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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001919-MR

PROGRESSIVE INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 00-CI-00076

MICHAEL A. STORTZ, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF RACHEL M. STORTZ, A MINOR; AND PEGGY STORTZ, AS PARENT AND NATURAL GUARDIAN OF RACHEL M. STORTZ, A MINOR — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

McANULTY, Judge: Progressive Insurance Company (Progressive) appeals from the findings of fact, conclusions of law and summary judgment for Michael and Peggy Stortz entered by the Bracken Circuit Court that required it to provide basic reparations benefits on a motorcycle insurance policy issued to Michael Stortz and denied its motion for summary judgment. After reviewing the record, the arguments of counsel and the applicable law, we reverse and remand.

In conjunction with his purchase of a motorcycle, Michael Stortz consulted with Sarah Carl at the Carol Moran Independent Insurance Agency in March 1999, about procuring motor vehicle insurance coverage. During their conversation, Stortz told Carl that he wanted a "good policy" and "full coverage" and wanted to make sure he had coverage for passengers because he sometimes took his children for rides. Carl allegedly responded that "it should not be a problem," but they did not have a specific discussion about basic reparations benefits, which often is also referred to as PIP, personal injury protection, benefits.[1] Carl accepted Stortz's application for a motorcycle insurance policy issued by Progressive[2] that included bodily injury liability, property damage liability, stacked uninsured and stacked underinsured coverage, and pedestrian personal injury protection, but no personal injury protection coverage for the insured.[3]

Sometime after March 1999, Carol Moran became aware, contrary to her previous belief, that PIP coverage was not automatically included in the motorcycle insurance policies issued by Progressive, but rather was an optional item. In early June 1999, Moran mailed letters to all of her clients with Progressive motorcycle policies informing them of this situation

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[1] See Stevenson v. Anthem Cas. Ins. Group, Ky., 15 S.W.3d 720, 723 (1999)(discussing automobile insurance liability terminology).

[2] The policy actually was issued by Progressive Northern Insurance Company, an affiliate of Progressive Insurance Company.

[3] The cost for the policy was $61.92.

and asking them to contact the agency about whether they wished to add PIP coverage. The agency did not receive a response from Michael Stortz to the letter, and he maintains that he never received it.

On September 5, 1999, Michael Stortz was driving on a rural highway with his daughter Rachel, when a dog ran onto the highway causing him to lose control of the motorcycle. Both occupants were injured with Michael sustaining the more severe injuries and approximately $30,000 in medical expenses, while Rachel had $2,600 in medical expenses. When Michael notified Progressive of the accident, the insurer denied his claim based on an absence of PIP coverage under the policy.

In July 2000, Stortz filed a petition for declaration of rights action pursuant to Kentucky Revised Statute (KRS) Chapter 418 seeking a judgment declaring that the motorcycle insurance policy provided PIP coverage. Subsequently, the parties took the depositions of Michael Stortz, Sarah Carl and Carol Moran. In March 2001, Progressive filed a motion for summary judgment pursuant to Kentucky Rule of Civil Procedure (CR) 56 arguing that PIP benefits were optional and neither it, nor its agents had breached a duty owed to Stortz. Stortz filed a response to the motion and its own motion for summary judgment against Progressive. Stortz asserted that Carl had misled him to believe he had PIP coverage and effectively failed to offer him the option to purchase PIP coverage.

On June 28, 2001, the trial court entered findings of fact, conclusions of law and summary judgment in favor of the

Stortzes, and denied Progressive's summary judgment motion. The court held that Carl had a duty to advise Michael Stortz of the optional nature of PIP coverage, had effectively failed to offer it, and had misrepresented the existence of that coverage under his policy. The court ordered Progressive to provide the Stortzes $10,000 in basic reparations benefits for both Michael and Rachel under the motorcycle insurance policy. Progressive filed a CR 59.05 motion to alter, amend or vacate stating summary judgment was premature because it needed more time for discovery on the issue of whether Michael Stortz received the June 1999 letter from Moran on the availability of PIP coverage. The trial court summarily denied the motion. This appeal followed.

Progressive contends that the trial court erred in granting the Stortzes summary judgment. The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there are no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Palmer v. International Ass'n of Machinists, Ky., 882 S.W.2d 117, 120 (1994); Stewart v. University of Louisville, Ky. App., 65 S.W.3d 536, 540 (2001); CR 56.03. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). See also City of Florence v. Chipman,

Ky., 38 S.W.3d 387, 390 (2001); Lucchese v. Sparks-Malone, Ky. App., 44 S.W.3d 816, 817 (2001). The court must view the record in a light most favorable to the nonmovant and resolve all doubts in his favor. Lipsteuer v. CSX Transportation, Inc., Ky., 37 S.W.3d 732, 736 (2000); Commonwealth, Natural Resources and Environmental Protection Cabinet v. Neace, Ky., 14 S.W.3d 15, 19 (2000). Summary judgment is not considered a substitute for a trial, so the trial court must review the evidentiary record not to decide any issue of fact, but to determine if any real factual issue exists and the nonmovant cannot prevail under any circumstances. Steelvest, 807 S.W.2d at 480; Chipman, 38 S.W.3d at 390; Barnette v. Hospital of Louisa, Inc., Ky. App., 64 S.W.3d 828, 829 (2002). An appellate court need not defer to the trial court's decision on summary judgment and will review the issue de novo because only legal questions and no factual findings are involved. See Lewis v. B & R Corp., Ky. App., 56 S.W.3d 432, 436 (2001); Barnette, 64 S.W.3d at 829. See generally Goldsmith v. Allied Bldg. Components, Inc., Ky., 833 S.W.2d 378, 380 (1992)(reviewing court need not give same deference to trial court on summary judgment as on case tried by the court).

Progressive questions the trial court's action on several grounds. Unlike the mandatory PIP coverage for automobiles,[4] the Motor Vehicle Reparations Act provides that insurers must provide basic reparations benefit coverage as an option for motorcycle liability insurance policies. See KRS 304.39.040(3) and (4). As such, Progressive asserts that it owed

[4] See KRS 304.39-080(5)and KRS 304.39-100(1)(c).

and breached no duty with respect to its conduct with Michael Stortz. Progressive relies heavily on Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245 (1992), in which the Kentucky Supreme Court held that insurance agents had no affirmative duty to advise insureds on the availability and desirability of purchasing underinsured motorists coverage because of its optional nature. It also cites Flowers v. Wells, Ky. App., 602 S.W.2d 179 (1980), wherein this Court held that an applicant's request for "full coverage" did not constitute a request for optional coverage items such as underinsured motorist coverage, which was involved in that case.

In making its decision, the trial court relied on Pan-American Life Ins. Co. v. Roethke, Ky., 30 S.W.3d 128 (2000), which was cited by the Stortzes. In Roethke, the court held that an insurance company could be held vicariously liable for the actions of its agents acting within the scope of their authority. The court noted statutory and case law expressing a need to protect insureds from overreaching by insurance agents.

A careful review of the case law raises questions with the positions of both parties and the trial court. For instance, while both Mullins and Flowers indicate that general requests for a "good policy" or "full coverage" do not create a duty on an insurance agent to advise insureds of optional coverage items, more specific requests can raise such a duty. In Mullins, the court noted that the insured told the agent that she wanted "as good a policy as I could get on liability and no fault, everything I could get on it, because I couldn't afford full

coverage." 839 S.W.2d at 246. The court said, "[s]ince her request was for less than full coverage, it precludes including optional coverages such as UIM [underinsured motorist] and added RB [reparation benefits], within its parameters, because we do not find circumstances creating an express or implied assumption of a duty to advise." 839 S.W.2d at 249. The court stated that an implied assumption of duty may arise if, inter alia, the insured clearly makes a request for advice. Similarly, in Flowers, the court said, "[w]e cannot conceive that a request for 'full coverage' would include all or even any optional coverages, unless specifically requested." 602 S.W.2d at 181 (emphasis added).

The issue of the existence of a duty is a question of law for the court subject to de novo review. Mullins, 839 S.W.2d at 248. While perhaps a close question, we agree with the trial court that Michael Stortz's request created an implied assumption of duty[5] on Sarah Carl to advise him of the optional PIP coverage. Although his request for a "good policy" and "full coverage" was not sufficient to create a duty, his request for coverage for his passengers was specific enough to require Carl to advise him of the availability and need for PIP coverage.

Having found an implied assumption of duty to advise Michael Stortz of option PIP coverage, the next question is whether Progressive breached that duty. While the existence of and standard of care associated with a duty are legal questions,

[5] We agree with Progressive that no express assumption of duty existed.

the breach of a duty and causation are factual issues. Lewis v. B & R Corp., 56 S.W.3d at 438. A court may decide the issue of causation as a matter of law only if there is no reasonable question on the issue. Id.

In the case sub judice, the evidence on breach of the duty and causation is unclear and Progressive disputes liability on both of these factual issues. It is undisputed that Michael Stortz and Carl did not specifically discuss the full aspects of PIP coverage in part because Carl believed that PIP coverage was included on a standard motorcycle policy.[6] Nevertheless, she testified in her deposition that she always went over the basic coverages with clients before issuing a policy. In addition, Carl stated that she gave Michael Stortz a copy of the application, which lists the coverages for his policy and specifically indicates that it did not include PIP coverage. The declarations page of the full insurance policy received by the Stortzes in late March 1999, several months prior to the accident, did not list PIP benefits as part of the covered items.[7] Finally, Progressive disputed Michael Stortz's assertion that he did not receive a copy of the June 1999 letter sent by the Moran Agency to its motorcycle policy holders fully

[6] The trial court's finding that PIP coverage was neither offered nor available to Michael Stortz because Carl believed it was already provided is clearly erroneous. The issue merely was not specifically discussed.

[7] We note the Kentucky Supreme Court has held in Grigsby v. Mountain Valley Ins. Agency, Inc., Ky., 795 S.W.2d 372 (1990), that failure of the insured to read and comprehend an insurance policy is not a defense to an insurance agency's negligence. Grigsby involved a fire insurance policy.

explaining the possible absence of PIP coverage. Progressive asked the trial court for additional time to conduct further discovery on this issue and Stortz's knowledge of PIP coverage based on a prior motorcycle policy, but the trial court summarily denied the motion.

Given the uncertainty of the evidence and disputed nature of the factual issues surrounding the breach of duty and causation, we believe the trial court erred in granting summary judgment to the Stortzes. The reliance of the trial court and the Stortzes on Roethke is unavailing and that case actually supports our decision. As Progressive points out, unlike this appeal, Roethke involved affirmative misrepresentations by the insurance agent, rather than omissions on optional coverages.[8] The court in Roethke held that summary judgment was improper because of the existence of factual questions concerning breach of duty and causation concerning the insurance agent's discussion with the insured.[9] In this appeal, there are genuine issues of material fact in dispute that preclude summary judgment for the Stortzes. For the same reason, we reject Progressive's claim that it was entitled to summary judgment.

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[8] We disagree with Progressive's argument that this fact compels judgment in its favor. The Roethke court did not hold that affirmative misrepresentations were required to constitute a breach of duty and its decision is based on an express assumption of a duty to advise, rather than an implied assumption.

[9] The main issues in Roethke actually involved the existence and scope of duty based on the scope of agency authority. The court relied on the contract between the insurance company and the insurance agency as creating a duty to advise and not misrepresent the insurance policy. Progressive has not raised the issue of the scope of agency authority based on any contract between itself and the Moran Agency.

For the foregoing reasons, we reverse the judgment of the Bracken Circuit Court and remand for further proceedings consistent with this opinion.

KNOPF, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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