

RENDERED: JUNE 8, 2001; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000723-MR

ROBERT CALDWELL

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 98-CI-01266

KENTUCKY NATIONAL INSURANCE COMPANY

APPELLEE

OPINION  
REVERSING AND REMANDING  
\*\* \*\*

BEFORE: DYCHE, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Robert Caldwell has appealed from a declaratory judgment entered by the Hardin Circuit Court on February 25, 2000, in favor of Kentucky National Insurance Company (KNIC). Having concluded that there are genuine issues of material fact for the trier of fact to decide which preclude the granting of the declaratory judgment by summary judgment, we reverse and remand.

On March 21, 1996, Caldwell applied for homeowner's insurance coverage for his home in Hardin County, Kentucky, from

KNIC through one of its agents, Bluegrass Insurance. While there are many questions concerning the completion of the insurance application, it is agreed that Caldwell signed the application and that it was accepted by KNIC. Shortly after Caldwell's home was destroyed by a fire on August 16, 1997, he filed a claim for his loss with KNIC. On December 8, 1997, KNIC rejected Caldwell's claim pursuant to KRS<sup>1</sup> 304.14-110<sup>2</sup> based on the grounds that his application for coverage contained "several material inaccuracies." KNIC refunded all premiums Caldwell had paid.<sup>3</sup>

---

<sup>1</sup>Kentucky Revised Statutes.

<sup>2</sup>KRS 304.14-110 is entitled "Representations in applications" and states:

All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- (1) Fraudulent; or
- (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
- (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

<sup>3</sup>The refund was for \$688.74.

On August 13, 1998, Caldwell filed a verified complaint in the Hardin Circuit Court against KNIC. He alleged that when his home was destroyed by fire, the premises were covered by a policy issued by KNIC. He claimed that he had "done all and sundry the [sic] acts and things required of him to have been done under the policy to be done as conditions precedent to [KNIC] making payment to him of his claim for loss due to the fire, and all such conditions precedent have been performed or have occurred, yet [KNIC] has failed and refused to pay [his] claim[.]" Caldwell asked for "a trial by jury on all issues so triable[.]"<sup>4</sup>

On August 31, 1998, KNIC filed an answer and a "Counter Petition for Declaration of Rights" pursuant to KRS Chapter 418. KNIC alleged that

Caldwell induced issuance of the subject Policy by means of an application of Insurance which contained misrepresentations, omissions and incorrect and fraudulent statements on which [KNIC] relied. Said misrepresentations were material, they were false, they were known by Plaintiff [ ] Caldwell to be false or he made said misrepresentations recklessly, he made said representations with the intent that it be acted upon by [KNIC], that [KNIC] acting in reliance thereon issued the subject Policy. Accordingly, Plaintiff [ ] Caldwell is

---

<sup>4</sup>Approximately five pages of Caldwell's nine-page complaint is devoted to alleging that KNIC committed an unfair claims settlement practice pursuant to KRS 304.12-230. Caldwell sought damages which included his attorney's fees and punitive damages. Caldwell tendered an amended complaint on July 27, 1999, which was ordered filed on July 30, 1999. The amended complaint withdrew the unfair settlement practice claim and the claim for punitive damages.

estopped from stating any claim under the subject Policy.

KNIC also claimed that it was entitled to payment of its attorney's fees pursuant to CR<sup>5</sup> 11. For the next ten months, the parties took some discovery; and Caldwell, pursuant to CR 12.05, sought a more definite statement of KNIC's counterclaim. Caldwell's CR 12.05 request was denied by an order entered on June 14, 1999. On June 29, 1999, Caldwell filed a "Reply to Counterclaim," wherein he once again demanded "a trial by jury on all issues so triable[.]"

On September 7, 1999, KNIC filed a motion "pursuant to KRS 418.050" for the trial court "to enter tendered Findings of Fact, Conclusions of Law and Judgment Declaring Rights." In its supporting brief, KNIC argued that Caldwell had made numerous misrepresentations in his application for homeowner's insurance; and that if KNIC had known the true facts, it would not have issued a policy to Caldwell. KNIC's motion was supported by the affidavit of Jeffrey Wilkinson, the Division Underwriting Manager for KNIC, which stated, in part, as follows:

4. That the misrepresentations, omissions, or incorrect statements set out in the application were material to the acceptance of this risk and were material to the hazard assumed by the insurer. KENTUCKY NATIONAL would not have accepted this risk under any program if it had been aware of the nature of the construction of the subject residence [emphasis original].

5. That the annual premium for coverage as set out in the subject application, totaled

---

<sup>5</sup>Kentucky Rules of Civil Procedure.

\$200.97. The annual premium for the actual residence would be unknown as this risk is not eligible for any of our Insurance programs.

There is a substantial material difference between the construction quality of a 1993 double wide modular home and a bolted together dwelling which consists of two mobile homes. Of primary concern, is the wiring and the potential for overloading the circuits. Also, the modular home would be subject to building and safety codes. A home made [sic] structure would not be subject to the same inspections and standards.

For these reasons, factory constructed houses are eligible for our programs. Bolted together mobile homes do not meet our requirements.

On October 6, 1999, the trial court entered an order<sup>6</sup> giving Caldwell until November 1, 1999, to file a brief in response to KNIC's motion. Caldwell did not file a responsive pleading.<sup>7</sup> On February 25, 2000, the trial court entered its "FINDINGS OF FACT, CONCLUSIONS OF LAW & FINAL JUDGMENT DECLARING RIGHTS" wherein it "considered, ordered, adjudged and determined that the subject KENTUCKY NATIONAL Policy of Insurance was void ab initio and Plaintiff, ROBERT A. CALDWELL, does and shall have no cause or have any rights or claims under or as to said Policy of Insurance" [emphases original].<sup>8</sup>

---

<sup>6</sup>The order had also been tendered by KNIC, but the deadline for Caldwell's response had been left blank.

<sup>7</sup>Trial counsel was not the same as appellate counsel.

<sup>8</sup>The declaratory judgment entered by the trial court was the one tendered by KNIC on September 7, 1999. The word "TENDERED" was apparently covered with white correction fluid.

The declaratory judgment, as tendered by KNIC and adopted in toto by the trial court, contained some interesting language that provides some insight into why the erroneous judgment may have been entered. The declaratory judgment specifically states that the trial court has "determined as fact" various matters. While some of these "facts" were not in dispute, some material facts were disputed. The declaratory judgment also stated that the trial court had "considered all pleadings including the Briefs and Exhibits of counsel [and] oral arguments." However, there were no "oral arguments," and many of the "Exhibits of counsel" were not verified, and thus, they were not appropriate for consideration in a summary judgment.

The trial court's declaratory judgment contained the following findings of fact:

The Court determines as fact that MR. CALDWELL has admitted that the subject application contained various misrepresentations and incorrect statements, viz:

The application was for a Homeowners Policy, not for a Mobile Homeowners Policy.

The subject residence was represented as being of frame construction.

The application asked whether the dwelling was currently insured and Mr. Caldwell answered "just purchased."

The application asked how many years he lived at this residence and he answered "New".

The application asked what year the dwelling was built and he answered "1993."

The application asked whether any business was conducted on the premises and his answer was "No."

The application asked when he purchased the property and his answer was "1996."

The application asked the "purchase price" and he stated \$50,000.00.

The application asked for the "replacement costs" and the "market value" to which he answered each question "\$50,000.00."

In the remarks section of the application, the residence was stated to be ". . . a double wide modular home" which is ". . . set on a continuous concrete foundation", the ". . . front porch of which was built on after the house was set on the property."

The Court further determines as fact and MR. CALDWELL has admitted that in fact, this residence consisted of two mobile homes joined together and then covered with siding and a wrap around front porch; the mobile homes were given to MR. CALDWELL, they were not purchased. MR. CALDWELL has resided at this property since January, 1992 and he operated his drywall business from the property. The Hardin County Property Evaluation Administrator valued the subject two joined mobile homes with a wrap around porch at \$8,000.00 [emphases original].

This Court further determines as fact that Defendant/Petitioner, KENTUCKY NATIONAL INSURANCE CO., does not have any Insurance Plan available by which it could have provided Insurance coverage for MR. CALDWELL'S actual residence [emphasis original].

Following the above factual findings, the trial court stated these conclusions of law:

This Court determines as a matter of law, that pursuant to the Kentucky Building Code, a modular home does not include mobile homes. Further, pursuant to KRS 304.14-110, the aforesaid misrepresentations and incorrect statements are:

Material to both the acceptance of the risk and to the hazard assumed by Kentucky National, and

Kentucky National, in good faith, would not have issued the Policy and would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to Kentucky National as required by the application for the Policy and the subject contract of Insurance.

From the record on appeal, it is clear that there are genuine issues of material fact to be decided by the trier of fact and the trial court erred by granting KNIC a declaratory judgment.<sup>9</sup> In a declaratory judgment action, it has generally been recognized that a party has a "right to jury trial on those issues in regard to which either party could have claimed a jury in any action for which the declaratory judgment action may be

---

<sup>9</sup>It would appear in this case that KNIC's demand for relief via a counterclaim for declaratory judgment may have been superfluous, since Caldwell's complaint and KNIC's answer raised the same issues as the counterclaim raised. However, there is precedent for proceeding in this manner. See Greenwell v. Nova, 314 Ky. 813, 236 S.W.2d 883 (1951) cited in 22A Am.Jur.2d Declaratory Judgments §220 (1988). See also Jefferson County ex rel. Coleman v. Chilton, 236 Ky. 614, 620, 33 S.W.2d 601 (1930).



regarded as a substitute."<sup>10</sup> "The general rule that a motion for summary judgment is proper if the pleadings and admissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law has been applied in actions for declaratory judgment." "But a summary judgment will be denied where genuine issues of fact are raised."<sup>11</sup>

Under the law of Kentucky, summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."<sup>12</sup> The moving party has the initial burden of showing that no genuine issue of a material fact exists, then the other party must refute the contentions of the moving party. If the moving party does not sustain his burden, . . . then the summary judgment should not be granted."<sup>13</sup> The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."<sup>14</sup> "The trial judge must examine the evidence, not to decide any issue of fact, but to

---

<sup>10</sup>22A Am.Jur.2d Declaratory Judgments §228 (1988).

<sup>11</sup>22A Am.Jur.2d Declaratory Judgments §225 (1988).

<sup>12</sup>Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (reaff'g Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

<sup>13</sup>Roberts v. Davis, Ky., 422 S.W.2d 890, 894 (1967) (citing Robert Simmons Construction Co. v. Powers Regulator Co., Ky., 390 S.W.2d 901 (1965); Conley v. Hall, Ky., 395 S.W.2d 575 (1965); and Spencer, et al. v. Leone, et al., Ky., 420 S.W.2d 685 (1967)). See also Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., Ky.App., 579 S.W.2d 628, 630-31 (1979).

<sup>14</sup>Steelvest, supra (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

discover if a real issue exists.”<sup>15</sup> The standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law” [citations omitted].<sup>16</sup> “There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.”<sup>17</sup>

Pursuant to Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” To prevail on its motion for summary judgment, KNIC was required to meet its “initial burden of showing that no genuine issue of material fact exists,”<sup>18</sup> and to demonstrate that “it would be impossible for [Caldwell] to produce evidence at trial warranting a judgment in [his] favor.”<sup>19</sup>

However, the evidence submitted by KNIC in support of its motion for summary judgment did not even address the factual dispute that is the central question in this case: Did Caldwell

---

<sup>15</sup>Id. at 480.

<sup>16</sup>Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

<sup>17</sup>Id.

<sup>18</sup>Roberts, supra at 894.

<sup>19</sup>Steelvest, supra; CR 56.03.

truthfully provide KNIC's agent with the correct material information concerning his home, and did the agent incorrectly complete the application; or did Caldwell misrepresent material facts concerning his home to the agent, and did the agent complete the application based on the information provided by Caldwell? While Caldwell has admitted that many of the questions in the application concerning his home were answered incorrectly, he claims he truthfully disclosed the correct information to KNIC's agent. It is conceded that most of the facts about the home itself are not in dispute; however, it is also obvious that there are disputed issues of fact concerning what Caldwell told the agent and what Caldwell did or did not understand concerning the application that he signed and the representations made therein.

When summary judgment is sought, the party opposing the summary judgment is not required to produce any evidence until the moving party first establishes a prima facie case.<sup>20</sup> "We think it clear that appellant had no duty to make any showing whatever to defeat the motion for summary judgment because the movant failed entirely to establish a prima facie case. CR 56.03 provides that a party opposing a motion for summary judgment may

---

<sup>20</sup>State Street Bank v. Heck's, Inc., Ky., 963 S.W.2d 626, 630-31 (1998) (citing D.H. Overmyer Co. v. Hirsh Bros. & Co., Ky., 459 S.W.2d 598, 600 (1970)).

file opposing affidavits, but does not require him to do so" [emphasis original].<sup>21</sup>

This Court in Continental Casualty Co. v. Smith,<sup>22</sup> affirmed a jury verdict in favor of the insured, after the insurance company had denied coverage based upon its contention that Smith's application was "substantially untrue."<sup>23</sup> This Court stated that "the determination of whether an insurance applicant was, through ignorance and good faith, misled by a company's agent into believing the answers were truthful is for a jury to decide."<sup>24</sup> Obviously, the jury may choose not to believe Caldwell if he testifies that he truthfully disclosed all the material facts concerning his home to KNIC's agent and that he did not realize that the application he signed contained false and misleading information that was material to KNIC's decision to grant him insurance coverage. However, if the jury finds the facts in Caldwell's favor, case law supports his claim for insurance coverage.

In Smith, supra, this Court noted that the former Court of Appeals in Pennsylvania Life Insurance Co. v. McReynolds,<sup>25</sup>

---

<sup>21</sup>Davis v. Dever, Ky.App., 617 S.W.2d 56, 57 (1981).

<sup>22</sup>Ky.App., 617 S.W.2d 48 (1980).

<sup>23</sup>Id. at 49.

<sup>24</sup>Id. at 50 (citing Metropolitan Life Insurance Co. v. Trunick's Adm'r, 246 Ky. 240, 54 S.W.2d 917 (1932)).

<sup>25</sup>Ky., 440 S.W.2d 275 (1969).

reiterates and affirms the law of Sovereign Camp, W.O.W. v. Alcock, 273 Ky. 734, 117 S.W.2d 938 (1938), to the effect:

In the case of insurance contracts it is the fixed rule that the insurer will be estopped to deny liability on a policy if its agent inserts false statements in the written application, or by misleading statements induces the insured to make false answers, if the insured is acting in good faith. . . .<sup>26</sup>

We now turn to KNIC's argument that Caldwell failed to preserve any issue for appeal. We have chosen to address this argument last so we could incorporate into our discussion of this issue our previous discussion concerning summary judgment. In its brief, KNIC states "that allegations contained in a Complaint, Amended Complaint and answers to discovery pleadings are not sufficient to reserve issues for Appeal. Otherwise, all cases would be appealable and the Rule requiring preservation of issues would have no meaning." KNIC cites no case law to support this statement, and we are not aware of any which does. To the contrary, we believe it is evident from our previous discussion concerning the movant for summary judgment being required to make a prima facie case before the opposing party is required to refute the contentions of the moving party, that Caldwell has properly joined the issues before the trial court. We hold that he preserved the issue of whether summary judgment was properly

---

<sup>26</sup>See generally B.H. Glenn, Annotation, Insured's Responsibility for False Answers Inserted by Insurer's Agent in Application Following Correct Answers by Insured, or Incorrect Answers Suggested by Agent, 26 A.L.R.3d 6 (1969).

entered for appellate review by filing his answer to the counterclaim and by raising in his pleadings and in his answers to discovery requests genuine issues of material fact which preclude the entry of summary judgment.

Accordingly, the declaratory judgment of the Hardin Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Lori Henninger  
Louisville, KY

BRIEF FOR APPELLEE:

Walter L. Porter  
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:

Jason Bell  
Elizabethtown, KY