[Cite as *Am. Family Ins. Co. v. Johnson*, 2010-Ohio-1855.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93022

AMERICAN FAMILY INSURANCE CO.

PLAINTIFF-APPELLANT

vs.

PATRICIA JOHNSON, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV- 545123

BEFORE: Blackmon, J., Kilbane, P.J., and Sweeney, J.

RELEASED: April 29, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Kristen M. Lewis
Michael G. Curtain
Curtin & Associates, LLP
920 Key Building
159 South Main Street
Akron, Ohio 44308

ATTORNEY FOR APPELLEES

Donald Butler
75 Public Square
Suite 600
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Plaintiff-appellant American Family Insurance Co. ("American Family") appeals the trial court's granting a directed verdict in favor of appellees, Patricia and Thomas Johnson. It assigns five errors for our review.[1]

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court's judgment in part, reverse in part and remand for a determination of damages. The apposite facts follow.

Facts

{¶ 3} American Family filed a declaratory judgment action against the Johnsons on October 12, 2004. The action was filed following the submission of a claim by the Johnsons under their homeowner's policy for fire damage to their home that occurred on September 11, 2003.

{¶ 4} In its complaint, American Family alleged that the Johnsons provided misrepresentations or omissions on their application for insurance, which rendered the insurance policy void. American Family also alleged that the Johnsons intentionally caused the fire. American Family requested that the court declare that American Family had no duty to pay the Johnsons' claim.

---

[1]See appendix.

{¶ 5} The matter proceeded to a bench trial. The evidence revealed that in May of 2002, the Johnsons applied for home and car insurance with American Family. The agent at the time, who was subsequently terminated, failed to fill out the application form and never submitted the application. After the agent was terminated, the Johnsons' file was forwarded to another American Family agent, Lynard Zingale. Zingale testified that he contacted Mrs. Johnson via telephone and asked her the questions listed on the application. According to Zingale, Patricia Johnson told him that their property had not suffered any past or current losses; it was later discovered that the home suffered a previous fire in June of 2002 when the Johnsons had coverage with State Farm Insurance.

{¶ 6} On September 11, 2003, a fire occurred in the home. The Johnsons submitted a claim to American Family. John Prexta, an investigator for American Family, surveyed the scene four days after the fire. Prexta could not find any electrical source for the fire and thus concluded the fire was not accidental. His investigation also revealed that the Johnsons were experiencing financial troubles at the time.

{¶ 7} At the conclusion of American Family's case, the Johnsons moved for a directed verdict claiming American Family had failed to establish the elements of its case. The trial court granted the motion, concluding: "I don't

find that there's sufficient information by a preponderance of the evidence that [the Johnsons] were involved in [the] starting of the fire, nor do I find that the application process for which the answers were omitted or deleted or not answered sufficient to warrant rendering the contract void."

{¶ 8} Subsequently, the trial court issued findings of fact and conclusions of law concluding that American Family had an obligation to insure the Johnsons for the fire and that they should be compensated in full for their loss. This court previously dismissed this appeal two times due to deficiencies in the findings of fact and conclusions of law. The trial court reissued new findings of fact and conclusions of law, which are the subject of this appeal.

Standard of Review

{¶ 9} Although the Johnsons moved for a directed verdict, we conclude that the motion was improper because a motion for a directed verdict applies only in actions tried to a jury, not to a court. In such a case, a motion for directed verdict is deemed to be a motion to dismiss pursuant to Civ.R. 41(B)(2). *Altimari v. Campbell* (1978), 56 Ohio App.2d 253, 256, 382 N.E.2d 1187; *Johnson v. Tansky Sawmill Toyota, Inc.* (1994), 95 Ohio App.3d 164, 167, 642 N.E.2d 9. Civ.R. 41(B)(2) states:

> **After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, * * *, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all of the evidence."**

{¶ 10} Unlike Civ.R. 50(A)(4), Civ.R. 41(B)(2) permits the court to weigh the evidence and assess the credibility of the witnesses. *Norris v. Weir* (1987), 35 Ohio App.3d 110, 116, 520 N.E.2d 10; *Janell, Inc. v. Woods* (1980), 70 Ohio App.2d 216, 217, 435 N.E.2d 1138; *Jacobs v. Bd. of Cty. Commrs.* (1971), 27 Ohio App.2d 63, 65, 272 N.E.2d 635. The court in *Jarupan v. Hanna* (2007), 173 Ohio App.3d 284, 878 N.E.2d 66, at ¶9, explained the differences between the rules as follows:

> **"In contrast to Civ.R. 50(A)(4), Civ.R. 41(B)(2) allows a trial court to determine the facts by weighing the evidence and resolving any conflicts therein. *Whitestone Co.*, 2007-Ohio-233, 2007 WL 155299, at ¶ 13; *Sharaf*, 2003-Ohio-4825, 2003 WL 22100140, at ¶ 8. If, after**

> **evaluating the evidence, a trial court finds that the plaintiff has failed to meet her burden of proof, then the trial court may enter judgment in the defendant's favor. *Daugherty*, Franklin App. No. 98AP-1580, 1999 WL 1267342. Therefore, even if the plaintiff has presented evidence on each element of her claims, a trial court may still order a dismissal if it finds that the plaintiff's evidence is not persuasive or credible enough to satisfy her burden of proof. *Tillman*, 2007-Ohio-2429, 2007 WL 1454781, at ¶ 11. An appellate court will not overturn a Civ.R. 40(B)(2) involuntary dismissal unless it is contrary to law or against the manifest weight of the evidence. *Whitestone Co.* at ¶ 13; *Sharaf* ¶8."**

{¶ 11} For ease of discussion, we will address American Family's first assigned error last.

Contract Void Ab Initio

{¶ 12} In its second assigned error, American Family contends the trial court erred by concluding that the Johnsons' misrepresentations did not void the policy ab initio.

{¶ 13} The trial court concluded that the Johnsons did not make any warranties or misstatements. The court did not find Agent Zingale's testimony that the Johnsons failed to tell him about the prior fire or the fact they filed for bankruptcy, to be credible. The court concluded the fact that a blank application with Patricia Johnson's signature was found in the terminated agent's file indicated that American Family fills out the application for its insureds because there was no reason for Johnson's signature to be on a blank application. The court concluded it was not until after the fire that the Johnsons were questioned about the answers on the application. Because credibility was for the trier fact, we defer to the trial court regarding the credibility of Agent Zingale and the relevance of the signed blank application. Thus, because the trial court found the Johnsons did not make any misrepresentations, it is unnecessary to determine whether the alleged false statements constituted warranties.

{¶ 14} Nonetheless, we agree with the trial court's conclusion that even if misrepresentations were made, they did not constitute warranties that voided the contract ab initio. In *Allstate v. Boggs* (1971), 27 Ohio St.2d 216, 271 N.E.2d 855, the Ohio Supreme Court explained that misstatements of an insured fall into two categories — warranties and representations.

{¶ 15} In *Allstate* the Ohio Supreme Court explained that the consequences of a misstatement of fact by an insured depends upon whether the misstatement is a representation or a warranty. Id. at 218-219. A representation is a statement made prior to the issuance of the policy that tends to cause the insurer to assume the risk. Id. A warranty, by contrast, is a statement, description, or undertaking by the insured of a material fact appearing either on the face of the policy or in another instrument specifically incorporated in the policy. Id. If the statement is a warranty, a misstatement of fact renders the policy void ab initio. If the statement is a representation, the misstatement merely renders the policy voidable. Id.

{¶ 16} Thus, *Boggs* set forth a two-prong test for determining whether a misstatement or misrepresentation constitutes a warranty. *Horton v. Safe Auto Ins. Co.* (June 14, 2001), 10th Dist. No. 00AP-1017. Under the first prong, the representation must plainly appear on the policy or must be plainly incorporated into the policy to be a warranty. Id. Under the second prong, there must be a plain warning that a misstatement as to the warranty will render the policy void from its inception. Id. In the instant case, the introduction of the policy states as follows:

> **"We will provide the insurance described in this policy in return for your premium payment and compliance with all policy terms. We will provide this insurance to you in**

> **reliance on the statements you have given us in your application of insurance.**
>
> **"You warrant the statements in your application to be true and this policy is conditioned upon the truth of your statements. We may void this policy if the statements you have given us are false and we have relied on them."**

{¶ 17} We conclude the above statements fail to incorporate the application into the policy. As the Court in *Boggs* held:

> **"For an insurance application to be incorporated by reference in an insurance policy, the incorporating language must be unequivocal and appear on the face of the policy; the mere fact that the policy refers to the application does not make the application part of the policy."**

{¶ 18} Here, the policy merely mentions the application; it does not state that the application is part of the policy. Moreover, the policy does not specifically state that a misrepresentation as to prior claims would render the policy void ab initio. Instead, it generally states that the false statements on the application may void the policy. Thus, the alleged misrepresentations by the Johnsons constitute a representation, not a warranty, which renders the policy voidable, but not void. Accordingly, American Family's second assigned error is overruled.

Arson

{¶ 19} In its third assigned error, American Family contends the trial court improperly concluded that the evidence failed to demonstrate the fire was caused by arson.

{¶ 20} Although American Family's fire investigator testified that the fire was not accidental, the trial court did not find his testimony to be credible. The investigator concluded that because he could not find an electrical source for the fire, the fire was most likely set by an open flame, either by matches or a lighter.

{¶ 21} American Family contends that because the investigator supplied evidence to support its claim that the fire was intentionally lit, the court erred by concluding there was insufficient evidence to prove arson. Although the expert's testimony may have been sufficient to overcome a directed verdict in a jury trial, the standard is different when it is a bench trial. When the matter is tried before the bench, the trial court has the ability to weigh the evidence and to ascertain the credibility of the witnesses. *Jarupan*, supra. The trial court concluded that the investigator was not credible. Accordingly, we overrule American Family's third assigned error.

Failure to Admit Insurance Policy

{¶ 22} In its fourth assigned error, American Family argues that the trial court's dismissal of the declaratory judgment action was erroneous

because the policy was never entered into evidence; thus, the trial court could not make legal conclusions related to the policy.

{¶ 23} The policy was not entered as an exhibit. However, the policy was attached to American Family's complaint for declaratory judgment. Because the matter was tried to the bench, the court could look at the policy contained within its record.

{¶ 24} Even if the policy should have been introduced into evidence, American Family's failure to do so does not operate as a benefit to American Family. "In a declaratory judgment action brought by an insurer, the burden is on the insurer to establish an exclusion." *Nationwide Mut. Fire Ins. Co. v. Kubacko* (1997), 124 Ohio App.3d 282, 288, 706 N.E.2d 17, quoting *W. Res. Mut. Ins. Co. v. Campbell* (1996), 111 Ohio App.3d 537, 541, 676 N.E.2d 919. In such cases, because it is the insurer that is "seeking to change the status quo and the party urging the affirmative of a proposition [the insurance company] bore the burden of proof." *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 160, fn. 6, 642 N.E.2d 615. Thus, by failing to introduce the policy into evidence, American Family failed to sustain its burden of proof that the policy language voided the contract ab initio. Accordingly, American Family's fourth assigned error is overruled.

Evidence Not in the Record

{¶ 25} In its fifth assigned error, American Family argues that the trial court set forth facts in its findings of fact and conclusions of law that were not in the record.

{¶ 26} The purpose behind the separate findings of fact and conclusions of law provided for under Civ.R. 52 is to aid appellate review of the trial court's decision and to clarify issues for potential res judicata and estoppel applications. *Giurbino v. Giurbino* (1993), 89 Ohio App.3d 646, 626 N.E.2d 1017; *Orlow v. Vilas* (1971), 28 Ohio App.2d 57, 59, 274 N.E.2d 783. There were some conclusions not in the record; however, even discounting those facts the court still had sufficient reasons for granting the dismissal.

{¶ 27} We agree that certain facts placed in the court's findings were not in the record; however, some of the facts that American Family argues were not in the record were actually the trial court's determination of credibility. For example, in spite of testimony otherwise, the court concluded that American Family agents never asked the Johnsons the questions on the application, the Johnsons never made any misrepresentations, and Agent Zingale failed to rectify the problems with the policy. These findings were all based on the trial court's assessment of credibility. Accordingly, American Family's fifth assigned error is overruled.

Damages

{¶ 28} In its first assigned error, American Family argues the trial court erred by awarding damages to the Johnsons because they failed to file a counterclaim.

{¶ 29} In its findings of fact and conclusions of law, the trial court concluded "Plaintiff is obligated to fully compensate Defendants for the loss suffered resulting from the house fire." Although the Johnsons did not file a counterclaim, the entire declaratory judgment concerned whether American Family had the duty to pay the Johnsons' claim. Thus, the court's ordering payment for the fire damage is not improper.

{¶ 30} However, the court could not order a certain amount of damages because no evidence regarding the damages was submitted, which prevented American Family from cross-examining as to the damage amount. Therefore, we reverse and remand the matter for a hearing on damages. American Family's first assigned error is sustained.

{¶ 31} Judgment affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR

APPENDIX

Assignments of Error:

"I. The trial court erred when it held that appellant had a duty to pay the appellees under the insurance policy for the damages done by the fire."

"II. The trial court erred in directing a verdict in favor of the defendants on the issue that the insurance policy was void *ab initio.*"

"III. The trial court erred in directing a verdict in favor of the defendants on the issue that the defendants' house burned as a result of arson."

"IV. The trial court erred in directing a verdict in favor of the defendants on the declaratory judgment as the insurance policy at issue was never admitted into evidence and hence the trial court never reviewed the same before issuing its order."

“V. The trial court erred when it based its findings of fact and conclusions of law on evidence that had not been presented during the course of the bench trial.”