar circumstances in failing to secure builder's risk coverage for the Peebles Family Health Center construction. If an insurance broker or agent is an expert qualified to obtain insurance, he

assumes the duty to exercise the particular skill, care and knowledge ordinarily possessed by members of his profession in good standing. Failure to perform with the required skill and care constitutes negligence.

The Supreme Court, in Kunz v. Buckeye Union Ins. Co. (1982), 1 Ohio St.3d 79, while considering an issue involving the statute of limitations, held that a question of failure to bind coverage was a tort. The court stated:

"We conclude that this interpretation of the nature of this action is a correct one. The instant action is roughly analogous to a malpractice action in which a party claims that his accountant, lawyer, or doctor has failed to perform the professional services that had been contractually bargained for. The relationship between the parties herein called for the performance of certain services by the insurance agent, and any breach thereof involved the agent's failure to secure the desired insurance coverage." Id. at 80.

The trial court's charge to the jury on negligence and contributing negligence reads as follows:

"Now, negligence is an act or omission in violation of the duty owed to the person who sustained damages. This duty involves ordinary care. Ordinary care is that degree of care which a reasonably prudent person is accustomed to use under the same or similar circumstances.

"One who undertakes to act as an insurance agent and to render services as an insurance agent must exercise the knowledge and care, reasonable skill, and ordinary diligence normally possessed by the insurance agents acting fairly and in good faith.

"Now, the Willis Agency Defendants claim that the Plaintiff, Great Oaks acting through its president, John Bottom, committed an act of negligence which directly and proximately caused its own damages.

"Now, a corporation acts through its officers, agents and employees. It is responsible for their acts or failure to act when they act within the scope of their employment.

"An officer of a corporation has a duty to use ordinary care while acting on behalf of the corporation.

"Failure to use ordinary care in handling the affairs of the corporation is negligence." (Tr. 747-749.)

Plaintiff's expert testified that particular duties were assumed by an insurance agent when there has been a contact from a client for builder's risk insurance. The standard operating procedure would include obtaining information concerning the locale of the project, the type of construction, the expected starting and completion date, as well as the dollar amount of the contract. He said the duty of the agent was to make an original note as to the initial contact and place it in some form of follow-up system. The testimony also indicated that the agent's duty included communication with the carrier.

The expert witness testified that the minimum standard of conduct required for a professional agent preparing the renewal of an expiring three-year multi-peril insurance policy for a client, such as plaintiff's policy which expired several weeks before the fire, was to meet with the insured and discuss the facts of the risk. He indicated that the agency was obliged to consider such a renewal with the same diligence and expertise used with a new insurer.

The record includes sufficient evidence for the jury to find LaFayette did not meet the required standard. LaFayette contends, however, that plaintiff's contributory negligence was active in establishing primary liability; while its own negligence was passive, involving secondary liability. This contention is not applicable to this case.

For the foregoing reasons, the first and second assignments of error are not well-taken.

As to LaFayette's third assignment of error, there was evidence upon which the trial court, within its discretion, could have awarded prejudgment interest under R.C. 1393.03(C) pursuant to Kalain v. Smith (1986), 25 Ohio St.3d 157. The court, in pertinent part, wrote:

"Appellant argues that the statutory language 'failed to make a good faith effort' necessarily requires a finding of

bad faith. We disagree. The statute requires all parties to make an honest effort to settle a case. A party may have "failed to make a good faith effort to settle" even when he has not acted in bad faith. Mills v. Dayton (1985), 21 Ohio App.3d 208, and Dailey v. Nationwide Demolition Derby, Inc. (1984), 18 Ohio App.3d 39, approved; Ware v. Richey (1983), 14 Ohio App.3d 3, disapproved.

"The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court. Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83. This court will not overturn a finding on this issue unless the trial court's actions indicate an abuse of discretion." Id. at 159.

The trial court, after citing Kalain, supra, wrote in its decision sustaining plaintiff's motion for prejudgment interest:

"Applying these standards to the actions of LaFayette, the conclusion is that it failed to make a good faith effort to settle subsequent to the reversal of the first trial on appeal.

"It is obvious that LaFayette did not rationally evaluate its risks and potential liability. At neither trial could it present an expert to describe its conduct as complying with minimal professional standards. LaFayette knew, or should have known, a case for negligence had been proved at the first trial.

"Furthermore, LaFayette did not respond in good faith to the monetary offer of plaintiff and defendant, Cincinnati. * * *

There is support for the trial court's determination in the record. This court will not reverse a trial court's judgment, unless there was an abuse of discretion. Hough v. Hagwood (June 11, 1987), Franklin App. No. 86AP-518, unreported (1987 Opinions 1108).

The jury's award of interest was a part of the measure of damages. Plaintiff was obliged to borrow money, including interest, to reconstruct the building, which was part of the jury verdict. The award of prejudgment interest, however, was based upon the trial court's finding of a lack of good faith effort to settle the case. Hence, it was within the trial court's discretion to consider the award of prejudgment interest.

The evidence in the record does not show that the trial court abused its discretion. Therefore, the third assignment of error is not well-taken.

The assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and COOK, JJ., concur.

COOK, J., of the Eleventh Appellate District, sitting by assignment in the Tenth Appellate District.