2004 WL 1147076
--- A.2d ---
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Briefs and Other Related Documents

Superior Court of Pennsylvania.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK Appellee
v.
SUBURBAN WEST ABSTRACTORS Appellant

No. 2290 EDA 2003.

May 24, 2004.

Background: Title insurer brought action against title search company for failing to discover judgment against insured's mortgagors. The Court of Common Pleas, Delaware County, Civil No. 00-000514, entered judgment on jury verdict in favor of insurer. Company appealed.

Holdings: The Superior Court, No. 2290 EDA 2003, Montemuro, J. held that:
(1) evidence of title search company's errors and omissions insurance was admissible to rebut its defense of limited liability;
(2) law firm's partner could testify with respect to the reasonableness of attorney fees; and
(3) insurer's decision to order only a last owner search was not contributory negligence.

Affirmed.

[1] Abstracts of Title k3

6k3

Evidence of title search company's errors and omissions insurance was admissible to rebut its defense of limited liability to title insurer for failing to discover judgment against insured's mortgagors; the evidence was offered for the sole purpose of determining whether the parties had agreed to restrict liability, and, if so, to what amount. Rules of Evid., Rule 411, 42 Pa.C.S.A.

[2] Appeal and Error k977(3)
30k977(3)

The power to grant a new trial lies inherently with the trial court, and the Superior Court will not reverse its decision absent a clear abuse of discretion or an error of law which controls the outcome of the case.

[2] New Trial k1
275k1

The power to grant a new trial lies inherently with the trial court, and the Superior Court will not reverse its decision absent a clear abuse of discretion or an error of law which controls the outcome of the case.

[3] Appeal and Error k970(2)
30k970(2)

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion.

[3] Trial k43
388k43

The admission of evidence is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion.

[4] Trial k127
388k127

[4] Trial k133.1
388k133.1

The general rule is that evidence of insurance is irrelevant and prejudicial and justifies the grant of a mistrial.

[5] New Trial k32
275k32

The mere mention of the word "insurance" does not necessitate a new trial unless the aggrieved party can demonstrate prejudice.

[6] Costs k207
102k207

Law firm's partner could testify with respect to the reasonableness of attorney fees sought by firm's client, even though the partner was never qualified as expert and whether or not he acted as advocate. Rules of Prof.Conduct, Rule 3.7(a)(2).

[7] Costs k207
102k207

Expert testimony is unnecessary as to the reasonableness of attorney fees.

[8] Attorney and Client k22
45k22

Generally, an attorney is not permitted to act as an advocate in a trial where he is likely to testify.

[9] Abstracts of Title k3
6k3

A title insurer's decision to order only a last owner search, rather than a full title search, before deciding to provide a $300,000 policy was not contributory negligence in suit against title search company for failure to discover judgment against insured's mortgagors; the missed judgment was against the owner and should have been discovered in the last owner search.

[10] Negligence k1571
272k1571

The burden of establishing contributory negligence rests on the defendant.

[11] Negligence k452
272k452

A plaintiff's recovery will not be affected by his negligent conduct unless that conduct was a substantial factual cause of the injury for which damages are sought.
Appeal from the Order entered June 23, 2003 In the Court of Common Pleas of Delaware County Civil No. 00-000514.

Before: STEVENS, MONTEMURO [FN*] and KELLY, JJ.

MONTEMURO, J.

***1** ¶ 1 Appellant Suburban West Abstractors appeals the Order entered June 23, 2003, in the Delaware County Court of Common Pleas following a jury verdict in favor of Appellee Fidelity National Title Insurance Company in this negligence action. We affirm.

¶ 2 Appellee is a title insurance company providing title insurance policies to purchasers, mortgage holders and other parties having an interest in real estate. Appellant is in the business of conducting last owner title searches. In December of 1998, New Century Mortgage Corporation (New Century), a mortgage lending company, approached Appellee for a title insurance policy in connection with New Century's refinancing of a residential mortgage on a property owned by Mike and Talia Rosen. Appellee subsequently requested that Appellant perform a last owner title search in order to uncover any mortgages, judgments or other liens that might affect the Rosens' property. Appellant's search revealed the first mortgage, which was being refinanced, and two minor tax judgments. Based on this information, Appellee issued New Century a title insurance policy insuring the mortgage for $318,750.00.

¶ 3 Several months later, Appellee received information that the Marian Asset Management

Committee (Marian Asset) held a $380,000 .00 judgment against the Rosens that was not listed on Appellant's search report. Pursuant to its obligations under the title insurance policy, Appellee defended the proceedings when Marian Asset attempted to execute on that judgment. Although Appellee ultimately paid New Century the full amount of the mortgage, it was later able to recoup $160,000.00 through a settlement agreement with Marian Asset.

¶ 4 Appellee brought the instant action against Appellant to recover its losses, including substantial legal fees, and received a jury verdict of $176,000.00 in its favor. Appellant's post trial motions were denied on June 16, 2003, and judgment was entered on the verdict by order of June 23rd. This timely appeal followed.

¶ 5 Appellant presents three questions for our review:

> 1) Whether the trial court erred in permitting [Appellee] to refer to and present evidence of [Appellant's] errors and omissions insurance coverage?
> 2) Whether the trial court erred in allowing [Appellee] to support its claim for attorney fees as 'fair and reasonable' with testimony from an attorney not identified as an expert, and with a 30-year association with the firm for whom he purported to offer such objective evidence?
> 3) Whether the trial court erred in failing to instruct on contributory negligence, and in precluding [Appellant] from presenting certain evidence relevant to [Appellee's] negligence as well as to causation?

(Appellant's Brief at 3).

[1] ¶ 6 Appellant first contends that it was unfairly prejudiced when the trial court permitted Appellee to introduce insurance evidence to the jury. As part of its defense, Appellant asserted that the parties had agreed to a limitation of liability for searches conducted on Appellee's behalf, and in support submitted two separate documents, a search report limiting liability to $25.00, and a price list stating that errors and omissions insurance for the search was limited to $10,000.00. Appellee, in response, argued that the parties had always intended for Appellant to bear the risk of loss, and that as a result Appellant had agreed to carry errors and omissions insurance of $250,000.00. The trial court allowed Appellee to introduce a vendor information sheet in support of this contention. Appellant now requests a new trial arguing that any claim that it had agreed to carry errors and omissions insurance to protect Appellee was both without evidentiary support and irrelevant to the issues, including Appellant's own affirmative defense of limited liability.

***2** [2][3][4][5] ¶ 7 "Our standard of review regarding a trial court's denial of a motion for a new trial is limited. The power to grant a new trial lies inherently with the trial court and we will not reverse its decision absent a clear abuse of discretion or an error of law which controls the outcome of the case." Kaplan v. O'Kane, 835 A.2d 735, 737 (Pa.Super.2003) (citation omitted). Further, "the admission of evidence is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion." Cooke v. Equitable Life Assurance Society of the United States, 723 A.2d 723, 729 (Pa.Super.1999) (citation omitted). "The general rule in Pennsylvania is that evidence of insurance is irrelevant and prejudicial and justifies the grant of a mistrial." Allied Electrical Supply Co. v. Roberts, 797 A.2d 362, 364 (Pa.Super.2002), appeal denied, 570 Pa. 680, 808 A.2d 568 (Pa.2002) (citations omitted). "However, the mere mention of the word insurance does not necessitate a new trial unless the aggrieved party can demonstrate prejudice." Id. (citations omitted). In addition, Pennsylvania Rule of Evidence 411 contains an

exception to the general rule:

> Rule 411. Liability Insurance
> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose ....
> Pa.R.E. 411 (emphasis added).

¶ 8 We find that the Pa.R.E. 411 exception applies to the instant matter. Following a lengthy in-chambers debate on the matter, the trial court permitted Appellee to introduce evidence of Appellant's errors and omissions insurance for the express purpose of rebutting Appellant's limited liability defense. See N.T., 1/27/03, at 98-99. Appellant understood the contingent nature of this permission, yet made the conscious decision to introduce the defense anyway. See Id. It cannot now object to the inclusion of evidence which it voluntarily introduced. Moreover, Appellant's price sheet and Appellee's vendor information sheet both confirm the existence of errors and omissions insurance. Neither document indicates whether the insurance is to be provided by a third party. In fact, the only difference between the two documents is the amount of liability assumed; thus it is clear that the evidence was offered for the sole purpose of determining whether the parties had agreed to restrict liability, and, if so, to what amount, a circumstance reinforced by the trial court's thorough limiting instructions. See N.T., 1/28/03, at 20-25.

¶ 9 Appellant cites Trimble v. Merloe, 413 Pa. 408, 197 A.2d 457 (Pa.1964), and Nicholson v. Garris, 418 Pa. 146, 210 A.2d 164 (Pa.1965), for the principle that a direct reference to liability coverage warrants a new trial. These cases are easily distinguishable, however, as Trimble and Nicholson, both personal injury matters, involved the plaintiffs' calculated introduction of liability insurance as a means of informing the jury that the respective defendants would not be personally responsible for paying the verdict. See Paxton National Insurance Co. v. Brickajlik, 513 Pa. 627, 522 A.2d 531, 533 (Pa.1987) ("[F]act-finders should not be tempted to render decisions based upon the extraneous consideration that an insurance company will actually pay the bill."). These concerns were not present here, as proof of errors and omissions insurance, which was introduced by Appellant, was relevant solely to a determination of which party would be liable for a faulty search, not to prove whether Appellant acted wrongfully or would bear the actual burden of satisfying a judgment.

***3** ¶ 10 Accordingly, the true issue concerned the amount of liability for the overlooked judgment. As the parties advanced different amounts, the issue became a credibility determination, and the jury, as fact finder, was entitled to believe all, part or none of the evidence presented. Ty-Button Tie, Inc. v. Kincel and Co., Ltd., 814 A.2d 685, 693 (Pa.Super.2002).

[6] ¶ 11 Next, Appellant challenges the trial court's decision to allow a partner in Appellee's counsel's firm to testify with respect to the reasonableness of the attorney's fees. Specifically, Appellant argues that the attorney was never qualified as an expert and was not impartial because of his association with Appellee's counsel's firm. We disagree.

[7] ¶ 12 Pennsylvania law does not require that an expert testify as to the reasonableness of attorney's fees. See Hart v. O'Malley, 781 A.2d 1211, 1220 (Pa.Super.2001) (holding plaintiff's own testimony sufficient to establish reasonableness of attorney's fees). Further, the partner was neither identified nor referred to as an expert.

[8] ¶ 13 Generally, an attorney is not permitted to act as an advocate in a trial where he is likely to testify. However, Pennsylvania Rule of Professional Conduct 3.7(a)(2) permits an attorney to testify as to the nature and value of legal services rendered in a case. Here, the partner did not act as an advocate. Even had he done so, however, he would have been permitted to testify with respect to legal fees. Moreover, the partner's relationship to the firm was fully disclosed during direct examination and explored on cross-examination. Again, the accuracy of his testimony became an issue of credibility for the jury. See Ty-Button Tie, Inc., supra.

[9] ¶ 14 Appellant's final issue questions the trial court's refusal to instruct the jury on Appellee's contributory negligence. Appellant claims that industry standards establish Appellee's negligence in ordering only a last owner search rather than a full title search before deciding to provide a $300,000.00 title insurance policy.

[10][11] ¶ 15 "[T]he burden of establishing contributory negligence rests on the defendant." Pascal v. Carter, 436 Pa.Super. 40, 647 A.2d 231, 233 (Pa.Super.1994). A plaintiff's recovery will not be affected by his negligent conduct unless that conduct was a "substantial factual cause of the injury for which damages are sought." Id. Evidence of such negligence should be submitted to the jury. Id. Here, there is no evidence of Appellee's contributory negligence as the missed judgment was against the owner and should have been discovered in the last owner search. Thus, Appellee could not have avoided its damages by ordering a full title search. Finally, Appellee was entitled to rely on the accuracy of the search absent any evidence to the contrary.

¶ 16 Order affirmed.

FN* Retired Justice assigned to Superior Court.

2004 WL 1147076, 2004 WL 1147076 (Pa.Super.), 2004 PA Super 179

Briefs and Other Related Documents (Back to top)

. 2004 WL 870761T2 (Appellate Brief) Brief of Appellee, Fidelity National Title Insurance Company (Feb. 02, 2004)Original Image of this Document (PDF)

. 2003 WL 23419903T2 (Appellate Brief) Brief of Appellant, Suburban West Abstractors (2003)Original Image of this Document (PDF)

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