[Cite as *Hudson v. P.I.E. Mut. Ins. Co.*, 2011-Ohio-908.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mary Jo Hudson, Superintendent of Insurance, Ohio Department of Insurance, in her Capacity as Liquidator of the P.I.E. Mutual Insurance Co.,	:	
Plaintiff-Appellee,	:	No. 10AP-480
v.		(C.P.C. No. 97CVH12-10867)
The P.I.E. Mutual Insurance Co.,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
(Thomas F. McManamon,	:	
Appellant).	:	

D E C I S I O N

Rendered on March 1, 2011

Michael DeWine, Attorney General, by Special Counsel *Calfee Halter & Griswold LLP, James M. Lawniczak* and *Tiiara N. A. Patton,* for appellee Superintendent of Insurance as Liquidator of the P.I.E. Mutual Insurance Company.

Thomas F. McManamon, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Appellant, Thomas F. McManamon, appeals from a judgment of the Franklin County Court of Common Pleas granting the application of appellee, Mary Jo Hudson, Superintendent of Insurance, Ohio Department of Insurance, in her capacity as Liquidator of P.I.E. Mutual Insurance Company ("PIE"), for an order terminating liquidation proceedings. Appellant assigns a single error:

> WHETHER THE TRIAL COURT ERRED WHEN IT GRATUITOUSLY INCLUDED A RELEASE OF THE OHIO DEPARTMENT OF INSURANCE IN PARAGRAPH 9 OF THE TRIAL COURT'S ENTRY AND ORDER GRANTING LIQUIDATOR'S APPLICATION FOR ORDER TERMINATING LIQUIDATION PROCEEDINGS AND TERMINATING LIQUIDATION PROCEEDINGS, FILED APRIL 20, 2010.

Because appellant failed to properly preserve through objection in the trial court the issue he assigns as error on appeal, we affirm.

I. Facts and Procedural History

{¶2} Appellant sold his insurance agency in 1994 to a PIE subsidiary, Provider's Insurance Agency, Inc., and received in return a multi-year employment contract. *McManamon v. Ohio Dept. of Ins.,* 179 Ohio App.3d 776, 2008-Ohio-6958, ¶2. In 1997, the trial court ordered PIE into rehabilitation under the Insurers Supervision, Rehabilitation and Liquidation Act, but by 1998 the court determined that allowing PIE to continue its business would be hazardous to its policyholders, creditors or the public. Accordingly, on March 23, 1998 the trial court determined PIE was insolvent as defined in R.C. 3903.01(K), ordered PIE into liquidation, and appointed the Superintendent of Insurance for the State of Ohio and his successors in office, as Liquidator of the PIE estate pursuant to R.C. Chapter 3903. Appellant filed a notice of appearance in the PIE liquidation.

{¶3} During the liquidation process, the trial court ordered Provider's Insurance Agency, Inc. to be consolidated into the PIE estate, allowing the court to treat the

subsidiary and PIE as a single entity for the purpose of resolving creditors' rights. Appellant objected to the consolidation, claiming Providers owed him and his brother, also an insurance agent, in excess of $500,000 pursuant to their employment contracts, an amount PIE guaranteed. Appellant wanted Providers to independently honor his contract. The Liquidator entered into a court-approved settlement agreement with appellant according to which appellant would receive $150,000. Appellant's employment contract subsequently was disavowed pursuant to the Liquidator's power under R.C. 3903.21(A)(11). *McManamon*, 2008-Ohio-6958 at ¶3.

{¶4} Appellant followed the Liquidator's action with documents filed in the trial court and separate actions filed in the Court of Claims, all stemming from his belief the settlement agreement was void, PIE owed him money under his employment contract, and PIE was not insolvent. He claimed Department of Insurance employees fraudulently induced PIE into liquidation even though other claims for Loss Adjustment Expenses ("LAE") existed, including $51 million in LAE reinsurance receivable. *McManamon*, 2008-Ohio-6958 at ¶4; *McManamon v. Ohio Dept. of Ins.*, Ohio Ct. Cl. No. 2003-08568, 2004-Ohio-1473, ¶4,

{¶5} On November 19, 2009, the Liquidator filed a Motion for Order Approving Liquidator's Final Report of Claims, Reserve for Administrative Expenses, and Authorizing Final Distribution of Assets of the P.I.E. Mutual Insurance Company. The motion stated the Liquidator paid the Class 1 claimants in full, the Class 2 claimants each would receive 82.1412 percent pro rata distribution on their claims, and the payout to the Class 2 claimants would extinguish all of the assets in the PIE estate. The court granted the motion.

{¶6} The following April, the Liquidator filed an application for an order terminating the liquidation proceedings. The application addressed appellant's earlier request for documents. The Liquidator advised the court that although the court orally ordered the Liquidator to preserve the requested documents, the only document located was privileged and non-discoverable. The application further noted the Liquidator completed asset recoveries, "including the purported $51 million LAE reinsurance receivable reported on P.I.E.'s 1996 financial statement." According to the application, "the Liquidator's consultant, Reinsurance Solutions International LLC ("RSI") and counsel, James Veach of Mound Cotton, confirmed that the LAE receivable is fabricated and is otherwise not a recoverable asset." (R. 2328 at 7.) The Liquidator thus requested she be allowed to abandon the $51 million claim as impossible to collect. With those two points addressed, the Liquidator requested that she and her employees, as well as employees of the Department of Insurance, be discharged and released and that the proceedings be terminated.

{¶7} Appellant filed an objection to the Liquidator's application on April 14, 2010, stating he was "a creditor in these proceedings but also ha[d] been advised that his claim [was] not senior enough to merit payment, given recoveries." (R. 2331.) Appellant asked the court to direct the Calfee Halter & Griswold law firm, serving as special counsel to the Liquidator in these proceedings, to search its records for certain documents and share them with appellant. Appellant also objected to the Liquidator's abandoning the $51 million LAE account receivable, stating he offered significant evidence in his 2004 Court of Claims case the $51 million existed and remained recoverable. Appellant advised he planned to re-file his case in the Court of Claims to litigate whether the asset could be collected.

{¶8} The trial court held a special hearing on April 20, 2010, which appellant attended, to consider the Liquidator's application for an order of termination. At the hearing, the trial court addressed appellant's document request, and the Liquidator reiterated she either could not find the documents requested or they were privileged documents not subject to discovery. After the Liquidator advised the trial court she had done a thorough search for the documents, the court asked appellant if he wished to respond. He replied, "No. I'll listen for a while." (Tr. 6.) The trial court informed appellant that unless he responded, the court planned to authorize destruction of the records. Appellant reiterated his request that the court order production of a specified document. The court advised appellant the document was not in the Liquidator's possession, as her staff's search for the document disclosed nothing. When the court concluded with "very well," appellant said, "Thank you." (Tr. 9.)

{¶9} As a result of the hearing, the trial court signed the "Entry and Order Granting Liquidator's Application for Order Terminating Liquidation Proceedings and Terminating Liquidation Proceedings." (R. 2332-33.) The order states that "all assets justifying the expense of collection and distribution have been collected and distributed under R.C. 3903.01 through 3903.59," so "the criterion of R.C. 3903.46(A) has been met and it is appropriate to terminate these liquidation proceedings and discharge the Liquidator." (R. 2332-33.) Addressing appellant's contentions regarding the LAE assets, the court ordered that "[p]ursuant to R.C. 3903.46(A) and 3903.21(A)(9) * * * the purported $51 million LAE reinsurance receivable is hereby ABANDONED on the ground that it is fabricated and does not exist." (Entry at ¶3.) In addition to authorizing destruction of PIE books and records, the court ultimately ordered that "[p]ursuant to R.C. 3903.46(A) and R.C. 3903.07, the Liquidator * * * and any and all current and former * * * employees

of the Liquidator and any and all current and former employees of the Ohio Department of Insurance, are hereby discharged and released from any and all past, present and future claims" relating to the PIE liquidation. (Entry at ¶9.)

II. Assignment of Error- No Objection to Discharge and Release

{¶10} On appeal, appellant asserts the trial court erred in releasing and discharging the Liquidator and her employees.

{¶11} The Liquidator served appellant with her Application for Order Terminating Liquidation Proceedings that also requested the trial court discharge and release the Liquidator and her employees from any claims arising out of or relating to the PIE liquidation. Appellant was served timely with a notice of a special hearing on April 20, 2010 to consider the application for termination. Appellant was present at the April 20, 2010 hearing and, although he voiced concerns about not receiving the documents he requested, he never objected to discharging and releasing the Liquidator, her employees, and the employees of the Department of Insurance; similarly, appellant's April 14, 2010 written objection to the Liquidator's application did not so object. As a result, even though appellant on appeal claims the trial court's order granting such a release and discharge was not statutorily authorized and was improper, appellant did not preserve the issue for appeal.

{¶12} "It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal." *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶74, citing *Estate of Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶10. See also *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278; *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43 (noting

"[o]rdinarily, errors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal"). A party thus "cannot raise new issues or legal theories for the first time on appeal." *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶19, citing *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶8. As a result, appellant's failure to object to the proposed discharge and release of the Liquidator and her employees in the trial court "waives," or forfeits, the issue on appeal. See *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶22-24 (noting failure to object results in forfeiture subject to plain error analysis).

{¶13} The "waiver," or forfeiture, rule "is tempered somewhat by the doctrine of plain error." *S&P Lebos, Inc. v. Ohio Liquor Control Comm.*, 163 Ohio App.3d 827, 2005-Ohio-5424, ¶12. In civil cases, however, the "plain error doctrine is nonetheless disfavored." *Lias v. Beekman*, 10th Dist. No. 06AP-1134, 2007-Ohio-5737, ¶30, citing *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus. A court should apply the doctrine of plain error "only in the extremely rare case involving exceptional circumstances" where error "to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss* at 122-23.

{¶14} The standard announced in *Goldfuss* was satisfied in *S&P Lebos*, where an administrative code provision that ordinarily would have applied in a liquor permit proceeding had been declared unconstitutional. *S&P Lebos* at ¶4, 8. On reconsideration, we applied the plain error doctrine because, even though the appellant did not raise the constitutionality of the administrative code provision in the earlier proceedings in the case, "[t]o allow appellee to rely upon a judicially invalidated regulation to impose a penalty

upon a permit holder would seriously affect 'the basic fairness, integrity, or public reputation of the judicial process.' " Id. at ¶13, quoting *Goldfuss*, supra. Appellant does not satisfy that high standard here.

{¶15} Perhaps in an effort to draw his argument under the parameters of *S&P Lebos*, appellant contends the trial court acted outside the applicable statutory authority when it entered the discharge and release order. Unlike *S&P Lebos,* which addressed an unconstitutional provision, appellant contends the trial court's order falls outside the statutory parameters.

{¶16} The order states the court acted "[p]ursuant to R.C. 3903.46(A) and R.C. 3903.07" to discharge and release the Liquidator and her employees from any claim or action relating to or arising out of the PIE liquidation. R.C. 3903.46(A) provides that when all the "assets justifying the expense of collection and distribution have been collected and distributed" under sections R.C. 3903.01 to 3903.59, "the liquidator shall apply to the court for discharge. The court may grant the discharge and make any other orders." Appellant does not explain how the trial court's order falls outside R.C. 3903.46(A). To the extent appellant suggests plain error by claiming not all the assets were collected and distributed, he raises not a question of law as was true in *S&P Lebos*, but a question of fact, a matter much more difficult to bring under the plain error doctrine. The record here fails to demonstrate plain error; to the contrary, the trial court's order appears to be consistent with the statutory language.

{¶17} R.C. 3903.07(B) states for purposes of any proceeding pursuant to R.C. 3903.01 to 3903.59 that R.C. 9.86 applies to, among others, the superintendent, any deputy liquidator, and any employee of the Department of Insurance. R.C. 9.86 grants state officers and employees immunity from civil liability for damage caused in the

performance of their duties, unless the officer or employees acted manifestly outside the scope of their employment or with malicious purpose, in bad faith or in a wanton or reckless manner. R.C. 3903.07(C) clarifies that the individuals listed in R.C. 3903.07(B) are deemed to be an "officer or employee" for purposes of R.C. 9.86. In view of those statutory provisions, the trial court's decision to release the Liquidator, her current and former employees and the current and former employees of the Department of Insurance regarding claims arising out of the PIE liquidation simply restates the civil immunity those persons enjoy under the Revised Code. Accordingly, the trial court did not act without statutory authority when it granted the release and discharge in its termination order.

{¶18} Finally, by discharging and releasing the Liquidator and her staff from any suit brought against them regarding the PIE liquidation, the trial court ended the 13-year liquidation of PIE, protected as much as possible the interests of insureds, claimants, creditors and the public generally, and eliminated the uncertainty that would ensue in continuing the litigation surrounding PIE's liquidation. See R.C. 3903.02(D) (stating one of the purposes of the Insurers Supervision, Rehabilitation, and Liquidation Act is to protect "the interests of insureds, claimants, creditors, and the public generally" and to promote "[e]nhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation"). The trial court did not commit plain error in discharging and releasing the Liquidator, her current and former employees and the current and former employees of the Department of Insurance regarding the PIE liquidation.

{¶19} Accordingly, we overrule appellant's sole assignment of error and affirm the judgment of the trial court. As a result, appellee's motion to dismiss is denied as moot.

Motion to dismiss denied;

judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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