IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-206

No. COA20-483

Filed 4 May 2021

Wake County, No. 19CVS1197

MICHAEL J. WHITE, Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND OAK TREE AGENCY OF RALEIGH, LLC, Defendants.

Appeal by Plaintiff from order entered on 17 December 2019 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 10 March 2021.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr., for Plaintiff-Appellant.

Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Kara V. Bordman, Robert C. Cratch, and Kenneth B. Rotenstreich, for Defendant-Appellees.

JACKSON, Judge.

¶ 1 The issue in this case is whether the trial court erred in granting summary judgment in favor of Allstate Insurance Company ("Allstate") and Oak Tree Agency of Raleigh, LLC ("Oaktree Agency") (collectively "Defendants") on Michael White's ("Plaintiff") claim for unfair and deceptive trade practices. Because the evidence,

when viewed in the light most favorable to Plaintiff, raised genuine issues of fact that should have been decided by a jury, we reverse and remand this matter for further proceedings.

I. Factual and Procedural Background

¶ 2 Plaintiff procured an Allstate Automobile Liability policy effective 31 January 2000 for a 1966 Ford Mustang, from the predecessor of Oak Tree Agency, which was owned and operated by Allstate agent, Tony Sheets ("Mr. Sheets"). In late 2007, Plaintiff restored the Mustang and notified Mr. Sheets about his interest in obtaining "classic car insurance." Mr. Sheets requested that Plaintiff bring his Mustang to the agency's branch for an inspection and appraisal. Plaintiff did as requested, bringing along receipts for the recent work performed on the Mustang. After inspecting the Mustang, Mr. Sheets represented that he would change Plaintiff's coverage so that, in the event of a collision, Plaintiff's policy would pay him the value of the car—which, at the time, they agreed was $24,000.

¶ 3 During Plaintiff's conversations with Mr. Sheets, Plaintiff referred to the coverage as "classic car insurance," which Plaintiff understood would fully cover the $24,000 value of the Mustang in the event of a collision. Mr. Sheets informed Plaintiff that Allstate could provide him with classic car insurance coverage and that Plaintiff's new policy would extend to such coverage.

¶ 4 In 2008, Plaintiff received an amended policy and enclosure letter from

Allstate, verifying changes to Plaintiff's insurance policy. The amended policy provided that Plaintiff's collision coverage was limited to "$24,000 or actual cash value"—signifying a change from the original policy's limit of actual cash value. As a result of this change, Plaintiff believed that the policy would pay him $24,000 in the event of a collision—it being Plaintiff's understanding that the appraisal done by Mr. Sheets provided that the actual cash value of the car was in fact $24,000. Plaintiff's understanding of the policy was confirmed by: (1) representations made by Mr. Sheets; (2) Plaintiff's review of the policy; and (3) a letter from Allstate indicating "[a] change in the vehicle rating group for the 66 Ford[,]" and a $100.10[1] increase in premium payments. Since 2008, Plaintiff paid the increasing premiums, believing the increased premiums were commensurate with the added protections of classic car insurance coverage.

¶ 5 In February 2011, Oak Tree Agency was purchased from Mr. Sheets by Wynne Dunn ("Mr. Dunn"). As a result of the sale, Mr. Dunn became Plaintiff's servicing agent and engaged in several conversations with Plaintiff about his coverage and his Mustang.

¶ 6 On 17 July 2019, Plaintiff's Mustang was damaged when it was hit by a City

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[1] This represented a $145.78 increase in the premium for the Mustang—a 315% increase in auto collision insurance coverage and a 490% increase in comprehensive coverage. The policy also insured other vehicles though. While some premiums under the policy decreased, the total amount of the premiums increased $100.10.

of Raleigh garbage collection truck. On 7 August 2015, Allstate performed an appraisal of the damaged Mustang and determined that the post-collision actual cash value was $5,297—the maximum amount Allstate would agree to pay Plaintiff under the policy. Plaintiff demanded that Allstate pay him $24,000 pursuant to the policy; however, Allstate refused.

¶ 7 In August 2015, Plaintiff met with Mr. Dunn to express his concerns about the situation. During the meeting, Mr. Dunn told Plaintiff that he had been misinformed by Mr. Sheets about the coverage Plaintiff was sold, as Allstate did not offer classic car insurance coverage. Moreover, Plaintiff should have been paying premiums far below what Allstate had charged him for the coverage Allstate claimed that he had, according to Mr. Dunn. Mr. Dunn emailed Allstate about the meeting that day. In the email, Mr. Dunn noted that he believed Plaintiff had been misinformed about his insurance coverage many years prior. Additionally, Mr. Dunn asked if "there was any way to help [Plaintiff] receive some type of refund on his premiums for all of these years of being over insured." Allstate, however, continued to reject Plaintiff's claim.

¶ 8 In response, Plaintiff contacted the North Carolina Department of Insurance ("NCDOI") to investigate the claim. During the investigation, Plaintiff's father fell terminally ill, and Plaintiff moved to Georgia. Due to Plaintiff's absence, NCDOI could not complete its investigation.

¶ 9 Upon Plaintiff's return to North Carolina, Plaintiff contacted an agent from

Hagerty Insurance ("Hagerty") to receive a quote for classic car coverage for his Mustang. On 15 October 2018, Hagerty quoted Plaintiff a $24,000 "guaranteed value" policy for a total annual premium of $221.67, which was significantly lower than the $892.60 annual premium Allstate charged Plaintiff. Hagerty also opined that Plaintiff's unrepaired Mustang was worth at least $11,000. Plaintiff shared this information with Defendants, but they continued to refuse to pay Plaintiff the $24,000.

¶ 10 On 16 July 2018, Plaintiff filed a *pro se* verified complaint against Defendants in Wake County District Court alleging claims for breach of contract, fraud or negligent misrepresentation, and unfair and deceptive trade practices ("UDTP"). However, after retaining counsel and due to service issues, Plaintiff voluntarily dismissed the action without prejudice.

¶ 11 On 25 January 2019, Plaintiff instituted the current action by filing a complaint reasserting his UDTP claims and seeking damages, treble damages, and attorneys' fees. Defendants were served the same day. Defendants filed an Answer on 11 April 2019 and an Amended Answer on 13 August 2019. On 2 December 2019, Defendants filed a motion for summary judgment. On 13 December 2019, Plaintiff filed an affidavit verifying his complaint and providing further testimony.

¶ 12 The motion came on for hearing on 17 December 2019 before the Honorable William R. Pittman in Wake County Superior Court. After hearing oral argument,

the trial court granted summary judgment in favor of Defendants. Plaintiff timely filed notice of appeal on 18 February 2020.

II. Analysis

A. Jurisdiction

¶ 13 As an initial matter, the Court needs to address the jurisdictional issue both parties stipulated to in the record. Pursuant to Rule 3(c) of the North Carolina Rules of Appellate Procedure, "a party must file and serve notice of appeal within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil procedure." If the party has not been served within the three-day period, the party must file and serve notice of appeal "within thirty days after service upon the party of a copy of the judgment." N.C. R. App. P. 3(c)(2).

¶ 14 Here, the order granting summary judgment in favor of Defendants was filed on 17 December 2019. Plaintiff filed his notice of appeal on 18 February 2020, nearly sixty days after the judgment—making notice of appeal potentially untimely. However, the parties have stipulated that Plaintiff was never served with a copy of the judgment.

¶ 15 Generally, we lack jurisdiction to hear an appeal when a notice of appeal is untimely. N.C. R. App. P. 27(c). However, "Rule 21(a)(1) [of the North Carolina Rules of Appellate Procedure] gives an appellate court the authority to review the merits of

an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). Further, this Court has the discretion to treat an appeal as a petition for certiorari in appropriate circumstances. *In re M.L.T.H.*, 200 N.C. App. 476, 481, 685 S.E.2d 117, 121 (2009). "A writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right of appeal has been lost by failure to take timely action or where no right to appeal from an interlocutory order exists." *Harbin Yinhai Tech. Dev. Co., Ltd. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 620, 677 S.E.2d 854, 858 (2009) (internal marks and citation omitted). Accordingly, we treat the Plaintiff's brief as a petition for a writ of certiorari, grant that petition, and reach the merits of Plaintiff's appeal.

B. Standard of Review

¶ 16 On appeal, this Court reviews a trial court's motion for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

¶ 17 Summary judgment is proper when, "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 any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2019). "The burden is on the moving party to show that there is no triable issue of fact and that he is entitled to judgment as a matter of law. In deciding the motion, all inferences of fact

. . . must be drawn against the movant and in favor of the party opposing the motion." *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 391, 594 S.E.2d 37, 40 (2004) (internal marks and citations omitted).

C. Plaintiff's Affidavit

¶ 18 First, Defendants argue that Plaintiff's affidavit was not properly before the trial court because it was not timely filed and that summary judgment was therefore proper because there was no genuine issue of material fact with respect to Plaintiff's UDTP claim in the absence of this affidavit. We disagree, and hold that it was not an abuse of discretion for the trial court to admit the untimely affidavit.

¶ 19 Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, "[t]he adverse party may serve opposing affidavits at least two days before the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). Because the time allowed to serve an affidavit is less than seven days, "intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." *Id.*, Rule 6(a). However,

> [i]f [an] opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.

Id., Rule 56(c). Rule 6(d) likewise authorizes trial courts to admit untimely filed affidavits. *Id.*, Rule 6(d).

¶ 20 "The trial court's admission of an untimely served affidavit under Rule 6(b) and (d) of the North Carolina Rules of Civil Procedure is reviewed under an abuse of discretion [standard]." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 417, 637 S.E.2d 551, 553 (2006) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis,* 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (internal citation omitted).

¶ 21 Plaintiff concedes that his affidavit was not timely filed. The motion was scheduled for hearing on Monday, 16 December 2019. Thus, Plaintiff was required to file the affidavit by Thursday, 12 December 2019—two days before the hearing, excluding the Saturday and Sunday that immediately preceded it. Instead, Plaintiff filed his affidavit on Friday, 13 December 2019—one day late.

¶ 22 We hold that the trial court's decision to admit the untimely affidavit filed by Plaintiff was not an abuse of discretion. The affidavit did not contain any additional allegations or claims that were not already introduced to Defendants by way of the complaint or exhibits thereto. Moreover, Defendants did not ask for a continuance or argue that they were prejudiced by the trial court's decision to exercise its discretion and allow the affidavit. We are therefore unable to say that admitting the affidavit was "manifestly unsupported by reason or [ ] so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 23 N.C. at 285, 372 S.E.2d at 527 (internal

citation omitted).

D. General Release

¶ 23 Next, Defendants argue that Plaintiff's claim is barred by a General Release executed by Plaintiff on 13 July 2018. We disagree.

¶ 24 Before filing his complaint, Plaintiff had asserted a claim against the City of Raleigh for damages caused by the garbage collection truck. This claim was resolved before Plaintiff filed suit against Defendants in a General Release, which released

> [the] City of Raleigh, Jonathan Burgess, the North Carolina League of Municipalities . . . and also all other persons, associations, and corporations, whether herein named or referred to or not and who, together with the above named, may be jointly and severally liable to the Undersigned . . . arising from . . . injuries or death or damages to property, and the consequences thereof."

In consideration for signing the release, Plaintiff was compensated $4,322.11.

¶ 25 Generally, "[a] release is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised." *Barefoot*, 163 N.C. App. at 392, 594 S.E.2d at 41 (internal marks and citation omitted). When executed properly, it "operates as a merger of, and bars all rights to recover on, the claim or right of action included therein, as would a judgment duly entered in an action between said persons." *Jenkins v. Fields*, 240 N.C. 776, 778, 83 S.E.2d 908, 910 (1954) (internal citations omitted).

> [Because] releases are contractual in nature, we apply the principles governing interpretation of contracts when construing a release. Under North Carolina law, when the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties. Thus, it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.

Barefoot, 163 N.C. App. at 395-96, 594 S.E.2d at 42-43 (internal marks and citations omitted).

¶ 26 Here, the General Release provides, in pertinent part, that Plaintiff

> does hereby remise, release and forever discharge City of Raleigh, Jonathan Burgess, the North Carolina League of Municipalities his successors and assigns, and/or his, her, their heirs, executors and administrators, and also any and all other persons, associations and corporations, whether herein named or referred to or not, and who, together with the above named, may be jointly or severally liable to the Undersigned, of and from any and all, and all manner of, actions and causes of action, rights, suits, covenants, contracts, agreements, judgements, claims and demands whatsoever in law or equity, including claims for contribution, arising from and by reason of any and all KNOWN AND UNKNOWN, FORSEEN AND UNFORSEEN bodily and personal injuries or death, damage to property, and the consequences thereof, which heretofore have been, and which hereafter may be sustained by this Undersigned or by any and all other persons, associations and corporations, whether herein named or referred to or not, and especially from all liability arising out of an occurrence that happened on or about the 17th July 2015 at or near Reflections Ct, Raleigh NC.

¶ 27 By signing this release, Plaintiff agreed to release the parties to the agreement and any of the parties' "successors and assigns, and/or his, her, their heirs, executors, and administrator, and also any and all other persons, associations, and corporations . . . [who] may be jointly or severally liable[.]" We must construe this to mean precisely what it says—that nonparties to the release must, together with the parties of the release, be "jointly or severally liable" to the Plaintiff to seek protections under the release.

¶ 28 To that end, we cannot amend the language of the release to include coverage that was not agreed to by the parties when they entered into the release. Because Defendants were not parties to the release, they must be "jointly or severally liable" to Plaintiff to claim protections under the release. Defendants do not purport to be joint tort-feasors and the record does not provide a basis to find that Defendants were joint tort-feasors. For this reason, we hold that the language in the release did not include Defendants and, therefore, the release does not bar Plaintiff's claims against Defendants.

¶ 29 This construction of the release is consistent with our Supreme Court's decision in *McNair v. Goodwin*, 262 N.C. 1, 136 S.E.2d 218 (1964). In *McNair*, the Court provided that "[a] valid release of one of several joint tort-feasors releases all and is a bar to a suit against any of them for the same injury." 262 N.C. at 3, 146 S.E.2d at 220. This proposition is in line with the overwhelming case law created to ensure

that injured parties receive "but one satisfaction, . . . and the release operates to extinguish the cause of action." *Id.* Thus, Defendants' attempt to rely on *McNair* to support its interpretation is misplaced, as *McNair* is not applicable because Defendants are not joint tort-feasors.

E. Statute of Limitations

¶ 30 Defendants also argue that Plaintiff's claim is time-barred by the statute of limitations. We disagree.

¶ 31 Pursuant to N.C. Gen. Stat. § 75-16.2, a UDTP claim must be filed within four years of when the claim accrues. N.C. Gen. Stat. § 75-16.2 (2019). Because Plaintiff's claim is based on fraud, the claim accrual begins "at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (internal citation omitted).

> Ordinarily, when fraud should be discovered in the exercise of reasonable diligence is a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. However, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law.

State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 548, 589 S.E.2d 391, 397 (2003) (internal citations omitted). Thus, "a jury must decide when fraud should have

been discovered in the exercise of reasonable diligence . . . when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524-25, 649 S.E.2d at 386 (internal citations omitted).

¶ 32 In the instant case, Defendants contend that, with reasonable diligence, Plaintiff should have discovered he did not have classic car insurance coverage in 2008 when he purchased the policy. Plaintiff, on the other hand, argues that he did not discover the fraud until 2015, when Allstate denied his claim.

¶ 33 Prior to being informed that he did not have classic car insurance coverage when Allstate denied his claim, Plaintiff expressed a desire to obtain such coverage to Mr. Sheets. After speaking with Mr. Sheets and having the Mustang appraised, Mr. Sheets informed Plaintiff that he would change Plaintiff's current coverage to include classic car insurance and that the car was worth the amount of the coverage—$24,000. Plaintiff's coverage did, in fact, change after speaking with Mr. Sheets. Not only did Plaintiff receive a new policy and a letter stating that there had been "[a] change in the vehicle rating group for your 66 Ford [Mustang,]" but his premiums increased substantially. Plaintiff was not told until his meeting with Mr. Dunn in August 2015 that Allstate did not offer classic car insurance coverage. Because the evidence of whether the fraud alleged by Plaintiff should have been discovered with reasonable diligence before Allstate denied Plaintiff's claim is conflicting, Plaintiff has alleged facts "sufficient to support an inference that the limitations period has

not expired, [and] the issue should be submitted to the jury." *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 403, 653 S.E.2d 181, 184-85 (2007) (internal marks and citations omitted).

F. Unfair and Deceptive Trade Practices

¶ 34 Finally, Defendants contend that Plaintiff has failed to state a UDTP claim. We disagree.

¶ 35 Chapter 75 of the North Carolina General Statutes prohibits "unfair or deceptive acts or practices in or affecting . . . all business activities[.]" N.C. Gen. Stat. § 75-1.1 (2019). Any individual who has been "injured by reason of any act or thing done by any other person, firm or corporation in violation of [this] provision[ ]" may assert a UDTP claim. N.C. Gen. Stat. § 75-16 (2019).

¶ 36 "In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013). A practice is considered unfair "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (internal citation omitted). Furthermore, "a practice is deceptive if it has the capacity or tendency to deceive; proof of actual

deception is not required." *Id.* (internal citations omitted).

¶ 37 To prevail on a UDTP claim, Plaintiff "need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception[.]" *Id.* (internal citations omitted). "Once the plaintiff has presented evidence in support of each of these elements, the question [of] whether [the] defendants committed the alleged acts is a question [of fact] for the jury; the court must then determine as a matter of law whether the proven facts constitute an unfair or deceptive trade practice." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252-53, 507 S.E.2d 56, 63 (1998) (internal marks and citation omitted).

¶ 38 Defendants' challenge to whether Plaintiff has stated a cognizable UDTP claim presents the question of whether the allegations in Plaintiff's complaint and the record evidence, viewed in the light most favorable to Plaintiff, shows that Defendants engaged in "an act or practice [that] possessed the tendency or capacity to mislead, or created the likelihood of deception[.]" *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. We hold that it does. In his affidavit, Plaintiff averred that he notified his insurance agent, Mr. Sheets, that he wanted to obtain classic car insurance coverage. During his conversations with Mr. Sheets, Plaintiff referred to the insurance as classic car insurance, which Plaintiff understood to mean that the insurance would pay a guaranteed floor value of $24,000 for the car. This understanding was confirmed by the changes to his policy, a letter from Allstate

providing that there had been "[a] change in the vehicle rating group for the 66 Ford[,]" and the 315% increase in auto collision insurance coverage and 490% increase in comprehensive coverage for the Mustang. Plaintiff believed that the term "actual cash value," referred to the $24,000 appraisal value calculated by Mr. Sheets. Thus, after requesting classic car insurance from an agent who appraised the value of his car at $24,000, and paying significantly higher premiums, Plaintiff understood that he would receive $24,000 if he filed a claim for a total loss under the policy. The averments in Plaintiff's affidavit to this effect amply show that the sale of a classic car insurance policy by Mr. Sheets constituted "an act or practice [that] possessed the tendency or capacity to mislead[.]" *Id.*

¶ 39 This holding is consistent with the other record evidence showing that Plaintiff was, in fact, misled. When Plaintiff was first informed that he did not have classic car coverage, and that Allstate did not offer any such coverage, his Mustang had already been totaled. Moreover, Plaintiff was advised by Mr. Dunn after his accident in August 2015 that Allstate had been overcharging him for years. Our Court has held that "systematically overcharging a customer" can itself constitute an unfair and deceptive act or practice. *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 177, 356 S.E.2d 805, 808-09 (1987). Giving Plaintiff the benefit of every reasonable inference arising from the evidence, as we must on review of an order granting summary judgment in favor of Defendants, *see Barefoot*, 163 N.C. App. at 391, 594

S.E.2d at 40, we conclude that the statements made to Plaintiff by Mr. Dunn and Mr. Sheets, in conjunction with the substantial increase in premiums paid by Plaintiff, make out a cognizable UDTP claim.

III. Conclusion

¶ 40 We hold that the record evidence, viewed in the light most favorable to Plaintiff, presents general issues of material fact with respect to Plaintiff's UDTP claim. We therefore reverse the trial court's order granting Defendants' motion for summary judgment, and remand the case for further proceedings.

REVERSED AND REMANDED.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).