Appellant's Motion for Rehearing Overruled, Opinion of May 17, 2001, Withdrawn, Affirmed and Corrected Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00194-CV

ANNIE F. LAAS AND EVERETT A. LAAS, Appellants

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 96-36414-A

C O R R E C T E D O P I N I O N

This is an appeal from an order of dismissal in a severed case involving claims under article 21 of the Texas Insurance Code. Appellants raised five points of error, challenging the severance and the dismissal. In our original opinion of May 17, 2001, we affirmed the trial court's judgment. Appellants filed a motion for rehearing. We overrule the motion for rehearing and issue this corrected opinion, affirming the trial court's judgment.

BACKGROUND

After an automobile collision, appellants obtained the property damage and personal injury policy limits from the insurer of the driver of the other vehicle. Appellants then sought to recover from their insurer, appellee, State Farm, under the underinsured motorist coverage in their policy. Appellants eventually filed suit against State Farm for the underinsured motorist benefits, for breach of the duty of good faith and fair dealing, and for violations of article 21 of the Texas Insurance Code.[1] The article 21 claims were severed from the property damage and personal injury claims.

The property damage claim was referred to appraisal, in accordance with the provisions of the insurance policy. The trial court appointed an umpire, who issued a valuation of $11,846.50 in property damages. Based on this evaluation, the trial court entered judgment for appellants' property damages for $1,746.50 (the award less the payment already received from the other driver's insurer and less appellants' deductible). As to appellants' personal injury claim, the jury awarded appellants a verdict in the amount of $9,410.60. Because this amount was less than the $15,000 paid to appellants by the other driver's insurer, the trial court entered final judgment that appellants take nothing on their personal injury claim against the underinsured motorist coverage from State Farm. This judgment also directed that appellants take nothing on their article 21.55 claims. Appellants appealed this judgment and the trial court's judgment was affirmed by a panel of this court. *See Laas v. State Farm Mut. Automobile Ins. Co.*, No. 14-98-00488-CV; 2000 WL 1125287 (Tex. App.–Houston [14th Dist.] August 10, 2000, pet. denied)(unpublished opinion).

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[1] Appellee claims that appellants' cause of action under Article 21.21 is not part of this case because it was first pled in a supplemental petition filed after the case was tried and required leave of court under TEX. R. CIV. P. 63. Appellee also claims the trial court denied appellants' motion for leave to file this petition. Nothing in the record supports the assertion that the trial court denied leave. The supplemental petition is included in the record filed in this court and it contains a trial court file stamp. Furthermore, the "trial" in this case concerned appellants' personal injury claims, not the bad faith claims against the insurer. The bad faith portion of the lawsuit was severed from the personal injury and property damage portion of the lawsuit. Therefore, we do not find that the Article 21.21 claims were raised too late.

The severed cause, which is the case before us, involves appellants' claims under the insurance code and of breach of the duty of good faith and fair dealing. The trial court dismissed these claims without prejudice. In the trial court's docket sheet, the court stated:

> Dismissed without prejudice. This case was severed from the main case because it was a bad faith case. The main case was tried. [Plaintiff] lost and the case is still on appeal. If [Plaintiff] wins the appeal in the main case, [Plaintiff] will be allowed to assert [Plaintiff's] Bad Faith claim again and awarded a separate trial or new severance. There is no reason to leave this case on the docket. This dismissal could be construed as a consolidation with the main case, now on appeal.

SEVERANCE

We turn first to appellants' fifth point of error. Appellants complain that it was an abuse of discretion under TEX. R. CIV. P. 41 to sever the bad faith and article 21 claims from the rest of the lawsuit. Appellants argue that these are not a separate cause of action and thus, the severance was a violation of Rule 41.

Appellants raised this same claim in their first appeal to this court. *See Laas*, 2000 WL 1125287. A panel of this court held that appellants had not preserved error on this issue because the record indicated no objection by appellants to State Farm's motion for severance and no complaint in the trial court about the severance. *See id*. Having already ruled on this issue, we need not address it again in this appeal. We overrule point of error five.

DISMISSAL

In points of error one through four, appellants challenge the dismissal of their claims under article 21. Appellants contend the dismissal was an abuse of discretion because the case was not moot or frivolous and because the dismissal violated Texas Rules of Civil Procedure 21, 21a, 166a, and violated their due process rights.

A trial court has broad discretion in determining whether to dismiss a lawsuit. *See, e.g., Trevino v. Houston Orthopedic Center*, 831 S.W.2d 341, 343 (Tex.App.--Houston [14th Dist.] 1992, writ denied). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or, in other words, acted in an arbitrary or unreasonable manner. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex.1985). A trial court may dismiss a cause of action if no cause of action exists or plaintiff's recovery is barred, *see Maranatha Temple, Inc. v. Enterprise Prod. Co.*, 893 S.W.2d 92, 98 (Tex. App.–Houston [1st Dist.] 1994, writ denied), if the action is frivolous, *see Onnette v. Reed*, 832 S.W.2d 450, 452 (Tex. App.–Houston [14th Dist.] 1992, no writ), or if the action is moot. *See Creel v. District Attorney*, 804 S.W.2d 628, 630 (Tex. App.–San Antonio), *rev'd on other grounds*, 818 S.W.2d 45 (Tex. 1991).

Appellants first argue the trial court erred in dismissing their cause of action without a filed written motion as required by TEX. R. CIV. P. 21 or notice under TEX. R. CIV. P. 21a and a hearing. Rule 21 merely concerns the requirement that pleadings or motions be filed with the trial court, that they state the grounds and relief sought, and be served on all other parties. *See* TEX. R. CIV. P. 21. Rule 21a describes the methods of service of pleadings and motions. *See* TEX. R. CIV. P. 21a. Neither of these rules provides a ground for a dismissal or challenging a dismissal.

Appellants next claim the trial court erred in dismissing under Rule 165a because appellant received no notice or hearing. Rule 165a concerns dismissal for want of prosecution. Under this rule, a case may be dismissed on the failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. *See* TEX. R. CIV. P. 165a(1). Furthermore, a case may be dismissed for failure to comply with time standards, or a lack of diligence. *See* TEX. R. CIV. P. 165a(2). A trial court also has the inherent power to dismiss a case for want of prosecution. *See State v. Rotello*, 671 S.W.2d 507, 508-09 (Tex. 1984).

Although the trial court's order does not state the basis for the dismissal, the basis is clear from the record: dismissal was not pursuant to Rule 165a, but was based on the court's determination that appellants' insurance code and bad faith claims were moot. Nothing in the record indicates appellants were dilatory in pursuing their claims or that they failed to appear for a hearing. Because we find the dismissal was not pursuant to Rule 165a, we need not address appellants' allegation of lack of due process.

As an alternative ground for challenging the dismissal, appellants contend the dismissal was effectively a summary judgment granted without a filed motion or supporting evidence. The judgment does not state that it is a summary judgment and the record contains no motion for summary judgment. Thus, we find that the judgment is not pursuant to Rule 166a.

Finally, appellants claim the trial court erred in dismissing their claims on the grounds that the claims were frivolous or moot. Nothing in the record indicates the trial court dismissed appellants' claims on the ground that they were frivolous. The record does, however, indicate the trial court dismissed appellants' claims as moot.

The mootness doctrine prohibits courts from deciding cases in which an actual controversy no longer exists. *See Federal Deposit Ins. Corp. v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994). Where a controversy between the litigating parties has ceased to exist due to events occurring after judgment was rendered by the trial court, the decision of a court would be a mere academic exercise and the court may not decide the appeal. *See Brown v. KPMG Peat Marwick*, 856 S.W.2d 742, 751 (Tex. App.–El Paso 1993, writ denied).

In the trial court, appellants alleged claims under both sections 21.21 and 21.55 of the Texas Insurance Code and of breach of the common law duty of good faith and fair dealing. On rehearing, appellants first raise their complaint that the trial court erred in dismissing the breach of duty claim. In response to appellants' motion for rehearing, appellee argues that appellants have waived their complaint about dismissal of the breach

of duty claim. We agree. In their brief, appellants did not challenge the dismissal of the claim of breach of the duty of good faith and fair dealing. Because appellants did not mention this claim, the original opinion disposing of this appeal did not discuss the breach of duty claim.

Rule 38.1 requires that the brief state concisely all issues or points for review. TEX. R. APP. P. 38.1(e). A court must treat a party's statement of an issue or point as covering every subsidiary question that is fairly included. *Id.* Even before Rule 38.1(e) became effective, a point of error was held to be sufficient if it directed the attention of the appellate court to the error about which the complaint was made. *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843 (Tex. App.--Houston [14th Dist.] 2000, pet. denied). Appellants' points of error claimed error in dismissing the claims for violation of articles 21.21 and 21.55, but the points of error did not mention the breach of duty claim. Furthermore, the argument under these points of error did not mention the breach of duty claim. We find that appellants did not direct the attention of this court to any error concerning dismissal of the breach of duty claim. We further find that neither the points of error in appellants' brief nor the argument can be fairly read to include a complaint about error in the dismissal of the breach of duty claim. Accordingly, we find that appellants waived any complaint about the trial court's dismissal of their claim of breach of the duty of good faith and fair dealing.

We turn now to appellants' claim of a violation of articles 21.21 and 21.55. Article 21.21 concerns unfair settlement practices, such as failing to attempt in good faith to settle a claim when the insurer's liability is reasonably clear. TEX. INS. CODE ANN. Art. 21.21, § (4)(10) (Vernon Supp. 2001). Section 21.55 requires an insurer to promptly notify a claimant of its acceptance or rejection of a claim after the insurer has received all information required. TEX. INS. CODE ANN. Art. 21.55, § (3) (Vernon Supp. Pamph. 2001).

If the insurer is found liable for an amount equal to or less than its highest settlement offer, then the bad faith claims (under article 21.21) will be rendered moot. *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.–Houston [1st Dist.] 1993, orig.

proceeding). This is because the extra-contractual claims are based on allegations of bad faith in investigating the plaintiff's claims and inadequate settlement offers. *Id.* If an insurer prevails on liability, or if the finder of fact concludes that the plaintiff's damages do not exceed the insurer's settlement offer, then the insurer's conduct necessarily cannot have been in bad faith. *Id.*

In the underlying case, State Farm was found liable for $1,746.50. *See Laas*, 2000 WL 1125287. This award was less than the amount ($2,309.13) of State Farm's offer to settle the disputed claim. Because the trial court's judgment awarded an amount less than State Farm's settlement offer, under the general rule, State Farm's conduct necessarily could not have been in bad faith.

In their motion for rehearing, appellants argue that, under *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995), extra-contractual claims may survive even if the insurer prevails on liability or if the plaintiffs' damages do not exceed the insurer's settlement offer. Indeed, the supreme court in *Stoker*, mentioned in dicta the possibility, that in denying a claim, an insurer might commit some act, so extreme, there could be an injury independent of the policy claim. *Id.* at 341.

As alleged in their supplemental petition, appellants claimed that appellee violated article 21.21[2] by making misrepresentations about appellants' appraiser, making numerous improper ex parte communications with the appointed umpire, and prevented appellants from providing evidence or responding to evidence supplied to the umpire which appellants contended was intended to do the following:

> This was the latest step in a series of procedures which Defendant instituted to decrease the value of the claim to Plaintiffs, including using noncomparable vehicles in their investigation of the claim, failing to timely and fully identify

[2] Appellants also claimed these actions constituted a breach of appellee's duty of good faith and fair dealing. As we held previously in this opinion, however, appellants did not complain in their brief about dismissal of these claims of breach of duty and, therefore, appellants waived complaint about dismissal of these actions as breaches of the duty of good faith and fair dealing.

> and describe the vehicles to show they were comparable in said investigation, failing to promptly respond to Plaintiffs [sic] evidence of claim, delaying in the consideration of the evidence presented by Plaintiffs regarding their claim, misrepresentation of Plaintiffs' appraiser Appel's actions of not participating in the process, failing to respond to Plaintiffs [sic] appraiser Appel's evaluation of value, feigning participation in the appraisal process while contacting Zora improperly and attempting to abuse the appraisal process in the manner which excluded Plaintiffs from participating in the process.

Alternatively, appellants claimed the ex parte contact with the appointed umpire by appellee's counsel resulted in an umpire's decision procured by fraud, corruption, or other undue means and that these actions constituted a breach by appellee of the duty of good faith and fair dealing.

These alleged actions by appellee do not involve appellee's failure to settle in good faith, but instead concern actions that allegedly occurred after appellee made its settlement offer, and thus, do not fall under the ambit of article 21.21. Furthermore, in their appeal of the original judgment in this case, appellants complained about the umpire's award on the grounds of fraud, accident or mistake. *Laas v. State Farm Mut. Automobile Ins. Co.*, No. 14-98-00488-CV; 2000 Wl 1125287 (Tex. App.--Houston [14th Dist.] August 10, 2000, pet denied)(unpublished opinion). In addressing this complaint, a panel of this court held that appellants had waived their complaints about the umpire's award because appellants presented no argument or authority. *Id.* Thus, we need not address whether appellants' complaint that appellee's alleged dealings with the umpire constituted an "act, so extreme, there could be an injury independent of the policy claim." *Republic Ins. Co.*, 903 S.W.2d at 341.

Although appellants' article 21.55 claim was included the trial court's order of severance, the court adjudicated appellants' article 21.55 claim in the first judgment. In that judgment, the trial court ordered that appellants take nothing on their claim for violation of

article 21.55.[3] Because the article 21.55 claim had already been adjudicated at the time the trial court signed its dismissal in the severed cause, there was no article 21.55 claim left to be adjudicated. Accordingly, the trial court's dismissal in the severed cause could not have included the article 21.55 claim.

Appellants have not shown that any action by the trial court probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). Because the judgment in the underlying case precludes appellants from obtaining any relief under article 21, appellants cannot establish error that would support reversal. We overrule points of error one through four.

Accordingly, we affirm the trial court's judgment.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 1, 2001.
Panel consists of Justices Fowler, Edelman and Cannon (Cannon, J., not participating).[4]
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[3] In their appeal of this earlier judgment, appellants challenged the trial court's take nothing judgment on the article 21.55 claim. *See Laas*, 2000 WL 1125287. Indeed, one of the points of error specifically challenged the trial court's adjudication of this claim after it had been severed. In ruling on these points of error, this court held that appellants had waived their points of error challenging the take nothing judgment on the article 21.55 claim because appellants had failed to cite to the record and present argument supporting their contentions. *See id.* Accordingly, the trial court's judgment in the underlying case, which included an adjudication of the article 21.55 claims, was affirmed by this court and the supreme court has denied review. *See id.*

[4] Senior Justice Bill Cannon, who was originally sitting by assignment on this case, passed away on August 8, 2001.