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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000777-MR

T.W. FRIERSON CONTRACTORS, INC. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY NOBLE, JUDGE
ACTION NO. 94-CI-00196

FLOYD REYNOLDS D/B/A FLOYD REYNOLDS PAINTING, VAUGHN W. HALLIS, VAUGHN W. HALLIS D/B/A COMPREHENSIVE INSURANCE & FINANCIAL PROFILES OF KENTUCKY, AND KENTUCKY NATIONAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND KNOPF, JUDGES.

KNOPF, JUDGE: In late fall 1990, Harold Holland suffered an injury during the course of his employment with Floyd Reynolds (d/b/a Floyd Reynolds Painting). The Workers' Compensation Board awarded Holland medical and disability benefits. When it was determined that Reynolds was not covered by workers' compensation insurance, liability for Holland's benefits passed to T. W. Frierson Contractors, Inc., a general contractor that had engaged

Reynolds. In January 1994, about one year after the settlement of Holland's workers' compensation claim, Frierson brought suit against Reynolds for indemnity.[1] In August 1996, the trial court permitted Frierson to amend its complaint by adding claims against Vaughn Hallis, an insurance agent; Hallis's agency, Comprehensive Insurance & Financial Profiles of Kentucky; and Kentucky National Insurance Company, one of the companies Hallis represented. Frierson appeals from an order and opinion of the Fayette Circuit Court[2] granting Kentucky National's motion for summary judgment. Frierson maintains that the insurer's liability is still a matter of disputed fact. We disagree and affirm.

CR 56 authorizes summary judgment only if the pleadings and evidentiary materials on file clearly indicate the lack of any material factual dispute and only if the moving party is entitled to judgment as a matter of law. CR 56 is to be applied cautiously,[3] but a "party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial."[4] This court reviews summary judgments without deference to the trial court.[5] As did the trial court,

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[1]*See* KRS 342.700(2).

[2]The circuit clerk entered the order February 29, 2000.

[3]Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476 (1991).

[4]City of Florence, Kentucky v. Chipman, Ky., 38 S.W.3d 387, 390 (2001).

[5]*Id.*; Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996).

we attempt to give the nonmovant the benefit of every reasonable doubt, and then ask whether the movant is nevertheless entitled to relief.[6]

Although Kentucky National disputes many of these facts, viewed favorably to Frierson the record may be summarized as follows. In the summer of 1990 Frierson subcontracted with Reynolds to work on a project for the Clay County Board of Education. The subcontract required Reynolds to maintain both employers' liability insurance and workers' compensation insurance. Reynolds asked Hallis to arrange for these coverages. Apparently Hallis agreed, although apparently too Reynolds was aware that his request for workers' compensation coverage would need to be submitted to Kentucky's high-risk pool. Reynolds paid what he believed were premiums for both coverages to Hallis, but never received from him or from an insurance company a policy or any other acknowledgment that coverage was in effect.

After the injury to Reynolds's employee, however, on February 8, 1991, Hallis did issue a certificate of insurance to Frierson purporting to show that under policy number 610-023-921 Kentucky National insured Reynolds against general liability and against workers' compensation/employers' liability for the period March 1, 1991, to June 1, 1991. Hallis also countersigned a Kentucky National declarations sheet noting that the March 1, 1991 to June 1, 1991 coverage was a renewal of that policy. In May 1991, Hallis notified Frierson that he had submitted Reynolds's policy for non-renewal effective as of June 1, 1991.

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[6]City of Florence, *supra.*

In addition to this evidence, Frierson also proffered a second certificate of insurance in the same format as the other. This certificate lists Kentucky National as the insurer, bears the same policy number as the other certificate, and indicates the same coverages. But it refers to the period September 1, 1990, to December 1, 1990, the period when Reynolds's worker was injured. This certificate, however, was never executed. It bears no issue date, was not signed, and identifies no certificate holder. Also, Reynolds testified at his deposition that, for several weeks immediately after the accident in November 1990, Hallis paid benefits to Holland, the injured employee. At the time, Hallis gave the impression that these benefits came from an insurer, although he did not indicate which one. It now appears that Hallis made these payments from his own or his agency's funds.

Largely on the basis of the unexecuted certificate, Frierson primarily alleged before the trial court the existence of an insurance contract between Reynolds and Kentucky National covering Holland's injury. As part of an alternative theory of liability, however, Frierson also asserted that, in his capacity as an agent for Kentucky National, Hallis had wrongfully failed to procure workers compensation coverage for Reynolds and had misrepresented the lack of coverage to both Reynolds and Frierson. Kentucky National shares liability for Hallis's conduct, according to this alternative strand of Frierson's complaint, under the doctrine of *respondeat superior.*

The trial court focused on Frierson's insurance-contract theory and ruled that Frierson had failed to proffer any substantial evidence that at the time of Holland's injury a contract existed. On appeal, Frierson concedes the correctness of this ruling. Frierson contends, however, that a jury could construe the evidence as we have summarized it and could conclude that Hallis promised to obtain workers' compensation insurance for Reynolds, accepted premiums for that insurance without obtaining it, and falsely represented both to Reynolds and to Frierson that the insurance was in place. The jury could further conclude, Frierson continues, that Hallis carried out these misdeeds as an agent of Kentucky National, which should thus share Hallis's liability. Frierson maintains that these possibilities preclude summary judgment.

In fairness to the trial court, we hasten to note that the theory Frierson is pressing on appeal was not raised earlier. Indeed, there is some question as to whether Frierson properly preserved the issues it has raised on appeal. We decline to address that question, however, for even if preserved for review, Frierson's alternative theory does not entitle it to relief.

We agree with Frierson that, as a general rule, an insurance agent or broker who undertakes to procure insurance and then wrongfully fails to obtain it may be held liable for the damage that results.[7] We also agree that, where the law of

[7]Grigsby v. Mountain Valley Insurance Agency, Inc., Ky., 795 S.W.2d 372 (1990). *See also* The Fidelity & Casualty Company of New York v. Tillman, 112 F.3d 302 (7th Cir. 1997); Wabash Independent Oil Company v. King & Wills Insurance Agency, 618 N. E. 2d 1214 (Ill.

(continued...)

agency so dictates, an agent's wrongful failure to procure insurance may be attributed to his or her principal.[8] We disagree, however, that the law of agency would permit such a result in this case.

KRS 304.9-035 provides that

> [a]ny insurer shall be liable for the acts of its agents when the agents are acting in their capacity as representatives of the insurer and are acting within the scope of their authority.

This statute as well as general principles of agency law

> mak[e] an insurance intermediary the agent of an insurance company for whom it solicits business.
> . . .
> [But this] does not make the insurer absolutely liable for the agent, relieving the agent of responsibility. It is only liable when the agent acts within the scope of his authority, the insured reasonably relies upon that act, and the reliance constitutes the cause of the insured's damage.[9]

Frierson has failed to allege facts that would satisfy these conditions upon Kentucky National's vicarious liability. True, Hallis was under contract with Kentucky National as a general agent. But this fact alone is not sufficient to support an inference that the alleged failure to procure insurance

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[7](...continued)
App. 1993); Rae v. Air-Speed, Inc., 435 N. E. 2d 628 (Mass. 1982); and Thomas R. Trenkner, "Annotation: Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance," 64 ALR3d 398 (1975).

[8]Pan-American Life Insurance Company v. Roethke, Ky., 30 S.W.3d 128 (2000). *See also* Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991); Heritage Mutual Insurance Company v. Stevens, 699 N. E. 2d 1005 (Ohio Misc. 1996); Lang v. Consumers Insurance Service, Inc., 583 N. E. 2d 1147 (Ill. App. 1991).

[9] Pan-American Life Insurance Company v. Roethke, 30 S.W.3d at 131, 132.

occurred while he was acting in his capacity as an Kentucky National representative or that he was acting within the scope of his authority, whether actual or apparent.[10] On the contrary, Reynolds asserted at his deposition only that Hallis, who was under contract with numerous insurers, agreed to seek coverage from someone, not that he agreed to seek it or promised to obtain it from Kentucky National. In fact, Reynolds anticipated that his workers' compensation coverage would need to be processed through the state high-risk pool, not through Hallis's agency. Reynolds made no claim, moreover, that, prior to his employee's injury, he ever applied for or received an Kentucky National policy, or that Hallis or Kentucky National represented to him that Kentucky National was his insurer. Thus, although Reynolds's reliance on Hallis as a general insurance agent seems to have been complete, amounting in effect to an abdication of his own responsibility, he did not rely on Hallis specifically as an agent of Kentucky National. Nor has he alleged anything that would permit an inference that Hallis acted, with respect to him, either actually or apparently on Kentucky National's behalf.

The unexecuted certificate that Hallis allegedly gave to Frierson does not materially alter this picture. Giving the benefit of the doubt to Frierson, we may assume that the post-injury certificate, the declarations sheet, and Frierson's other evidence prove that, prior to the injury, Hallis gave the incomplete certificate to Frierson and misrepresented it as a

[10] The Fidelity & Casualty Company of New York v. Tillman, 112 F.3d 302 (7th Cir. 1997).

bona fide token that Kentucky National had provided coverage. Nevertheless, the certificate would not and could not justify a verdict in Frierson's favor. On the contrary, the unsigned, undated, undesignated certificate is so clearly invalid that it provides no evidence that Hallis perpetrated his alleged misdeeds while acting within his authority as an agent for Kentucky National. Hallis, of course, had no actual authority to dispense unexecuted Kentucky National certificates. And no contractor could reasonably have believed that he had apparent authority to do so. Frierson having thus failed to allege facts that would support the imposition of vicarious liability, the trial court did not err by granting Kentucky National's motion for summary judgment.

One court explained as follows why intermediaries are generally treated as agents of the insurers:

> Agency is a voluntary relation. . . . [I]nsurers can decide with whom to deal. Carriers may demand that would-be agents establish their trustworthiness, and may set conditions--fidelity bonds, audits of the books, compensation for risk bearing--to protect themselves. Insurers are best situated to monitor intermediaries through which they choose to deal, and therefore bear the risk of loss.[11]

This case illustrates a limit to that rationale. While it is generally true that insurers are better situated than consumers to monitor the insurance industry's intermediaries, consumers are not for that reason relieved of all responsibility to look out for themselves. If Hallis cheated Frierson and Reynolds, we

[11] The Fidelity & Casualty Company of New York v. Tillman, 112 F.3d 302, 304 (7th Cir. 1997).

regret it and deplore it, but Frierson has not proffered any substantial evidence tending to show that Hallis did so as an agent, in any material sense, of Kentucky National. In these circumstances, Kentucky National could not, as a matter of law, be made to bear the loss. Accordingly, we affirm the February 29, 2000, order of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephanie D. Ross
Ferreri & Fogle
Lexington, Kentucky

BRIEF FOR APPELLEE KENTUCKY NATIONAL INSURANCE COMPANY:

Henry E. Kinser
Melanie J. Kilpatrick
Wyatt, Tarrant & Combs
Lexington, Kentucky