IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 2000 Session

RANDALL D. WEBBER, JR., ET AL. v. LESLIE RICHARD HUNT, ET AL.

Direct Appeal from the Circuit Court for Anderson County
No. 96LA0572 and 97LA0112 James B. Scott, Jr., Judge

FILED SEPTEMBER 20, 2000

No. E1999-01909-R3-CV

The question presented by this appeal is whether an automobile insurance policy issued by State Farm Mutual Insurance Company provided uninsured motorist coverage of 50/100 thousand dollars or 25/50 thousand dollars. The Trial Judge sustained the Insurance Company's motion for summary judgment, holding that the 25/50 thousand dollars was applicable. We vacate the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and CHARLES D. SUSANO, JR., joined.

Roger L. Ridenour, Knoxville, Tennessee, for the Appellant, Randall D. Webber, Sr.

James S. MacDonald, Knoxville, Tennessee, for the Appellee State Farm Mutual Automobile Insurance Company.

OPINION

The question presented by this appeal is whether an automobile insurance policy issued by State Farm Mutual Insurance Company provided uninsured motorist coverage of 50/100 thousand dollars or 25/50 thousand dollars.

The Trial Court sustained a motion for summary judgment filed by State Farm resulting in this appeal, wherein the Plaintiffs insist there are genuine disputes as to material facts, rendering summary judgment inappropriate. State Farm raises a separate issue, contending that the Trial Court should have dismissed the case presently on appeal, which is in the nature of a declaratory judgment action, because of a previous suit filed by the Plaintiffs against the Estate of

Susan Seivers, who was an uninsured motorist. State Farm Mutual, the Plaintiffs' insurance carrier, was served by process in accordance with the applicable statute. State Farm insists that its motion to dismiss should have been granted under the doctrine of Former Suit Pending.

A recent opinion of the Supreme Court of Tennessee, Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 89 (Tenn. 2000), restates the standard of review as to summary judgments:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

We shall now detail the material facts in accordance with the standard hereinbefore set out. On October 13, 1996, Randall D. Webber, Sr., and his son, who was a passenger in the Ford Ranger truck being operated by his father, were seriously injured when struck by an automobile driven by Nancy Seivers, who was uninsured.

It appears that in about 1986 Mr. Webber's mother-in-law, Barbara Southard, obtained a policy to cover the vehicle Mr. Webber then owned, which had previously been uninsured. The policy that issued had liability limits of $25,000 per person and $50,000 per accident for bodily injury. At that time Mrs. Southard signed a document requesting a lower limit, which initially was $15,000 per person and $30,000 per accident. This was consistent with other policies obtained by the Southards as to their vehicles. The limits as to uninsured motorist had increased during the ensuing years in accordance with State law until at the time of the accident the minimum was as heretofore stated--$25,000 -- $50,000.

There is also proof that Mr. Webber received approximately 20 notices from State Farm wherein the reduced limits as to uninsured motorist were set out.

Counsel for State Farm attached to his motion for summary judgment a statement of material facts about which he contends there is no genuine issue for trial. We list all those statements which were agreed to in whole and portions of those which were agreed to in part by counsel for the Webbers:

> 1. Mr. and Mrs. Webber met one another in high school and moved from Anderson County, Tennessee to Atlanta, Georgia in June, 1984 to pursue higher education. After moving to Atlanta, Georgia, Lisa S. Webber purchased a 1965 Ford Fairlane automobile. That an Application For State Farm Automobile

Insurance was completed on behalf of Lisa Carol Southard (maiden name of Lisa S. Webber) and signed "Lisa C. Southard" on 8-17-84 by Mrs. Webber's mother, Barbara Southard.

2. As reflected on Exhibit 1 to the deposition of Mrs. Webber, rather than the $50,000/$100,000/$25,000 liability limits selected, lower limits of uninsured motorist coverage were selected in the respective amounts of $15,000/$30,000/$10,000, the "minimum limits" then available under Tennessee law. As is further reflected on this Application, Lisa Carol Southard received a "multi-car discount" as a result of making application through her parents' carrier, State Farm.

3. Lisa S. Webber understood from essentially the time she obtained State Farm coverage in 1984 that there was a separate policy for each insured vehicle, that the term of each State Farm policy was for a period of six months, and that every six months, regardless of whether payments were made semiannually or monthly, a statement confirming the amount of the various coverages was sent to its insureds via State Farm and received by Mrs. Webber and her husband.

4. Lisa S. Southard and Randall D. Webber, Sr., were married on December 31, 1985 in Atlanta, Georgia.

5. There exists in the file of State Farm Agent James F. Trent of Oak Ridge, Tennessee the typewritten document with handwritten notations made Exhibit 3 to the deposition of Lisa S. Webber. (See Appendix A)

No one who testified by deposition or affidavit could be certain of this document's origin, although Ms. Southard, mother of Mrs. Webber, did identify the printed material as being penned by her.

The principal issue in the Webbers' appeal is whether using the standard of review hereinbefore noted, Mrs. Webber's mother had authority, either actual or ostensible, to sign the application for the initial policy on the 1968 Ford Fairlane and the rejection of standard uninsured motorist coverage.

With regard to Mrs. Southard's authority, her testimony by deposition was rather inconclusive:

A. No, as I say, I'm sure I was directed to do whatever is here.

Q. Directed by Lisa and Randy?

A. I would say so. I don't think I would have – I wouldn't have done that on my own had they not asked me to do it. And again, it might have been that they called the agent's office. I'm not sure. I don't recall. I don't recall this at all, but seeing it, I know that that's my printing.

However, this testimony by her--and as a matter of fact even if she had testified unequivocally that Mr. or Mrs. Webber gave her such authority--would be unavailing to sustain the summary judgment because of the affidavit filed by Mr. Webber and the deposition of Mrs. Webber:

Mr. Webber's Affidavit

1. That I am over twenty-one (21) years of age, am competent to testify, and am familiar with the facts herein.

2. That my signature is not contained in the application for automobile insurance with State Farm dated July 21, 1986.

3. That Barbara S. Southard was never provided permission to act as my legal representative in applying for automobile insurance, was not given my permission to sign my name to an application for automobile insurance with State Farm dated July 21, 1986, and was not given permission to act on my behalf for any of my legal affairs.

Mrs. Webber's Deposition

Q. Going back in time to July of '86, you would have been living in Atlanta at that time, is that right?

A. That is correct.

Q. And had you had any conversations that you recall with your mother about transacting insurance business on your behalf?

A. No.

In conclusion as to the Webbers' issue, we have not overlooked the evidence that the Webbers received some 20 semi-annual statements from State Farm, which showed the uninsured motorist coverage to be at the reduced amount. However, although both Mr. and Mrs. Webber admitted receiving the statements, they denied being aware that the uninsured motorist coverages shown thereon was less than the liability coverage.

State Farm raises as an issue that the Trial Court was in error in not sustaining its motion seeking dismissal of this case under the doctrine of Former Suit Pending. The former suit was that of the Webbers against the Administrator of the Estate of Susan Seivers in which State Farm was served as an uninsured motorist carrier.

The case of Young v. Kittrell, 833 S.W.2d 505, 508 (Tenn. Ct. App. 1992), addresses the subject thusly:

> The doctrine is not applicable unless four criteria are met: (1) the two suits must "involve the identical subject matter;" (2) they must both be "between the same parties;" (3) the former suit must still be pending; and (4) the court in which the former suit is pending must be "a court in this state having jurisdiction of the subject matter and the parties." Cockburn v. Howard Johnson, Inc., 215 Tenn. 254, 256-257, 385 S.W.2d 101, 102 (1964) (quoting from Higgins & Crownover, Tennessee Procedure in Law Cases, § 518(6).

Although not specifically so stating, criterion four implies that the two suits are in different courts because if they were in the same court, and if it had jurisdiction to hear the first case, it obviously would have jurisdiction to hear the second. Other appellate cases, some of which do not specifically refer to the doctrine of Former Suit Pending, make it clear there must be two separate courts involved before the doctrine comes into play. King of Clubs, Inc., v. Gibbons, 9 S.W.3d 796 (Tenn. Ct. App. 1999); State v. Hazzard, 743 S.W.2d 938 (Tenn. Crim. App. 1987); Wilson v. Grantham, 739 S.W.2d 776 (Tenn. Ct. App. 1986).

In the tort case the complaint seeking damages against the Administrator of Ms. Seivers' Estate is captioned as follows:

> IN THE SEVENTH JUDICIAL DISTRICT FOR THE STATE OF TENNESSEE
>
> _____(Circuit Division)

The complaint for declaratory judgment was captioned exactly like the first case. Thus, we have only one court involved--the Seventh Judicial District of Tennessee.

We accordingly conclude that the Trial Court under such circumstances has discretion to set the order in which the cases will be tried, or even to consolidate them. In the case at bar we find no abuse of discretion and that the Trial Court employed a more orderly process in first determining the question presented in the declaratory judgment action case rather than the tort action.

For the foregoing reasons we vacate the judgment of the Trial Court and remand the case to the Trial Court for further proceedings consistent with this opinion. Costs of appeal are adjudged against State Farm.

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HOUSTON M. GODDARD, PRESIDING JUDGE