Motion for Rehearing Granted, Opinion filed July 22, 1999 Withdrawn, Affirmed, and Opinion on Rehearing filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00894-CV

LANNY DARRELL HEATHCOCK and RAQUEL PILAR HEATHCOCK, Appellants

V.

SOUTHERN COUNTY MUTUAL INSURANCE COMPANY and GENERAL AGENTS INSURANCE COMPANY OF AMERICA, INC., Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 90-57010

O P I N I O N O N R E H E A R I N G

Appellees' motion for rehearing is granted, the opinion issued in this case on July 22, 1999, is withdrawn, and the following opinion is issued in its place.

In this insurance case, Lanny Darrell Heathcock and Raquel Pilar Heathcock (the "Heathcocks") appeal a summary judgment granted in favor of Southern County Mutual Insurance Company ("Southern County") and General Agents Insurance Company of

America, Inc. ("Gainsco") (collectively, the "insurers") on the grounds that: (1) the holding of *Gandy*[1] does not retroactively apply to this case; (2) if *Gandy* applies retroactively, it is factually distinguishable from this case; (3) the statutes of limitations as to the Heathcocks' claims, as third parties, had not expired because those causes of action could not accrue until the Heathcocks secured a judgment in the underlying lawsuit; (4) the insurers failed to prove lack of agency; and (5) the affidavit of C.W. Rains is not competent summary judgment evidence. We affirm.

Background

In 1984, the Heathcocks were injured in an automobile collision with a vehicle for which liability insurance coverage was or had been held by Billy Don Avritt, D.C. Avritt, and/or Avritt Mobile Home Transit (collectively, the "Avritts"). The liability insurance policy (the "policy") had been issued by Southern County. The Heathcocks' filed suit against the Avritts (the "first lawsuit"), and, in 1986, the Avritts requested that the insurers provide a defense. The insurers denied the claim on the ground that the policy had been canceled six months before the accident for non-payment of premiums. On March 12, 1990, an allegedly agreed judgment (the "judgment") was entered in the first lawsuit awarding the Heathcocks $703,454.00. The Avritts thereafter assigned any claims they had against the insurers to the Heathcocks.

In October of 1990, the Heathcocks filed the current action against the insurers for: (1) breach of contract in the Heathcocks' capacity as judgment creditors of the Avritts; and (2) breach of contract, negligence, gross negligence, breach of the duty of good faith and fair dealing, breach of fiduciary duty, deceptive trade practices, insurance code violations, and fraud in the Heathcocks' capacity as contractual assignees of the Avritts' claims. The insurers filed three motions for summary judgment on various grounds. The trial court

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[1] *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

entered two orders collectively granting summary judgment against all of the Heathcocks' claims.

Standard of Review

A movant for summary judgment has the burden to show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). To be entitled to summary judgment, a defendant must either: (1) disprove at least one element of each of the plaintiff's causes of action, or (2) establish all elements of an affirmative defense to each claim. *See American Tobacco Co., Inc. v Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

In reviewing a summary judgment, we take all evidence favorable to the nonmovant as true and indulge all reasonable inferences in the nonmovant's favor. *See KPMG Peat Marwick v. HCH*, 988 S.W.2d 746, 748 (Tex. 1999). However, issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered as grounds for reversal on appeal. *See* TEX. R. CIV. P. 166a(c).[2] Similarly, an appeals court may not reverse a trial court's judgment in the absence of properly assigned error. *See Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998); *Vawter v. Garvey*, 786 S.W.2d 263, 264 (Tex. 1990).[3]

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[2] In a civil case, judicial economy generally requires a trial court to have an opportunity to correct an error before an appeal proceeds. *See In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999). Moreover, one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating the complaint for the first time. *See id*. Therefore, our rules of civil procedure and decisions thereunder generally require a party to apprise a trial court of its error before that error can become the basis for reversal of a judgment. *See id.*

[3] When reviewing a summary judgment, an appellate court should consider all grounds that: (a) the trial court ruled upon; (b) the movant preserved for appellate review; and (c) are necessary for final disposition of the appeal. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626-27 (Tex. 1996). In the interest of judicial economy, an appellate court may also consider other grounds that the movant preserved for review but the trial court did not rule upon. *See id*. In this case, in addition to the grounds addressed below, the insurers also moved for summary judgment on the ground that the Avritts failed to give timely notice of the Heathcocks' claim. However, the trial court's summary judgment orders indicate that summary judgment was granted on other grounds and the insurers have not asserted a cross-point to preserve a complaint regarding the trial court's failure to grant summary judgment on

Heathcocks' Claims as Judgment Creditors

Gandy

The first of the Heathcocks' five points of error contends that *Gandy* does not apply retroactively to this case because the insurers failed to preserve a complaint under *Gandy*.[4] Their second point of error argues that the facts of this case do not satisfy the test set forth in *Gandy*.

Gandy held that a defendant's *assignment* of his claims against his insurer to a plaintiff is invalid as against public policy if: (1) it is made prior to an adjudication of the plaintiff's claim against the defendant in a fully adversarial trial; (2) the defendant's insurer has tendered a defense; and (3) either: (a) the defendant's insurer has accepted coverage, or (b) the defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of the plaintiff's claim. *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996).[5] *Gandy* further held, however, that in no event is a *judgment* for a plaintiff against a defendant, rendered without a fully adversarial trial, binding on the defendant's insurer or admissible as evidence of damages in an action against the defendant's insurer by the plaintiff as the defendant's assignee. *See id.* This is because, if an insurer's liability is to be litigated in an action by a plaintiff as a defendant's assignee after a judgment is rendered, then it should be done on the strength of the plaintiff's claims rather than on the generosity of the defendant's concessions. *See id.* at 719. Thus, in no event should a judgment agreed to between a plaintiff and defendant be binding on a

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the issue of notice. *See id.* at 626. Accordingly, we do not address it.

[4] As a preliminary matter, the insurers assert that the Heathcocks have failed to challenge one of the grounds in their third motion for summary judgment, namely, that there was no contract upon which to base the Heathcock's claim for breach of contract as a judgment creditor. Because we are unable to distinguish this contention from that discussed in connection with the Heathcocks' second point of error, we will address it in our discussion of that point.

[5] *Gandy* expressly declined to address whether an assignment is also invalid if any of these elements is lacking. *See* 925 S.W.2d at 714.

defendant's insurer. *See id*. Decided on July 12, 1996, *Gandy* applies: (a) in cases then pending in which a complaint of an assignment had been preserved; and (b) to every assignment executed thereafter to which the *Gandy* elements apply. *See id*. at 720.

In this case, the insurers' third motion for summary judgment contended that, under *Gandy*, the Heathcocks lacked standing to bring this suit *as judgment creditors* because the Heathcocks obtained their judgment against the Avritts without an adversarial trial. The Heathcocks' response argued that *Gandy* does not apply in this case because the insurers did not provide a defense for the Avritts or attempt to adjudicate the coverage issue before the trial of the underlying suit.

Retroactive Application

Because the Heathcocks' summary judgment response challenged only the factual, and not the retroactive, application of *Gandy*, their first point of error presents nothing for our review. *See* TEX. R. CIV. P. 166a(c). Moreover, in support of their argument that the insurers failed to preserve a complaint under *Gandy*, the Heathcocks rely on the facts that: (a) their assignment was made in 1991, roughly five years before *Gandy* was decided; (b) the insurers' first amended answer filed in 1994 alleged that the assignment was void because it was barred by limitations, *i.e.*, not because of public policy; and (c) the insurers did not complain of the assignment on public policy grounds until their third motion for summary judgment was filed in 1997.

The Heathcocks apparently contend that an objection on public policy grounds to an assignment entered into before *Gandy* was decided must already have been asserted when *Gandy* was decided in order to have been preserved. We interpret the *Gandy* preservation requirement to instead mean simply that *Gandy* cannot be raised for the first time on appeal without first being properly raised in the trial court and, if unsuccessful, by assignment of error on appeal. The Heathcocks have cited and we are aware of no authority holding that a ground to negate a plaintiff's cause of action is not preserved if it is raised for the first

time in a motion for summary judgment in the trial court. Accordingly, the Heathcock's first point of error is overruled.

Factual Application

The Heathcocks' second point of error contends that the insurers failed to satisfy the *Gandy* requirements because they failed to prove that there was no adversarial trial in the underlying suit[6] and because the insurers never tendered a defense, accepted coverage, or made a good faith effort to adjudicate coverage issues prior to the adjudication of the Heathcocks' claims.

Although the insurers correctly contend that *Gandy* establishes a different standard to invalidate an assignment than a judgment,[7] as recited above, the absence of a fully adversarial trial is common to both. *See Gandy*, 925 S.W.2d at 714. The insurers' third motion for summary judgment alleges that the Avritts and Heathcocks entered into an agreed judgment and states that it is undisputed that the judgment obtained by the Heathcocks against the Avritts was procured without a fully adversarial trial. However, it refers to no evidence to support this contention. Instead, the "supplement" to the insurers' third motion for summary judgment refers to an attached certified copy of the trial court's docket sheet in the underlying lawsuit, which contains the following consecutive entries:

7-19-89 CASE ASSIGNED TO TRIAL [stamped].

3-12-90 Final Judgment per Agreed Decree. R.C. [handwritten].

In addition, because the first lawsuit was also held in the 55th District Court, the supplement asked the trial court to "take judicial notice of the lack of a fully adversarial proceeding" in that case.

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6 We interpret this contention as a challenge to the legal sufficiency of the evidence to prove the lack of a fully adversarial trial.

7 Thus, a different test applies to a plaintiff's claims asserted as an assignment creditor than those asserted as a judgment creditor. In this case, the insurers asserted *Gandy* only against the Heathcocks' claims as judgment creditors and relied on other grounds, discussed below, to invalidate their claims as assignment creditors.

On appeal, the Heathcocks contend that the docket sheet was not "competent" summary judgment evidence, but do not state why or in what respect it is not competent.[8] Although the Heathcocks further argue on appeal that the recitations of the March 12, 1990, judgment must be taken as true as to whether an adversarial trial took place,[9] they have cited, and we have found, no portion of the record reflecting that the March 12 judgment was attached to any summary judgment motion or response[10] or otherwise presented to the trial court for consideration in ruling on the summary judgment. Therefore, any effect of the March 12, 1990, judgment cannot be considered as grounds for reversal on appeal. *See* TEX. R. CIV. P. 166a(c).

In addition, the Heathcocks pose no challenge on appeal to the possibility that the trial court assented to the insurers' request to take judicial notice of the alleged lack of an adversarial proceeding in the first lawsuit. Whether or not such action would have been proper, we are not at liberty to address its propriety in the absence of properly assigned error. *See Pat Baker*, 971 S.W.2d at 450; *Vawter*, 786 S.W.2d at 264.[11] Because the

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8 It is therefore not apparent whether the Heathcocks contend that the docket sheet is not "competent" because, for example: (1) it is not a type of summary judgment evidence recited in Rule 166a(c); (2) a docket sheet does not constitute an official or comprehensive record of a trial court's action; (3) the information reflected in the docket sheet is vague, conclusory, ambiguous, or uncertain; or (4) the docket sheet is insufficient or unreliable for other reasons. We are neither authorized nor inclined to speculate on the Heathcocks' intended basis, if any, for this contention or to construct a supporting argument on their behalf and then respond to it.

9 The March 12, 1990, judgment contains recitations that the case was tried to the court and that evidence was presented.

10 A copy of the March 12, 1990, judgment appears in a supplement to the clerk's record by itself and not as an attachment to any of the summary judgment motions or responses. It was requested by the Heathcocks in a supplemental request filed under the cause number of the first lawsuit rather than the current lawsuit. The request represented to the clerk that the Heathcocks were appealing the first lawsuit to this court and referred to the cause number of this appeal even though that lawsuit was not on appeal in this proceeding or apparently any other.

11 Again, we may not speculate as to how, if at all, the Heathcocks' might have challenged this matter, or construct a supporting argument on their behalf in order to respond to it.

Heathcocks' second point of error thus fails to demonstrate error in granting summary judgment against their claims as judgment creditors, it is overruled.

Assigned Claims

The Heathcocks' third point of error argues that the trial court erred in granting the insurers' second motion for summary judgment based on the statute of limitations as to their assigned claims for breach of contract, fraud, insurance code violations and deceptive trade practices (the "assigned claims")[12] because: (a) the Heathcocks had no cause of action against the insurers until they obtained a judgment against the Avritts; and, alternatively, (b) a fact question remained as to the date of the insurers' final denial of the claim because of communications occurring between the insurers and the Avritts after the initial denial of coverage.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively prove when the cause of action accrued. *See KPMG*, 988 S.W.2d at 748. If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *See id*. In this case, the insurers' amended and second motions for summary judgment asserted that each of the assigned claims would have accrued when the Avritts received notice in September of 1986 that the insurers were denying coverage. The insurers thus contended that, because the Heathcocks filed this suit in October of 1990, more than four years after coverage was denied, the assigned claims were barred by limitations. The Heathcocks' summary judgment responses included the contentions set forth in their third point of error.

A party injured by an insured is a third party beneficiary of the insured's liability insurance policy. *See State Farm County Mut. Ins. Co. v. Ollis*, 768 S.W.2d 722, 723

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[12] Because the Heathcocks do not assign error to the granting of summary judgment against their assigned claims for breach of the duty of good faith and fair dealing, negligence, gross negligence, and breach of fiduciary duty, we do not address those claims.

(Tex. 1989). Normally, direct actions by an injured third party against a defendant's insurance company are prohibited until it has been established by judgment or agreement that the insured has a legal obligation to pay damages to the injured party. *See id.*; *Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 265 (Tex. 1969). In the instant case, the policy similarly states that "No action shall lie against the company, unless as a condition precedent thereto, . . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial . . . ." Under such policy language, a third party's right of action against the insurer does not arise or begin to accrue until he has secured such an agreement or a judgment against the insured. *See Great American Ins. Co.*, 437 S.W.2d at 265.

As contrasted from such a third party, an assignee: (a) stands in the same position as the assignor; (b) may only assert the rights that the assignor could claim; and (c) is subject to any defenses, limitations, or setoffs that could be asserted against the assignor's rights. *See Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 720-21 (Tex. App.—Houston [1st Dist.] 1988, writ denied). In this case, when acting in their capacity as assignees of the assigned claims from the Avritts, the Heathcocks were thus subject to any limitations defenses and dates of accrual that the insurers could have asserted against those claims while in the hands of the Avritts.

A first party claim accrues, and limitations begin to run on the claim, on the date coverage is denied, not the date a separate suit to determine coverage under the policy is resolved. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828-29 (Tex. 1990). Conversely, where there is no outright denial of a claim, the date of accrual is difficult to ascertain and is a question of fact. *See id.*, at 828 n.2. Thus, "if an insurance company strings an insured along without denying or paying a claim, limitations will be tolled." *See id.*

To establish the date of denial of coverage in this case, the insurers attached to their summary judgment motions a letter dated September 25, 1986, from Gainsco to John Williford, the Avritts' attorney. The letter stated that the policy had been canceled effective November 25, 1983, six months before the accident, and that Gainsco "cannot be of service . . . in the matter." Attached to the letter was a copy of the notice of cancellation sent in 1983.

To establish a fact issue with regard to the date of denial of coverage, the Heathcocks' summary judgment response referenced an attached affidavit of Williford. The affidavit acknowledged that the "insurers [had] initially indicated they would not provide coverage . . . ." but stated that:

> In a letter dated August 8, 1988, Alvin Breeland, a Vice-President of Southern County [the "Breeland letter"], advised me that Southern County was not in a position to comment on the validity of the policy . . . .
>
> On numerous occasions during my representation of [the Avritts], I corresponded with representatives of [Southern County] inquiring whether coverage to Mr. Avritt would be provided . . . . Despite my repeated inquiries, I never received an affirmative answer . . . nor did I ever receive an express denial . . . . The responses received from Southern County either indicated that research into the matter was being done, or that further information was necessary . . . . [A] direct and express denial of coverage by Southern County was never made.

The Breeland letter, attached to Williford's affidavit, referenced the Heathcock's lawsuit against the Avritts, and stated that, at the time, Breeland was "still not in a position to comment on the validity of the policy" and that he did "not want to assume a negative position to suddenly find that a contradicting fact [had] not yet come to [his] attention." Even taking this evidence as true and indulging all inferences in the Heathcocks' favor, there is no fact issue as to the date of accrual of the assigned claims because the September 25,

1986, letter was an outright denial of the claim which began the limitations period.[13] Therefore, the Heathcocks' third point of error is overruled. Moreover, because their claims as judgment creditors and assignees have been negated, we need not address the Heathcocks' fourth point of error concerning the authority of William Pipkin to reinstate the policy after it had been canceled.

Admissibility of Affidavit

The Heathcocks' fifth point of error argues that the trial court erred in granting summary judgment based on the affidavit of C.W. Rains because this affidavit is not competent summary judgment evidence. Because the portions of the summary judgment that we are affirming were either not based on Rains' affidavit or were also supported by other legally sufficient evidence, this point of error is not material to our disposition of this appeal. Therefore, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Anderson, Edelman, and Sears.[14]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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[13] Williford's affidavit does not deny the existence of this letter, and its statement that a denial of coverage was never made cannot create a fact issue as to the meaning or legal effect of that letter which we interpret as a matter of law.

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