STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Sandra Blosser and
Herbert D. Blosser,
Plaintiffs below, Petitioners

FILED
February 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101295 (Monongalia County 99-C-202)

Sentry Select Insurance Company,
Defendant below, Respondent

MEMORANDUM DECISION

Petitioners, Sandra Blosser and her husband, Herbert Blosser ("the Blossers"), appeal from the circuit court's order denying their motion filed pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure seeking to alter or amend the court's order denying their motion filed pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. In their Rule 60 motion, the Blossers sought relief from the circuit court's order granting summary judgment in favor of respondent, Sentry Select Insurance Company ("Sentry")[1]. The Blossers ask this Court to reinstate their remaining claims and find that the circuit court erred in not finding sufficient circumstances to grant their motion for relief under either Rule 60(b) or Rule 56(d).

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Upon consideration of the standard of review, as well as the parties' briefs and the record, the Court finds no substantial question of law nor does the Court disagree with the decision of the lower tribunal as to the question of law. Moreover, the Court finds no prejudicial error. For these reasons, and having reviewed the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

This Court reviews the denial of a Rule 59(e) motion under the same standard applicable to the underlying judgment on which the Rule 59(e) motion was based.

---

[1] Sentry Select Insurance Company was formerly John Deere Insurance Company.

Zimmerer v. Romano, 223 W.Va. 769, 679 S.E.2d 601 (2009) (*per curiam*). The subject of the Blossers' Rule 59(e) motion was the circuit court's order denying their Rule 60(b) motion. "'A motion to vacate a judgment made pursuant to Rule 60(b), W.Va.R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.' Syllabus Point 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 1, *Builders' Service and Supply Company v. Dempsey,* 224 W.Va. 80, 680 S.E.2d 95 (2009)(*per curiam*). "'[A]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.' Syllabus Point 3, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 2, *Dempsey*, 224 W.Va. 80, 680 S.E.2d 95 . While the Blossers devote much of their argument to the summary judgment order entered on December 17, 2008, this Court's review is limited to the order being appealed, which is the May 4, 2010, Order denying their Rule 59(e) motion. Accordingly, the Court applies a deferential standard of review.

This action arose out of a head-on collision that occurred on July 8, 1997, between a vehicle being driven by plaintiff Sandra Blosser and a tow truck being driven by defendant, William Swinburn, who was acting in the course and scope of his employment with defendant, David Black d/b/a Black's Auto Repair ("Black"). Sandra Blosser was not at fault in the accident. The Blossers and the other occupants of the Blosser vehicle made claims against Black and Mr. Swinburn for their injuries and damages arising out of the accident.

Sentry had issued a commercial auto insurance policy to Black ("the Black policy") with policy limits of $400,000. Those limits were paid to the Blossers and the other claimants within four months of the collision. The Blossers executed a full release of all claims against Swinburn, Black, and Sentry on November 4, 1997. The Blossers contend that the problem with this settlement was that they were told by Black and Sentry that no other persons had any business relationship with Black when the accident occurred.

The Blossers instituted this action in 1999, seeking damages for their injuries. When the Blossers learned that a David Tennant had a business relationship with Black, they filed an amended complaint on November 28, 2001, naming David Tennant as a defendant. Sentry had issued a policy of insurance to Mr. Tennant ("the Tennant policy"). Sentry filed a motion for summary judgment on the issue of whether there was coverage for the accident under the Tennant policy. This motion was pending when the claims against Tennant were mediated and settled by Sentry for policy limits of $400,000. A settlement agreement and release was executed on May 13, 2002, in which

the parties agreed that Sentry was not acknowledging coverage under the Tennant policy; that the payments were not to be construed as an admission of liability; and that liability was expressly denied.

In July of 2003, the Blossers filed their third amended complaint alleging, *inter alia*, that Sentry, by and through its employees, had acted in bad faith, committed fraud, and misrepresented the true amount of insurance coverage available for the subject accident, and they sought to set aside the prior releases. Sentry filed an answer denying the allegations and asserted a counterclaim for declaratory relief to determine whether the policy limits of the Black policy had previously been paid. Sentry filed a motion for summary judgment on its counterclaim. On September 28, 2005, the circuit court granted the motion and found that the total amount of auto liability coverage afforded under the Black policy was $400,000 per accident, which amount had been paid, in full, by Sentry.

Sentry amended its answer to the Blossers' third amended complaint to add a counterclaim for declaratory relief regarding coverage under the Tennant policy.[2] On July 3, 2008, Sentry filed a motion for summary judgment and asked the circuit court to find: (1) that there was no insurance coverage available for any of the Blossers' claims arising out of the accident under the Tennant policy and (2) that the Blossers' remaining claims against Sentry be dismissed. The Blossers responded and argued that coverage did exist under the policy because Sentry voluntarily settled with them under the Tennant policy and paid policy limits.

On December 17, 2008, the circuit court entered an order granting Sentry's motion for summary judgment. The court found that provisions of the Tennant policy were clear and unambiguous and that the tow truck being driven by Mr. Swinburn did not fall within the parameters of the Tennant policy. The circuit court noted that while Sentry's payment of policy limits under the Tennant policy in a settlement with the Blossers was inconsistent with the policy, it did not make the policy ambiguous. The

---

[2] When Sentry settled with the Blossers and paid the policy limits under the Tennant policy, Sentry's motion for summary judgment on the issue of whether there was coverage under the Tennant policy was pending. Given the settlement, the circuit court never ruled on this coverage issue, and the parties' settlement agreement expressly stated that Sentry was not acknowledging coverage under the Tennant policy. Sentry pursued the coverage issued under the Tennant policy by way of a counterclaim for declaratory judgment in its amended answer to the third amended complaint.

circuit court further noted that the settlement did not include any language stating that coverage existed under the Tennant policy. The circuit court found that there were no further matters pending and that the entire matter was concluded.

The Blossers did not appeal this December 17, 2008, summary judgment order. Instead, on January 20, 2009, they filed a Rule 60(b) motion seeking a reinstatement of their fraud, bad faith, and misrepresentation claims, as well as relief from the summary judgment order. The Blossers argued that the circuit court had mistakenly believed that these remaining claims involved the Tennant policy when, in fact, they involved the Black policy, and that the circuit court had confused these claims with a cross-claim that Tennant had filed against Sentry, all of which they endeavored to correct through their Rule 60(b) motion.

On February 6, 2009, the circuit court entered an order denying the Rule 60(b) motion.[3] The circuit court stated that it had thoroughly reviewed the summary judgment order entered on December 17, 2008, as well as the court file and the numerous memoranda that had been submitted by the parties, and found that the Blossers' fraud and misrepresentation claims were against Sentry in relation to the Tennant policy. The circuit court affirmed the conclusion reached in the summary judgment order entered on December 17, 2008, that there was no coverage for the Blossers under the Tennant policy and, given the same, found that there could be no claim for fraud and misrepresentation against Sentry for failure to disclose a policy (the Tennant policy) under which there was no coverage available to them. The circuit court further found that there had not been a showing of exceptional circumstances under Rule 60(b) and that any attempt to re-litigate legal issues heard previously was without merit.

On February 17, 2009, the Blossers filed a Rule 59(e) motion to alter, amend, or reverse the order denying their Rule 60 motion.[4] On May 4, 2010, the circuit court entered an order denying the motion. The circuit court stated that the matters had

---

[3] The circuit court also acknowledged the Blossers' argument that they were entitled to a reinstatement of this matter under Rule 37 of the West Virginia Rules of Civil Procedure. The circuit court found that Rule 37 had no applicability to this matter.

[4] The Blossers also argued in their motion that the Rule 56(d) case had not been fully adjudicated, therefore, their claims should be reinstated. The circuit court stated in a footnote in its May 4, 2010, Order that the case had been dismissed in its entirety in the summary judgment order entered on December 17, 2008, thus, no portion of the case remained to be fully adjudicated.

been fully reviewed, including the Blossers' Rule 60(b) motion, as well as their Rule 59(e) motion, and that the summary judgment was appropriate as set forth in the court's prior orders. The circuit court concluded that there had not been a showing of circumstances to support relief under Rule 59(e) and, again, found that any attempt to re-litigate legal issues under Rule 59(e) was without merit.

Having reviewed the parties' briefs and the record designated for appeal, including the orders entered by the circuit court, this Court cannot state that the circuit court abused its discretion in this matter.

Affirmed.

ISSUED: February 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh