

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 04-2142

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DAVID H. OVERDORF, Administrator of the  
Estate of KRISTEN R. OVERDORF, Deceased,

Appellant

v.

THE TRAVELERS INSURANCE COMPANIES;  
JOHN D. NEWBORG

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. No. 01-cv-02076)  
District Judge: Honorable Gary L. Lancaster

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Submitted Under Third Circuit LAR 34.1(a)  
January 27, 2005

Before: SCIRICA, *Chief Judge*, RENDELL and FISHER, *Circuit Judges*.

(Filed March 7, 2005)

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OPINION OF THE COURT

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FISHER, *Circuit Judge*.

David H. Overdorf (“Overdorf”) appeals the District Court’s grant of summary judgment in favor of The Travelers Insurance Companies (“Travelers”) on his claims of

breach of contract and bad faith, 42 Pa. Cons. Stat. § 8371, asserted on behalf of the estate of his deceased daughter Kristen Overdorf, who was fatally injured while riding her bicycle, by an automobile operated by Sharon Fonner. Overdorf obtained a judgment against Fonner in excess of the \$50,000 Travelers' policy limit in a wrongful death action tried in the Court of Common Pleas of Washington County, Pennsylvania. Overdorf subsequently filed this action as an assignee of Fonner in which he is pursuing recovery of the excess judgment from Travelers. The procedural and factual background of this action was thoroughly discussed by the District Court, and is known to the parties.

This appeal specifically challenges the District Court's grant of summary judgment regarding the breach of contract claim based upon the District Court's determination from Overdorf's pretrial statement that Overdorf was no longer pursuing that claim. Overdorf contends that the District Court erred in not permitting Overdorf an opportunity to be heard on the merits of the contract claim. After conducting plenary review of the factual and legal contentions of the parties, we affirm the grant of summary judgment in favor of Travelers.

It is undisputed that the Amended Complaint alleged that Travelers had an express contractual duty to pay the delay damages assessed against Fonner in the Washington County, Pennsylvania action and post-judgment interest pursuant to the "Supplementary Payments" clause. Travelers moved for summary judgment on both the bad faith and breach of contract claims raised by Overdorf. While Travelers' briefing primarily

focused on the bad faith claim, it nonetheless sought dismissal of the entire action, specifically naming both the bad faith and the breach of contract claims. Overdorf's opposition to summary judgment pertained only to the bad faith claim and raised no argument regarding the breach of contract claim or the "Supplementary Payments" clause despite the fact that Travelers' moving brief indicated that "most" of the breach of contract claims had been abandoned. Nor did Overdorf's pretrial statement advance the breach of contract theory as one that was being pursued for purposes of trial.

Overdorf's omission of any reference to the breach of contract action in its opposition to summary judgment, coupled with his failure to request reconsideration of the District Court's determination based on the pretrial statement that the breach of contract claim was no longer being pursued by Overdorf, leads us to conclude that the District Court's assessment regarding that claim was correct – at the time summary judgment was entered, the breach of contract theory was not advanced by Overdorf. *See, e.g., Shafer v. Reo Motors, Inc.*, 205 F.2d 685, 688 (3d Cir. 1953) (where no questions of fact were raised in the District Court in opposing summary judgment they may not be presented for appellate review given that summary judgment is to be determined based upon the record the parties have actually presented); *Price v. Inland Oil Co.*, 646 F.2d 90, 95-96 (3d Cir. 1981) (recognized that the scope of a case will be limited by a pre-trial order or in its absence by the pre-trial representations of the parties).

We have considered all of the arguments of the parties and conclude that no further discussion is necessary. We will affirm the judgment of the District Court.

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