SAFECO INSURANCE COMPANY OF AMERICA v. RICHARD PAUL VENABLE and VICKY VENABLE; A

2020 | Cited 0 times | Court of Appeals of Arizona | April 8, 2020

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

RICHARD PAUL VENABLE AND VICKY VENABLE, HUSBAND AND WIFE; ANGELO S PIZZA & GYROS, LLC, Defendants in Intervention/Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA, Plaintiff-Intervenor/Appellee.

No. 2 CA-CV 2018-0168 Filed April 8, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. NOT FOR PUBLICATION See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County No. C20133966 The Honorable Kenneth Lee, Judge The Honorable D. Douglas Metcalf, Judge

AFFIRMED

COUNSEL

Law Offices of Miniat & Wilson L.P.C., Tucson By Kevin E. Miniat Counsel for Appellants

Foran Glennon Palandech Ponzi & Rudloff PC, Phoenix By Amy M. Samberg Counsel for Appellee MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Richard Venable appeals grant of summary judgment to Safeco Insurance Company of America, denial of his motions for reconsideration and new trial, and award of attorney fees in favor of Safeco. We affirm.

Factual and Procedural Background

¶2 In January 2013, while delivering food for his employer, vehicle struck Venable, who was in a wheelchair. Venable and his wife, Vicky, subsequently filed an action for personal injury, alleging: (1) Burton negligently caused the collision by veering off the road because he was distracted by a GPS device; (2) its owner/manager, Danny Walsh, Danny Walsh were vicariously liable negligence; and (3) hired, trained, and/or supervised Burton.

¶3 Safeco had issued an automobile insurance policy step-father, who was the named insured, but which covered Burton as an

insured family member. The policy provided liability coverage for bodily that while employed in the pickup or delivery of . . . food or any products for

under the policy for defense and indemnification. Safeco agreed to defend

limited coverage to $15,000 because Arizona law requires insurers to

provide named insureds and permissive users with automobile liability coverage in an amount no less than $15,000 per person. See A.R.S. § 28- 4009(A)(2)(a). 1

¶4 In February 2016, the Venables, Ang entered Morris alsh stipulated to a $400,000 judgment in favor of Venable. See United Servs. Auto. Ass n v. Morris, 154 Ariz. 113 (1987). 2 The Morris agreement also resulted in the dismissal of Danny Walsh and his wife as individual defendants, and expressly provided that it had no effect on the action against Burton. The trial court entered judgment accordingly on February 17, 2016, and specifically stated: nor this Order apply to the ongoing and pending claim against Defendant Christian Burton or bind Defendant

¶5 On February 29, 2016, the trial to comply with various court orders. The next day, Safeco moved to intervene The court granted

objection.

¶6 In March 2018, Safeco moved for summary judgment, arguing . . . Venable can recover that it was of law that in the event the Food Delivery At the hearing on Safe , the trial court

afeco] is responsible due to the dismissal of . . . After both Safeco and Venable briefed the issue, the court granted summary judgment in favor of

1 superior court, Safeco filed a declaratory action in federal court, seeking a

declaratory judgment that the Food Delivery Exclusion limited coverage for the accident to $15,000. That matter remains pending. 2 Morris agreement entered into when the insurer is defending under a reservation

of rights, under which the insured stipulates to a judgment, assigns his rights against the insurer to the claimant, and receives in return a covenant Parking Concepts, Inc. v. Tenney, 207 Ariz. 19, n.1 (2004). Safeco and ruled that Venable could not recover any portion of the stipulated judgment from Safeco:

Defendant Burton were dismissed with

prejudice, even if the dismissal was based on . . . no longer available to satisfy the stipulated

judgment. The Court in this ruling is not voiding the Morris agreement. This Court is available to satisfy that stipulated judgment,

due to the dismissal of the employee/agent which also released the employer/principal from any claims based on vicarious liability.

This appeal followed. 3

Jurisdiction

¶7 We have jurisdiction granting summary judgment and it a new trial pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a). Because the judgment presents the same questions as an appeal from the grant of

summary judgment, the denial of the motion to reconsider is not appealable and we lack jurisdiction to review it. See § 12-2101(A)(2) (allowing appeal but see Reidy v. O Malley Lumber Co., 92 Ariz. 130, 136 (1962) judgment is not appealable if the appeal presents the same question as

Discussion

¶8 On appeal, Venable argues the trial court erred by: (1) impermissibly considering liability as a basis for ignoring the Morris agreement; (2) improperly concluding the policy did not provide coverage to Burton for the liability established in the Morris agreement;

3 Venable first filed a motion to reconsider and a motion for new trial (3) improperly applying claim preclusion to the Morris agreement; (4) not

liability; (5) denying Venable ; (6) awarding attorney fees to Safeco; and (7) including Vicky Venable in

the summary judgment. See Jackson v. Eagle KMC L.L.C., 245 Ariz. 544, ¶ 7 (2019).

The Trial Court Did Not Ignore the Morris Agreement

¶9 Venable argues the trial court erred by considering the absence of Morris, 154 Ariz. 113, prohibits -litigating the liability or damage circumstances that According to Venable, Safeco is only permitted to challenge the Morris reasonableness or fraudulent behavior in reaching the settlement, and the

Morris Venable contends the

Morris, Associated Aviation Underwriters v. Wood, 209 Ariz. 137 (App. 2004), and Quihuis v. State Farm Mut. Auto. Ins., 235 Ariz. 536 (2014).

¶10 judgment did not ignore or invalidate the Morris agreement. Specifically,

Safeco argues the Morris agreement remains valid to the extent that it Wood, 209 Ariz. 137, does not apply because coverage for direct negligence did not require

relitigation of the facts supporting the agreement. Safeco also asserts Quihuis, 235 Ariz. 536, does not apply because that case was about an

¶11 As noted, a Morris entered into by an insured who stipulates to a judgment in favor of a third-

party tort claimant, when the insurer has defended the insured in the underlying litigation under a reservation of rights. Morris, 154 Ariz. at 119-20. A Morris insurer will only defend under a reservation of rights, to agree that judgment may be entered against the defendant in a specified amount with the understanding that the plaintiff will not execute on the judgment against the defendant. Munzer v. Feola, 195 Ariz. 131, ¶ 11 (App. 1999). that is, if the plaintiff prevails on the coverage issue, he may collect his judgment from the insurer to the extent that the judgment is reasonable and prudent. Id. And, on the insurer unless the insured or claimant can show that the settlement

Morris, 154 Ariz. at 120; Parking Concepts, Inc. v. Tenney, 207 Ariz. 19, ¶ 15 (2004).

¶12 In Wood after its insured entered a Morris agreement with the plaintiffs. 209 Ariz.

137, ¶¶ 10, 24. There, the insurer argued that even when the facts underlying the tort liability and coverage cases were the same, it should be permitted to relitigate those facts in the coverage case after its insured entered a Morris agreement. Id. ¶ 24. This court disagreed with the insurer Morris does not authorize, but rather essentially prohibits, an insurer s attempt in that context to litigate tort liability and damage Id. ¶ 37.

¶13 Here, however, Safeco did not seek to litigate Burton, liability Morris agreement with Venable. Rather, in its motion for summary judgment, it asked the court to find that in the event the Food Delivery Exclusion was e $100,000 auto-policy limit. Thus, Wood does not apply.

¶14 Next, Venable cites Quihuis, 235 Ariz. 536, and asserts that although our supreme court allowed the insurer in that case to dispute the limitations recognized in [Morris] and [Wood] and approved the holding in Wood Venable, however, does not explain how Quihuis supports his position, and merely

¶15 In Quihuis, our supreme court considered whether a default judgment entered pursuant to a Damron agreement 4 that stipulated facts determinative of both liability and coverage had a preclusive effect on the litigate coverage. Id. ¶ 1. There, the insurer declined to defend its insured because it believed the accident was not covered under the policy. Id. ¶¶ 3-4. 4

Morris agreement] entered into when the insurer refuses to defend is referred to as Damron Parking Concepts, 207 Ariz. 19, n.1 (citing Damron v. Sledge, 105 Ariz. 151 (1969)). a default judgment against an insured pursuant to a Damron or Morris agreement, that judgment will bind the insurer in a coverage case as to the existence and extent of the insured that the

basis for contesting coverage, irrespective of any fault or damages assessed Id. ¶ 38. In other words, an insurer is not bound by a stipulation between its insured and the plaintiffs as to facts essential to establishing coverage; rather, the insurer is free to litigate those facts in its coverage case. Id.

¶16 Here rather sought to litigate its exposure to a stipulated judgment based on the

terms of its insurance policy. That is, Safeco only sought to litigate its responsibility to satisfy the judgment not liability established in the Morris agreement. Under Quihuis, Safeco was not precluded from litigating the reasonableness of the Morris agreement or its exposure to the judgment s reliance on Quihuis is misplaced and we find no error on this point. T grant of summary judgment was not contrary to law. 5

¶17 Additionally, to the extent Venable argues the trial court he Morris agreement, we disagree. Venable made negligence in causing the accident; and

independent negligence in hiring, training, and/or supervising Burton. Here, the court did not consider the existence direct liability for their own negligence. Rather, the court considered s liability due to dismissal extinguished Walsh vicarious liability. The court concluded it did and In cases of vicarious liability, the We agree.

¶18 nder the doctrine of respondeat superior, an employer is - Kopp v. Physician Grp. of Ariz., Inc., 244 Ariz. 439, ¶ 9 (2018) (quoting Engler v. Gulf Interstate Eng g, Inc., 230 Ariz. 55, ¶ 9 (2012)).

Vicarious liability

5 We also note that because the Morris agreement did not establish liability as to Burton, Safeco would have been permitted to litigate the Wood, 209 Ariz. 137, and Quihuis, 235 Ariz. 536. results solely from the principal-agent relationship . . . . Id. It is well- settled that negligence of the agent, a judgment in favor of the agent bars the plaintiff s

vicarious liability claim against the principal, even when the judgment is Jamerson v. Quintero, 233 Ariz. 389, ¶ 6 (App. 2013); see also Chaney Bldg. Co. v. City of Tucson, 148 Ariz. 571, 574 hen a judgment

on the merits including a dismissal with prejudice is entered in favor of . . . there is no fault to impute and the party potentially vicariously liable . . . is not Law v. Verde Valley Med. Ctr., 217 Ariz. 92, ¶ 13 (App. 2007) (quoting A.R.S. § 12-2506(D) [A] party is responsible for the fault of another person, or for payment of the proportionate share of another person, if . . . [t]he other person was acting)).

¶19 and Walsh are vicariously liable for negligence. As noted, vicarious liability as to can only exist because of their principal-agent relationship with Burton. See Kopp, 244 Ariz. 439, ¶ 9. Here, however, the court dismissed Burton with prejudice, thus entering a judgment on the merits in his favor. See Ariz. R. Civ. P. 41(b) (with . Without any liability on the part of Burton,

there was no fault to impute to or Walsh; thus, they could not be held vicariously liable. See Law, 217 Ariz. 92, ¶ 13.

¶20 Lastly, the trial court specified that its ruling did not void the Morris agreement it satisfy that agent/employee released the principal/employer from any claims based

on vicarious liability. Thus, the court did not ignore or invalidate the Morris agreement.

The Policy Liability

¶21 Venable argues the trial court improperly concluded the by the Morris He asserts the policy requires Safeco to pay the damages established in the Morris damages for bodily injury or property damage for which any insured

According to Venable, the insured became legally responsible when the court signed and entered the stipulated judgment arising from the Morris agreement. 6

¶22 Safeco counters could only be considered an if Burton was found liable and that because the dismissal with prejudice rendered

Walsh. That is was extinguished with the dismissal of Burton, the only remaining bases

ere their own acts or omissions for which they could not be considered insureds. Safeco argues that because or Walsh directly, it is not obligated to or Walsh for any direct negligence on their part. We agree.

¶23 As to liability coverage, the Safeco policy reads, in relevant part:

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.

And, the section of the policy provides:

B.

6 Venable also argues there is no case law, policy, or equitable reason this argument. 1. You or any family member for the ownership, maintenance or use of any auto or trailer.

2. Any person using your covered auto with your express or implied permission. The actual use must be within the scope of that permission.

3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under B.1. and B.2. above.

¶24 here - and Walsh are neither family members nor persons step-father permitted to use the auto under B.2. and Walsh could only qualify in this instance to legal respo

under B.1. Because the trial court dismissed Burton from the suit with prejudice, he could not have been found legally responsible for the accident. neither nor Walsh could be Therefore, the policy does not cover notwithstanding their liability as established in the Morris agreement.

The Trial Court Did Not

¶25 Venable argues the trial court erred in applying claim preclusion because a judgment is not and claim preclusion only applies to rulings on claims entered after an agent is released from liability. Generally, we review de novo the application of claim preclusion. Howell v. Hodap, 221 Ariz. 543, ¶ 17 (App. 2009). Here, however, the court did not apply or base its ruling on claim preclusion, nor did

Safeco argue that claim preclusion applied. 7 Therefore, we need not address this argument.

7 Although the trial between claim preclusion and issue preclusion, issue preclusion did not

apply either. Waiver and Estoppel Do Not Apply

¶26 Venable argues Safeco waived any res judicata argument when it failed to raise the defense in its intervention complaint or its federal declaratory action, and waived its ability to challenge the validity of the Morris agreement because it did not do so in its intervention complaint or disclosure. Because the trial court did not grant summary judgment based on Safeco challenging the validity of the Morris agreement, we need not address this argument.

¶27 Next, Venable appears to argue that because Safeco litigated its intervention action and r over 2 years without ever claiming the dismissal against Burton undermined or voided the Morris because its failure to raise the argument earlier induced Venable to rely on He further asserts that although Rule 56(f), Ariz. R. Civ. P., allows the trial court to grant summary judgment on grounds not raised by a party, nothing states the trial court can simply ignore the pleadings and grant summary judgment based on a claim or contention never made over a two and one 8 We disagree.

¶28 Rule 56(f) fter giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmoving party; (2) grant summary judgment on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute. The trial court has broad discretion in granting summary judgment and by Rule by a party or if it independently determines no material facts are in dispute.

Compassionate Care Dispensary, Inc. v. Ariz. Dep t of Health Servs., 244 Ariz. 205, ¶ 14 (App. 2018).

¶29 Here, the trial court . . . is responsible due to the dismissal of . . . on its own, ordered the aforementioned issue, ty-one days to do so. Thus, the court gave the parties notice and a reasonable amount of time to respond in accordance

8 argument; thus, we do not address it. See Ariz. R. Civ. App. P. 13(a)(7)(A);

see also Brown v. U.S. Fid. & Guar. Co., 194 Ariz. 85, ¶ 50 (App. 1998) (rejecting assertion unsupported by argument or citation of authority). with Rule 56(f). A the issue, the court nce [Venable] claims against . . . Burton were dismissed with prejudice, even if the dismissal was based on . . . pretrial discovery sanctions policy was no longer available to satisfy the stipulated judgment. Because Rule 56(f)(2) plainly allows the court to grant summary judgment on grounds not raised by either party, we find no error.

Motion for New Trial

¶30 Venable argues the trial judge, who was newly assigned to the case after another judge granted the summary judgment, erred by denying his motion for a new trial pursuant to Rule 59, Ariz. R. Civ. P. In cursory fashion, he asserts that the issue by characterizing was reassigned to the judge through the normal court procedure. Venable,

however, cites no authority for this argument. Therefore, we do not address it. See Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must contain citations of legal authorities and supporting reasons for each argument); see also Brown v. U.S. Fid. & Guar. Co., 194 Ariz. 85, ¶ 50 (App. 1998) (rejecting assertion unsupported by argument or citation of authority).

Attorney Fee Award

¶31 On appeal, Venable argues the trial court erred in awarding itself as the prevailing party, as relief s We review the

§ 12-341.01 for an abuse of discretion, but we review de novo whether § 12-341.01 allows an award of attorney fees. See Tucson Estates Prop. Owners Ass n v. McGovern, 239 Ariz. 52, ¶ 7 (App. 2016).

¶32 Here, the trial court awarded Safeco $45,000 in attorney fees. Although the court did not make specific findings on the record as to its determination that Safeco was a successful party for purposes of awarding attorney fees pursuant to § 12-341.01 or its determination of the amount to award Peterson v. City of Surprise, 244 Ariz. 247, ¶ 25 (App. 2018).

¶33 Venable contends that, although the judgment ruling concluded able to satisfy

the judgment, the ruling party, and therefore, Safeco is not entitled to attorney fees under § 12-341.01. Venable also asserts the $45,000 award to Safeco was inequitable and the court abused its discretion by failing to consider the factors outlined in Associated Indemnity Corp. v. Warner, 143 Ariz. 567 (1985). Safeco counters that because this action arose from a contract the insurance policy agreement between -father and Safeco prevailed as the Superior Court determined that it was not liable to it was entitled to attorney fees under § 12-341.01(A). Safeco also asserts the court properly weighed the factors outlined in Warner, 143 Ariz. 567, and did not abuse its discretion.

¶34 Section 12-341.01(A) arising out of a contract. party for the

purposes of attorneys fees is within the trial courtVortex Corp. v.

Denkewicz, 235 Ariz. 551, ¶ 39 (App. 2014) (quoting Berry v. 352 E. Virginia, L.L.C., 228 Ariz. 9, ¶ discretion, role, and experience, may determine the prevailing party from

respective financial position Bobrow v. Bobrow, 241 Ariz. 592, ¶ 25 (App. 2017).

¶35 Once the trial court has determined the prevailing party and decided to award attorney fees pursuant to § 12-341.01(A), ward of reasonable attorney fees . . . should be made to mitigate the burden of the § 12- 341.01(B). of discretion. Rudinsky v. Harris, 231 Ariz. 95, ¶ 27 (App. 2012). In

exercising its discretion, the court should consider:

[T]he merits of the unsuccessful party s claim, whether the claim could have been avoided or settled, whether the successful party s efforts were completely superfluous in achieving the result, whether assessing fees against the unsuccessful party would cause an extreme hardship, whether the successful party did not prevail with respect to all of the relief sought, the novelty of the legal question presented, and whether an award to the prevailing party would discourage other parties with tenable claims from litigating legitimate contract issues for fear of incurring liability for substantial amounts of attorneys fees.

Fulton Homes Corp. v. BBP Concrete, 214 Ariz. 566, ¶ 10 (App. 2007) (quoting Uyleman v. D.S. Rentco, 194 Ariz. 300, ¶ 27 (App. 1999)). Id. ¶ 15. And although a

eed not make findings on the , 233 Ariz. 94, ¶ 21 (App. 2013).

¶36 Although the trial court did not make a specific finding that Safeco was a prevailing party, the court had the discretion to do so. See Vortex Corp., 235 Ariz. 551, ¶ 39. And, given the circumstances of this case, we conclude there was a reasonable basis for the court to find Safeco had prevailed. See Bobrow, 241 Ariz. 592, ¶ 25. As Venable notes, Safeco did not seek relief from all responsibility to satisfy the stipulated judgment, but rather sought only to have its maximum exposure capped at $100,000. Venable, however, cites no authority, and we find none, requiring a party to receive the specific relief requested in order to be a successful party under § 12-341.01(A). Here, Safeco obtained relief that was more favorable than the relief it requested: rather than having its maximum responsibility being limited to $100,000, Safeco was relieved of all responsibility and is required to pay nothing to Venable.

¶37 Next, we review whether the trial court acted within its discretion in awarding $45,000. See Rudinsky, 231 Ariz. 95, ¶ 27. First, when Burton was dismissed, as his dismissal extinguished any vicarious

liability claims again policy did not cover their direct negligence. Second, Safeco attempted to settle by offering the $15,000 Food Delivery Exclusion limit on multiple occasions. Third, because the result. Fourth, Venable properly asserted of Safeco would create a severe hardship to [his] current living status in a

sworn affidavit. See Woerth v. City of Flagstaff, 167 Ariz. 412, 420 (App. 1990) (party asserting hardship must present specific facts by affidavit or testimony). Fifth, although Safeco sought only to

have its responsibility to satisfy the Morris judgment capped at a particular amount, the end result went above and beyond the relief sought. Thus, Safeco prevailed with that judgment from the Morris affect the judgment; his dismissal simply extinguished any vicarious liability claims for which Safeco could be responsible. The issue of whether ility is not novel. See Jamerson, 233 Ariz. 389, ¶ 6; see also Chaney Bldg. Co., 148 Ariz. at 574. Finally, an attorney fee award would not discourage other parties with tenable claims from litigating similar cases or pursuing Morris agreements because the dismissal of Burton, which ultimately released Safeco from all responsibility, was a sanction against Venable for his failure to comply with court orders. Based on these factors, we cannot say the court abused its discretion in awarding Safeco $45,000 in attorney fees. See Rudinsky, 231 Ariz. 95, ¶ 27.

Inclusion of Vicky Venable in Form of Judgment

¶38 no basis to include because the previous trial judge dismissed Vicky from the action in connection with the court dismissed Burton. Venable, however, cites no authority for this argument; therefore, we do not address it. See Ariz. R. Civ. App. P. 13(a)(7)(A); see also Brown, 194 Ariz. 85, ¶ 50.

Attorney Fees

¶39 Safeco seeks attorney fees and costs pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. §§ 12-341 and 12-341.01(A). Because the action underlying this litigation arises from a contract, we award Safeco reasonable attorney fees against Venable under § 12-341.01. And, as the prevailing party, Safeco is entitled to taxable costs pursuant to § 12-341 upon compliance with Rule 21.

Disposition

¶40 For the reasons above, we affirm.