Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-00901-CV

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JAMES E. CORNELIUS AND
JIM CORNELIUS & ASSOCIATES, INC., Appellants

V.

AMERICAN E&S INSURANCE TEXAS, INC.; HCA INSURANCE SERVICE, INC.; GLANVILL SPECIAL RISK TEXAS, INC.; GLANVILL SPECIAL RISK INSURANCE BROKERS; FG SPECIAL RISK, INC.; FINANCIAL GUARDIAN GROUP; ROBERT KOPAL; ARTHUR J. FERENZA, JR.; LARRY P. MENES; THERESA DRAGO; DONALD WEBER; AND GEORGE FEAGIN, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 92-028388

O P I N I O N

James E. Cornelius and Jim Cornelius & Associates, Inc., (collectively "Cornelius" unless otherwise noted) appeal from a summary judgment granted to appellees, American E&S Insurance Texas, Inc.; HCA Insurance Service, Inc.; Glanvill Special Risk Texas, Inc.; Glanvill Special Risk Insurance Brokers; FG Special Risk, Inc.; Financial Guardian Group;

Robert Kopal; Arthur J. Ferenza, Jr.; Larry P. Menes; Theresa Drago; Donald Weber; and George Feagin (collectively "American" unless otherwise noted). We affirm the trial court's judgment.

I. Background

James E. Cornelius is an insurance agent, and Jim Cornelius & Associates, Inc., is his agency. In 1990 Cornelius's agency handled an account for Automated Marine Propulsion Systems, Inc. Jim Cornelius & Associates had previously used FG Special Risk to place Automated Marine's insurance needs. In February 1990, FG Special Risk informed Jim Cornelius & Associates that the Automated Marine policy was due to expire on May 1, 1990. On March 12, 1990, Jim Cornelius & Associates sent Automated Marine's application for a renewal quote to FG Special Risk, and in April 1990, the policy was renewed. On May 11, 1990, FG Special Risk sent the policy binders and an invoice to Jim Cornelius & Associates. The premium was due May 21, 1990.

On May 30, 1990, FG Special Risk changed its name to Glanvill Special Risk Texas, Inc. On June 25, 1990, Glanvill Special Risk Texas sent a facsimile to Cornelius's agency informing the agency that Glanvill Special Risk Texas had not received Automated Marine's past-due premium payment of $27,862.50. The next day, James Cornelius received a call from his Houston office, telling him that the Automated Marine policy would be canceled if the premium remained unpaid. Cornelius then called Theresa Drago.

Cornelius became upset during the call because the insurance binder was still in effect and thus the threat of cancellation was wrongful. He also became upset when he learned the Automated Marine policy had been "upgraded." Nevertheless, on June 27, 1990, Jim Cornelius & Associates delivered a check to the carrier for the premium. On July 1, 1990, Cornelius was admitted to a hospital and diagnosed with a myocardial infarction. Cornelius alleges that the stress of the June 26, 1990, telephone conversation led to the July myocardial infarction and to later heart attacks in May 1991, February 1992, and August 1992.

II. Procedural History

On June 25, 1992, Cornelius filed his Original Petition seeking recovery on grounds of negligence, Deceptive Trade Practice Act violations, Insurance Code violations, breach of contract, breach of warranty, and civil conspiracy. Nearly three years later, on May 10, 1995, Cornelius filed his First Amended Original Petition, after which American filed special exceptions. In granting the special exceptions, the trial court ordered Cornelius (1) to plead with specificity the acts or omissions of each defendant that gave rise to the claims under the DTPA and under the Insurance Code; (2) to specify the "other related sections" of the Insurance Code for which he alleged a claim; (3) to specifically plead all "other acts" of each defendant that gave rise to any pleaded cause of action; (4) to plead specific acts, if any, that gave rise to specific claims against each defendant; and (5) to specify the claims asserted against each defendant as well as the facts relied upon by Cornelius to support the claims against each defendant.[1]

On August 14, 1996, Cornelius responded to the special exceptions order by filing his Second Amended Original Petition, largely reiterating the previous petitions with no greater specificity. In early September 1996, American filed a counterclaim against Cornelius, seeking attorney's fees for defending itself against the DTPA and Insurance Code claims. That same month, American filed its first summary judgment motion, seeking judgment on the claims of negligence, DTPA violations, Insurance Code violations, breach of contract, breach of warranty, and civil conspiracy.

The trial court granted American's summary judgment motion on November 15, 1996. That same day, Cornelius filed his Third Amended Original Petition with the added claims of fraud and intentional infliction of emotional distress. When the court granted American's

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[1] Cornelius failed to include in the appellate record the order granting American's special exceptions. American, however, included an unsigned copy of the order in its summary judgment proof. Cornelius admits the court granted the special exceptions, and Cornelius has never disputed that the unsigned order supplied by American was a true and correct copy of the order signed by the court.

first motion, the order did not address these two additional claims of fraud and intentional infliction of emotional distress and the remaining civil conspiracy claim. On November 21, 1996, some days after American was granted its first summary judgment, it filed its second summary judgment motion, seeking judgment as to those remaining claims.

The trial court granted American's second summary judgment motion on December 13, 1996. On December 6, 1996, Cornelius had filed his Fourth Amended Original Petition, largely reiterating the facts in his third petition but adding a claim of negligence per se. Thus, when the trial court granted American's second summary judgment motion, the negligence per se claim and the civil conspiracy claim remained. On December 16, 1996, three days after it was granted its second summary judgment, American filed its third motion for summary judgment, seeking judgment on these final negligence per se and civil conspiracy claims.

The trial court granted American's third summary judgment motion on March 20, 1997, on the remaining claims of negligence per se and civil conspiracy. The judgment was not final, however, because of American's counterclaim for attorney's fees. On June 2, 1997, this counterclaim was severed and abated, making the March 20, 1997, order final and clearing the way for this appeal. Cornelius appeals all three summary judgment orders.

Summary Judgment

A movant is entitled to summary judgment when it establishes that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). On appeal, the issue is whether the proof establishes as a matter of law that no genuine issue of fact exists as to one or more of the essential elements of the plaintiff's cause of action. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

Negligence

As for Cornelius's negligence claim, the first inquiry is whether a legal duty exists. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). Also, foreseeability of risk is the foremost consideration in determining whether a party violated a duty. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Foreseeability is what one should, under the circumstances, reasonably anticipate as consequences of his conduct. *See City of Dallas v. Maxwell*, 248 S.W. 667, 670 (Tex. Comm'n App. 1923, holding approved). We hold that a person of ordinary prudence could not reasonably foresee that a phone call, requesting an overdue payment for an insurance policy, could result in a heart attack. We hold that American owed no duty to Cornelius. Cornelius's injury was not a reasonably foreseeable result of a claim for payment with past due insurance premiums.

The uncontroverted evidence demonstrates that Cornelius has a long prior history of health problems, most significant of which was extensive vascular and heart disease. Cornelius's heart condition was so bad that he carried nitroglycerin tablets wherever he went to ease the angina pain caused by the narrowing of the major blood vessels of the heart. The trial court did not err in granting summary judgment on the negligence claim.

DTPA

As to the DTPA claim, to have standing to sue under the DTPA a party must establish that it is a consumer, as defined by the DTPA. *See Brown v. Bank of Galveston, Nat'l Ass'n*, 930 S.W.2d 140, 143 (Tex. App.–Houston [14th Dist.] 1996), *aff'd*, 963 S.W.2d 511 (Tex. 1998). An insurance agent who does not seek to acquire the insurance policy's benefits by purchase, or who is not covered by the policy's provisions, does not qualify as a consumer under the DTPA. *See Shelton Ins. Agency v. St. Paul Mercury Ins. Co.*, 848 S.W.2d 739, 744 (Tex. App.–Corpus Christi 1993, no writ). The appellants are merely agents, and neither is a consumer. The trial court did not err in granting summary judgment on the DTPA claim.

Insurance Code

In connection with Insurance Code claims, to assert a claim a party must have sustained actual damages caused by another's engaging in unfair methods of competition or unfair deceptive acts. *See* TEX. INS. CODE ANN. art. 21.21, § 16(c) (Vernon Supp. 1999). The acts must have been the producing cause of such damages. *See Crawford & Co. v. Garcia*, 817 S.W.2d 98, 101 (Tex. App.–El Paso 1991, writ denied). The only specific damages claimed by Cornelius are related to the heart attack. The Insurance Code does not provide for recovery for personal injuries, and the trial court did not err in granting summary judgment.

Breach of Contract and Breach of Warranty

As to the breach of contract and breach of warranty claims, Cornelius failed to support these appellate issues with legal authority and so waived his complaints. *See* TEX. R. APP. P. 38.1(h); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 304-305 (Tex. App.–Houston [14th Dist.] 1995, no writ).

Fraud

For a party to have an actionable fraud claim, the party must suffer injury from the alleged fraud. *See Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990). A victim can recovery only for those damages resulting directly and proximately from the fraud. *See Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996). Cornelius has failed to allege how he, rather than his client, Automated Marine, was defrauded. Moreover, the claimed injury was too far removed from the alleged actions to be the direct and proximate result of those actions. The trial court did not err in granting summary judgment on the fraud claims.

Intentional Infliction of Emotional Distress

For a party to assert a claim of intentional infliction of emotional distress, the actions alleged must be so outrageous in character and so extreme in degree as to go beyond all

possible bounds of decency as to be regarded as atrocious and utterly intolerable in a civilized community. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). The acts here alleged are not so outrageous in character or extreme in degree to constitute the tort. The trial court correctly granted summary judgment on this claim.

Negligence Per Se

Duty is an element of negligence per se. *See Missouri Pac. R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). As mentioned above, American did not owe a duty to Cornelius. The trial court, therefore, correctly granted summary judgment on Cornelius's negligence per se claims.

Civil Conspiracy

As for the civil conspiracy claims asserted in the second, third, and fourth amended petitions, there is no independent liability for civil conspiracy. *See Central Sav. & Loan Ass'n v. Stemmons N.W. Bank*, 848 S.W.2d 232, 241 (Tex. App.–Dallas 1992, no writ). If no other tort theories remain viable, a civil conspiracy claim no longer exists. *See Schoellkoph v. Pledger*, 778 S.W.2d 897, 900 (Tex. App.–Dallas 1989, writ denied). The trial court correctly granted American's third summary judgment motion on the claims of negligence per se and civil conspiracy.

III. Conclusion

It should be noted that the trial court could easily have dismissed Cornelius's pleadings for failing to plead with specificity as ordered. Even the Fourth Amended Original Petition listed a series of allegations not even remotely connected with Cornelius's alleged injury, the allegations of causes of actions against each defendant are virtually the same, word for word. It is impossible for any defendant to know specifically what it did, when, and

to whom. Although the final pleading was sixty-three pages long, it still alleged "... it is these acts, as well as other acts more specifically to be defined at a subsequent time, that constitute the basis of this cause of action."

We find that the pleadings, as well as the appeal, are frivolous. If this court is further burdened with this frivolous appeal, we will have a hearing to consider sanctions. *See* TEX. R. APP. P. 45.

This court, like the trial court, cannot find any valid cause of action. Therefore, having found the trial court correctly granted American's summary judgment motions' and having overruled all of Cornelius's appellate issues, we affirm the trial court's judgment.

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Ross A. Sears
Justice

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Anderson, Edelman, and Sears.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Ross A. Sears sitting by assignment.