Larrison v. Westfield Ins. Co.

2024-Ohio-4591 (2024) | Cited 0 times | Ohio Court of Appeals | September 19, 2024

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bryan Larrison et al., :

Plaintiffs-Appellants/ : [Cross-Appellees], v. : No. 23AP-368 (C.P.C. No. 20CV-2989) Westfield Insurance Company et al., : (REGULAR CALENDAR) Defendants-Appellees, :

[American Select Insurance Company], :

Defendant-Appellee/ : [Cross-Appellant]. :

D E C I S I O N

Rendered on September 19, 2024

On brief: The Tyack Law Firm Co., L.P.A., James P. Tyack, Madison Mackay, and Cecilia M. Hardy, for appellants/cross-appellees. Argued: James P. Tyack.

On brief: Teetor Westfall, LLC, J. Stephen Teetor, Matthew S. Teetor, and Sarah A. Lodge, for appellee/cross- appellant. Argued: Matthew S. Teetor.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Plaintiffs-appellants/cross-appellees, Bryan and Asia Larrison, appeal from a judgment of the Franklin County Court of Common Pleas in the favor in the amount of $36,000. Defendant-appellee/cross-appellant, American Select Insurance Company , appeals from the same judgment. For the following reasons, we affirm the judgment. I. Facts and Procedural History {¶ 2} The Larrisons own a home in Dublin that was insured by American Select from August 28, 2019 to August 28, 2020. On September 1, 2019, there was a wind and regarding roof damage allegedly caused by the storm.

{¶ 3} American Select obtained two before . The first inspection, by Chris Mergel of Syndicate Claim Services, Inc., occurred on September 25, 2019. Mergel [w] (Dec. 8, 2022

Mot. for Summ. Jgmt, Ex. E at 2.) Mergel recommended that American Select reserve $1,000 to cover the damage to the kitchen ceiling. {¶ 4} Tim McParland, a professional engineer employed by EES Group, performed called CoreLogic. (. for Summ. Jgmt, Ex. H at 3.) McParland explained that

fell at the on September 1, 2019. Id. at 2-3. However, after inspecting damage (i.e., hail-strike bruises) to the asphalt sh Id. at 7. McParland opined as to

size of the hailstones based on his measurements of the dents in the soft metal surfaces on the roof. McParland found dents consistent with hailstone impacts measuring up to in diameter on the flue cap and skylight flashings. McParland explained:

The threshold for functional damage to asphalt shingles from hail impacts begins when hailstones reach 1- diameter. The size (diameter) of the hail that likely fell on the

subject property was approximated by the inspection of the metal surfaces and measurements of the impact marks that appeared consistent with hail-strikes. For hailstones measu ranges from 1-1/2 to 2-1/2 times the diameter of the inner dent

created upon impact with the most common metal surfaces on average (Petty 2013). * * * The inner dents of the impact marks diameter[,] indicating the hailstones may have ranged conservatively from 3/4" to 1- account the average multiplier and the maximum inner dent in diameter, which was not likely of sufficient size to cause

functional damage to asphalt shingles.

Id. {¶ 5} McParland also found that the absence of hail-strike bruises on the shingles confirmed his calculation of the hailstone size. Hail-strike bruises are caused when

a hailstone fractures the asphalt mat of a shingle. According to McParland, his inspection of the Larrisons roof found Id. {¶ 6} Finally, McParland identified multiple issues partially unadhered shingles; weathered, exposed adhesive strips; nail pops; and severe blistering, spot defects, granule loss, and thermal tears in the roof surfaces. However, McParland did not attribute any of the issues he observed to wind damage. {¶ 7} Based on s, American Select denied the Larrisons insurance claim for storm damage to their roof. On May 1, 2020, the Larrisons filed a complaint with the trial court alleging that American Select breached the insurance insurance claim and refusing to pay the full cost of roof repairs and replacement. {¶ 8} Prior to trial, American Select filed two motions. First, American Select moved for summary judgment on the bad faith claim. American Select contended that reasonable minds could only conclude that evaluations of the for roof repairs and replacement.

{¶ 9} The Larrisons opposed the motion for summary judgment, arguing that reasonable minds could differ regarding whether American Select lacked good faith. The Larrisons pointed out that McParland had conceded that hailstones had struck the roof, and that CoreLogic had demonstrate at trial that American Select relied on biased inspections and ignored reports,

commissioned by the Larrisons, that concluded that the September 1, 2019 storm caused . {¶ 10} faith claim. was damaged from the September 2019 hailstorm, the denial of coverage thus falls under

McParland * * * concluded that the roof damage was * * * not from the September 2019

hailstorm[,] provid[ing] claim at that time. May 8, 2023 Order & Entry at 7-8.)

{¶ 11} In the second motion filed before trial, American Select moved in limine to exclude all evidence regarding whether other Dublin residents were successful in their insurance claims for roof damage resulting from the September 1, 2019 storm. American Select argued that the evidence at issue was inadmissible hearsay, as the Larrisons intended to testify as to what their neighbors said about their insurance claims. American Select also argued that sustained damage. To support this argument, American Select relied on an expert affidavit.

The expert testified that whether any individual roof sustains direct physical loss caused by hail depends on multiple factors, including the age of the roof, the type of shingle, the slope of the roof, and the force and size of the hail, which can vary significantly over a short distance. American Select also pointed out that insurance coverage depends on the terms and conditions of the specific policy purchased by the resident and whether the insurer chooses to investigate or simply accept a claim. Given these differences, American Select argued that proof that neighbors had recovered from their insurers for storm damage to their roofs had no bearing on whether the Larrisons had also suffered a covered loss. {¶ 12} - testimony, counsel proffered that Bryan Larrison would testify that he:

observed many, many houses, perhaps not all, but a large majority of the homes in his neighborhood had their roofs replaced at a time that is directly, I think, related to common sense explained by the hail storm in September of 2019. And that it did have an impact on him to take further action, including continuing to pursue coverage by his insurance company due to his understanding and also, basically, common sense.

(May 17, 2023 Tr. Vol. II at 123-24.) The trial court ruled that this evidence was inadmissible. {¶ 13} The parties tried the breach-of-contract claim to the jury. At the conclusion of trial, a nonunanimous jury returned a verdict in favor of the Larrisons and awarded them 2023.

II. Assignments of Error {¶ 14} The Larrisons now appeal from the May 22, 2023 judgment, and they assign the following errors: [1.] The trial court erred in granting Defendant- Motion for Summary Judgment on the issue of bad faith one

week before trial.

[2.] The trial court abused its discretion and materially prejudiced Plaintiffs-Appellants by excluding evidence of hailstorm damage caused to surrounding homes within Plaintiffs-

{¶ 15} American Select cross-appeals from the May 22, 2023 judgment, and it assigns the following errors: [1.] IT WAS ERROR TO ENTER JUDGMENT AWARDING DAMAGES TO PLAINTIFFS WHEN THREE (3) OF THE JURORS SPECIFICALLY FOUND NO RECOVERABLE DAMAGES WERE SUSTAINED[.]

[2.] WHEN OUTCOME DETERMINATIVE INTERROGATORIES ARE INCONSISTENT WITH THE GENERAL VERDICT FORM, AND THE JURORS WERE INADVERTANTLY PERMITTED TO OVERHEAR OFF-THE- RECORD SIDEBAR DISCUSSIONS WITH THE COURT ABOUT THE SAME, A MISTRIAL SHOULD HAVE BEEN GRANTED[.]

[3.] WHERE THERE IS EVIDENCE FROM WHICH A JURY COULD FIND THAT PLAINTIFFS DID NOT DISCLOSE, AND LATER CONCEALED, MATERIAL FACTS CONCERNING THEIR INSURANCE CLAIM, THE TRIAL COURT ERRED IN FAILING TO INCLUDE REQUESTED JURY INSTRUCTIONS FOR MATERIAL MISREPRESENTATION, DUTY TO COOPERATE, INTENT TO MISLEAD, JUSTIFIABLE RELIANCE, AND DUTY TO SPEAK, PARTIAL DISCLOSURE, AND THE COURT SHOULD HAVE SUBMITTED THE PROPOSED JURY INTERROGATORY REGARDING WHETHER PLAINTIFFS KNOWINGLY CONCEALED OR INTENTIONALLY FAILED TO DISCLOSE MATERIAL FACTS[.]

III. Analysis A. Summary Judgment on the Bad Faith Claim {¶ 16} By their first assignment of error, the Larrisons argue that the trial court erred in granting American Select summary judgment on their bad faith claim. We disagree. {¶ 17} A trial court must grant summary judgment under Civ.R. 56 when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. A.J.R. v. Lute, 163 Ohio St.3d 172, 2020- Ohio-5168, ¶ 15; McConnell v. Dudley, 158 Ohio St.3d 388, 2019-Ohio-4740, ¶ 18. Appellate review of a trial court s ruling on a motion for summary judgment is de novo. A.J.R. at ¶ 15. This means that an appellate court conducts an independent review, without deference to the trial court s determination. Schumacher v. Patel, 10th Dist. No. 23AP-254, 2023-Ohio-4623, ¶ 16; Coppo v. Fixari Family Dental Practice, LLC, 10th Dist. No. 21AP- 593, 2022-Ohio-1828, ¶ 9. {¶ 18} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no

genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); Dresher at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Dresher at 293. {¶ 19} Under Ohio law, an insurer has a duty to act in good faith in the processing and payment of the claims of its insured. Scott Fetzer Co. v. American Home Assurance Co. Inc., 173 Ohio St.3d 256, 2023-Ohio-3921, ¶ 22; Kamnikar v. Florita, 10th Dist. No. 16AP-736, 2017-Ohio-5605, ¶ 20 to pay the claim [of its insured] is not predicated upon circumstances that furnish

Zoppo v. Homestead Ins. Co., 71 Ohio St.3d 552 (1994), paragraph one of the syllabus. Reasonable justification is lacking where an insurer refuses to pay a claim for an arbitrary or capricious reason. Jenkins v. State Farm Mut. Auto. Ins. Co., 10th Dist. No. 11AP-1074, 2013-Ohio-1142, ¶ 41; Dorsey v. Campbell Hauling, 10th Dist. No. 02AP-961, 2003-Ohio-3341, ¶ 19; accord Hoskins v. Aetna Life Ins. Co., 6 Ohio St.3d 272, 277 (1983), quoting Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 188 (1949) n insured insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, * * * .

{¶ 20} On summary judgment, courts assess bad-faith-denial-of-coverage claims Smith v. Allstate Indemn. Co., 304 Fed. Appx. 430, 432 (6th Cir.2008). [T]o grant a motion for summary judgment brought by an insurer on the issue of whether it lacked good faith in the iewing the evidence in a light most favorable to the insured, that the claim was fairly debatable and the refusal was premised on either the status of the law at the time of the denial or the facts that gave rise Tokles & Son, Inc. v. Midwestern Indemn. Co., 65 Ohio St.3d 621, 630 (1992); accord Dorsey at ¶ 19, quoting Tokles at 630 where the claim i over either the facts giving rise to the claim or the status of the law at the time the claim was

show that the insurer had no reasonable justification for refusing the claim. 1 Tokles at 630.

1 We recognize that Tokles actually requires an insured to oppose a motion for summary judgment with which tends to show that the insurer had no reasonable justification for refusing the claim, and the insurer either had actual knowledge of that fact or intentionally failed to determine whether there was {¶ 21} to their roof based on two inspections. Mergel reported to American Select that he observed no storm- Mergel noted water $1,000 to pay for repair of the ceiling. McParland, who conducted a more thorough

inspection of the roof determined that the hailstones that struck the roof were a sufficient size to cause functional damage (i.e., hail-strike bruises)

. for Summ. Jgmt., Ex. H at 7.) Indeed, McParland found 0.0 hail-strike bruises per 100 square feet of area for all roof slopes. While -readily visible cosmetic damage consistent with hailstone roof

surfaces consistent with hailstone impacts. Id. at 8.

{¶ 22} justification for concluding that the Larrisons had not sustained a covered loss and denying

their claim. Although the Larrisons presented evidence that hail had functionally damaged their roof, this evidence only made their claim fairly debatable; it did not create a question of fact precluding summary judgment on the bad faith claim. As we stated above, an insurer may deny a claim where the claim is fairly debatable and the denial is based on a genuine dispute over the facts giving rise to the claim. Tokles, 65 Ohio St.3d at 630; Dorsey, 2003- Ohio-3341, at ¶ 19. {¶ 23} In arguing that American Select lacked a reasonable justification for denying evaluation of their home. Select because Mergel did not observe any hail damage and only recommended a $1,000

reserve. Because of this alleged serve as reasonable justification for rejecting their claim. The Larrisons did not raise this

any reasonable justification for refusing the claim. (Emphasis added.) Id. at 630. However, in Zoppo, the Supreme Court of Ohio removed the intent element from the bad faith cause of action. Id., 71 Ohio St.3d at 555. Therefore, to prevail on a bad faith claim, an insured no longer needs to produce evidence that the insurer had actual knowledge that it lacked a reasonable justification or intentionally failed to determine if a reasonable justification existed. Consequently, we eliminate from our analysis the portion of Tokles that is no longer consistent with prevailing law. argument in the trial court. Generally, a party waives the right to appeal an argument that the party could have, but did not, raise before the trial court. West v. Bode, 162 Ohio St.3d 293, 2020-Ohio-5473, ¶ 43. before the trial court, we will not consider it as a reason for reversing the grant of summary

judgment. {¶ 24} Moreover, McParland, a professional engineer, with determining

functional hail damage to the roof.

{¶ 25} The Larrisons contend that report because

would cause functional damage to a roof.) the CoreLogic estimate. Instead, McParland disagreed with CoreLogic estimate due to the

size of the dents in the soft metal surfaces on the roof. In his report, McParland explained that: size typically ranges from 1-1/2 to 2-1/2 times the diameter of

the inner dent created upon impact with the most common metal surfaces on average (Petty 2013). * * * The inner dents of the impact marks observed on the metal surfaces measured ranged conservatively from 3/4 to 1- into account the average multiplier and the maximum inner

dent diameter, the size of the hail that fell on the home was

cause functional damage to asphalt shingles.

. for Summ. Jgmt., Ex. H at 7.) {¶ 26} McParland, therefore, provided a reasonable scientific and factual basis for his opinion as to the size of the hailstones Consequently, the Larrisons did evaluation of the roof {¶ 27} Finally, the Larrisons argue that we should adopt a different bad faith standard because an insurer need only hire an expert willing to support the denial of an insurance claim to obtain summary judgment on a bad faith claim. As an intermediate appellate court, we must follow precedent set by the Supreme Court of Ohio. State v. Tatom, 10th Dist. No. 17AP-758, 2018-Ohio-5143, ¶ 24. Here, the Supreme Court determined the applicable law in Zoppo, Tokles, and Hoskins, and we cannot deviate from it. {¶ 28} In sum, we conclude that the trial court did not err in granting American

B. Evidence of the Damage

{¶ 29} By their second assignment of error, the Larrisons argue that the trial court erred in excluding evidence that the neighbors used insurance proceeds to replace their roofs. We disagree. {¶ 30} A motion in limine is a tentative, precautionary request to limit inquiry into a specific area until admissibility is determined during trial. Gable v. Gates Mills, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 35; accord Morgan v. Ohio State Univ., 10th Dist. No. 13AP- 287, 2014-Ohio-1846, ¶ 34 (holding that an in limine order is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue). Decisions regarding the admissibility of evidence are within the discretion of the trial court. Banford v. Aldrich Chem. Co., Inc., 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 38; Beard v. Meridia Huron Hosp., 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20. Thus, because discretion that amounted to prejudicial error. Fairrow v. OhioHealth Corp., 10th Dist. No.

19AP-828, 2020-Ohio-5595, ¶ 55. {¶ 31} preventing the Larrisons from testifying that their neighbors had insurance claims

would testify that he: observed many, many houses, perhaps not all, but a large majority of the homes in his neighborhood had their roofs replaced at a time that is directly, I think, related to common sense explained by the hail storm in September of 2019. And that it did have an impact on him to take further action, including continuing to pursue coverage by his insurance company due to his understanding and also, basically, common sense.

(May 17, 2023 Tr. Vol. II at 123-24.) The trial court excluded this proffered testimony. {¶ 32} proffer does not include an important element: his belief that the That, of course, was the information the motion in limine sought to exclude. Moreover, the missing information is the bit that arguably knew out-of-court statements. In their appellate brief, the Larrisons ignore this deficiency in the proffer. For the purpose of , we will assume that the proffer included the missing information. {¶ 33} The

Larrisons must surmount two evidentiary hurdles: hearsay and relevancy. 801(C). An out-of-court statement offered to prove something other than the truth of the

matter asserted is not hearsay. State v. Osie, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 118. as hearsay. United States v. Boyd, 640 F.3d 657, 664 (6th Cir.2011); State v. Stanford, 6th Dist. No. H- 17-010, 2018-Ohio-2983, ¶ 37; accord Osie at ¶ 122, quoting 2 McCormick, Evidence, § 249, at 191 (7th Ed.2013) (Footnotes omitted.) not subject to attack as hearsay when its purpose is to establish the state of mind thereby

{¶ 34} existence of any fact that is of consequence to the determination of the action more probable {¶ 35} The Larrisons maintain that the disputed testimony does not constitute hearsay because they did not intend to offer it for the truth of the matter asserted. Instead, the Larrisons contend, they intended to offer the testimony to show that they were on notice that their neighbors had filed successful insurance claims for storm damage, and they, too, may have viable insurance claims. If the Larrisons intended to use the disputed testimony to show they knew they may have a viable insurance claim, then that testimony would not constitute hearsay. {¶ 36} The Larrisons, however, still need to establish the relevancy of their knowledge to their claim for breach of contract. Yet, the Larrisons make no argument as to how their knowledge of a potentially viable insurance claim is relevant to establishing a breach of contract. Rather, the Larrisons pivot and argue that the disputed testimony is relevant to prove the magnitude of the damage to their roof. In short, the Larrisons would have a fact finder infer from the testimony significant covered losses from the September 1, 2019 storm, the Larrisons did, too.

However, to arrive at this inference, a fact finder would have to consider the disputed testimony for the truth of the matter asserted, which would render it hearsay. Because the disputed evidence must simultaneously satisfy both relevancy and hearsay evidentiary nt fails. {¶ 37} To establish a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract, (2) performance by the plaintiff under the contract, (3) breach of the contract by the defendant, and (4) damages or loss resulting from the breach. Lucarell v. Nationwide Mut. Ins. Co., 152 Ohio St.3d 453, 2018-Ohio-15, ¶ 41; Campbell v. 1 Spring, LLC, 10th Dist. No. 19AP-368, 2020-Ohio-3190, ¶ 5. Given the elements of the claim for breach of contract, we do not see how the of the potential viability of their insurance claim would tend to make any fact of consequence more probable than it would be without the evidence. At most, would explain their motive for their continued pursuit of their insurance claim. That motive, however, is not a consideration in determining whether American Select breached the insurance policy. {¶ 38} In sum, we conclude that the trial court did not abuse its discretion in excluding the disputed testimony on hearsay and/or relevancy grounds. Accordingly, we C. Waiver of Cross-Appeal {¶ 39} In a typical case, we would now assignments of error. However, during oral argument, American Select stated that if this

court overruled the Larrisons two assignments of error, it waived its cross-appeal. Based upon this representation determine that American Select has waived its cross-appeal, and we thus dismiss it.

IV. Conclusion {¶ 40} -appeal. We affirm the judgment of the

Franklin County Court of Common Pleas. Judgment affirmed. MENTEL, P.J. and LUPER SCHUSTER, J., concur.