IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

January 28, 2000

Cecil Crowson, Jr.
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E1998-00747-COA-R3-CV

MARK ANTHONY, Plaintiff-Appellant, v. LORA LONG, NANCY McAMIS & SHERWOOD CHEVROLET, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Uninsured Motorist Carrier-Appellee.	) C/A NO. 03A01-9808-CV-00278)) APPEAL AS OF RIGHT FROM THE) SULLIVAN COUNTY LAW COURT)) HONORABLE JOHN S. McLELLAN, III,) JUDGE

For Appellant

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O P I N I O N

VACATED AND REMANDED

Susano, J.

In this tort action, the plaintiff, Mark Anthony ("Anthony"), filed suit against three defendants ("the alleged tortfeasors") and ultimately took the necessary steps to secure service of process on his uninsured motorist carrier, State Farm Mutual Automobile Insurance Company ("State Farm"), pursuant to the provisions of T.C.A. § 56-7-1206(a)(Supp. 1999). Subsequent to the filing of the record on this appeal, but before Anthony filed his appellate brief, the Tennessee Supreme Court released its opinion in ***Alcazar v. Hayes***, 982 S.W.2d 845 (Tenn. 1998). Anthony now raises the following issue for our consideration: Should the trial court's order granting State Farm's motion for summary judgment be vacated due to the Tennessee Supreme Court's recent holding in ***Alcazar***?

I. Facts

On May 14, 1997, Anthony filed a complaint asserting that the three named defendants were liable for injuries that Anthony sustained as a result of a motor vehicle accident. The uninsured motorist coverage in Anthony's insurance policy contains a submission-of-suit papers requirement. The applicable provision reads, in pertinent part, as follows:

> The ***person*** making claim also shall...under the uninsured motor vehicle coverage...send us at once a copy of all suit papers if the ***person*** sues the party liable for the accident for damages.

(Italics and bold print in original.) The policy also provides that

> [t]here is no right of action against us...until all the terms of this policy have

been met....

State Farm's attorney, being aware[1] that Anthony had filed this action against the alleged tortfeasors, searched the case file at the Clerk's Office on numerous occasions between June 16, 1997, and early September, 1997, to determine whether process had been issued as to State Farm. Though Anthony's counsel had informed State Farm's counsel on July 15, 1997, that State Farm was to be joined in the proceedings, State Farm first received suit papers when a summons and copy of the complaint were served on State Farm by the Department of Commerce and Insurance by letter dated September 26, 1997, approximately four and one-half months after Anthony had filed suit. The record reflects that process had not been issued by the Clerk as to State Farm until September 22, 1997, some four months plus after the complaint was filed.

State Farm subsequently moved for summary judgment based on Anthony's failure to satisfy the aforesaid submission-of-suit papers requirement of his policy. On July 10, 1998, the trial court granted State Farm's motion for summary judgment, expressly relying upon ***Kelley v. Vance***, 959 S.W.2d 169 (Tenn.Ct.App. 1997).

II. Applicable Law

[1]The record is not clear as to how State Farm's counsel first became aware of the pending litigation. In this regard, it may be significant that an earlier suit pursuing the same cause of action had been non-suited. In the present action, the plaintiff's attorney filed his affidavit, in which he stated the following:

> I am T. Martin Browder, Jr. and attorney for [the plaintiff] in the above styled case. State Farm Mutual Automobile Insurance Company as an uninsured motorist carrier was a party to the previous suit filed and is a party to this action.

A trial court's grant or denial of summary judgment, raising as it does a question of law, is reviewed on appeal *de novo* with no presumption of correctness. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44 (Tenn.Ct.App. 1993). If we find that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law, we must affirm the trial court's grant of summary judgment. *See* ***Byrd v. Hall***, 847 S.W.2d 208, 211 (Tenn. 1993). If there is a genuine dispute as to any material fact or any doubt as to the conclusions to be drawn from the undisputed material facts, we must vacate the order granting summary judgment. *See* ***id***.

To determine whether summary judgment is appropriate in this case, we must first determine the effect of ***Alcazar***, if any, on ***Kelley***. Anthony argues that ***Alcazar*** overruled ***Kelley*** *sub silentio* while State Farm asserts that ***Kelley*** remains good law.

Prior to ***Alcazar***, the failure of an insured to satisfy a condition precedent in an uninsured motorist provision of an insurance policy resulted in the insured being unable to recover under the policy. *See, e.g.,* ***Hartford Acc. & Indem. Co. v. Creasy***, 530 S.W.2d 778 (Tenn. 1975). This traditional rule applied to conditions in policies requiring the insured to timely notify the insurer of an accident ("notice-of-accident requirement"). *See, e.g.,* ***id.*** at 779; ***Phoenix Cotton Oil Co. v. Royal Indem. Co.***, 205 S.W. 128, 129-30 (Tenn. 1918). The rule also applied to provisions requiring the insured to timely send suit papers to the insurer in the event the insured brought suit against an alleged tortfeasor ("submission-of-suit papers requirement"). *See* ***Kelley***, 959 S.W.2d at 169-70; ***Whaley v. Underwood***, 922 S.W.2d 110, 112-13 (Tenn.Ct.App. 1995). Under this traditional rule, it was irrelevant whether the failure to

satisfy the condition precedent resulted in prejudice to the insurer. ***Creasy***, 530 S.W.2d at 779***; Phoenix Cotton***, 205 S.W. at 130***; Kelley***, 959 S.W.2d at 170***; Whaley***, 922 S.W.2d at 113.

In ***Alcazar***, the Tennessee Supreme Court expressly overruled ***Creasy***, ***Phoenix Cotton***, and "other cases in this State holding that prejudice to the insurer is irrelevant to whether forfeiture of an insurance contract results from the insured's breach of a notice provision." ***Alcazar***, 982 S.W.2d at 856. The Court adopted a new rule and articulated it as follows:

> once it is determined that the insured has failed to provide timely notice in accordance with the insurance policy, it is presumed that the insurer has been prejudiced by the breach. The insured, however, may rebut this presumption by proffering competent evidence that the insurer was not prejudiced by the insured's delay.

Id.

In granting summary judgment for State Farm, the trial court expressly relied on ***Kelley***. In ***Kelley***, we applied the traditional rule to a submission-of-suit papers requirement. ***Kelley***, 959 S.W.2d at 169, 170. We affirmed the trial court's grant of summary judgment to the insurer on the ground that the insured, by furnishing suit papers to the insurer four and one-half months after filing suit against the tortfeasors, failed to satisfy a valid condition precedent. ***Id***. at 170. We held in ***Kelly*** that the fact the insurer may have suffered no prejudice was of no significance. ***Id***.

Anthony argues that ***Alcazar*** has the effect of overruling ***Kelley*** and that the trial court's grant of State

Farm's motion for summary judgment must therefore be vacated. State Farm asserts that there are three reasons why ***Alcazar*** did not have the effect of overruling ***Kelley***: (1) ***Alcazar*** deals with a notice-of-accident requirement while ***Kelley*** addresses a submission-of-suit papers requirement; (2) applying ***Alcazar*** to a submission-of-suit papers requirement would result in a judicial determination of public policy which conflicts with a public policy determination by the Legislature; and (3) ***Alcazar*** should not be applied to a submission-of-suit papers requirement because an uninsured motorist carrier that does not receive suit papers at the commencement of a suit is necessarily prejudiced. For the following reasons, we disagree with State Farm and hold that the application of the modern rule, as recognized in ***Alcazar***, to a submission-of-suit papers requirement is a logical extension of that holding.

State Farm first argues that ***Alcazar*** is not applicable to a case involving a submission-of-suit papers requirement and, hence, did not overrule ***Kelley***. State Farm cites ***Whaley*** for the proposition that a notice-of-accident requirement and a submission-of-suit papers requirement involve separate and distinct provisions and that failure to satisfy the latter requirement may be less excusable than failure to comply with the notice-of-accident requirement. We agree that the two requirements are separate and distinct and that "[u]nlike an accident or loss that may or may not be an event triggering [uninsured motorist] coverage, the filing of a suit, in which the insurance company has an obvious interest, is a known, concrete fact." ***Whaley***, 922 S.W.2d at 115. We also recognize that ***Alcazar*** did not expressly overrule earlier cases dealing with the submission-of-suit papers requirement. However, the rationale

that prompted the Supreme Court to abandon the traditional rule in favor of the modern trend supports application of the new rule to a submission-of-suit papers requirement.[2] Accordingly, we hold that the new rule applies to both requirements.

State Farm next argues that applying ***Alcazar*** to a submission-of-suit papers requirement would result in a judicial determination of public policy which conflicts with a prior public policy determination by the Legislature. State Farm relies on T.C.A. § 56-7-1206(a) (Supp. 1999), which provides as follows:

> Any insured intending to rely on [uninsured motor vehicle coverage] shall, if any action is instituted against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant.

We disagree with the assertion that application of ***Alcazar*** to a submission-of-suit papers requirement in an automobile insurance policy would conflict with T.C.A. § 56-7-1206(a). The requirement at issue here requires Anthony to "at once" send a copy of the suit papers to State Farm if Anthony sues the alleged tortfeasors. In contrast, the statute under discussion "sets out the procedures a party must follow in order to bring its uninsured motorist carrier into a case against a tortfeasor." ***Winters v. Jones***, 932 S.W.2d 464, 465 (Tenn.Ct.App. 1996). The policy provision and the statutory provision

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[2]The Supreme Court in ***Alcazar*** articulated three relevant public policy consierations: "1) the adhesive nature of insurance contracts; 2) the public policy objective of compensating tort victims; and 3) the inequity of the insurer receiving a windfall due to a technicality." ***Alcazar***, 982 S.W.2d at 850. All of these considerations apply with equal force to a case involving a failure to comply with a submission-of-suit papers requirement.

therefore are separate requirements and serve different purposes. One satisfies a provision in an insurance policy; the other addresses the procedure by which an uninsured motorist carrier is made an unnamed party in a lawsuit. Applying the new rule to a submission-of-suit papers requirement in a policy does not conflict with a requirement that an insured serve process upon his or her insurer in order to bring the insurer into the case. Hence, we find that T.C.A. § 56-7-1206(a) does not preclude application of the holding in ***Alcazar*** to a submission-of-suit papers requirement in an uninsured motorist provision.

State Farm's final argument is that ***Alcazar*** should not apply to the policy requirement now before us because an uninsured motorist carrier that does not receive suit papers at the commencement of a suit is necessarily prejudiced by the delay. We reject State Farm's argument for the application of a *per se* rule. The rule enunciated in ***Alcazar*** means that an insured's failure to comply with a submission-of-suit papers requirement gives rise to a rebuttable presumption that the insurer was prejudiced by the insured's failure to comply. If, as State Farm contends, the insured cannot rebut this presumption of prejudice, the insurer will be under no obligation to provide coverage. Accordingly, we find this argument to be without merit.

In summary, we hold that the application of the new rule to a submission-of-suit papers requirement is a logical extension of the holding in ***Alcazar***. Therefore, ***Kelley*** does not control the instant case. Our initial inquiry is whether Anthony complied with the submission-of-suit papers requirement in the uninsured motorist provisions of his policy. If he did, he has

satisfied that particular condition precedent to coverage. If he did not, it is presumed that State Farm has been prejudiced by Anthony's failure to comply. Anthony then has the burden to rebut this presumption by presenting evidence that State Farm was not prejudiced. If he carries this burden, his failure to comply with the subject requirement is no bar to his recovery. If he does not, State Farm is under no obligation to provide coverage.

III. Summary Judgment

We must now determine whether summary judgment for State Farm is appropriate under the record now before us. In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, 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." Rule 56.04, Tenn.R.Civ.P. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-211 (Tenn. 1993).

Thus, the questions a court must consider in determining whether to grant or deny a motion for summary judgment are (1) whether a factual dispute exists; (2) whether that fact is material; and (3) whether that fact creates a genuine issue for trial. ***Id***. at 214. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Id***. at 215. A disputed material fact creates a genuine issue if

"a reasonable jury could legitimately resolve that fact in favor of one side or the other." ***Id***. The phrase "genuine issue" refers exclusively to factual issues and not to legal conclusions that could be drawn from the facts. ***Id***. at 211.

The party seeking summary judgment has the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. ***Id***. at 215. Generally, a defendant seeking summary judgment may meet this burden in one of two ways: (1) by affirmatively negating an essential element of the plaintiff's case, or (2) by conclusively establishing an affirmative defense. ***Id***. at 215 n. 5. "A conclusory assertion that the nonmoving party has no evidence is clearly insufficient." ***Id***. at 215.

Once the moving party satisfies its burden of showing that there is no genuine issue of material fact, the burden then shifts to the nonmoving party to show that there is a genuine issue of material fact requiring submission to the trier of fact. ***Id***. The nonmoving party cannot simply rely upon its pleadings, but rather must set forth, by affidavit or discovery materials, specific facts showing a genuine issue of material fact for trial. Rule 56.06, Tenn.R.Civ.P.; ***Byrd***, 847 S.W.2d at 215. The evidence offered by the nonmoving party must be admissible at trial but need not be in admissible form. It must be taken as true. ***Byrd***, 847 S.W.2d at 215-216.

Concerning summary judgment, our first inquiry is whether State Farm has shown that there is no factual dispute concerning Anthony's failure to comply with the submission-of-suit papers requirement in the uninsured motorist coverage of his

policy. We find and hold that State Farm has met this burden. State Farm filed the affidavit of its claims superintendent in support of its motion for summary judgment. In this affidavit, the affiant states that State Farm first received suit papers when a summons and copy of the complaint were served on State Farm by the Department of Commerce & Insurance by letter dated September 26, 1997, almost four and one-half months after Anthony filed suit against the alleged tortfeasors. There is nothing in the record countervailing the assertions of this affidavit. Hence, we find the facts set forth in the affidavit to be undisputed.

The provision in Anthony's policy dealing with submission of suit papers requires him to send to State Farm "*at once* a copy of all suit papers if [Anthony] sues the party liable for the accident for damages." (Emphasis added.) In ***Allstate Ins. Co. v. Wilson***, 856 S.W.2d 706 (Tenn.Ct.App. 1992), we noted that

> [a] requirement in a policy for "prompt" or "immediate notice" or that notice must be given "immediately," "at once," "forthwith," "as soon as practicable," or "as soon as possible" generally means that the notice must be given within a reasonable time under the circumstances of the case.

Id. at 709. (Quoting with approval 44 Am.Jur.2d *Insurance* § 1330 (1982)). In ***Kelley***, we held that "it cannot be said that a delay of 4-1/2 months in furnishing the legal papers is prompt." ***Kelley***, 959 S.W.2d at 170. There is nothing in the record to take this case out of the ambit of this particular holding in ***Kelley*** -- a holding that is unaffected by ***Alcazar***. Hence, we find and hold that Anthony's delay of approximately four and one-

half months in delivering a copy of the suit papers to State Farm was not reasonable under the record now before us. Accordingly, we hold that there is no genuine issue of material fact regarding whether Anthony complied with the suit papers provision. He did not.

However, the fact that Anthony failed to comply with the submission-of-suit papers requirement merely results in a rebuttable presumption that State Farm was prejudiced by Anthony's non-compliance. This presumption shifts the summary judgment burden to Anthony to show that State Farm suffered no prejudice. *Cf.* ***Brown v. J.C. Penney Life Ins. Co.***, 861 S.W.2d 834, 837-38 (Tenn.Ct.App. 1992) (trial court erred in failing to grant insurer's motion for summary judgment where the nonmoving party failed to present evidence to rebut a statutorily-created rebuttable presumption). Since a presumption of prejudice arises from a showing of non-compliance with a requirement of the type now before us -- a showing that has been made in this case -- the burden was and is on Anthony to show that there is a dispute as to the question of prejudice.

Anthony argues on appeal that State Farm was not prejudiced because it had actual knowledge of Anthony's suit against the alleged tortfeasors. The record supports Anthony's assertion that State Farm was aware of the suit. State Farm's attorney began to check the file at the Clerk's Office on June 16, 1997, to determine whether State Farm had been sued or served, and he checked several more times before actually receiving the suit papers. Moreover, Anthony's counsel informed State Farm's counsel on July 15, 1997, that Anthony intended to join State Farm as an unnamed party. Furthermore, the record

before us -- in the form of the affidavit of plaintiff's counsel -- reflects that there was an earlier suit asserting the same cause of action in which "[State Farm] was a party." All of this gives rise to a reasonable inference of a lack of prejudice. This is not to say that there was a lack of prejudice; but this reasonable inference is enough to make out a genuine issue of material fact at the summary judgment juncture of this litigation.

State Farm argues that because it had both knowledge of the suit *and* knowledge that it had not been made a party, it was prejudiced by the "dilemma" it faced, i.e., having to choose between (1) preparing for litigation to which it may never be made a party or (2) not preparing for litigation to which it may later be made a party. This alleged dilemma is not the issue. The question to be resolved is whether, *in fact*, State Farm was prejudiced by Anthony's failure to comply with the submission-of-suit papers requirement. For all we know at this point, State Farm may have resolved its "dilemma" by fully investigating the claim. For all we know now, State Farm may not have been prejudiced in any way. All of this remains to be seen. At the present time, there is a dispute in the record on the issue of prejudice. That is all that is required to render summary judgment inappropriate.

IV. Conclusion

In accordance with the above analysis, we vacate the trial court's order granting summary judgment and remand this case to the court below. On remand, the trial court must determine whether State Farm was prejudiced by Anthony's failure to comply with the submission-of-suit papers requirement in his policy. Under ***Alcazar***, Anthony has the burden of showing a lack of prejudice. Costs on appeal are taxed to State Farm.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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D. Michael Swiney, J.