IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 11, 2020

Lyle W. Cayce
Clerk

No. 19-40250
Summary Calendar

DEBORAH GONZALES,

Plaintiff–Appellant,

v.

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 6:18-CV-26

Before OWEN, Chief Judge, and SOUTHWICK and WILLETT, Circuit Judges.

PER CURIAM:*

Following an insurance dispute, Deborah Gonzales asserted three claims against Allstate Vehicle and Property Insurance Company (Allstate). After exercising its appraisal rights and paying the appraisal award, Allstate moved for and was granted summary judgment. Gonzales appeals the dismissal of her claim based on the Texas Prompt Payment of Claims Act (TPPCA). She

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

relies on two Supreme Court of Texas cases decided after the grant of summary judgment holding that payment of an appraisal award does not bar, as a matter of law, a plaintiff's TPPCA claim. Nevertheless, we affirm the district court's judgment because Gonzales failed to preserve her argument in the district court.

I

The facts in this case are undisputed. Gonzales's home in Victoria, Texas was damaged during Hurricane Harvey. Her insurance policy with Allstate covered the damage. After Gonzales submitted her insurance claim, Allstate issued a payment of $6,247.73. Dissatisfied, Gonzales filed suit in state court alleging three causes of action: a claim for breach of contract, a claim pursuant to the TPPCA, and a statutory bad faith claim pursuant to the Texas Insurance Code and the Deceptive Trade Practices Act. Allstate removed the case to federal district court.

Thereafter, Allstate exercised its appraisal rights under Gonzales's policy. The appraisers valued the amount of loss at $23,822.72. Allstate agreed with the appraisers and tendered $15,073.98 to Gonzales, an amount equaling the appraisers' loss estimate "less [the policy's] deductible and prior payments." Allstate then moved for summary judgment in the district court, arguing that its "compliance with the policy's appraisal provision and timely payment of the appraisal award serve[d] to preclude [Gonzales's claims] as a matter of law." The district court granted summary judgment in favor of Allstate on each of Gonzales's claims. Gonzales now appeals the dismissal of her TPPCA claim.

II

Gonzales argues that we should reverse and remand her case in light of *Barbara Technologies Corp. v. State Farm Lloyds*[1] and *Ortiz v. State Farm Lloyds*,[2] two Supreme Court of Texas cases issued after the district court granted summary judgment in this case. These cases hold that payment of an appraisal award does not entitle an insurer to dismissal of an associated TPPCA claim as a matter of law.[3] But we decline to address the merits of Gonzales's argument because she did not raise it in the district court.

As a general rule, "a change in law . . . does not permit a party to raise an entirely new argument that could have been articulated below."[4] This rule applies if a party "could have made the same 'general argument' to the district court, but had not done so."[5] Here, Gonzales could have made the same general argument below but did not do so. Nothing in Gonzales's response to Allstate's motion for summary judgment suggests that payment of the appraisal award did not entitle Allstate to dismissal of her associated TPPCA claim as a matter of law.

Gonzales's reply brief confirms this conclusion. She states that she "made a sufficiently similar argument in the trial court" but points to nothing in the record that supports this conclusory assertion. Instead, she asserts that the "crux" and the "essence" of her arguments below countered Allstate's contentions that all of her claims were extinguished as a matter of law. Gonzales argued that Allstate could not "establish its estoppel defense as a

---

[1] 589 S.W.3d 806 (Tex. 2019).

[2] 589 S.W.3d 127 (Tex. 2019).

[3] *Barbara Techs.*, 589 S.W.3d at 829; *Ortiz*, 589 S.W.3d 127, 135.

[4] *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 256 (5th Cir. 2013); *see also Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312, 317 n.5 (5th Cir. 2015).

[5] *Learmonth*, 710 F.3d at 256 (quoting *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc)).

matter of law" in the district court. But she enumerated three specific sub-arguments in support of her contention, none of which assert that a TPPCA claim is unaffected by an insurer honoring an appraisal award. She failed to raise the "same general argument" she now raises here.[6]

Nor are we convinced Gonzales was precluded from making such an argument. We recognize that several courts, including our own, had previously concluded a TPPCA claim was extinguished as a matter of law after the payment of an appraisal award.[7] But the Supreme Court of Texas granted review in *Barbara Technologies* and *Ortiz* on January 18, 2019, seven days after Allstate moved for summary judgment and thirteen days before Gonzales filed her response to the motion. This fact undermines her assertion here that she "could not have made a good faith argument in the trial court that payment of the appraisal award did not preclude her from recovering under the TPPCA as a matter of law."

In a final attempt to salvage her claim, Gonzales argues that her case presents the sort of "extraordinary circumstances" where we have declined to apply our traditional rules concerning forfeiture.[8] We disagree. "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it."[9] Gonzales's contention on appeal may present a pure question of law, but she has not met her burden of establishing that a miscarriage of justice would

---

[6] *Id.* (internal quotation marks omitted) (quoting *McGinnis*, 918 F.2d at 1496).

[7] *See, e.g.*, *Mainali Corp. v. Covington Specialty Ins. Co.*, 872 F.3d 255, 258 (5th Cir. 2017), *as revised* (Sept. 27, 2017); *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 847 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

[8] *Learmonth*, 710 F.3d at 257 (quoting *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009)).

[9] *Id.* (quoting *AG Acceptance Corp.*, 564 F.3d at 700).

result were we to decline to consider her argument.[10]

Gonzales analogizes her case to *AG Acceptance Corp. v. Veigel*.[11] But it is materially distinguishable. The appealing party in *Veigel* had been ordered to pay $206,544.52 in attorney's fees to the opposing party. Our precedent clearly "preclude[d] an award of attorney's fees [in that case] . . . as a matter of law."[12] After recognizing the "significant actual harm" that would befall the appealing party were we to affirm "liability for approximately $206,544.52 in unjustified attorney's fees," we considered the appealing party's argument.[13] In contrast, Gonzales is not required to pay an undeserving party's attorney's fees that are prohibited as a matter of law. Her case is more analogous to the numerous other cases where litigants have procedurally forfeited arguments by failing to address them below.[14] As in those cases, we decline to consider Gonzales's argument for the first time on appeal.

* * *

The district court's judgment is AFFIRMED.

---

[10] *See AG Acceptance Corp.*, 564 F.3d at 700 (noting that the burden of establishing extraordinary circumstances rests with the party who is appealing the particular ruling in question (citing *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996))).

[11] *See id.* at 701.

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, *Green Tree Servicing, L.L.C. v. House*, 890 F.3d 493, 503 (5th Cir. 2018); *Cent. Sw. Tex. Dev., L.L.C. v. JPMorgan Chase Bank, Nat. Ass'n*, 780 F.3d 296, 300-01 (5th Cir. 2015); *cf. Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 549 (5th Cir. 2016) ("Plaintiffs' argument, however compelling, is waived. They do not appear to have presented anything like it to the district court, and the district court did not appear to detect it in what they did offer.").