IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 4, 2008 Session

LUCY C. KIRBY, ET AL. v. ROBERT P. WOOLEY

Appeal from the Circuit Court for Knox County
No. 1-253-02 Dale C. Workman, Judge

No. E2008-00916-COA-R3-CV - FILED FEBRUARY 27, 2009

This lawsuit arises out of an automobile accident. At the time of the accident, Robert P. Wooley ("the defendant") gave an address in Lexington, Kentucky. Lucy C. Kirby and her husband ("the plaintiffs") filed suit[1] and also caused a summons to be issued and served on their automobile casualty insurance company, Prudential Property & Casualty Insurance Company ("the uninsured motorist carrier"). Unbeknownst to the plaintiffs, the defendant had died of unrelated causes some six months after the motor vehicle accident, and before the lawsuit was filed. Service on the uninsured motorist carrier was effected, but service of process on the nonresident defendant through the Secretary of State was returned marked "Moved No Forwarding Address." The plaintiffs proceeded against the uninsured motorist carrier; they did not learn until some two years after filing suit that the defendant was dead. When they learned of his death, the plaintiffs had *alias* process issued and successfully served on the administratrix of the estate of the defendant and subsequently on the administrator *ad litem* of the estate. The trial court granted summary judgment to both the defendant and the uninsured motorist carrier, predicated on the court's holding that the plaintiffs failed to comply with Tenn. R. Civ. P. 3. We hold that the resolution of the controversy in this case is controlled by Tenn. Code Ann. § 56-7-1206(d) and (e) (2008) and not by Tenn. R. Civ. P. 3 and that, under the applicable statute, service of process was properly and effectively made upon both the uninsured motorist carrier and the defendant. The trial court incorrectly granted summary judgment to both. Accordingly, we vacate the judgment below and remand for further proceedings.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

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[1] Lucy Kirby sued alleging negligence and claiming personal injuries. Her husband's suit is derivative in nature.

Bradley A. Farmer and Steve E. Fox, Knoxville, Tennessee, for the appellants, Lucy C. Kirby and Roy Kirby.

James S. MacDonald, Knoxville, Tennessee, for the appellees, Robert P. Wooley, deceased, Carolyn Wooley, administrator of the estate of Robert P. Wooley, and Dennis A. Bradley, administrator *ad litem* of the estate of Robert P. Wooley.

Terrill L. Adkins, Knoxville, Tennessee, for the appellee, Prudential Property & Casualty Insurance Company.

OPINION

I.

The accident upon which this lawsuit is based occurred on June 21, 2001. It is undisputed (1) that the plaintiffs' suit was filed on May 2, 2002, and (2) that it was filed within the one year limitations period for filing personal injury actions under Tenn. Code Ann. § 28-3-104 (2000). Because the monetary claim of the plaintiffs, *i.e.*, $110,000, exceeded the insurance limits available to the defendant under his casualty policy, *i.e.*, $25,000, the plaintiffs served their uninsured motorist carrier, naming it in the complaint as the "under insured motorist carrier . . . ." The plaintiffs have $100,000 in uninsured/under-insured coverage. It is further undisputed that the uninsured motorist carrier was timely served following the filing of the complaint.

The uninsured motorist carrier answered and discovery commenced. The uninsured motorist carrier served the plaintiffs with interrogatories, which were answered. The uninsured motorist carrier also took the depositions of the plaintiffs. On May 15, 2002, the plaintiffs received the Secretary of State's return of attempted service on the defendant at the Lexington, Kentucky, address. The plaintiffs then attempted to locate the defendant by making telephone calls and using the internet.[2] And, in August 2002, the plaintiffs' attorneys contacted Loonie Boone at the defendant's insurance company, State Farm Insurance, to request an address where the defendant could be served. In a letter dated August 30, 2002, State Farm's attorney wrote to the plaintiffs' attorney saying that State Farm had no idea as to the defendant's whereabouts. The letter also stated that the address used by the plaintiffs for service was the "last known address" that State Farm had. State Farm took the position that, in the absence of an express waiver by its insured, it could not waive service on him.

After this contact, State Farm's attorney remained involved. He was advised by the attorney for the uninsured motorist carrier of developments in the case, such as the filing of a motion to dismiss on July 15, 2003. In a letter dated two days after the motion was filed, State Farm's attorney

[2] The defendant and the uninsured motorist carrier argue that the court should not consider this statement. The information is in the record, however, and our review is *de novo*.

wrote to the attorneys of record saying that he had been authorized by State Farm to represent the defendant in the event the defendant was served. He noted: "[The defendant] *could have died, or become incompetent*, but certainly at no time did the defendant ever advise State Farm or myself that he was waiving his rights to insist upon lawful service of process on him." (Emphasis added.)

The plaintiffs responded to the motion to dismiss of the uninsured motorist carrier by arguing that they should be permitted to proceed against the uninsured motorist carrier pursuant to Tenn. Code Ann. § 56-7-1206. After a hearing on the motion, the uninsured motorist carrier filed a third-party complaint against the defendant. On October 27, 2003, the trial court denied the motion to dismiss.

In April 2004, the plaintiffs had process issued against "Robert P. Wooley" in Boaz, Kentucky, but the Robert Wooley in Boaz was not the Robert P. Wooley involved in an accident in 2001 in Tennessee. The attorney for State Farm argues that the April summons was sent to "Robert J. Wooley," but the record before us reflects that the two names used were "Robert Wooley" and "Robert P. Wooley."

In May 2004, the plaintiffs learned that the defendant was dead. Plaintiffs then successfully served the administratrix of the estate, Carolyn Wooley ("the administratrix") by *alias* process. She signed for the certified letter from the Secretary of State on July 3, 2004. The trial court allowed plaintiffs to amend the complaint and substitute the administratrix as a party defendant. The estate was still in probate when these actions were taken. According to an attested document signed by the Judge of Fayette District Court, Probate Division, Fayette County, Kentucky, the final settlement in the estate was found to be correct and the administratrix was discharged on July 27, 2004.

In March 2005, the State Farm attorney appeared in this case on behalf of the administratrix, filing an answer, a motion to discover the file and take the deposition of the plaintiffs' attorney, and a motion to dismiss. The motion to dismiss was based in primary part on the failure of the plaintiffs to comply with Tenn. R. Civ. P. 3 and the one year statute of limitations for tort actions found at Tenn. Code Ann. § 28-3-104. The motion to dismiss, motion to discover file, and the answer all incorrectly stated that the defendant's estate was closed on July 27, 2003.

In June 2005, at the trial court's request, the plaintiffs had the estate of the defendant reopened so the plaintiffs could secure service of process on the estate even though it had already served the administratrix. Because the administratrix had been discharged, the Kentucky probate court appointed an administrator *ad litem*, Dennis A. Bradley. Mr. Bradley signed a waiver of service on June 30, 2005.

The trial court granted the administrator's motion to discover the file and take the deposition of the plaintiffs' attorney. The administrator's motion to dismiss was pretermitted. On September 27, 2007, the administrator's attorney deposed attorney Edward Parrott. Although Mr. Parrott filed the lawsuit on behalf of the plaintiffs, he had little personal knowledge of the case because, after filing the lawsuit, he turned the handling of the file over to other attorneys in his firm. In January 2008, the administrator and the uninsured motorist carrier filed motions for summary judgment, which were granted.

II.

The issue we address is:

> Whether the trial court erred in granting motions for summary judgment by finding a lack of "due diligence" in the plaintiffs' failure to renew service of process under Tenn. R. Civ. P. 3 when the plaintiffs were proceeding under, and complied with, the requirements of the Uninsured Motorist Statute at Tenn. Code Ann. § 56-7-1206(d) and (e).

III.

Our review of the matters in this appeal is *de novo*. ***Blair v. West Town Mall***, 130 S.W.3d 761, 763 (Tenn. 2004). Our inquiry involves purely a question of law; thus, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. ***Id***. (citations omitted). Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Tenn. R. Civ. P. 56.04; *see* ***Staples v. CBL & Assocs., Inc***., 15 S.W.3d, 83, 88 (Tenn. 2000).

When we are called upon to interpret a statute, as in this case, our role " 'is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" ***Calaway ex rel. Calaway v. Schucker***, 193 S.W.3d 509, 514 (Tenn. 2005) (citations omitted). The intent of the legislature is determined " 'from the natural and ordinary meaning of the statutory language within the context of the whole statute without any forced or subtle construction that would extend or limit the statute's meaning.' " ***Id***. (quoting ***State v. Flemming,*** 19 S.W.3d 195, 197 (Tenn. 2000) (citing ***State v. Butler***, 980 S.W.2d 359, 362 (Tenn. 1998)). If the language of a statute is clear, we apply its plain meaning. ***Mooney v. Sneed***, 30 S.W.3d 304, 306 (Tenn. 2000).

IV.

A.

The defendant had $25,0000/$50,000 in insurance coverage, and the plaintiffs had $100,000/$300,000 in uninsured motorist coverage. Tenn. Code Ann. § 56-7-1202 (a) (1) provides:

> For the purpose of uninsured motor vehicle coverage, "uninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured, and for which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made . . . .

Tenn. Code Ann. § 56-7-1202(a)(1) (2008). There is no question that this suit is an underinsured motorist claim in which the coverage available from the defendant ($25,000) is "less than the applicable limits of the uninsured motorist coverage . . . ." The statutes found at Tenn. Code Ann. § 56-7-1201, *et seq*., which govern uninsured motor vehicle coverage, are thus applicable. *See* ***Seymour v. Sierra***, 98 S.W.3d 164, 166 (Tenn. Ct. App. 2002) (uninsured motorist in Tenn. Code Ann. § 56-7-1206(d) includes underinsured motorist); ***Bonner v. Billen***, No. E2005-01901-COA-R3-CV, 2007 WL 3245436, at *3 (Tenn. Ct. App. E.S., filed November 5, 2007) (wording of Tenn. Code Ann. § 56-7-1202(a) makes clear uninsured is the same as underinsured). In this case we use the appellation "uninsured motorist carrier" to indicate the plaintiffs' carrier even though the defendant here was underinsured.

B.

This case requires the court to examine whether the due diligence requirements of Tenn. R. Civ. P. 3 are applicable to the service of process that Tenn. Code Ann. § 56-7-1206(d) requires before a plaintiff can proceed directly against an uninsured motorist carrier when the whereabouts of the alleged uninsured motorist is unknown. Tenn. R. Civ. P. 3., which concerns commencement of actions provides, in pertinent part, as follows:

> If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining

> issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

Tenn. R. Civ. P. 3.

The statutory scheme concerning uninsured motor vehicle coverage begins at 56-7-1201. The sub-section concerning service of process in circumstances in which the location of the uninsured motorist is unknown, provides, in pertinent part, as follows:

> (d) In the event that service of process against the uninsured motorist, which was issued to the motorist's last known address, is returned by the sheriff or other process server marked, "Not to be found in my county," or words to that effect, or if service of process is being made upon the secretary of state for a nonresident uninsured motorist and the registered notice to the last known address is returned without service on the uninsured motorist, the service of process against the uninsured motorist carrier, pursuant to this section, shall be sufficient for the court to require the insurer to proceed as if it is the only defendant in the case.
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> (e) In the event the uninsured motorist's whereabouts is discovered during the pendency of the proceedings, an alias process may issue against the uninsured motorist. In such case, the uninsured motorist shall be allowed a reasonable time within which to plead to the original process, and then the case may proceed against the uninsured motorist as if the motorist was served with process in the first instance.

Tenn. Code Ann. § 56-7-1206(d) and (e) (2008).

In this case, the trial court held:

> [T]here was a failure to comply with Tennessee Rule of Civil Procedure 3 with respect to the [uninsured motorist] . . . and that there is no genuine issue of material fact establishing "due diligence" on the part of Plaintiffs' counsel in attempting to effect service of process upon [the uninsured motorist], to the prejudice of [the uninsured motorist carrier] with the result that Summary Judgment should be granted to [the uninsured motorist carrier] as well.

It is clear, and without dispute, that the plaintiffs in this case did not re-issue process within one year after the original summons was issued. But it is well settled that the Tennessee Rules of Civil Procedure are "laws" and are subject to being superseded in the same manner as statutes. ***Lady v. Kriegger***, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987) (citing ***Tenn. Dept. of Human Servs. v. Vaughn***, 595 S.W.2d 62 (Tenn. 1980)). In ***Kriegger***, this court held that "the specific provisions in Tenn. Code Ann. § 56-7-1206(e) prevail over the conflicting general provisions in . . . Rule 3." ***Id.***

We stated in ***Kriegge***r that the intention of the legislature in enacting Tenn. Code Ann. § 56-7-1206 was to provide efficient procedures to allow plaintiffs to obtain complete relief when injured by an uninsured defendant. Our analysis of the statutory provision was as follows:

> Subsection (d) is the procedure required to perfect a direct action against the uninsured motorist carrier when the whereabouts of the alleged uninsured motorist are unknown. Subsection (e) sets out the procedure required to add the alleged uninsured motorist to the subsection (d) proceeding when his whereabouts are ascertained. Suspension of the . . . Rule 3 requirement, that alias process be issued every six months[3] or that the action be filed yearly, during the subsection (d) proceeding, is consistent with the legislative intent to provide an efficient procedure.

Kriegger, 747 S.W.2d at 345. In an opinion of Presiding Judge Herschel P. Franks some three years later, this court followed ***Kriegger***. *See* ***Little v. State Farm Mutual Ins. Co.***, 784 S.W.2d 928, 929 (Tenn. Ct. App. 1990). In ***Little***, we rejected the argument that a plaintiff could not proceed under Tenn. Code Ann. § 56-7-1206(d) due to his failure to obtain the issuance of "new process" as required by Rule 3. ***Id***. We said: "The construction urged upon us by defendant would hold a plaintiff hostage to the requirement of obtaining service on the uninsured motorist or reissuing process from time to time indefinitely, which was not the intention of the legislature."***Id***.

Five years after ***Little***, the Supreme Court held that a plaintiff could proceed under Tenn. Code Ann. § 56-7-1206(d) against the uninsured motorist carrier in circumstances in which the process sent to the uninsured motorist defendant had been returned unserved "even if the defendant is, for some reason, dismissed from the case." ***Brewer v. Richardson***, 893 S.W.2d 935, 938-39 (Tenn. 1995). In ***Brewer***, the insurer relied on ***Glover v. Tennessee Farmers Mutual Ins. Co.***, 225 Tenn. 306, 468 S.W.2d 727 (Tenn. 1971), for the proposition that a plaintiff may not bring a suit directly against the uninsured motorist, saying that "despite the language of Tenn. Code Ann. § 56-7-1206(d) a judgment must first be obtained against the uninsured motorist defendant . . . ." ***Brewer***,

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[3] Six months was the applicable period at the time ***Kriegger*** was decided. Rule 3 now provides that there must be re-issuance within one year of the date of issuance of the previous process or, if there has been no issuance of process, one year from the date of filing of the complaint.

893 S.W.2d at 937. The Supreme Court disagreed. It stated that "it is beyond question that in enacting the statute [Tenn. Code Ann. § 56-7-1206(d)] the legislature intended that a plaintiff be allowed to sue the uninsured motorist carrier directly if he is unable to obtain service of process over the uninsured motorist defendant." ***Id***. at 938. The Court then cited ***Kriegger*** approvingly. ***Id***.

The defendant and the uninsured motorist carrier argue that "there are multiple, longstanding Tennessee precedents requiring due diligence on the part of Plaintiffs' counsel in attempting to locate and serve process on the Defendant." They state that a recent decision of this court, ***Webb v. Werner***, 163 S.W.3d 716 (Tenn. Ct. App. 2004) is instructive as to the due diligence requirement.[4] Then they argue, in effect, that, in ***Webb,*** this court imposed the due diligence requirements of Rule 3 on plaintiffs proceeding under Tenn. Code Ann. § 56-7-1206 (d) and (e).

While we agree that there are due diligence requirements with respect to service of process, ***Webb*** does not stand for the proposition that the due diligence requirements of Rule 3 are applicable when a party is proceeding pursuant to Tenn. Code Ann. § 56-7-1206(d) and (e). Such a reading would be directly contrary to our holdings in ***Kreigge***r and ***Little*** that the Rule 3 requirements are suspended during a subsection (d) proceeding.

The inquiry in ***Webb*** was whether, pursuant to Tenn. Code Ann. § 56-7-1206(d), the plaintiff had complied with the provision of that statute that requires a showing of "service of process against the uninsured motorist, which was issued to the motorist's last known address" and that the service was "returned by the sheriff or other process server marked, "Not to be found in my county," or words to that effect . . . ." In ***Webb***, we relied on and quoted ***Winters***, 932 S.W.2d 464 (Tenn. Ct. App. 1996) stating:

> In the present case, the plaintiff cannot proceed directly against the insurance company in accordance with the provisions of Tenn. Code Ann. § 56-7-1206(d) because even though she managed to elicit a "Not to be found in my county" response on the return of process, *she did not serve, or attempt to serve, the responsible party at his last known address.*

Webb, 163 S.W.3d at 720 (quoting ***Winters***, 932 S.W.2d at 465-66) (emphasis added). Similarly in ***Webb***, we said that "[a]lthough Plaintiff caused a summons to be issued on January 12, 2002, there is no showing that he ever attempted to deliver it to Werner's last known address in

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[4] The defendant and the uninsured motorist carrier also refer this court to its decision in ***Temlock v. McGinnis***, 211 S.W.3d 238 (Tenn. Ct. App. 2006). That case, which deals with the construction of Rule 4 in relation to Tenn. Code Ann. § 56-7-1206(e), is inapposite. The plaintiffs rely on ***Grindstaff v. Bowman***, E2007-00135-COA-R3-CV, 2008 WL 2219274 (Tenn. Ct. App. E.S., filed May 29, 2008). That case has no application to the facts of this case.

Switzerland." ***Id***. at 721. The failures of the plaintiffs in ***Winters*** and ***Webb*** to attempt to serve the uninsured motorist at his last known address showed a lack of due diligence.

That the statements concerning due diligence were in the context of determining whether the statutory requirements of Tenn. Code Ann. § 56-7-1206(d) had been met is made clear in ***Webb*** when we state: "We believe *the statute* requires a more diligent effort on the plaintiff's part to preserve her rights . . . ." ***Id***. (emphasis added). We clearly are *not* discussing due diligence under Rule 3 or any other rule of procedure. Rather, we are discussing the diligence necessary to attempt service at the *last known address* – a requirement of Tenn. Code Ann. § 56-7-1206(d).

Furthermore, ***Webb*** acknowledges that Tenn. Code Ann. § 56-7-1206(d) allows "a plaintiff to proceed directly against an uninsured motorist carrier under certain circumstances even if the uninsured motorist is never successfully served with process . . . ." ***Webb***, 163 S.W.3d at 720-21 (citing ***Brewer v. Richardson***, 893 S.W.3d at 936). In ***Webb***, we distinguished ***Kriegger*** and ***Little***, stating that "in neither case did the court find a lack of due diligence by the plaintiff." ***Id***. at 721.

In this case, the plaintiffs fully complied with the requirements of Tenn. Code Ann. § 56-7-1206(d). At the time of filing the lawsuit, the plaintiffs had process issued through the Secretary of State to the defendant's last known address.[5] In addition, that process was returned "Moved No Forwarding Address," which are words to the same effect as "Not to be found in County." The plaintiffs timely served the insured motorist carrier and clearly intended to proceed against that carrier from the beginning of the suit. There is no dispute concerning any of these facts. The plaintiffs thus met the requirements to proceed against the carrier under Tenn. Code Ann. § 56-7-1206(d).

During the pendency of the proceeding against the uninsured motorist carrier when the plaintiffs learned of the defendant's death, *i.e.*, his "whereabouts", they caused *alias* process to issue against the administratrix of his estate. According to Tenn. Code Ann. § 56-7-1206(e): "In such a case, the uninsured motorist shall be allowed a reasonable time within which to plead to the original process, and then the case may proceed against the uninsured motorist *as if the motorist was served with process in the first instance.*" Tenn. Code Ann. § 56-7-1206(e) (2008) (emphasis added). There are no disputes as to whether the plaintiffs had *alias* process issued and served on the administratrix of the defendant's estate shortly after they learned that the defendant was dead or whether they subsequently obtained service on an administrator *ad litem* of the estate. The plaintiffs thus fully complied with the requirements of Tenn. Code Ann. § 56-7-1206(e).

In support of their argument that the due diligence requirements of Tenn. R. Civ. P. 3 apply in this case, the defendant and the uninsured motorist carrier quote ***Webb***, citing various cases in

[5] In a letter that is part of the record, State Farm acknowledged that the Lexington, Kentucky, address used by the plaintiffs was the last known address State Farm had.

which the courts discussed due diligence The conclusion reached from the general statements in ***Webb*** are in error, however. "It is not an uncommon thing that general expressions used in disassociated cases, when invoked to apply beyond their original meaning are found inapplicable in the light of special instance." ***Nat'l Life & Accident Ins. Co. v. Eddings***, 221 S.W.2d 695, 699 (Tenn. 1949). The words of Chief Justice Marshall are pertinent: "'It is a maxim not to be disregarded that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used.'" ***Id***. (quoting ***Cohens v. Virginia***, 19 U.S. 264, 398 (1821)). The defendant and the uninsured motorist carrier in this case have read generalized statements concerning due diligence in ***Webb*** too broadly and out of the context of the particular decision.

We hold that because the plaintiffs timely filed their original complaint and proceeded within the letter of Tenn. Code Ann. § 56-7-1206(d) and (e), their action was not barred by the provisions of Tenn. R. Civ. P. 3. Rule 3 is superceded in actions such as this one. ***Kriegger***, 747 S.W.2d at 345; ***Little***, 784 2d at 929; ***Bonner***, 2007 WL 324536 at *3. This decision is consistent with the Supreme Court's holding in ***Brewer*** and with legislative intent clearly expressed in the language of Tenn. Code Ann. § 56-7-1206(d) and (e), as read literally. Because the plaintiffs complied with Tenn. Code Ann. § 56-7-1206(d), they may proceed against the uninsured motorist carrier, and, because they complied with Tenn. Code Ann. § 56-7-1206(e), they may proceed against the defendant's estate.

V.

The judgment of the trial court is vacated. The costs on appeal are taxed one-half to the appellant, Prudential Property & Casualty Insurance Company, and one-half to the appellant, Robert P. Wooley, deceased, through the administratrix of his estate, Carolyn Wooley and/or the administrator *ad litem* of his estate, Dennis A. Bradley. The case is remanded to the trial court for further proceedings, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE