2004 WL 3090181 (Ohio App. 10 Dist.), 2004 -Ohio-7193

Court of Appeals of Ohio, Tenth District, Franklin County.
Ann H. Womer BENJAMIN, Superintendent of the Ohio Department of Insurance, in Her Capacity as Liquidator, Plaintiff- Appellee,
v.
CREDIT GENERAL INSURANCE CO. et al., Defendants -Appellees,
(Sean G. LOGAN, Chapter 11 Trustee of the PRS Insurance Group, Appellant).
No. 03AP-1117.
Dec. 30, 2004.

Appeal from the Franklin County Court of Common Pleas.
Jim Petro, Attorney General; Dinsmore & Shohl, LLP, George H. Vincent, Stephen G. Schweller, Neal D. Baker and Amy M. Scholl, Special Counsel to the Ohio Attorney General, for plaintiff -appellee.
Benesch, Friedlander, Coplan & Aronoff, LLP, Jack Gregg Haught and Jennifer M. Turk; Bingham McCutchen, LLP, Harold S. Horwich, Thomas J. Hennessey and Stephen M. Hryniewicz, for appellant.

OPINION

SADLER, J.

(REGULAR CALENDAR)

*1 {¶ 1} This is an appeal by appellant, Sean G. Logan, Chapter 11 Trustee ("the trustee") of PRS Insurance Group, Inc. ("PRS") from the October 10, 2003 decision and entry of the Franklin County Court of Common Pleas, denying the trustee's "Motion for Order Requiring Return of Assets and Posting of Bond" filed January 22, 2003. In the trial court's decision, it refused to order that appellee, Ann H. Womer Benjamin ("the liquidator"), in her capacity as liquidator of Credit General Insurance Company ("CGIC"), convey to appellant over $20 million of assets now in the liquidator's hands and to which the trustee claims entitlement outside the proof of claims procedures set forth in Chapter 3903 of the Ohio Revised Code. For the following reasons, we affirm.

{¶ 2} PRS was the parent company of a group of insurance -related concerns, including agencies, reinsurance companies and Ohio insurance companies subject to regulation by the Ohio Department of Insurance ("ODI"). CGIC was one of the Ohio insurance companies held by PRS. In June 2000, CGIC voluntarily entered into a confidential supervision consent order ("consent order"), pursuant to R.C. 3903.11. Under the consent order, ODI supervised the affairs of CGIC and had the authority to preapprove certain of CGIC's actions, including the making of payments exceeding a stated amount, and the entering into certain contracts. CGIC's officers, directors and employees maintained the day-to-day operations of the company. Pursuant to an addendum to the consent order, PRS and its other subsidiaries agreed to cooperate with ODI during the period of supervision. This included an agreement that certain transactions between PRS -held companies would not be undertaken without ODI's prior written approval.

{¶ 3} On November 27, 2000, ODI filed a motion to place CGIC in liquidation, pursuant to R.C. 3903.12. On January 5, 2001, the Franklin County Court of Common Pleas journalized a Final Order of Liquidation and Appointment of Liquidator, placing CGIC in liquidation pursuant to R.C. Chapter 3903 and appointing the liquidator. Nearly contemporaneously, PRS' creditors filed an involuntary petition under Chapter 7 of the United States Bankruptcy Code, forcing PRS into bankruptcy proceedings. PRS subsequently agreed to an order for relief and converted the involuntary Chapter 7 case to a voluntary Chapter 11 case. The liquidator filed a proof of claim in the bankruptcy case, claiming that CGIC was owed over $45 million by PRS and several other of its subsidiaries. Later, the trustee instituted an adversary proceeding against CGIC, in which the trustee sought to recover the same assets that PRS seeks to obtain through its motion filed with the court of common pleas in the instant case.

{¶ 4} Though he was not a party to the present liquidation case, the trustee filed on January 22, 2003, a Motion for an Order Requiring the Return of Assets and Posting of Bond, through which he sought "return" of assets held by the liquidator and to which PRS claimed lawful entitlement outside the proof of claims procedure found in R.C. Chapter 3903. The trustee based his claim to "return" of the assets on Ohio's Fraudulent Transfer Act, codified in R.C. Chapter 1336; certain sections of the

United States Bankruptcy Code; and on the common law theory of breach of fiduciary duty. Through his motion, the trustee also sought the requirement that the liquidator post a bond in the amount of $20 million and an order imposing upon the liquidator a constructive trust.

*2 {¶ 5} On October 10, 2003, the trial court journalized a decision and entry denying the motion. It is from this decision and entry that the trustee now appeals. He asserts three assignments of error for our review, as follows:

I. The trial court erred in denying PRS Insurance Group, Inc.'s Motion for Order Requiring Return of Assets and Posting of Bond, as amended on January 22, 2003 (the "Amended Motion") in its Decision and Entry Denying PRS Insurance Group, Inc.'s Amended Motion for Order Requiring Return of Assets and Posting of Bond Filed January 22, 2003 (the "Decision") by its ruling that the sole remedy of the PRS Group was to file a proof of claim as a creditor in the liquidation proceedings of Credit General Insurance Company.

II. The trial court erred in denying PRS Insurance Group, Inc.'s Motion for Order Requiring Return of Assets and Posting of Bond, as amended on January 22, 2003 (the "Amended Motion") in its Decision and Entry Denying PRS Insurance Group, Inc.'s Amended Motion for Order Requiring Return of Assets and Posting of Bond Filed January 22, 2003 (the "Decision") by its ruling that the PRS Group's Motion did not seek return of property from the liquidation of the estate of Credit General Insurance Company to which the PRS Group asserted ownership.

III. The trial court erred in denying PRS Insurance Group, Inc.'s Motion for Order Requiring Return of Assets and Posting of Bond, as amended on January 22, 2003 (the "Amended Motion") in its Decision and Entry Denying PRS Insurance Group, Inc.'s Amended Motion for Order Requiring Return of Assets and Posting of Bond Filed January 22, 2003 (the "Decision") by its ruling that the remedy of constructive trust was not available to the PRS Group on the basis of the allegations set forth in the Motion.

{¶ 6} The parties do not agree as to the standard of review that we are required to employ in passing upon the merits of the assignments of error. All three of the assignments of error raise purely legal issues. Thus, we apply a de novo standard of review. *Covington v. Ohio Gen. Ins. Co.* (Sept. 6, 2001), 10th Dist. No. 01AP-213, reversed on other grounds, 99 Ohio St.3d 117, 2003-Ohio-2720, 789 N.E.2d 213, citing *Ohio Dept. of Commerce, Div. of Real Estate v. DePugh* (1998), 129 Ohio App.3d 255, 261, 717 N.E.2d 763.

{¶ 7} The trustee's first and second assignments of error are interrelated and will be addressed together. We begin by reviewing in detail the bases for the trustee's motion filed with the trial court, as well as that court's rationale for denying the same. The stated objects of the January 22, 2003 motion are, "a determination of whether the assets transferred as a result of ODI's actions are or should be assets of CGIC," "an accounting of the assets transferred from the PRS Group to CGIC," an "order imposi[ng] * * * a constructive trust on the assets transferred from the PRS [sic] to CGIC," an order to return to PRS "all assets transferred from the PRS Group to CGIC or damages of corresponding value," and an order "to post an initial bond in the amount of $20 million," plus interest, costs and attorneys fees.

*3 {¶ 8} The trustee alleged that funds and assets rightfully belonging to PRS had been retained by, or unlawfully transferred, sold, assigned, relinquished, directed or allocated to, CGIC. The trustee alleged that various persons or entities effected these transfers, including PRS itself, PRS subsidiary PRS Enterprises, Inc ., a vendor called Flight Options, Inc., ODI, and former CGIC director and officer Robert Lucia.

{¶ 9} The trustee's stated "theories of recovery" against the liquidation estate were Sections 542, 544, 547, 548 and 550 of the United States Bankruptcy Code; the Ohio Fraudulent Transfer Act; and common law breach of fiduciary duty. The trustee brought his motion pursuant to paragraph 18 of the Final Order of Liquidation and Appointment of Liquidator ("liquidation order") journalized January 5, 2001, which states:

[illegible]

[illegible] In response, the **liquidator** argued that Ohio's **Liquidation** Act provides the sole means of recovery against an **insolvent** insurer in **liquidation**, and bars fraudulent transfer claims, claims

Here, PRS is not seeking return of property that it holds clear title to. Rather, it is claiming ownership of funds exceeding $20 million under various theories of recovery, including that the funds were improperly transferred during the bankruptcy preference period or were obtained through fraud or a breach of fiduciary duty. These are not the types of disputes that were intended to be resolved through a motion under Paragraph 18 of the Liquidation Order. The liquidation process would be completely circumvented if PRS were allowed to do so.
*4 (October 10, 2003 Decision and Entry, 3 -4.)
{¶ 12} The trustee disagrees with the trial court's characterization of paragraph 18, and argues that the language of the paragraph clearly permits the bankruptcy estate to assert a claim having priority over those of CGIC's general creditors; or, more precisely, the trustee argues that by virtue of CGIC's so-called breach of fiduciary duty, PRS is entitled to circumvent the proof of claims process entirely. The liquidator contends that this court should leave to the trial court's discretion the manner in which that court's own order is interpreted. We reject the arguments of both parties on this issue.
{¶ 13} We perceive no need for interpretation of paragraph 18 because Ohio's insurance **liquidation** statutory scheme mandates that title to the assets the trustee seeks vested in the **liquidator** at the time of her appointment. Pursuant to R.C. 3903.18, upon her appointment by the court, the **liquidator** of an **insolvent** insurance company, "forthwith * * * take[s] possession of the assets of the insurer * * * [and is] vested by operation of law with the title to all of the property * * * of the insurer ordered **liquidated,** wherever located, as of the entry of the final order of **liquidation**." R.C. 3903.18(A).
{¶ 14} "Upon issuance of the order, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members, and all other persons interested in its estate shall become fixed as of the date of entry of the order of liquidation," except with respect to certain types of claims not applicable under the facts herein. [FN1] R.C. 3903.18(B). R.C. 3903.57 provides, "[d]uring the pendency in this or any other state of a liquidation proceeding, whether called by that name or not, no action or proceeding in the nature of an attachment, garnishment, or levy of execution shall be commenced or maintained in this state against the delinquent insurer or its assets."

FN1. See R.C. 3903.17 and 3903.37.

{¶ 15} The latter two statutory provisions represent the codification of the common law doctrine known as "in custodia legis," which means "in the custody of the law." [FN2] This doctrine exempts funds held by the courts or an arm or agent of the court, from orders of garnishment, execution, attachment or distribution. This includes funds held by an executor/administrator of a decedent's estate, a court-appointed receiver for a corporation, the **liquidator** in a bank **liquidation**, a court trusteeship for funds held by a sheriff after sale of property before a petition in bankruptcy is filed, and the **liquidator** for an **insolvent** insurance company. *See Deutsch v. Harris* (Mar. 16, 1989), 2nd Dist. No. 9008.

FN2. Black's Law Dictionary (7 Ed.Rev.1999) 771.

{¶ 16} That the doctrine of in custodia legis has been incorporated into Ohio's insurance **liquidation** statutory scheme evidences an intent by the General Assembly that the remedies available thereunder be the exclusive remedies available to one claiming entitlement to any portion of the

liquidation estate--that is, any funds to which the **liquidator** has legal title as of the entry of the final order of **liquidation**. The funds that the trustee seeks herein are included in the CGIC **liquidation** estate because the **liquidator** took legal title to them upon being appointed. Thus, the trustee is limited to the **proof** of **claims** process contained in R.C. 3903.35, et seq., in his pursuit of funds allegedly due to PRS from the **insolvent** insurer. This is true whether or not the trustee asserts legal title to the funds he seeks.

*5 {¶ 17} The fact that the trustee alleges that PRS' losses are the result of tortious activity does not change this result. "The purpose of sections 3903.01 to 3903.59 of the Revised Code is the protection of the interests of insureds, claimants, creditors, and the public generally * * *." R.C. 3903.02(D). On the facts as alleged in the trustee's motion, PRS was in a far better position to prevent the alleged tortious activity than were CGIC's insureds, claimants and creditors, and the general public.

{¶ 18} For the foregoing reasons, the trustee's first and second assignments of error are overruled.

{¶ 19} In his third assignment of error, the trustee argues the trial court erred in refusing to impress a constructive trust upon the liquidator and in favor of the trustee in the amount of the monies he seeks. For the following reasons, we find this assignment of error to be without merit.

{¶ 20} We note initially that, nowhere in Chapter 3903 of the Ohio Revised Code does the code exclude from the **liquidation** estate property held by the **liquidator** subject to a constructive trust. R.C. 3903.01 defines the "assets" of the **insolvent** insurer broadly, including "all property, real and personal, of every nature and kind whatsoever or any interest therein." R.C. 3903.01(B).

{¶ 21} A constructive trust is an equitable remedy that may be used "when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Cosby v. Cosby*, 96 Ohio St.3d 228, 2002-Ohio-4170, 773 N.E.2d 516, at ¶ 17, citing *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 225, 9 OBR 565, 459 N.E.2d 1293 . (Citation omitted.) The Supreme Court of Ohio has also held:

Where a right is statutory it should not be extended beyond the scope of the statute, however inequitable the result may seem. * * * "Equity follows the law, and cannot be invoked to destroy or supplant a legal right." *In re Dickey* (1949), 87 Ohio App. 255, 264, 94 N.E.2d 223 . When the rights of parties are clearly defined and established by law (especially when the source of such definition is through constitutional or statutory provision) the maxim "equity follows the law" is usually strictly applied.

Civil Service Personnel Assoc., Inc. v. City of Akron (1976), 48 Ohio St.2d 25, 27, 2 O.O.3d 98, 356 N.E.2d 300. (Citations omitted.)

{¶ 22} In other words, where a statutory scheme clearly defines the rights and provides the remedies of persons and entities asserting claims to any portion of assets, the legal title to which have been fixed in the **liquidator** of an **insolvent** insurer, such statutory rights and remedies will be exclusive, except in cases where the applicable statutes will not provide a remedy, which situation we do not perceive here. "Equity will not suffer a wrong to be without a remedy," but "this appealing pronouncement must endure its limitations in the interests of reasonable order." Ibid.

*6 {¶ 23} The "reasonable order" wielding force here is the primary goal of the insurance liquidation scheme, as stated in R.C. 3903.02(D); that is, the protection of the interests of insureds, claimants, creditors, and the public generally. A constructive trust is fundamentally at odds with this goal because it elevates one claim (which is all one seeking a constructive trust really has) above all other claims and thwarts the policy of proportional distribution of the assets in the liquidator's hands. Thus, because the legislature has provided a comprehensive statutory scheme governing the distribution from an insolvent insurer's estate, equitable relief different from the relief provided by statute is not available to the trustee. This result is not influenced by the manner in which PRS may have found itself in the position of a creditor of CGIC. As the United States Court of Appeals for the Sixth Circuit explained, in refusing to impress a constructive trust upon a trustee in bankruptcy:

Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor. Ratable distribution among all creditors justifies the Code's placement of the trustee in the position of a first-in-line judgment creditor and bona fide purchaser for value, empowered to avoid certain competing interests * * * so as to maximize the value of the estate. To a party defrauded by the debtor, incorporating the proceeds of fraud in the debtor's estate may seem like allowing the "estate to benefit from property that the debtor did not own." But * * * "allowing the estate to 'benefit from property that the debtor did not own' is exactly what the strong-arm powers are about: they give the trustee the status of a bona fide purchaser for value, so that the estate contains interests to which the debtor lacked good title." The Code recognizes that each creditor has suffered disappointed expectations at the hands of

the debtor; for this reason, it makes maximization of the estate the primary concern and entitlement to shares of the estate secondary. Imposing a constructive trust on the debtor's estate impermissibly subordinates this primary concern to a single claim of entitlement.
In re Omegas Group, Inc. (C.A.6, 1994), 16 F.3d 1443, 1452 -1453. (Citations omitted.)
{¶ 24} The trial court in the present case correctly concluded that the equitable remedy of a constructive trust is not available to the trustee. Accordingly, the trustee's third assignment of error is overruled.
{¶ 25} Having overruled all of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.
Judgment affirmed.

PETREE and BROWN, JJ., concur.
Ohio App. 10 Dist.,2004.
Benjamin v. Credit General Ins. Co.
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West Reporter Image (PDF)

17 Kan.App.2d 1, 834 P.2d 387

Court of Appeals of Kansas.

Ron TODD, Commissioner of Insurance of the State of Kansas, as Receiver of Farm and Ranch Life Insurance Company, Inc., in Liquidation, Appellant,

v.

LAKELAND CHRYSLER-PLYMOUTH-DODGE, INC., et al., Appellees.

No. 66804.

Jan. 10, 1992.

Motion for Publication Granted April 22, 1992.

Florida automobile dealerships moved to quash service in liquidation proceedings for Kansas insurer. Motion was granted by the Shawnee District Court, E. Newton Vickers, J., and Commission of Insurance appealed. The Court of Appeals, Pierron, J., held that Florida automobile dealerships, whose customers had acquired credit life insurance from Nebraska insurer which subsequently sold its credit life division to Kansas insurer, submitted to jurisdiction of Kansas courts by submitting unsigned proofs of claim to Kansas insurer's office.

Reversed and remanded.

West Headnotes

[1] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(2) k. Findings of Fact and Conclusions of Law. Most Cited Cases

30 Appeal and Error KeyCite Notes
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(6) k. Substantial Evidence. Most Cited Cases

Supreme Court's ordinary standard of review for findings of fact is whether trial court's findings of fact are supported by substantial competent evidence, while review of trial court's conclusions of law is unlimited.

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Supreme Court on appellate review determines de novo what the facts establish below where controlling facts are based upon written or documentary evidence by way of pleadings, admissions, depositions, and stipulations, as in such case trial court has no peculiar opportunity to evaluate credibility of witnesses.

[3] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Standard of review of findings of fact of trial court on **jurisdictional** issue in insurance **liquidation** proceeding was de novo, where evidence consisted of documents and testimonial affidavits.

[4] KeyCite Notes

106 Courts
106I Nature, Extent, and Exercise of **Jurisdiction** in General
106k10 **Jurisdiction** of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long -Arm" **Jurisdiction** in General
106k12(2.40) k. Other Particular Types of Cases. Most Cited Cases

Florida automobile dealerships, whose customers had acquired credit life insurance from Nebraska insurer which subsequently sold its credit life division to Kansas insurer, submitted to **jurisdiction** of Kansas courts in **liquidation** proceeding for Kansas insurer by submitting unsigned requested **proofs** of **claim** to Kansas insurer's office; dealerships were sent **proof** of **claim** forms clearly labeled as part of Kansas insurer's **liquidation**, with no reference to Nebraska insurer, and dealerships responded in detail on forms provided by receiver, requesting to be paid a total of $17,768.15. K.S.A. 60-308(a)(1); U.S.C.A. Const.Amends. 5, 14.

****387 *1** Syllabus by the Court

In an insurance corporation liquidation proceeding in Kansas, the submission of claims in the proceeding by an out-of-state party subjects that party to personal jurisdiction in the proceeding.

John W. Brand, Jr., and Nanette M. Kraus, of Stevens, Brand, Lungstrom, Golden & Winter, Lawrence, for appellant.

James L. Grimes, Jr., of Cosgrove, Webb & Oman, Topeka, and Robert E. Vaughn, Jr., of Preuss & Vaughn, P.A., Tampa, Fla., for appellees.

Before PIERRON, P.J., LARSON, J., and C. FRED LORENTZ, District Judge, assigned.

****388** PIERRON, Judge:

Ron Todd, Commissioner of Insurance for the State of Kansas (Commissioner), as receiver of Farm and Ranch Life Insurance Company, Inc., (Farm and Ranch) in liquidation, appeals the decision of the district court that Kansas does not have personal jurisdiction over the defendants in this action to recover alleged unearned commissions. The district court granted the defendants' motion to quash service, and we reverse and remand for further proceedings.

The Commissioner was appointed to be the receiver for Farm and Ranch, an insolvent insurance company placed in liquidation by the Shawnee County District Court. Farm and Ranch had *2 previously bought the credit life insurance division of Empire Life Insurance (Empire), a Nebraska insurance company. Empire had sold credit life insurance policies to customers of defendants, Lakeland Chrysler-Plymouth-Dodge, Inc., (Lakeland) and Brandon Chrysler- Plymouth, Inc.,

(Brandon), two Florida car dealerships. After cancelling all of the Farm and Ranch insurance policies, the Commissioner sued defendants to recover unearned premiums. The district court found that Kansas did not have jurisdiction over the defendants, and the Commissioner appeals.

In its journal entry finding that there was no jurisdiction over the defendants, the trial court adopted the defendants' statement of facts as its own findings of fact.

Defendants Brandon and Lakeland were Empire credit life insurance agents from 1982 and 1979, respectively. Credit life insurance pays off the financed price of a car, if the purchaser dies while the car is still financed. The agreements between Empire and defendants were signed in Florida and Nebraska.

Farm and Ranch bought Empire's credit life insurance business effective April 1, 1986. Farm and Ranch sent the defendants assumption certificates, stating it would assume the liabilities and obligations of the Empire policies effective April 1, 1986. The defendants then received cancellation notices from Farm and Ranch cancelling the Empire policies and issuing Farm and Ranch policies effective September 1, 1986.

Throughout the spring and summer of 1987, the defendants had difficulty in obtaining payment of death benefits and reimbursement of customers for cancelled policies. The defendants' attorney wrote to Empire on September 9, 1987, asking for reimbursement for the $13,721.57 the defendants had paid out on Empire's behalf in order "to maintain local integrity and reputation."

Also in September 1987, the Commissioner cancelled all Farm and Ranch policies pursuant to a court order filed on August 27, 1987, finding that Farm and Ranch was **insolvent** and placing it in **liquidation**. The defendants were sent notice of the Farm and Ranch **liquidation** proceedings in October 1987. The notices were on Kansas Insurance Department letterheads. The notices instructed all policyholders that **proof** of **claim** forms would be mailed out and that they should be returned to a P.O. Box in *3 San Antonio, Texas. The plaintiff explains that although the home office of Farm and Ranch was Topeka, Kansas, it had closed that office, and the last office Farm and Ranch used before becoming insolvent was in San Antonio, Texas.

In November 1987, the circuit court in Leon County, Florida, began a proceeding entitled: "In Re The Ancillary Receivership of Farm and Ranch Life Insurance Company, Inc. a Kansas corporation." That court ordered that all policies of insurance by Farm and Ranch were to remain in full force and effect. The defendants contend that it is the policy of Florida not to automatically cancel all the policies of an insolvent insurance company because it may be more profitable to continue the policies in force and pay off the few that are actually claimed. The alternative is to cancel all policies, refund all premiums paid in advance, and bill agents who had received their commissions up front and who now owe the insurance company a refund for the commission on the cancelled portion of the policy. If an insurance company becomes **insolvent,** the **389 Florida Life and Health Insurance Guaranty Association will pay all Florida consumers' claims against the **insolvent** company. The plaintiff contends that all Florida did was guarantee that its consumers would not be left with worthless insurance policies.

In March 1988, the defendants through their attorney timely submitted the requested **proofs** of **claim** to the Farm and Ranch office. The signature lines were left blank and, where the form requested the claimant's name, the car dealerships' names were typed. A letter from the defendants' attorney accompanied the **proofs** of **claim** stating in part, "My clients have paid out to date, in excess of $17,000.00 to claimants under Empire Life policies."

Those claims were denied by the Kansas Deputy Receiver, who then made demand upon the defendants for the unearned commissions from the cancelled insurance policies. The defendants resisted those claims saying, first, the insurance policies were not cancelled in Florida, thus they did not owe Farm and Ranch any unearned commissions. Second, they contended they had never sold Farm and Ranch credit life insurance, so they owed nothing to Farm and Ranch. Third, they contended they never had had any contact with Kansas and, therefore, Kansas lacked jurisdiction. Additionally, they asserted their business was *4 only with Empire, the policies had been continued by the Florida courts, they had been paid the money owed them by Empire through the Florida court system, and they only filed the proofs of claim because it was requested of them and they were not sure of the relationship between Empire and Farm and Ranch.

We must first address the appropriate standard of review.

[1] [2] While the traditional standard of review for findings of fact and conclusions of law is that this court must only determine that the trial court's findings of fact are supported by substantial competent evidence, *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 19, 774 P.2d 919

(1989), it would appear there is an exception in this case. This court's review of the trial court's conclusions of law is, of course, unlimited. *Hutchinson Nat'l Bank & Tr. Co. v. Brown,* 12 Kan.App.2d 673, 674, 753 P.2d 1299, *rev. denied* 243 Kan. 778 (1988). So also is our review of the findings of fact in this particular case.

"Where, as here, the controlling facts are based upon written or documentary evidence by way of pleadings, admissions, depositions and stipulations, the trial court has no peculiar opportunity to evaluate the credibility of witnesses. In such a situation, this court on appellate review has as good an opportunity to examine and consider the evidence as did the court below, and to determine de novo what the facts establish." *American States Ins. Co. v. Hartford Accident & Indemnity Co.,* 218 Kan. 563, 572, 545 P.2d 399 (1976).

See *Fourth Nat'l Bank & Trust Co. v. Mobil Oil Corp.,* 224 Kan. 347, 353, 582 P.2d 236 (1978); *Reznik v. McKee,* 216 Kan. 659, 673, 534 P.2d 243 (1975).

[3] The defendants have asserted that the evidence is not entirely documentary in nature as several testimonial affidavits are part of the record. The defendants suggest that this court accord considerable deference to the weight the trial court gave to the testimonial affidavits. Since there is no way to know just how much weight the trial court gave the affidavits, this is an impossible request. The plaintiff is also correct in pointing out that affidavits are quite similar to depositions -- both are sworn testimony not given before the trier of fact. *American States,* 218 Kan. 563, 545 P.2d 399, clearly holds that, if the evidence is nothing more than pleadings, admissions, *depositions,* and stipulations, this court can review the findings of fact de novo.

***5** [4] After reviewing the evidence before us, it appears that Kansas

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There is no dispute that Kansas was the appropriate venue for the **liquidation** process. The need for giving one state exclusive **jurisdiction** over insurance **liquidation** proceedings has long been recognized in the courts. *Motlow v. Southern Holding & Securities Corp.,* 95 F.2d 721 (8th Cir.1938); *Ballesteros v. N.J. Prop. Liab. Ins. Guar. Ass'n,* 530 F.Supp. 1367 (D.N.J.) 696 F.2d 980 (3d Cir.1982) *Agency,* No. 86-841-E, slip op. (S.D.Iowa July 19, 1989).

"Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary **jurisdiction** for assistance, are excluded from participation. This should be particularly true as to proceedings for the **liquidation** of **insolvent** insurance companies...." *Motlow,* 95 F.2d at 725-26; *Ballesteros,* 530 F.Supp. at 1371.

The plaintiff contends that under K.S.A. 60-308(a)(1) service upon a party outside the state who has submitted to the **jurisdiction** of the courts of Kansas has the force and effect of personal service within this state. The issue is, therefore, whether the return of the claim forms constitutes submission to the courts of Kansas in this matter. Although we have found no cases precisely on point, it appears that the return of the claim forms did precisely that.

***6** It cannot be seriously argued that the defendants did not wish to avail themselves of the liquidation proceeding. They knew of its existence and responded in detail on the forms provided by the receiver, requesting to be paid a total of $17,768.15. Their claim that they believed they were only requesting a share of an asset available from Empire is contradicted by the face of the claim forms they submitted.

Further, the defendants' claim that since they did not sign their claim forms, the forms were invalid, is groundless. Once the claims were received by the receiver the defendants, by their actions, accepted the benefits of, and thus submitted themselves to, the jurisdiction of the Kansas courts. The fact that defendants might be subjected to claims by the receiver for claimed debts to Farm and Ranch is a risk

they took by filing a claim with the court-appointed receiver.
The defendants' claim that an ancillary proceeding in Florida disposed of the issue is similarly groundless. The proceeding in Florida was initiated to protect Florida policyholders and not to adjudicate the issues between the defendants and the receiver.
Plaintiff cites *State ex rel. Low v. Imperial Ins. Co.*, 140 Ariz. 426, 682 P.2d 431 (App.1984), in support of its position.
Imperial Insurance Co. was a California medical malpractice carrier which did business in Arizona. The company was placed in receivership in California and several Arizona claimants filed claims. The claimants eventually obtained judgments against physicians insured by Imperial.
Later, an Arizona ancillary receiver was appointed and the same Arizona claimants attempted to file the same claims in the Arizona proceeding. The Arizona Court of Appeals agreed with the California receiver that by voluntarily submitting to the California action claimants were bound by the results in the California courts.
In dicta, the Arizona Court of Appeals stated that California was the only forum where the individual claims could be filed and fully administered. See 140 Ariz. at 433-34, 682 P.2d 431 . Although the issues ***391** are not identical, we believe the facts are similar to the instant case and the same reasoning applies.
The defendants cite the usual Kansas and United States Supreme Court cases of *7 *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) ; *Volt Deta Resources, Inc. v. Devine*, 241 Kan. 775, 740 P.2d 1089 (1987) ; and *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 215 Kan. 849, 852, 528 P.2d 1248 (1974) , in discussing the "minimum contacts" requirements of due process. We stress that our decision is not based on the usual criteria of business activity in the state, but on submission to the authority of the courts in the liquidation process. Whether there were the minimum contacts necessary through the conduct of business to establish jurisdiction is not addressed here. We, therefore, find that jurisdiction is appropriate in Kansas.
Reversed and remanded for further proceedings.
Kan.App.,1992.
Todd v. Lakeland Chrysler-Plymouth-Dodge, Inc.
17 Kan.App.2d 1, 834 P.2d 387
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