NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LAMIA AFIF, Appellant v. HUTH INSURANCE AGENCY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2034 EDA 2013

Appeal from the Judgment Entered September 19, 2013
in the Court of Common Pleas of Lehigh County
Civil Division at No.: 2011-C-3509

BEFORE: SHOGAN, J., STABILE, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JULY 22, 2014**

Appellant, Lamia Afif, appeals from the judgment entered in favor of Appellee, Huth Insurance Agency, after a bench trial. We affirm.

The trial court aptly set forth the background facts of this case in its July 2, 2013 opinion, as follows:

> In early February of 2009, [Appellant] and her husband opened a retail store in Emmaus. They secured a business owner's insurance policy through [Appellee]. The policy was placed with Harleysville Insurance Company for coverage of $75,000 of fire damage/debris removal. The premium for the policy was $575. On February 12, 2009, [Appellant] called Michele Trimmer, CFR ("Trimmer"), a licensed agent employed by [Appellee], to discuss the cost of adding a second store to the insurance policy. . . . [Appellant] indicated that the proposed Allentown store was approximately half the size of the Emmaus store, and the contents would be worth $40,000 ($30,000

---

* Retired Senior Judge assigned to the Superior Court.

> inventory; [$]10,000 fixtures). In mid-April of 2009, [Appellee] sent a cancellation notice to [Appellant] due to nonpayment of the premium. After [Appellee] received the payment, the policy was reinstated without a lapse of insurance. On September 18, 2009, [Appellant] called Trimmer and told Trimmer she was closing the Emmaus store and planned to open the Allentown store in about two months. [Appellant] instructed Trimmer to remove her husband from the policy, to change the mailing address to [Appellant's] home [address (Home Address)], to add the Allentown store under the policy, and to delete the Emmaus store from the policy. At no time did [Appellant] tell Trimmer to increase the proposed coverage from the $40,000 figure which they had discussed in their February 12, 2009 phone call.
>
> Therefore, Trimmer processed a change endorsement to the policy for the address 301 North 9th Street, Allentown with $40,000 coverage for contents for fire damage/debris removal. . . . Trimmer then mailed the Businessowners Supplemental Declarations to [Appellant's Home Address]. . . . [T]he change endorsement clearly showed the limit of insurance for business personal property was $40,000. Trimmer mailed the change endorsement along with a cancellation notice that was generated due to another non-payment of the insurance policy premium. [Appellant] paid the overdue premium, and the policy was reinstated.
>
> The Allentown store opened on October 13, 2009. . . . On December 16, 2009, a fire burned essentially all of [its] contents . . . . When [Appellant] made the insurance claim, she was advised by the insurance adjuster that the coverage was limited to $40,000, which limit was confirmed by Trimmer to [Appellant] on the original quote, and [Appellant] duly received notice of same by mail. . . .

(Trial Court Opinion, 7/02/13, at 2-4 (footnotes omitted; some formatting added)).

On January 23, 2012, Appellant filed a complaint against Appellee sounding in negligence and breach of fiduciary duty. The trial court held a

bench trial on April 3 and 4, 2013. On April 5, 2013, the trial court entered a verdict in favor of Appellee.

On April 12, 2013, Appellant timely filed post-trial motions that the trial court denied after argument on July 2, 2013.[1] Upon Appellant's praecipe, the court entered judgment in favor of Appellee and against Appellant on September 19, 2013. Appellant timely appealed.[2]

---

[1] Appellant improperly appealed from the trial court's July 2, 2013 order denying her post-trial motions. (***See*** Notice of Appeal, 7/15/13); ***see also Brown v. Phila. College of Osteopathic Med.***, 760 A.2d 863, 865 n.1 (Pa. Super. 2000), *appeal denied*, 781 A.2d 137 (Pa. 2001). On September 19, 2013, Appellant praeciped the trial court to enter judgment pursuant to this Court's September 12, 2013 *per curiam* order. Therefore, we treat this case as properly filed after the entry of judgment. ***See*** Pa.R.A.P. 905(a)(5); (***see also*** *Per Curiam* Order, 9/12/13).

[2] Appellant filed a "Statement of Reasons" on July 15, 2013, contemporaneously with her notice of appeal. (***See*** Statement of Reasons, 7/15/13, at 1). On July 19, 2013, the trial court ordered Appellant to file a Rule 1925(b) statement. ***See*** Pa.R.A.P. 1925(b). On August 12, 2013, the court filed a Rule 1925(a) opinion asserting that this appeal should be deemed waived for Appellant's failure to file a Rule 1925(b) statement pursuant to its July 19, 2013 order and, alternatively, relying on its July 2, 2013 opinion. (***See*** Trial Court Opinion, 8/12/13, at 1-2). We decline to find waiver where it appears that Appellant intended for her July 15, 2013 "Statement of Reasons" to be a Rule 1925(b) statement.

We further note, however, that Appellant has attached a document entitled "Statement of Issues on Appeal" to her brief as a "Required Attachment." (***See*** RR 74, Statement of Issues on Appeal, at 1; Appellant's Brief, at cover). However, this document is not time-stamped as properly docketed and is not in the certified record supplied to this Court. Accordingly, we will not consider it as part of this appeal. ***See Brandon v. Ryder Truck Rental, Inc.***, 34 A.3d 104, 106 n.1 (Pa. Super. 2011) ("[A]n appellate court cannot consider anything which is not part of the [certified] record . . . . Any document which is not part of the official certified record is

(Footnote Continued Next Page)

Appellant raises four questions for our review:

> I. Whether or not the trial court's opinion was arbitrarily capricious and an abuse of discretion where the court indicated that the verdict was based on the judge's assessment of [Appellant's] credibility when the undisputed facts come from [Appellee's] witnesses?
>
> II. Whether or not the facts viewed most favorably to [Appellee] concede liability?
>
> III. Whether or not the damages have been proven to a mathematical certitude?
>
> IV. Whether or not the failure by [Appellant] to read the policy is a defense to [Appellee]?

(Appellant's Brief, at 2).

Our standard of review of this matter is well-settled:

> Our standard of review in non-jury trials is to assess whether the findings of facts by the trial court are supported by the record and whether the trial court erred in applying the law. Upon appellate review the appellate court must consider the evidence in the light most favorable to the verdict winner and reverse the trial court only where the findings are not supported by the evidence of record or are based on an error of law. Our scope of review regarding questions of law is plenary.
>
> The court's findings are especially binding on appeal, where they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion or that the court's findings lack evidentiary support or that the court capriciously disbelieved the evidence.
>
> Judicial discretion requires action in conformity with law on facts and circumstances before the trial

(Footnote Continued) ———————————

considered to be nonexistent, which deficiency may not be remedied by inclusion in the reproduced record.") (citations omitted).

> court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 955 (Pa. Super. 2013), *appeal denied*, 79 A.3d 1099 (Pa. 2013) (citations and quotation marks omitted).

As a preliminary matter, we observe that Appellant's brief fails to contain a summary of the argument as required by Pennsylvania Rule of Appellate Procedure 2111(a)(6). ***See*** Pa.R.A.P. 2111(a)(6); ***see also*** Pa.R.A.P. 2118. Additionally, Appellant improperly relies, to a significant degree, on federal and other states' cases, which are not binding on this Court. (***See*** Appellant's Brief, at 4-12); ***Branham v. Rohm & Haas Co.***, 19 A.3d 1094, 1103 (Pa. Super. 2011) ("This Court is not bound by the decisions of federal courts, other than the United States Supreme Court, or the decisions of other states' courts on a matter of Pennsylvania law.") (citations omitted). Accordingly, we would be free to disregard any of Appellant's arguments that are not supported by pertinent, binding authority and discussion. ***See*** Pa.R.A.P. 2119(a)-(b).

In Appellant's first issue, she argues that "the trial court's opinion was arbitrarily capricious and an abuse of discretion where the court indicated that the verdict was based on [its] assessment of [Appellant's] credibility when the undisputed facts come from [Appellee's] witnesses." (Appellant's Brief, at 4). Specifically, Appellant asserts that Trimmer's testimony

established that she breached a duty to Appellant and that, therefore, Appellee is liable as her employer. (***See id.*** at 7). Appellant's issue does not merit relief.[3]

> [An] insurance company has a duty to deal with its insured on a fair and frank basis, and at all times, to act in good faith. The duty of good faith originates from the insurer's status as a fiduciary for its insured under the insurance contract, which gives the insurer the right, *inter alia*, to handle and process claims.

Berg v. Nationwide Mut. Ins. Co., Inc., 44 A.3d 1164, 1170 (Pa. Super. 2012), *appeal denied*, 65 A.3d 412 (Pa. 2013) (citations and quotation marks omitted).

The trial court found that:

> In her claims of negligence and breach of fiduciary duty, [Appellant] must have proven that [Appellee] breached a duty. [Appellant] failed to prove this essential element of both claims. In placing the change endorsement, [Appellee] complied with all of [Appellant's] instructions as communicated and reasonably fulfilled all of its responsibilities to its insured. The endorsement

---

[3] We observe that, in spite of her duty to provide citation to, and discussion of, pertinent law, the only legal authority Appellant cites in support of her first issue is a non-binding, factually and legally distinguishable, 1968 case from the Third Circuit Court of Appeals. ***See*** Pa.R.A.P. 2119(a)-(b); ***Branham***, ***supra*** at 1103; (Appellant's Brief, at 4-7); ***see also Estate of Haiko v. McGinley***, 799 A.2d 155, 161 (Pa. Super. 2002) ("The Rules of Appellate Procedure state unequivocally that each question an appellant raises is to be supported by discussion and analysis of pertinent authority.") (citations omitted). However, although we arguably could have found waiver of this issue, we decline to do so because we are able to discern Appellant's argument and our meaningful appellate review is not hampered. ***See*** Pa.R.A.P. 2119(a)-(b); ***Smitley v. Holiday Rambler Corp.***, 707 A.2d 520, 525 n.8 (Pa. Super. 1998) (declining to dismiss appeal on the basis of briefing deficiencies where Court could conduct meaningful review).

> clearly indicated that the policy was limited to $40,000. The endorsement was clearly worded and conspicuously displayed the $40,000 policy limits for the Allentown store . . . . It was up to [Appellant] to alert [Appellee] to any problems with the policy as endorsed.
>
> The evidence was clear that [Appellant] did receive mailings from Harleysville, but she selectively chose whether or not to open them. For instance, she received mail containing cancellation notices and paid the required amount to reinstate the policy.

(Trial Ct. Op., at 4-5). We agree with the trial court.

Reviewing the evidence in the light most favorable to Appellee, it reflects that Appellant contacted Trimmer and provided her with information regarding the Allentown store, including telling her that the contents should be insured for $30,000.00 and the fixtures for $10,000.00. (***See*** N.T. Trial, 4/04/13, at 100-01, 106, 123). Trimmer's contemporaneous notes and the activity log in which she memorialized the substance of her conversations with Appellant corroborated these facts. (***See id.*** at 104-06; Exhibit 4, Trimmer Notes, at unnumbered page 2; Exhibit 5, Activity Log, 8/09/11, at 2, 12/17/09).

Trimmer testified that she sent a policy change endorsement to Appellant's Home Address with the clearly worded $40,000.00 policy limit conspicuously displayed and a cover-sheet that stated in large, bold type, "**Your Harleysville policy has been amended**." (Exhibit 6, Coversheet, at 1; ***see also*** Exhibit 7, Businessowners Supplemental Declarations, at 1; N.T. Trial, 4/04/13, at 123-25). Along with the endorsement, Trimmer sent

a policy cancellation notice due to Appellant's non-payment. (***See*** N.T. Trial, 4/04/13, at 125). Although Appellant testified that she never opened mail from Appellee, (***see id.***, at 67), Trimmer stated that she received the past due premium payment after having mailed the notice to Appellant. (***See id.*** at 126).

Based on the foregoing, we conclude that the record supports the court's findings of fact and assessment of credibility. ***See Weston***, ***supra*** at 955; ***see also Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.***, 53 A.3d 53, 64 (Pa. Super. 2012), *appeal denied*, 69 A.3d 599 (Pa. 2013) ("[T]he trial court, as fact finder, was free to believe all, part [or] none of the evidence presented.").

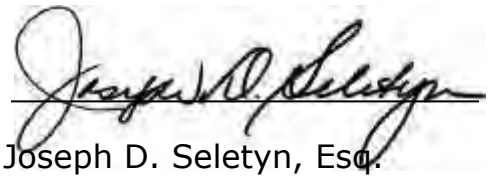
Further, after our own independent review, we conclude that the trial court did not commit legal error when it found that, because Trimmer dealt with Appellant in good faith and on a "fair and frank basis," she did not breach a duty to Appellant as a matter of law. ***See Berg***, ***supra*** at 1140. Accordingly, we would not disturb the court's judgment and Appellant's first issue does not merit relief. ***See Weston***, ***supra*** at 955.

In Appellant's second issue, she claims that "the facts viewed most favorably to [Appellee] concede liability." (Appellant's Brief, at 8). However, as discussed above, after reviewing the evidence in the light most favorable to Appellee as verdict winner, we concluded that the trial court properly found that Appellee was not liable. Accordingly, this issue lacks

merit and we affirm the trial court's judgment.[4] ***See Weston***, ***supra*** at 955.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/22/2014

---

[4] Appellant's third issue regarding damages is moot and we will not address it where we have concluded that the trial court properly found that Appellee did not breach a duty to Appellant. ***See Erie Ins. Exch. v. Claypoole***, 673 A.2d 348 (Pa. Super. 1996) ("Generally, [the Superior Court] will not review moot or abstract questions.").

In Appellant's fourth issue, she claims that she had no duty to read the insurance policy. (***See*** Appellant's Brief, at 10-12). This claim is arguably waived as well for Appellant's failure to cite any pertinent, binding law. (***See id.***); ***see also*** Pa.R.A.P. 2119(a)-(b), ***Branham***, ***supra*** at 1103. Specifically, Appellant cites sixteen cases from foreign jurisdictions and no Pennsylvania authority, and makes statements of law that are not justified by the record or the findings of the trial judge. (***See*** Appellant's Brief, at 10-12). However, we decline to waive this issue because we can discern Appellant's argument.

Instead, we conclude that this issue lacks merit because whether Appellant read the insurance policy has no impact on our analysis of whether the trial court properly found that Trimmer did not breach a duty to Appellant. ***See Berg***, ***supra*** at 1170. Additionally, Appellant's argument directly conflicts with the law of this Commonwealth that an insured does have a duty to read her insurance policy. ***See Standard Venetian Blind Co. v. Amer. Empire Ins. Co.***, 469 A.2d 563, 566 (Pa. 1983). Therefore, this issue does not merit relief.