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80,175

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IN THE
SUPREME COURT OF FLORIDA

CASE NOS. 80,194
80,175

INAC CORPORATION,
Petitioner,

v.

BOBBY COOKE, d/b/a
CONTINENTAL TOP SHOP,
Respondent,

and

INSURANCE COMPANY OF
NORTH AMERICA,
Petitioner,

v.

BOBBY COOKE, d/b/a,
CONTINENTAL TOP SHOP,
Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER INAC CORPORATION

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INTRODUCTION

This case is before this Court on a question certified by the Second District Court of Appeal. The certified question concerns an insurer's right to cancel a policy upon the request of an insurance premium finance company when the insured fails to make installment payments to the finance company. This brief, filed by Petitioner INAC Corp., the finance company in the action below, concerns two equally important issues raised by the Second District's opinion. Either of the issues are grounds for reversal, at least in part, of the decision below.

Specifically, INAC will address the issue of the admissibility of an INAC computer report showing that INAC sent a proper notice of intent to cancel to the insured. The report is relevant to the critical factual issue in this case: whether INAC, in fact, mailed a notice of intent to cancel to Cooke prior to the insurance company's cancellation of Cooke's policies. INAC will show that the Second District was in error in holding INAC's computer report violative of the best evidence rule. In effect, the Second District's interpretation of the rule suggests that INAC could prove the mailing and contents of the notice of intent to cancel only by a copy of the notice accompanied by a return receipt. In this brief, INAC will demonstrate that the applicable statute imposes no such record-keeping or proof requirement. INAC will prove that, given the proper foundation, other evidence, even oral testimony alone, is sufficient to prove mailing of a notice of intent to cancel. The computer report

likewise was admissible on the issue of whether INAC provided the requisite notice to Cooke.

This case also raises the threshold issue of whether the Second District had jurisdiction to consider the admissibility of the computer report. INAC will show that the trial court's ruling on the admissibility of the computer report was an interlocutory ruling that was not part of the case on appeal, and therefore, was not yet before the appellate court.

This case has generated two petitions for review: Case No. 80-175 filed by the insurance company, Insurance Company of North America ("INA") and Case No. 80-194 filed by INAC. This brief has been filed in each case. INAC previously filed a motion to consolidate Case Nos. 80-175 and 80-194 or, alternatively, to intervene in 80-175. That motion is pending before this Court.

STATEMENT OF THE CASE AND FACTS

This case arises out of a dispute over the cancellation of two insurance policies because of the insured's failure to make the payments due under a Premium Finance Agreement. The respondent, Bobby Cooke, d/b/a Continental Top Shop ("Cooke"), purchased insurance from Petitioner Insurance Company of North America ("INA") in 1988. (R. 187). Cooke decided to finance his insurance premiums through Petitioner INAC Corp. ("INAC"), an insurance premium finance company. (R. 187).

Cooke entered into a Premium Finance Agreement with INAC in which Cooke agreed to make monthly payments to INAC and appointed INAC attorney in fact, authorizing INAC to cancel his insurance policies with INA if he failed to make those payments. (R. 79-80). Cooke's first payment to INAC was due August 14, 1988. (R. 188). Cooke did not make that payment. Id. INAC sent Cooke and Cooke's insurance agent a Notice of Intent to Cancel Cooke's insurance policies. Id. The Notice of Intent to Cancel informed Cooke that his policies would be cancelled if he did not cure his default within ten days. Id. Cooke still made no payment and on September 7, 1988, INAC sent a Notice of Cancellation to Cooke, Cooke's insurance agent, and INA, instructing INA to cancel Cooke's policies effective September 11, 1988. Id.

After Cooke's insurance was cancelled, Cooke delivered a check to INAC during the second week in September in an amount sufficient to cover the delinquent payments due in August and September. (R. 189). INAC forwarded a request for reinstatement

to INA requesting that Cooke's cancelled policies be reinstated as a result of his payment. Id. INA reinstated the policies on September 20 and 28, 1988, respectively. Id.

This process began all over again the next month when Cooke failed to make his October payment to INAC. INAC again sent a Notice of Intent to Cancel to Cooke and Cooke's insurance agent giving Cooke ten days to cure his default. Cooke claims that he never received this Notice. (R. 218). However, Cooke's insurance agent received its copy and, in fact, contacted Cooke to bring the Notice to his attention.[1] Despite notice from both INAC and his agent, Cooke did not make his delinquent payment. (R. 189). Consequently, INAC sent Cooke, Cooke's agent, and INA another Notice of Cancellation instructing INA to cancel Cooke's policies effective November 8, 1988. (R. 189-90). Following cancellation, Cooke again came to INAC with the late payment seeking reinstatement. (R. 190). INAC agreed once again to request reinstatement from INA.[2] Id. That reinstatement request was ultimately denied by INA. Id.

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[1] Evidence that Cooke's agent received the notice and followed up with a telephone call to Cooke appears in notes maintained by the agent in its file on Cooke. This entire file was filed in the trial court by Cooke and appears in the record at R. 221-307.

[2] Each request for reinstatement, copies of which were given to Cooke, gave notice to Cooke that his insurance remained cancelled until the insurer notified him of reinstatement. The reinstatement requests also specifically informed Cooke that continuing to make payments to INAC after cancellation did not mean that his insurance was in force. If reinstatement was denied, any post-cancellation payments made by Cooke to INAC would be credited to Cooke's account. (R. 190, 195).

Following cancellation of the policies, a fire allegedly damaged Cooke's business. (R. 74). INA refused coverage to Cooke because the fire occurred after his insurance policies had been cancelled. Although Cooke knew his insurance policies had been cancelled at the time of the fire, Cooke sued both INA and INAC claiming that he was entitled to coverage because he had not received proper notice of INAC's intent to cancel the policies (R. 73, 218). Cooke moved for partial summary judgment on the coverage issue. (R. 67-68). INAC filed its own summary judgment motion arguing that INAC had properly followed the cancellation procedures set forth in Section 627.848, Florida Statutes. (R. 204-212). In support of its motion for summary judgment, INAC submitted the affidavit of its Vice President of Operations, Robert Ballon. (R. 187 et seq.). Mr. Ballon's affidavit included a computer report showing that a notice of intent to cancel Cooke's policies was printed by INAC on October 19, 1988. (R. 193). Ballon testified that the computer report constituted INAC's permanent record of its mailing of a notice of intent to cancel to Cooke. (R. 189). Cooke moved to strike the computer report as violative of the best evidence rule. (R. 215-216).

The lower court denied both the INAC and Cooke motions for summary judgment, holding that a factual issue exists concerning whether proper notice had been sent. (R. 341-342). The court also denied Cooke's motion to strike INAC's computer report. (R. 341). The effect of these orders was that the Cooke/INAC portion of the case was to proceed to trial on the issue of

notice. Thus, the trial court's orders with respect to INAC's motion for summary judgment and Cooke's motion to strike were interlocutory and not yet reviewable by an appellate court.

INA also filed a motion for summary judgment. (R. 213-14). INA argued that INAC had properly cancelled Cooke's policies. (R. 213). INA also argued that it was INAC's duty to assure proper cancellation and that INA could rely on INAC's representation that a valid notice of intent to cancel had been sent, regardless whether INAC actually sent a valid notice to Cooke. (R. 363-64).

The trial court granted INA's motion for summary judgment and dismissed INA from the lawsuit. (R. 342). Because INA was now out of the case, this order was a final order as between Cooke and INA. Cooke filed an appeal to the Second District Court of Appeal and named INA the sole appellee. (R. 350). In his notice of appeal, Cooke stated that he was only appealing the entry of summary judgment in favor of INA. (R. 350). Because the remainder of the case between Cooke and INAC remained interlocutory, INAC did not participate in the appeal.

The Second District reversed the summary judgment entered in favor of INA, ruling that INA had an independent responsibility to determine that the premium finance company had followed the cancellation procedures set forth in Section 627.848, Florida Statutes. Opinion at 8.[3] Acknowledging a conflict among

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[3] Citations to the Second District's opinion will be referred to as "Opinion at ____."

Florida's appellate courts, the Second District certified that question to this Court. Opinion at 10. The Second District also affirmed the denial of Cooke's motion for summary judgment on the coverage issue holding that there was a factual issue concerning whether effective notice was sent. Opinion at 10.

The Second District's opinion, however, did not stop there. The court went on to rule on Cooke's motion to strike filed against INAC. Although INAC did not participate in the appeal and the trial court did not rely on INAC's computer report in granting summary judgment for INA, the Second District ruled that INAC's computer evidence was incompetent and reversed the trial court's refusal to strike INAC's evidence. Opinion at 9.

INAC filed a motion for leave to intervene and for rehearing in the Second District. INAC argued that the Second District lacked jurisdiction to determine the evidentiary issue between Cooke and INAC because that issue was still interlocutory. INAC also addressed the merits of the evidentiary issue, arguing that the computer report was competent, admissible evidence. The Second District denied the rehearing motion. Both INA and INAC petitioned this Court for review of the Second District's decision.

SUMMARY OF THE ARGUMENT

Computer reports and other secondary evidence are admissible to prove that notice of intent to cancel was provided to an insured. Neither the statute governing notices of intent to cancel nor Florida case law prohibits use of computer reports to prove mailing. In fact, Florida law holds that even oral evidence of office practice creates a presumption that a notice was mailed and received. Likewise, the best evidence rule does not bar the admission of the computer report. Even if the original notice were considered the "best evidence," use of secondary evidence is specifically permitted when the best evidence in unavailable. Thus, when a proper foundation is laid, the best evidence rule does not prohibit the use of secondary evidence.

The Second District also erred by considering the evidentiary issue at all. The computer report was offered by INAC, which was not named as an appellee in the appeal below which concerned only Cooke and INA. The ruling on the computer report was part of the case between Cooke and INAC which was not yet before the court. The Second District had no jurisdiction to consider an interlocutory issue raised against INAC in the final appeal between Cooke and INA.

ARGUMENT

This case concerns the important issue of how an insurance company (or insurance premium finance company) can prove that it mailed a notice of intent to cancel to the insured. The Second District, analyzing the best evidence rule, has ruled that INAC may not rely on a computer report to prove the mailing of a notice. Apparently, INAC must present the actual notice plus a return receipt. This ruling is a dramatic departure from existing Florida precedent and statutes, and risks havoc in the insurance industry.

I. INAC's Computer Report is Competent, Admissible Evidence.

Throughout this case, Cooke has argued that INAC's computer report is incompetent and inadmissible evidence on the issue of whether notice of intent to cancel was provided to Cooke. The basis of Cooke's argument, and the Second District's opinion adopting that argument, is that the computer report violates the best evidence rule. Cooke and the Second District suggest that the only way for INAC, and insurers, to prove that a notice of intent to cancel was mailed to an insured is to produce the "best evidence" in the form of an actual copy of the notice and a return postage receipt. There is no support for this proposition in Florida law.

The best evidence rule, Section 90.954, Fla. Stat. (1991), is merely a rule of preference setting forth the undisputed notion that the law prefers the highest quality evidence available. Sponsors Note-1979 to Section 90.954. However, when

the best evidence is unavailable, the rule contemplates that a party may substitute secondary evidence. Section 90.954 specifically provides that other evidence of the contents of a writing is admissible when: "all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith." Even if the original notice were considered the "best evidence" for the purposes of the rule, the computer report should not be barred. So long as INAC can prove to the satisfaction of the trial court that the original notice of intent to cancel is no longer in existence and convinces the court that no bad faith was involved, Section 90.954 specifically permits INAC to rely on alternative evidence.[4] See Hernandez v. Pino, 482 So.2d 450 (Fla. 3d DCA 1986) (physician permitted to testify regarding contents of x-ray despite destruction of x-ray); Pennsylvania National Mutual Casualty Insurance Company v. Burns, 375 So.2d 302 (Fla. 2d DCA 1979) (reversing trial court's refusal to admit unsigned insurance endorsement when original could not be located); Saporito v. Madras, 576 So.2d 1342 (Fla. 5th DCA 1991) (copy of contract can be admitted when original is unavailable).

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[4] The case relied upon by the Second District in its opinion, Sun Bank of St. Lucie County v. Oliver, 403 So.2d 583, 584 (Fla. 4th DCA 1981), is no more than a restatement of the best evidence rule. Sun Bank makes it clear that a party may not rely on alternative evidence such as secondary sources if the original evidence is available. In Sun Bank there was no proof that the original evidence was not available for submission to the court. Moreover, in Sun Bank the issue was not proof of mailing. As shown below, the best evidence rule has never been used in Florida to require a return receipt to prove mailing.

The Second District's decision that INAC may prove mailing only by maintaining return receipts or a U.S. Postal Service certificate of mailing is likewise unsupported by the statute governing notices of intent to cancel, Section 627.848, Florida Statutes (1987). Unlike other notice statutes that specifically require proof of mailing by return receipt, e.g., Section 627.728(5), the notice statute at issue in this case imposes no such requirement. § 627.848, Fla. Stat. (1987). A court may not read into the statute a requirement to send a notice by certified mail when no such requirement exists. See Pennsylvania National, 375 So.2d at 304 (refusing to require an original signature not required by statute).

Nor is there support in Florida case law for the proposition that the best evidence rule requires an insurance company to prove the contents of the notice or the date the notice was mailed only by a copy of the actual notice itself. Quite to the contrary, an insurance company may prove statutory notice, and even obtain summary judgment, based on oral testimony alone. Indeed, under Florida law oral testimony on office custom and practice alone creates a presumption of mailing. See Boman v. State Farm Mutual Automobile Insurance Company, 505 So.2d 445 (Fla. 1st DCA 1987), rev. denied, 509 So.2d 1119 (Fla. 1987); Brown v. Giffen Industries, Inc., 281 So.2d 897 (Fla. 1973); Progressive American Insurance Co. v. Kurtz, 518 So.2d 1339 (Fla. 5th DCA 1987), rev. denied, 528 So.2d 1182 (Fla. 1988) (entering summary judgment for insurance company based solely on evidence

of office custom); Allstate Insurance Co. v. Eckert, 472 So.2d 807 (Fla. 4th DCA 1985).

For example, in Boman the plaintiffs filed an affidavit claiming that they did not receive statutory notices that their premiums were due. The insurer had no copies of the actual notices to the insured beyond form letters which did not contain the name and address of the insured. The insurance company filed affidavits that its standard procedure was to send renewal notices thirty-four days before the due date and then to generate notices fourteen and twenty-one days after the due date. The insurance company had no record of actual mailings, only notice of its computer program and office custom. The First District Court of Appeal held that this affidavit testimony was admissible and was sufficient to create an issue of fact on whether the notices had been mailed.

The courts in Progressive and Allstate went even further to determine that evidence of routine office practice is sufficient to establish a presumption that mailing occurred, even in an absence of specific testimony that the office practice was followed on a particular occasion. Progressive and Allstate involved insureds' claims that their insurance companies failed to give them notice of their uninsured motorist coverage options as required by statute. The insurers offered evidence regarding their routine practices of mailing the requisite notice to their insureds. The insurers, however, did not offer any specific evidence that their practices were followed in the particular

cases. Both courts concluded that the insurers were entitled to a presumption that the insureds had received the requisite notice based on the insurers' evidence of customary office practice. The Fourth District Court of Appeal explained in Allstate, "To expect evidence as to the individual, actual act of mailing or as to receipt of the mailed item would be 'totally unreasonable.'" Allstate, 472 So.2d at 809 (citing Brown, 281 So.2d at 900).

INAC is in even a stronger position than the insurance companies in these cases. Rather than being forced to rely merely on office custom and practice alone, INAC offers its computer report showing that a notice of intent to cancel Cooke's policies was printed on a particular day. While the computer report, in and of itself, does not prove that anything was mailed to Cooke, the computer report has significant probative value if a proper foundation is laid and the report is offered with testimony that it is INAC's business practice to place the notices printed that day in the mail, properly addressed, and with proper postage affixed.

If the oral testimony by the insurers in cases like Brown, Boman, Progressive, and Allstate was considered probative and admissible, surely the computer report, which can only add to the weight of this evidence, is similarly admissible. Thus, INAC should have the opportunity to lay a proper foundation for the admissibility of the computer report below by marshalling testimony concerning the authenticity of the computer report, the way in which the computer report was prepared, and INAC's normal

business customs and practices relating to mailing out notices of intent to cancel printed on a particular day. It will then be for the jury to decide the weight of this evidence. The trial court should have the opportunity to determine the admissibility of the computer report in light of the foundation INAC will offer at trial.[5]

II. The Second District Lacked Jurisdiction To Consider the Motion to Strike Filed Against INAC.

While this Court should reverse the Second District's decision on the merits of the evidentiary issue, this Court should also reverse the Second District based on its lack of jurisdiction to rule on the motion to strike against INAC. The only basis for the Second District's exercise of jurisdiction in this case was the trial court's grant of summary judgment to INA, which was a final order. However, the issues between Cooke and INAC decided below remain interlocutory and are not yet ripe for review because the Cooke/INAC case must proceed to trial. See Aagaard-Juergensen, Inc. v. Lettelier, 540 So.2d 224, 224 n. 1 (Fla. 5th DCA 1989) (order appealable as to the parties dismissed); Dauer v. Freed, 444 So.2d 1012, 1015-16 (Fla. 3d DCA 1984) (same). INA raised this point in its answer brief in the Second District. Cooke's response relied on the proposition that

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[5] INAC believes that the computer report--when coupled with proof that Cooke was intimately familiar with the cancellation process, that Cooke's agent had received a copy of INAC's notice of intent to cancel and communicated its contents to Cooke, and that Cooke had received the myriad other cancellation documents from both INAC and INA--will overcome Cooke's self-serving assertion that he did not receive proper notice of INAC's intent to cancel Cooke's policies.

the appeal of a final order permits the appeal of all interlocutory orders issued in that same case. Cooke carried the general rule too far by blurring the distinction between orders entered in Cooke's case against INA and orders entered in Cooke's case against INAC. Interlocutory orders entered by the court below in one case are not appealable in the companion case. To demonstrate, suppose Cooke had also moved for summary judgment against INAC and that motion had been denied. Under Cooke's theory this order denying Cooke's summary judgment motion against INAC would also be up for review as a previous interlocutory order in the same "case" (defining "case" broadly to include the INA and INAC cases). However, the Second District would not have jurisdiction to write an opinion directing the entry of summary judgment against INAC, a nonparticipant in the appeal. To the contrary, only interlocutory orders raised in the case between INA and Cooke were properly before the appellate court. See Anderson v. Walthal, 468 So.2d 291, 293 (Fla. 1st DCA 1985); Dauer, 444 So.2d at 1015-16; Phillips Petroleum Co. v. Dorn, 292 So.2d 429, 431 (Fla. 4th DCA 1974).

When that critical caveat is recognized, it is clear that the Second District did not have jurisdiction to consider the denial of the motion to strike because this motion was filed against INAC and was directed to INAC's evidence and INAC's motion for summary judgment and not against INA. Any contrary conclusion, as this case demonstrates, puts INAC at substantial

risk of an adverse result in a proceeding in which it was not made a party.

CONCLUSION

The cases demonstrate that there can be no blanket preclusion of particular evidence offered to prove notice and mailing. The admissibility of a particular piece of evidence can be considered only in the context of examining the foundation laid for the testimony. That analysis should be conducted in the first instance by the trial court in this case. For all of the foregoing reasons, INAC respectfully requests that this Court reverse the Second District Court of Appeal's decision striking INAC's computer report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Bruce A. Walkley, Esq., 202 Moody Avenue S., Tampa, FL 33609, and to J. A. Setchel, Esq., 201 E. Kennedy Blvd., Suite 1416, Tampa, FL 33602 this 17th day of August, 1992.

Attorney

TPA-65799