IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

May 22, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FELTON M. SMITH and MARY L. SMITH	)	HAMILTON COUNTY 03A01-9510-CV-00370
Plaintiffs-Appellants	)	
v.	)	HON. WILLIAM L. BROWN, JUDGE
AMERISURE INSURANCE COMPANY	)	
Defendant-Appellee	)	VACATED AND REMANDED

JOHN C. CAVETT, JR., OF CHATTANOOGA FOR APPELLANTS

PAUL CAMPBELL, JR., OF CHATTANOOGA FOR APPELLEE

OPINION

Goddard, P.J.

The Plaintiffs, Felton M. Smith and his wife Mary L. Smith, appeal for the second time the entry of a summary judgment in favor of the Defendant Amerisure Insurance Company in their suit seeking recovery under a fire insurance policy issued by Amerisure.

Prior to 1990 the Plaintiffs owned a residence at 5603 Weigelia Avenue in Hamilton County. The Plaintiffs insured their residence through the Defendant Insurance Company. According to the wife, the Plaintiffs paid their insurance premiums through an escrow agreement with their savings and loan association. The association held a deed of trust on the Plaintiffs' home.

In early 1990, the husband became very ill and, as a result, incurred numerous medical bills. In his deposition, the husband testified that he had large bills from the hospital and his doctor and that he did not have insurance to cover these expenses. In addition to these bills, the Plaintiffs owed various sums to credit card companies. The Plaintiffs stated that sometime prior to June of 1990 they received at least one threatening call from one of the credit card companies. The Plaintiffs stated that a representative from the credit card company called concerning the Plaintiffs' credit card debt and threatened the Plaintiffs that the company could take the Plaintiffs' home if their debts were not paid.

Because of the call from the credit card company and the mounting medical expenses, the Plaintiffs decided, with the consent of the savings and loan association, to deed their house to their son Van Smith, who also lived in Hamilton County. A quit claim deed was executed and recorded in June of 1990. No consideration was given by Van Smith for the home. No notice was given to the Defendant about the change in ownership. The

Plaintiffs continued to pay the property taxes and mortgage payments as well as the insurance payments through the escrow account. The Plaintiffs continued to occupy the home while Van Smith retained his own home in Chattanooga. The Plaintiffs did not pay any rent to Van Smith, and he never resided in the home after the conveyance. The Plaintiffs contend that they intended the conveyance of the property to be temporary only and that it would be reconveyed at a later date.

On about July 25, 1991, the year following the transfer, the Plaintiffs renewed their policy with the Defendant which continued to insure the home in which they lived. The Defendant was not informed that the Plaintiffs no longer held legal title to the property. On January 14, 1992, a fire destroyed the home. The Plaintiffs notified the Defendant about the fire and an adjuster was sent to the home to investigate the fire. The Plaintiffs told the insurance adjuster that they were the owners of the home. When the Defendant discovered that the Plaintiffs no longer owned the home, it refused to pay the claim.

The Plaintiffs then brought suit in which they alleged the Defendant wrongfully failed to pay their claim. The Plaintiffs further alleged that the failure to pay the claim was in bad faith and that pursuant to T.C.A. 56-7-105 the Defendant should be assessed a 25 percent penalty.

In its answer, the Defendant alleged that the Plaintiffs had no insurable interest in the home at the time of the fire and, thus, had no right to make a claim. The Defendant further alleged that the Plaintiffs had violated the terms of the policy by deeding the property to their son without the consent of the Defendant.

Both parties then filed for summary judgment. The Trial Court Judge dismissed the Plaintiffs' motion but granted the Defendant's motion for summary judgment and dismissed the Plaintiffs' complaint. The Plaintiffs perfected the first appeal to this Court.

We determined that complete justice could not be had because of deficiencies in the record. This Court stated that material issues evolved around the provisions of the insurance policy, but that the policy was not included in the record. As a result, the case was remanded in order to supplement the record.

The record has now been supplemented and the case has been returned to this Court for a review of the Trial Court's determination. The sole issue is whether summary judgment was properly awarded to the Defendant. The first summary judgment was apparently awarded to the Defendant on all issues. However, on remand, the Trial Court awarded summary judgment on the basis that the Plaintiffs did not have any insurable interest in the

property at the time of the fire. It is the second summary judgment that we now address.

The Supreme Court of Tennessee, in Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993), set forth the proper summary judgment analysis to be applied in Tennessee. There, the Court said in evaluating a summary judgment motion, these questions must be resolved: "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial." (Emphasis in original.)

Byrd further explained that summary judgment should be employed where there is no dispute over the evidence and there is no issue for a jury to decide. For a party to avoid summary judgment, it must show that the fact in dispute is material. Meaning, this fact is one that "must be decided in order to resolve the substantive claim or defense at which the motion is directed." If such a disputed material fact does exist, the court "must then determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03." Here, "the test for a 'genuine issue' is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other. If the answer is yes, summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless . . . ." When applying this test, "the court is to view the evidence in a light favorable to the nonmoving

party and allow all reasonable inferences in his favor." It is the burden of the nonmoving party to demonstrate that there are no disputed, material facts creating a genuine issue for trial and that summary judgment is appropriate.

We hold that under the facts before us there is a genuine issue for trial, i.e., whether the Plaintiffs had an insurable interest in the home.

First, the Plaintiffs' plan to deed the house to their son was an apparent attempt to defraud their creditors, an act which is certainly not condoned by this Court; however, their conduct does not necessarily preclude the Plaintiffs from recovering. The "doctrine of 'unclean hands'" is not a bar to plaintiff's claim. "'[I]t is not every willful and reprehensible act that will preclude a litigant in a court of equity from obtaining the relief prayed, but such conduct . . . *must bear an immediate relation to the subject-matter of the suit*, and in some measure affect the equitable relations subsisting between the parties to the litigation and arising out of the transaction.'" Greer v. Shelby Mutual Ins. Co., 659 S.W 2d 627 (Tenn.App.1983), quoting from Overton v. Lewis, 152 Tenn. 500, 279 S.W 801 (1926). (Emphasis in original.)

In Greer, the plaintiff bought some property with his own funds and had an insurance policy issued in his name. However, he placed legal title of the property in the name of a

corporation of which he was part owner. The plaintiff later admitted that the reason for placing legal title in the name of his corporation was to conceal the ownership from his wife because he and his wife were seeking a divorce. When the house on the property was destroyed by fire, the plaintiff's insurance company denied the claim. The Court held that the plaintiff's conduct was collateral to the transaction involved in the lawsuit and, therefore, the plaintiff's claim was not barred by the "unclean hands" doctrine. We are presented with a very similar issue in the case now before this Court. The Plaintiffs' conduct here is collateral to the transaction with the Defendant as was that in Greer. The Plaintiffs deeded their house to their son in an attempt to defraud their creditors, not their insurance company. As such, the Plaintiffs' conduct is not a bar to their claim against this Defendant.

The Defendant maintains that because the Plaintiffs no longer hold title to the home they do not have an insurable interest in the home. We disagree. A person is not required to have "title to or possession of property in order to have an insurable interest in the property 'if by its continued existence he will gain an advantage, or if by its damage or destruction he will suffer a loss. . . .'" Oliver v. Johnson, 692 S.W.2d 855 (Tenn. App. 1985), quoting from Duncan v. State Farm Fire & Casualty Co., 587 S.W.2d 375 (Tenn. 1979). It is not necessary for a person to show for a certainty that he suffered economic harm from a loss of property. Rather, it is sufficient to show

that the loss might subject the person to injury. Brewer v. Vanguard Ins. Co., 614 S.W.2d 360 (Tenn.App.1980). A person who has care and custody or possession of another's property may obtain insurance on the property for the benefit of the owner. In fact, any interest in property, legal or equitable, qualified, conditional, contingent, or absolute, or merely the right to use the property, with or without the payment of rent is sufficient. Brewer, supra. Under the facts now before us, we find, as already noted, that there is a genuine issue for trial, i.e., whether the Plaintiffs had an insurable interest in the home. By the home's destruction, they certainly suffered an economic loss. They no longer have a home in which to live. Additionally, by simply living in the home, the Plaintiffs have a sufficient interest as described above in Brewer. Thus, the Plaintiffs' claim cannot be denied on the lack of an insurable interest.

This Court is not persuaded by the case of Pappas v. Insurance Co. of the State of Penn., 54 Tenn.App. 633, 393 S.W.2d 298 (1965). In that case, the Court held that a father who deeded property to his son did not have an insurable interest in the property. The Court determined that the father would not be advantaged by the continued existence of the property nor would he be disadvantaged by the loss of the property. That is simply not the case here. The Plaintiffs lived in the home and cared for the home. It appears that in Pappas, the plaintiff did not

live on the property, which, as noted in Brewer, can be a sufficient interest.

In conclusion, we have not overlooked the fact that Amerisure has briefed other matters which it contends justifies the Court's granting a summary judgment. We, however, in this case, are disinclined to consider matters not addressed by the Trial Court.

For the foregoing reasons, the judgment of the Trial Court is vacated and the cause remanded for proceedings not inconsistent with this opinion.

Costs of appeal are adjudged against Amerisure.

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Houston M. Goddard, P.J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.