

CASE NO. A06-58

A05-2020

State of Minnesota
In Court of Appeals

PROGRESSIVE INSURANCE COMPANY,

Appellant,

vs.

EDGAR VILLAFANA PALLARES,

Respondent.

APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

Appellant timely filed its Notice of Appeal in this matter and then served and filed its brief on April 8, 2006. Appellant received Respondent's brief in this matter on May 9, 2006. In its brief, Respondent has made serious, unsupported allegations against Appellant and Appellant's attorney accusing them of making misrepresentations of the District Court throughout this process, specifically as it relates to a "protective order." Respondent, through his attorney, has accused Appellant and its attorney of misrepresentations and misleading conduct no less than ten (10) times. See Respondent's Brief and Appendix, pp. 3, 6, 7, 8, 9 and 12. Respondent's assertions of misrepresentations are not supported by any reference to the court record and the claim that there was no "protective order" does not reference the actual "protective order." See, Progressive Insurance Company v. Edgar Pallares, Case No. A05-2020, filed Nov. 22, 2005, Appellant's Brief and Appendix, A-67 to 68.

Respondent also fails to acknowledge that the reason for the request to stay the proceedings surrounding the "protective order" was fully reviewed by the Honorable E. Anne McKinsey on May 25, 2005, including a review by the Court of the allegedly non-existent "protective order." See, Progressive Insurance Company v. Edgar Pallares, Case No. A06-58, filed April 8, 2006, Appellant's Brief and Appendix, A-25 to 26, ¶¶ 24 to 25, 1-18.

Based on Judge McKinsey's review the Honorable Kevin Burke stayed the motion scheduled for May 25, 2005 until the "protective order" was lifted. See Progressive Insurance Company v. Edgar Pallares, Case No. A05-2020, filed Nov. 22, 2005,

Appellant's Brief and Appendix, A-69. The reason for the request for the protective order in the federal court matter was also reviewed by Judge McKinsey and contained in the Temporary Restraining Order (Filed Under Seal) issued by the Honorable Judge Paul A. Magnuson, United States District Court on May 19, 2005. Id. at A-236 to 239.

On June 7, 2005, the Honorable Judge Paul A. Magnuson issued an Order lifting the temporary seal on the federal court Complaint and on "accompanying documents that were filed under seal pursuant to this Court's Order dated May 18, 2005." Id. at A-244 to 245. In addition, Respondent, in its brief, has raised a new legal issue regarding "equitable estoppel," which had not been previously raised with the District Court and based on the unfounded allegation of material misrepresentations contained in Respondent's Brief and Appendix. See Respondent's Brief and Appendix, p. 6.

ARGUMENT

I. The Respondent's serious allegation that Appellant and its attorney made misrepresentations to the District Court is unfounded and unsupported by the court record.

Respondent has made very serious allegations of making misrepresentations to the court against Appellant and its attorney. The seriousness of an allegation of an attorney lying to the court and the impact it has on our administration of justice was discussed by the Minnesota Supreme Court, which stated:

To a great degree our system for the administration of justice is based upon the integrity of the lawyers who handle litigation before the courts. Attorneys at law are officers of the court and have been so regarded for centuries. As we have done in Minnesota, traditionally courts have established procedures by way of bar admission requirements and standards to attempt to insure that only those who possess that integrity shall be admitted to practice. When we admit an applicant to the bar, in effect, we

are certifying to the bench, to the bar, and to the public that that person possesses character traits of honesty and personal integrity. Likewise, when, notwithstanding such pre-admission scrutiny, a lawyer demonstrates a lack of that truthfulness and candor that the courts have a right to expect of their officers to the end that the system of justice will not be undermined, courts do not hesitate to impose severe discipline. This court has noted that 'An attorney who deliberately deceives the court is guilty not only of obstructing the administration of justice but also of subverting that loyalty to the truth without which he cannot be a lawyer in the real sense of the word.'

In the Matter of the Application for the Discipline of Douglas E. Schmidt, an Attorney at Law of the State of Minnesota, 402 N.W.2d 544, 548-49 (Minn. 1987); citing In re Nilva, 266 Minn. 576, 583, 123 N.W.2d 803, 809 (1963).

Respondent's unfounded and unsupported allegation that Appellant's attorney made misrepresentations to the District Court should not be taken lightly by this Court. Appellant and its attorney have fully and honestly disclosed to the District Court the reasons for the request to stay the initial motion before the Honorable Kevin Burke, District Court Judge and the record on appeal clearly and unequivocally supports the existence of a protective order and the reasons why the motion should be stayed until that protective order was lifted.

More importantly, Judge Burke had the Honorable E. Ann McKinsey review Appellant's request for a stay to ensure that the grounds for such a request were warranted and not based on a frivolous argument. The review by Judge McKinsey included obtaining and reviewing a copy of Judge Magnuson's May 17, 2005 Protective Order sealing the federal Complaint and all other documents, which Respondent denies even exist. "Every court has supervisory power over its own records and files and access has been denied where court files might have become a vehicle for improper purposes."

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598, 98 S. Ct. 1306, 1312 55 L. Ed. 2d 570 (1977).

Respondent's unfounded and unsupported allegation of misrepresentations goes well beyond zealous legal advocacy in this case. Candor to the court applies to all parties that appear before it and must be an uncompromising tenet of our legal profession. Without it we are left with presenting arguments and deciding cases based on rhetoric and unfounded allegations of wrongdoing not supported by evidence.

II. Respondent's equitable estoppel argument based on unfounded allegations of misrepresentations should be dismissed and is presented for the first time on appeal.

A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it. See Thiele v. Stich, 424 N.W.2d 580, 582-83 (Minn. 1988). A party may not obtain review by raising the same general issue litigated below, but under a different theory. Id. In the present case, Respondent raises a different theory of equitable estoppel based on unfounded and unsupported allegations that Appellant and its attorney made misrepresentations to the District Court. However, while the record on appeal establishes that Respondent has on numerous occasions attempted to argue misrepresentation, the legal issue of equitable estoppel was not presented to the District Court. Therefore, Appellant requests that the issue of equitable estoppel be dismissed.

III. A Rule 115.11 Request for Reconsideration is not a formal motion.

Respondent attempts to argue that the unsigned Notice of Motion for sanctions was timely because it was a response to Appellant's motion for reconsideration.

However, Appellant made a request for a motion to reconsider pursuant to Minn. Gen. R. Prac. Rule 115.11, which states:

Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances. **Requests to make such a motion, and any responses to such requests, shall be made only by letter to the court of no more than two pages in length, a copy of which must be sent to opposing counsel.**

Minn. Gen. R. Prac. Rule 115.11 [Emphasis added]. Motions to reconsider do not toll any time periods or deadlines, including the time to appeal. Limongelli v. GAN National Insurance Company, 590 N.W.2d 167, 168 (Minn.App. 1999). A judgment denying reconsideration is not independently appealable. Id. at 169; citing Carlson v. Panuska, 555 N.W.2d 745, 746 (Minn. 1996).

In the present case, an Order for Judgment was issued on August 15, 2005 and entered on August 16, 2005. Respondent's unsigned Notice of Motion was received on August 17, 2005 requesting that Appellant dismiss the action and withdraw the pleadings after the Court had already entered Judgment. Therefore, Respondent's motion for sanctions was untimely.

CONCLUSION

Respondent's brief contains unsupported and unsubstantiated allegations of misrepresentations that are contrary to the record on appeal and that raise new legal theories that are generally not subject to review by this Court. Appellant asks that this Court consider its reply to these specific allegations and ultimately requests that the allegations raised be stricken as unfounded and unsupported by the court record.

Dated: 19 May 06

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STATE OF MINNESOTA
IN COURT OF APPEALS
CASE NO. A06-58

Progressive Insurance Company,

Appellant,

**CERTIFICATION
OF BRIEF LENGTH**

vs.

Edgar Villafana Pallares,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subs. 1 and 3, for a brief produced with a Times New Roman font. The length of this brief is 1,450 words. I certify that the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations. This brief was prepared using Microsoft Office Word 2003.

DATED: 19 May 06

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