

89-LW-0719 (10th)

James W. McGUIRE, Plaintiff-Appellee,

v.

Howard P. LUKEN et al., Defendants-Appellees,

(Professionals Insurance Company, Defendant-Appellant).

No. 88AP-422.

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

Decided on March 14, 1989.

Appeal from the Franklin County Court of Common Pleas.

Norman M. Frank, for appellee.

Porter, Wright, Morris & Arthur, Thomas R. Sant and Craig D. Barclay, for appellant.

Arter & Hadden, and Judith E. Trail, for appellees Jeffrey Page and The McCaffrey Insurance Agency.

Darrell E. Fawley, Jr., for third-party plaintiff-appellant, Chris N. Miller.

OPINION

McCORMAC, Presiding Judge.

The appeals herein arose from an automobile accident caused by the negligent driving of Howard Luken. Luken was driving a 1979 Cadillac Limousine owned by Chris Miller, doing business under the name of Limos Limited. As a result of the accident, a mailbox owned by James W. McGuire was damaged in the amount of \$291.75, and personal injuries and property damage were caused to Patricia Mosley.

Both McGuire and Mosley brought damage actions against Miller and Luken. When notified of the accident, the Professionals Insurance Company refused to provide coverage on the basis that there was an exclusion for commercial usage of the limousine. Consequently, Miller obtained his own counsel who defended him in the lawsuits and ultimately settled the mailbox claim for \$291.75 and the Mosley claim in the amount of \$7,500.

Miller sued the Professionals Insurance Company and the McCaffrey Insurance Agency and its solicitor, Jeffrey Page, for compensatory and punitive damages for breach of contract and fraud for failing either to provide the agreed insurance to him or in failing to honor the contracts which were provided.

The case was tried to a jury who rendered judgment in favor of Miller against Professionals for compensatory damages of \$50,000, which judgment was later reduced by the trial court to \$35,000. Thereafter, Miller moved the court for prejudgment interest, which motion was sustained and an additional judgment for prejudgment interest and attorney fees was entered. The trial court directed a verdict in favor of Jeffrey Page and the McCaffrey Insurance Agency.

The Professionals Insurance Company appeals, asserting the following assignment of error:

"The trial court erred in overruling the Professionals' motion for a directed verdict and in permitting the issue of whether the Professionals had acted in bad faith to be determined by the jury, and further compounded said error by not granting the Professionals' motions for a judgment notwithstanding the verdict and in the alternative a new trial, which ultimately resulted in the court's awarding Chris N. Miller prejudgment interest and additional attorneys fees."

Chris Miller dealt directly with Jeffrey Page, a solicitor for McCaffrey Insurance Agency, in procuring insurance for the

limousine. The record discloses a substantial conflict between Miller and Page as to the purpose for which the limousine was stated to be used. Miller testified that he told Page that the limousine would be used for both personal and client use by him and by John Connor, who was a partner with him at the time that the limousine was initially purchased, and that it would also be used for hire. He said that Page was aware of the commercial use of the vehicle and that he had even discussed use of the limousine for Lazarus for whom Page's wife worked. He also pointed out that payment for the insurance was made to McCaffrey by check issued under the commercial name by which the limousine rental service operated.

Page stated that he was unaware of the commercial rental use of the limousine and that client use would be personal use under the policy.

The McCaffrey Insurance Agency wrote the policy for liability and collision with the Professionals Insurance Company as a personal use policy. The rates at which the insurance was written were substantially less than would have been required had it been a commercial use policy. A claims examiner for Professionals stated that the company basically wrote personal automobile insurance, not commercial insurance. McCaffrey stated that Professionals did not offer commercial use.

The policy that was actually written contained an exclusion for commercial use under the collision and liability coverage. There was a question of fact as to whether the insurance policy was sent to Miller. He denied receiving the insurance policy and stated that he presumed that coverage was as he had agreed with Page.

Subsequently, and before the accident, an umbrella liability policy was also arranged for by Page for McCaffrey, with Professionals also the insurer. Professionals does not question that the umbrella liability policy covered liability for Miller for the accident in question. However, Professionals stated that it did not discover the umbrella policy when the claims were first made and, thus, that it denied all coverage strictly on the basis of the commercial use. Much later, Professionals agreed that it was liable for damages to others under the umbrella policy and ultimately Professionals paid the McGuire and Mosley claims, although in the meantime Miller was required to provide his own attorney to defend these claims. The undisputed testimony was that he incurred reasonable attorney fees of \$5,376.50 in regard to the litigation.

In summary, there was a conflict of testimony between Page, the soliciting agent who was an employee of McCaffrey, and Miller as to what use the insurance was to cover. If Miller is to be believed, as he obviously was by the jury, he requested insurance coverage for the commercial rental operation for which he used the limousine and Page was aware of this use. If Page is to be believed, he considered any business use to be personal use, such as client use, and was unaware of the rental use of the limousine. There is no conflict in the testimony but that Page reported back to McCaffrey that a personal use policy was to be issued and that McCaffrey obtained that insurance from Professionals with the commercial exclusion at the much cheaper personal use rate. There is also no question but that Professionals breached its contract to Miller to defend the liability claims when it failed to apply the umbrella policy to these claims until Miller was required to incur attorney fees to defend himself after coverage was totally denied. Professionals' claim that it should be excused because they were unaware of the umbrella policy and that Miller had a specific duty to point to this policy is ineffective. It is Professionals' obligation to keep track of the policies that it issues and to perform as required by those policies. Hence, clearly Professionals was liable for the attorney fee bill for defending the liability suits and to recover for the breach of contract.

The primary issue is the liability of Professionals, McCaffrey, and/or Page for collision coverage to the limousine. According to the way that the initial policy was written, there would be no collision coverage because of the commercial exclusion. If the insurance policy is applicable, or if McCaffrey or Page is liable for failure to procure the correct insurance, Miller would be entitled to the amount that collision coverage would have provided for the limousine. There was testimony that the market value of the limousine at the time of the accident was \$20,000 and that the cost of repairs of the damage to the limousine was \$15,000. There was also testimony that the limousine remained unrepaired and that a storage lien was imposed by the shop holding the limousine in the amount of \$3,600.

In Miller's third-party's complaint, which he filed on December 19, 1985, he brought a claim against Professionals for breach of contract and bad faith in failing to defend the liability claims and in failing to pay damages for collision, referring specifically both to the original policy and the umbrella policy. In the second count of the third-party complaint, Miller claimed fraudulent misrepresentation by Page and McCaffrey in regard to the coverage that he was provided under the original policy. He claimed that they led him to believe that the policy that was originally issued would cover the commercial use to which the limousine was put.

There was evidence from which the jury could find that Professionals breached its contract with Miller and failed to act in good faith in regard to his claims. The umbrella policy provided liability coverage to Miller and gave rise to the duty of Professionals to defend its insured. See Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177. There was clearly evidence from which it could be concluded that Professionals exhibited bad faith toward its insured. Initially, the claimed refusal to defend was based upon the allegation that the adjuster was unaware of the umbrella policy and that the original policy had an exclusion clause. However, at the very latest, within a few months after the accident, on December 19, 1985, Professionals was clearly advised of the existence of and reliance upon the umbrella policy in the third-party claim. Despite being so aware of that policy, there was substantial evidence that Professionals did not then offer to take over defense of the claims or to pay the claims. It was a long time thereafter, shortly before the cases came to trial, that Professionals acknowledged any responsibility, at least construing the evidence most favorable to Miller. The insurer has a duty to act in good faith in the processing and payments of the claims of its insured. Staff Builders, Inc. v. Armstrong (1988), 37 Ohio St.3d 298. In Armstrong, the court noted that, while it is ordinarily no tort to breach a contract regardless of motive, there is a different consideration in an insurance contract because an insurer's liability arises from the breach of a positive legal duty imposed by law due to the relationships of the parties. The legal duty is the duty imposed upon the insured to act in good faith. A bad faith refusal to settle a claim is a breach of that duty and imposes liability sounding in tort.

Considering the original contract entered into between Professionals and Miller, the court must take into account the entire course of conduct between Professionals and its representatives, Page and McCaffrey. See Roberts v. Personal Service Ins. Co. (1983), 12 Ohio App.3d 92. Construing the evidence most favorable to Miller, Miller clearly told Page what the limousine was to be used for and how the insurance was to apply. He was issued only a partial policy that did not contain any notice of exclusions for commercial use. Professionals is bound by the promises of its authorized agents who procure insurance for it. There was proof that Miller was promised collision coverage for the use that was made of the limousine. Thus, Professionals is bound by the contract that its agents promised.

It is not necessary to prove bad faith of the nature described in Hoskins v. Aetna Life Ins. Co. (1983), 6 Ohio St.3d 272, which pertains primarily to the issue of recovery of punitive damages rather than the recovery of damages for breach of the insurance contract.

In summary, the trial court correctly overruled Professionals' motions for a directed verdict and judgment notwithstanding the verdict as there was sufficient evidence to submit to the jury and for the jury to find liability on the part of Professionals for compensatory damages both for failure to defend the liability actions and for breach of the original contract of insurance, which should not have included an exclusion for commercial use in regard to collision damages.

The next issue is whether the \$35,000 to which the jury verdict was reduced is supported by the evidence. Construing the evidence most favorable to Miller, there was proof of \$15,000 collision damage to the limousine, storage fees of \$3,600, and attorney fees of \$5,376.50. There is not evidence of any other recoverable compensatory damages in the record even construing the evidence most favorable to Miller. (Initially, the verdict may have also included \$7,500 for the Mosley claim but, since that judgment has been paid by Professionals, it cannot be included.) Thus, the record supports only damages of \$23,976.50. If plaintiff on remand agrees to a remittitur to that amount, the judgment against Professionals for that amount will be affirmed. If Miller does not agree to a remittitur to that amount, a new trial should be ordered by the trial court.

Another issue is whether the trial court properly awarded Miller prejudgment interest and additional attorney fees. The trial court did not err in this respect. R.C. 1343.03(C) provides that:

"(C) Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

A party has not failed to make a good faith effort to settle under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risk and potential liability, (3) did not unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. Kalain v. Smith (1986), 25 Ohio St.3d 157, at 159.

In this case, in December of 1985 at the latest, Professionals was fully aware of the umbrella policy and that it had a contractual duty to defend the lawsuits brought against Miller by McGuire and Mosley. According to substantial evidence, Professionals took few, if any, steps to assume the duty that was imposed upon it thus delaying very substantially the termination of those lawsuits and causing Miller to incur additional legal fees in regard to those actions. Additionally, Professionals made no good faith effort to pay or to offer in settlement the legal fees that it clearly owed Miller in regard to the defense of those claims and in regard to the claim against Professionals to compel it to honor its contracts. While there may have been a reasonable basis upon which to resist Miller's claim for collision damages, that fact alone does not render unreasonable the trial court's finding that, construing the entire course of conduct of Professionals, there was not a good faith effort to settle the litigation. There was not an objectively reasonable belief that Professionals had no liability to Miller.

Appellant's assignment of error is partly overruled and partly sustained. The liability of Professionals for damages and for prejudgment interest and additional attorney fees is sustained to the extent and under the conditions stated previously.

Pursuant to R.C. 1343.03, Chris Miller, defendant, third-party plaintiff-appellant, has cross-appealed alleging the following assignments of error:

"I. The trial court erred in directing a verdict for third party defendants, appellees, Jeffrey Page and the McCaffrey Insurance Agency.

"II. The trial court erred in denying defendant third party plaintiff, appellant's motion to amend the third party complaint to conform to the evidence.

"III. The trial court erred in reducing the amount of the jury's verdict rendered in favor of defendant, third party plaintiff, appellant, Chris N. Miller."

As previously explained, the trial court did not err in reducing the amount of the jury's verdict rendered in favor of Miller but, as has been pointed out, the court erred in not reducing the amount of damages to the maximum amount for which reasonable proof was offered. As previously pointed out, the original verdict may have contained a sum of \$7,500 for settlement of the Mosley claim, which sum obviously must be deducted since Professionals has paid and settled that judgment.

Miller's third assignment of error is overruled.

Miller's first and second assignments of error relate to the question of whether the trial court erred in directing a verdict in favor of Page and McCaffrey, and erred in denying Miller's motion to amend the third-party complaint to conform to the evidence.

In the third-party complaint, Miller asserted that there was fraudulent misrepresentation by Page and McCaffrey in causing Miller to believe that his automobile was fully insured for the purposes for which he intended to use it, including commercial use. In this claim, Miller sought the same damages that he sought against Professionals in the matters already discussed.

The first issue is whether there was sufficient evidence to satisfy the directed verdict test to hold Page and his employer, McCaffrey Insurance Agency, responsible for fraudulent misrepresentations to Miller. Construing the evidence most favorable to Miller, he outlined fully the uses to which the limousine was to be put and was assured by Page that the vehicle was covered for liability and collision coverage for those uses. According to Miller, he was only issued a partial insurance policy which did not notify him of any commercial use exclusion that might apply, even if he were aware of the meaning of that exclusion. Finally, he paid premiums on the policy in the name of a company that indicated a commercial use of the limousine. Applying the test for directed verdict set forth by Civ.R. 50(A)(4), there was evidence from which a jury could find a fraudulent misrepresentation. There were admissions and conduct by Page from which it can be reasonably inferred that he knew or should have known that the limousine was used for commercial uses. State of mind is subjective and a reasonable trier of fact could find that Page was reckless in his representations to Miller. As to the element of knowingly making a false statement, it has been held that it is not necessary that the person making the representation actually knew that the statement was false where he makes a positive statement and the circumstances are such that he should have known whether it was true or false. Fenstermaker v. Elwood (1984), 17 Ohio

App.3d 250, at 255. When a party making a statement has a duty to know whether a statement is true or not, he cannot escape liability for a false representation by alleging that he believed the statement to be true. See Pumphrey v. Quillen (1956), 165 Ohio St. 343.

R.C. 3901.21 prohibits the making of any misrepresentations regarding the coverage afforded by an insurance policy by an agent. Such action is declared to be unfair or deceptive trade practice.

Since Page and McCaffrey were held to have bound Professionals by their acts in procuring the insurance, there was no prejudice to Miller in directing a verdict on the second count of the complaint.

Miller's first assignment of error is overruled.

Miller secondly asserts that the trial court erred in refusing to allow him to amend count two against Page and McCaffrey. At the conclusion of his evidence, Miller sought to amend the complaint to allege a negligent failure of Page and McCaffrey to procure insurance that would cover commercial use of the limousine.

The trial court did not abuse its discretion in declining to allow the amendment. It was within the discretion of the trial court to find that the proposed amendment was not timely and that it would be unfair and prejudicial to Page and McCaffrey to require them to defend the negligent failure to procure insurance at that stage of the trial. Additionally, as the trial evolved, there was no prejudice to Miller since Professionals was held to be liable for the type of policy that Page and McCaffrey were asked to procure because Page and McCaffrey were found to have acted on behalf of Professionals in promising coverage for commercial useage.

Miller's second assignment of error is overruled.

Professionals' assignment of error is sustained to the extent that the judgment of the trial court is ordered to be reduced from \$35,000 to \$23,976.50, subject to the approval of Miller. If Miller fails to approve the reduction of the judgment, the trial court is ordered to retry the matter on the issue of damages only. Cross-appellant's assignments of error are overruled. The case is remanded to the trial court for further procedure consistent with this opinion.

Judgment reversed and case remanded.

WHITESIDE and RUMER, JJ., concur.

RUMER, J., of the Allen County Common Pleas Court, sitting by assignment in the Tenth Appellate District.