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United States Court of Appeals
Tenth Circuit

April 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUTUMN BERTELS,

Plaintiff - Appellant,

v.

FARM BUREAU PROPERTY AND CASUALTY INSURANCE CO.,

Defendant - Appellee.

No. 21-3222
(D.C. No. 2:20-CV-02298-JWB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Autumn Bertels appeals the district court's grant of summary judgment to Farm Bureau Property and Casualty Insurance Co. on her claim that Farm Bureau breached its contractual obligation to its insured (Autumn's grandmother) to act in good faith and without negligence when it failed to timely offer Autumn a policy-limits settlement. During the pendency of this appeal, the Kansas Supreme Court issued an opinion in *Granados v. Wilson*, 523 P.3d 501 (Kan. 2023), that

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

undermines the basis of the district court's decision. Having reviewed *Granados* in light of the record and the parties' arguments, we conclude that remand is in order so that the district court can determine, in the first instance and in light of *Granados*, whether genuine issues of material fact preclude summary judgment on Autumn's claim or whether summary judgment may be granted to Farm Bureau on any of the alternative grounds Farm Bureau presented in its motion for summary judgment. Consequently, exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I. BACKGROUND

On October 15, 2010, Autumn was a passenger in a car her grandmother, Elizabeth Bertels, was driving south on a highway in Kansas. Denver Barr was driving north on the highway when his car crossed the center line, went through Elizabeth's travel lane, and entered the shoulder on Elizabeth's side of the road. Barr's car then changed directions, veered back onto the road and into the path of Elizabeth's car, and collided with Elizabeth's car. Elizabeth and Barr died in the accident. Autumn, who was then eight years old, suffered a severe spinal cord injury and paralysis from the chest down. Three of Elizabeth's other grandchildren who were also in the car were not seriously injured.

Farm Bureau insured Elizabeth's car, including liability coverage limited to $50,000 per person and $100,000 per accident. Farm Bureau learned of the accident on October 18, 2010, and one of its adjusters, Jim Wagoner, began investigating. He spoke that day with Ron Bertels, who was Elizabeth's son and the family's

spokesperson, about the passengers' medical conditions. The next day, Wagoner made a preliminary determination that Barr was 100% at fault for the accident based on his review of a police crash log, his inspection of the accident scene and the vehicles, and a newspaper article about the accident. On October 20, Farm Bureau set a $22,499 reserve for Autumn. According to Farm Bureau employee Ray Will, "[a] reserve gets assigned to a claim for a potential future claim payment." Aplt. App., Vol. 2 at 339 (Will Depo. Tr. at 59:17–18). Will also stated that due to Elizabeth's death, the seriousness of Autumn's injury, and the potential claim value, Farm Bureau placed the matter on a "watch list." *See id.* (Will Depo. Tr. at 57:1–15). At the time, Farm Bureau was aware that Elizabeth's estate could have up to $285,000 in assets it might have to pay out to Autumn if Elizabeth had any liability for the accident.

On November 10, 2010, Farm Bureau received the police accident report, which confirmed the facts as initially reported, including that Elizabeth had not left her lawful travel lane. Wagoner again determined that Barr was 100% at fault.

On December 3, 2010, Farm Bureau learned that the Bertels family had retained Steve Sanders as an attorney and that Elizabeth did not have a will. A few days later, Sanders provided Farm Bureau with a letter from Barr's insurer stating that the police report "confirms our insured [Barr] was at fault for this loss." Aplt. App., Vol. 3 at 672 (Wagoner Aff. at 2, ¶ 8) (internal quotation marks omitted). Believing Elizabeth was not at fault for the accident, Farm Bureau closed its file on March 7, 2011.

On October 5, 2012, Sanders filed two actions, one by Autumn against Elizabeth, Elizabeth's estate (the "Estate"), Barr's estate, and Ford Motor Company (the "2012 Action"); and one by the other three grandchildren against Elizabeth and Barr's estate. On December 28, 2012, Sanders wrote Wagoner a demand letter asserting that Elizabeth was at fault for the accident and offering to settle the claims of the other three grandchildren. Sanders also stated that he represented Autumn and that he would "be sending a separate settlement offer to [Wagoner] on her behalf." *Id.*, Vol. 1 at 130.

On February 20, 2013, Sanders had a telephone conversation with the attorney Farm Bureau hired to represent Elizabeth's estate, Lee Brumitt. In a note to file regarding the call, Sanders documented that while completing settlement negotiations regarding the other three children, Brumitt "volunteered information to me about the Autumn Bertels case." *Id.*, Vol. 6 at 1491. According to the note, Brumitt said "he knew that I had not made a demand, but he expected a demand from me in the future. He told me that, when we make a demand, Farm Bureau is prepared to pay the full $50,000 policy limit to [Autumn]." *Id.* Brumitt acknowledged that Sanders "might not want to take the money and settle out the Estate of Elizabeth Bertels due to federal court diversity jurisdiction issues at this time." *Id.* Sanders responded, "'Thank you for the information and we'll keep that information in our hip pocket.'" *Id.* Sanders wrote further: "At no time did I say anything to him along the lines of 'Thank you; we'll get that matter settled,' or 'Your offer is accepted,' or anything of that nature at all." *Id.*

Farm Bureau settled the claims of the other three children. Sanders never followed up with a separate settlement offer regarding Autumn. In November 2013, Brumitt sent Sanders an email referencing their earlier discussion about a policy-limits settlement for Autumn and inquiring whether there was any reason to delay resolution of Autumn's claims against Elizabeth. On January 2, 2014, Brumitt inquired again by email about settling Autumn's claims. And by letter dated February 18, 2014, Brumitt offered policy limits to settle with Autumn.

Apparently, Autumn (through Sanders) rejected that offer. After settling with Barr's estate and Ford Motor Company in the 2012 Action, Autumn voluntarily dismissed that action without prejudice. Sanders then opened a probate estate for Elizabeth and filed another case in Kansas state court against the Estate, asserting that Elizabeth's negligent operation of her car caused or contributed to Autumn's injuries (the "2014 Action"). The Estate and Autumn entered into a Covenant Not To Execute ("Agreement"). In the Agreement, the Estate assigned to Autumn its rights or cause of action against Farm Bureau, and Autumn agreed to pay the fees of the Estate's administrator and its counsel and to not execute any judgment against the Estate. The Estate agreed to waive all objections to Autumn's evidence and its rights to a jury trial, to cross-examine witnesses, to present evidence, and to appeal. Following a bench trial, the court entered judgment in Autumn's favor in the amount of $15,758,245.20 and allocated 60% of the fault for the accident to the Estate.[1]

[1] Farm Bureau had counsel in the courtroom during the trial, but it was not a party and never sought to intervene.

Autumn, having stepped into the Estate's shoes, then brought the diversity action underlying this appeal. Autumn asserted Farm Bureau breached the contractual duties it owed to Elizabeth to perform its obligations in good faith and without negligence by, among other things, failing to timely and appropriately investigate the accident and refusing to tender a policy-limits settlement offer to Autumn in a timely manner. Farm Bureau's breach, Autumn asserted, forced her to file the 2012 Action against the Estate and expend significant time, resources, and effort developing her case. She sought nearly $10 million in damages.

The parties filed cross-motions for summary judgment. The district court denied Autumn's motion and granted Farm Bureau's motion. The court concluded that under Kansas law, Farm Bureau had no duty to engage in settlement negotiations with Autumn because she never made a claim for compensation, and that Autumn assumed the burden to initiate settlement negotiations in December 2012, when Sanders told Wagoner that he would be sending Farm Bureau a settlement offer on Autumn's behalf. The court further construed Brumitt's alleged February 2013 offer to Autumn as a "conditional offer" contingent only on Sanders making a settlement demand. Aplt. App., Vol. VII at 1630.

Autumn appeals the grant of summary judgment to Farm Bureau.

II. STANDARD OF REVIEW

We review de novo a district court's decision to grant summary judgment, applying the same standard governing the district court. *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926, 930 (10th Cir. 2018). A "court shall

grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We view all facts and evidence in the light most favorable to the party opposing summary judgment." *Craft Smith, LLC v. EC Design, LLC*, 969 F.3d 1092, 1099 (10th Cir. 2020) (internal quotation marks omitted).

"A federal court sitting in diversity must apply the law of the forum state, in this case [Kansas], and thus must ascertain and apply [Kansas] law with the objective that the result obtained in the federal court should be the result that would be reached in [a Kansas] court." *Siloam Springs Hotel*, 906 F.3d at 930 (internal quotation marks omitted). "A federal district court's state-law determinations are entitled to no deference and are reviewed de novo." *Id.* at 931 (internal quotation marks omitted).

III. DISCUSSION

After briefing was completed in this appeal, the Kansas Supreme Court issued an opinion in *Granados v. Wilson*, 523 P.3d 501 (Kan. 2023), that resolves whether an insurer has a separate duty to engage in settlement negotiations with a third party before that party makes a claim for damages. *Granados* concluded that "[u]nder Kansas law, when handling claims against the insured, an insurer has no implied contractual duty to settle. Nor does it have implied contractual duties to investigate . . . ." *Id.* at 511. Instead, the court explained, "insurers have an implied contractual duty to act with reasonable care and in good faith when handling claims against the insured." *Id.* And whether "[a] failure to properly investigate or evaluate claims . . . or settle with the injured party . . . breach[es] those duties" presents "fact questions to

be decided by the trier of fact under the many circumstances that may give rise to an excess-judgment claim against an insurer." *Id.*[2]

Without the benefit of the Kansas Supreme Court's guidance in *Granados*, the district court framed the settlement issue as whether Farm Bureau had a legal duty to engage in settlement negotiations before Autumn filed the 2012 Action. The district court determined Farm Bureau had no such duty because Autumn never made a claim for damages until filing the 2012 Action.[3] *Granados*, however, clarifies that framing the settlement issue as a discrete legal duty conflates "the element of legal duty . . . with the element of breach" and "invades the province of the fact-finder." 523 P.3d at 509. Thus, the basis for the district court's ruling was erroneous.

If there were no genuinely disputed issues of material fact, we might still be able to resolve this appeal in favor of Farm Bureau as a matter of law. *See Kan. Penn Gaming, LLC v. HV Props. of Kan., LLC*, 662 F.3d 1275, 1284 (10th Cir. 2011) (explaining that in diversity cases, "the substantive law of the forum state . . . governs our analysis of the underlying claims" but "federal law [governs] the propriety of the district court's grant of summary judgment"). But it appears there

[2] Under Kansas law, "[a]n insurance company may become liable for an amount in excess of its policy limits if it fails to act in good faith and without negligence when defending and settling claims against its insured." *Glenn v. Fleming*, 799 P.2d 79, 85 (Kan. 1990).

[3] The district court also concluded that Autumn had "a minimal duty . . . to give notice of the potential of a claim before [Farm Bureau] was obligated to move" but instead filed the 2012 Action without giving Farm Bureau notice. Aplt. App., Vol. VII at 1629.

may well be such factual issues as to breach, causation, and damages. *See Granados*, 523 P.3d at 510 (explaining that a plaintiff asserting breach of the duty to act with reasonable care and in good faith must establish the existence of a duty, breach, causation, and damages, and that the latter three elements are factual questions).

Granados reiterated factors that, under Kansas law, bear on the factual breach inquiry the district court here must address on remand, several of which seem particularly pertinent: "the strength of the injured claimant's case on the issues of liability and damages," "failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured," "the insurer's rejection of advice of its own attorney or agent," and "the amount of financial risk to which each party is exposed in the event of a refusal to settle." *Id.* at 510 (internal quotation marks omitted).

Autumn addressed these and other breach factors in her motion for summary judgment, relying heavily on her expert witness's opinion that Farm Bureau's investigation was negligent and contrary to industry standards, which led Farm Bureau to a faulty conclusion as to the strength of Autumn's case that in turn put the Estate at risk of loss well in excess of policy limits. Autumn also addressed causation and damages. The district court's grant of summary judgment on the duty element meant it never grappled with whether undisputed facts allowed summary

judgment on any of the three factual elements, and we decline to do so in the first instance.[4]

We also cannot salvage the grant of summary judgment to Farm Bureau based on the district court's conclusion that Autumn assumed the burden of making a settlement offer in December 2012, when Sanders told Wagoner he would be sending a demand on her behalf. Autumn alleged her damages stemmed from Farm Bureau's failure to make a settlement offer in a timely manner, including soon after the accident and before the 2012 Action she filed in October 2012, and instead Farm Bureau waited years to make any offer. It therefore strikes us that the relevant inquiries include (1) whether Farm Bureau breached its duty to act with reasonable care and in good faith when it did not extend a settlement offer to Autumn until after she filed the 2012 Action and, if so, (2) whether Farm Bureau improperly delayed extending a settlement offer after the 2012 Action was filed. Sanders's failure to make a demand may bear on resolution of the second inquiry, particularly to the extent it has any effect on the analysis of causation and damages.

Finally, Farm Bureau claims it was entitled to summary judgment on alternative grounds presented in the district court. Although we may affirm a district court's judgment on any ground supported by the record and briefed by the parties, *Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1144 n.9 (10th Cir. 2023),

[4] We note that Farm Bureau filed a motion to exclude the testimony of Autumn's expert witness. The district court denied that motion as moot in light of its grant of summary judgment to Farm Bureau. Farm Bureau also identified a liability expert.

"proper judicial administration generally favors remand for the district court to examine the issue initially," *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005). Remand for consideration of the alternative grounds is the better course in this case.[5]

IV. CONCLUSION

We reverse the district court's judgment and remand the case for further proceedings consistent with this Order and Judgment.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[5] One of Farm Bureau's alternative grounds is an argument that Autumn lacks standing because her claims arise from the Estate's assignment of its rights against Farm Bureau but the assignment fails for lack of consideration. Autumn responds that she provided consideration when she agreed to pay the Estate's legal fees. Generally, before addressing the merits of an appeal, we must ensure the district court had jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). But Farm Bureau's argument requires "us to review the evidence and make the appropriate findings of jurisdictional fact," and "that job seems better suited for the district judge, who has wide discretion to allow affidavits, other documents, and [a] limited evidentiary hearing to resolve disputed jurisdictional facts." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10th Cir. 2012) (internal quotation marks omitted).