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TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-000231-MR

GAINSCO COMPANIES;
H & H AUTO SALES; AND
DAVID HOLDER — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILIP R. PATTON, JUDGE
ACTION NO. 00-CI-00589

DARRELL GENTRY, AS GUARDIAN FOR
JOSHUA GENTRY; JOE ALLEN BOOTH,
AS GUARDIAN FOR JONATHAN BOOTH,
A MINOR; AND KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Gainsco Companies, H & H Auto and Trailer Sales, Inc., and David Holder have appealed from an order of the Barren Circuit Court entered on January 9, 2002, which denied their motion to alter, amend or vacate the trial court's previous order granting the appellees' (Darrell Gentry, as

guardian for his son Joshua Gentry, Joe Allen Booth, as guardian for his son Jonathan Booth, and Kentucky Farm Bureau Insurance Company) motion for summary judgment. Having concluded that H & H Auto was the owner of the vehicle in question at the time of the accident, and that summary judgment in favor of the appellees on this issue was proper, we affirm.

On March 22, 2000, Phillip Duke Motors, an automobile dealership located in Albertville, Alabama, purchased a 1996 Dodge pickup truck from Ken's Auto Sales of Colmesneil, Texas. Approximately two weeks later, on April 6, 2000, Phillip Duke Motors sold the same pickup truck to H & H Auto, located in Lucas, Barren County, Kentucky. When H & H Auto took possession of the vehicle, Phillip Duke Motors could not at that time transfer the certificate of title to the pickup truck.[1] Hence, H & H Auto did not have the certificate of title to the pickup truck when the vehicle was brought to Kentucky.

On April 15, 2000, Joe Allen Booth and his son, Jonathan Booth, visited H & H Auto and expressed an interest in buying the pickup truck. Joe agreed to purchase the vehicle from H & H Auto on that same day.[2] David Holder, president of

[1] It is unclear from the record what caused the delay in transferring the certificate of title from Phillip Duke Motors to H & H Auto.

[2] In his deposition testimony, Joe stated that he purchased the vehicle primarily for his son to drive. Joe's son Jonathan was a minor at the time of the transaction.

H & H Auto, negotiated the sale on behalf of H & H Auto. Joe signed various documents on the day of the sale, including an application for certificate of title,[3] a bill of sale, and the certificate of title to a 1995 Dodge pickup truck that Joe had agreed to trade in as part of the purchase of the 1996 Dodge pickup truck. However, because H & H Auto had not yet received the certificate of title to the 1996 pickup truck, the title could not be transferred to Joe on the date of the sale. Nonetheless, Holder permitted Jonathan to drive the vehicle home on April 15, 2000.

At approximately 7:30 a.m. on April 20, 2000, Jonathan, Joshua Gentry, Andy Gentry, and Beau McGuire were on their way to school in the 1996 pickup truck when Jonathan lost control at the wheel and totaled the pickup truck in a single-vehicle accident.[4] All four of the young men were injured; however, Joshua sustained life-threatening injuries and had to be flown to the University of Louisville Medical Center for treatment. As a result of his injuries, Joshua is now permanently disabled.

At approximately 3:30 p.m. on April 20, 2000, eight hours after the accident, H & H Auto received the certificate of

[3] Although Joe testified that he did not remember signing an application for a certificate of title on April 15, 2000, he also stated that he did not dispute the accuracy of his notarized signature, which indicates that he did in fact sign the application on April 15, 2000.

[4] It is not clear from the record how the accident occurred.

title to the 1996 pickup truck from Phillip Duke Motors. At that time, Joe was in Louisville with Joshua's family. Hence, the certificate of title was not transferred over to Joe until April 24, 2000, and the proper documents were not filed with the county clerk's office until April 29, 2000.

On September 22, 2000, Darrell Gentry, as guardian for his son Joshua, filed a complaint in Barren Circuit Court seeking, inter alia, monetary damages for his son's injuries. Among the named defendants in Darrell's complaint were Joe Booth and his insurer, Kentucky Farm Bureau Insurance Company, H & H Auto and its insurer, Gainsco Companies/MGA Insurance, and David Holder.[5] Darrell also filed a petition for declaratory relief on September 22, 2000, asking the trial court to determine which party, Joe Booth or H & H Auto, was the "owner" of the pickup truck at the time of the accident. This would be a necessary finding in order to determine which insurance provider, Farm Bureau or Gainsco, would be responsible for primary coverage.[6]

[5] Ohio Casualty Group, an insurance provider for Darrell and his wife, Patty, was also named as a defendant in the complaint. On March 2, 2001, Darrell agreed to voluntarily dismiss all claims against Ohio Casualty Group. On August 8, 2001, Phillip Duke, d/b/a Phillip Duke Motors and its insurer, Acceptance Insurance Companies were added as defendants in Darrell's second amended complaint. On November 29, 2001, the claims against Phillip Duke Motors and Acceptance were dismissed by the trial court. Darrell has not appealed from the order dismissing his claims against Phillip Duke Motors and Acceptance. Further, H & H Auto did not assert any cross-claims against Phillip Duke Motors and/or Acceptance before the trial court. Hence, Phillip Duke Motors and Acceptance are not necessary parties to this appeal and have been dismissed by a separate order of this Court.

[6] It is not disputed that Gainsco provided insurance coverage on the pickup truck prior to the sale, and that Farm Bureau provided coverage on the

On June 18, 2001, Darrell filed a motion for summary judgment, arguing that H & H Auto had not followed the statutes governing the transfer of vehicles from dealers to purchasers. Darrell argued that H & H Auto should therefore be deemed to be the "owner" of the vehicle at the time of the accident, and that Gainsco, H & H Auto's insurer, should therefore be responsible for primary coverage. H & H Auto filed a response on June 25, 2001, and argued that an effective transfer of ownership had occurred and that Joe was the "owner" at the time of the accident. On July 17, 2001, the trial court entered an order denying Darrell's motion for summary judgment, stating that there was insufficient evidence at that time to determine which party was the "owner" at the time of the accident.

On November 13, 2001, after additional discovery had taken place, Darrell renewed his motion for summary judgment on the issue of ownership. On November 29, 2001, following a hearing on the matter, the trial court entered an order granting Darrell's motion for summary judgment. The trial court found that H & H Auto was the "owner" of the vehicle at the time of the accident. Hence, the trial court ruled that Gainsco would be liable for primary coverage and Farm Bureau would be liable for secondary coverage.

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vehicle after Joe purchased the pickup truck from H & H Auto. Instead, the dispute centers on the "ownership" of the vehicle at the time of the accident and which party, Gainsco or Farm Bureau, is to be responsible for primary coverage under the respective policies.

On December 10, 2001, Gainsco, H & H Auto and Holder filed a motion to alter, amend, or vacate the trial court's previous order granting Darrell's motion for summary judgment. On January 9, 2002, the trial court denied the motion to alter, amend, or vacate. Thereafter, on January 28, 2002, Gainsco, H & H Auto and Holder filed a timely notice of appeal. However, by mutual agreement of all of the parties, the appeal was held in abeyance pending the outcome of the Supreme Court of Kentucky's decision in Auto Acceptance Corp. v. T.I.G. Insurance Co.[7] The Supreme Court's decision in Auto Acceptance became final on December 12, 2002.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[8] The trial 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."[9] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a

[7] Ky., 89 S.W.3d 398 (2002).

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

[9] Steelvest, supra, (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

genuine issue of material fact requiring trial."[10] This Court has previously stated that "[t]he 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted].[11]

The primary issue on appeal is whether H & H Auto was the "owner" of the pickup truck at the time of the accident. In support of its claim that Joe Booth was the owner, H & H Auto argues:

> H & H Auto complied with the requirements of KRS[12] 186A.220 in the transfer of [the pickup truck] from [H & H Auto] to [Joe Booth]. Auto Acceptance Corp. v. TIG Insurance Co. recognizes the legislative changes to this transfer statute and applies the exception to the rule of delivering titling documents to the purchaser. Because H & H Auto did not have the certificate of title, it was permitted to retain those documents once received for later filing so long as [Joe Booth] provided proof of insurance.

[10] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, 807 S.W.2d at 480).

[11] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[12] Kentucky Revised Statutes.

We disagree and hold that H & H Auto was the "owner" of the pickup truck at the time of the accident and that summary judgment in favor of Darrell was proper.

The principal statute at issue, KRS 186A.220, reads in pertinent part as follows:

> (5) When [a licensed motor vehicle dealer] assigns the vehicle to a purchaser for use, he shall deliver the properly assigned certificate of title, and other documents if appropriate, to such purchaser, who shall make application for registration and a certificate of title thereon. The dealer may, with the consent of the purchaser, deliver the assigned certificate of title, and other appropriate documents of a new or used vehicle, directly to the county clerk, and on behalf of the purchaser, make application for registration and a certificate of title. In so doing, the dealer shall require from the purchaser proof of insurance as mandated by KRS 304.39-080 before delivering possession of the vehicle [emphases added].

The above provision reflects a 1994 amendment which created an exception to the general rule that the party holding the certificate of title was the "owner" of the vehicle for insurance purposes. In Auto Acceptance, our Supreme Court explained one of the requirements that an automobile dealer must follow in order to fall within that exception:

> The 1994 revision created an exception to the general statutory scheme that makes the title holder the owner of a vehicle for insurance purposes. But a car dealer can only take advantage of the exception by first verifying that the buyer has a valid

> and current insurance policy that covers the purchased vehicle. This exception is consistent with the important public policy of keeping uninsured vehicles off Kentucky highways, roads, and streets [emphasis added].[13]

Hence, as both KRS 186A.220(5) and Auto Acceptance make clear, before a car dealer can effectively transfer ownership of a vehicle without simultaneously transferring possession of the certificate of title, the dealer must (1) obtain the purchaser's consent to file the certificate of title and other documents on behalf of the purchaser in the county clerk's office; and (2) verify that the purchaser has obtained insurance on the vehicle before relinquishing possession of that vehicle to the purchaser. With this in mind, we turn to the facts of the case sub judice.

It is not disputed that Jonathan Booth took possession of the 1996 pickup truck on April 15, 2000. In his deposition testimony, David Holder, president of H & H Auto, stated that he did not call Farm Bureau to verify that Joe Booth had obtained insurance on the 1996 pickup truck until April 17, 2000, which was two days after Jonathan had taken possession of the vehicle.[14] In addition, there is nothing in the deposition

[13] Auto Acceptance, 89 S.W.3d at 401.

[14] Holder testified that he "knew" Joe Booth had insurance on the 1995 pickup truck on the day of the sale. However, it is clear from Holder's own testimony that he did not call Farm Bureau to verify that Joe Booth had insurance on the 1996 pickup truck until April 17, 2000.

testimony of either Joe or Holder which would indicate that Joe provided proof of insurance for the 1996 pickup truck prior to Jonathan's driving it off the lot. Finally, there is nothing in the record to suggest that Holder obtained Joe's consent to file the certificate of title and other documents on Joe's behalf in the county clerk's office. In fact, in its brief to this Court, H & H Auto has not argued that this requirement of the statute was met.

Hence, H & H Auto clearly failed to follow the mandates of KRS 186A.220(5). H & H Auto failed to obtain Joe's consent to file the certificate of title and other documents on his behalf in the county clerk's office, and it failed to obtain proof that Joe had insurance on the 1996 pickup truck prior to allowing Jonathan to take possession of the truck. Therefore, since it is not disputed that the certificate of title had not yet been transferred over to Joe at the time of the accident, H & H Auto was the "owner" of the vehicle when the accident occurred.[15] Accordingly, there were no genuine issues of material fact with respect to the issue of ownership, and pursuant to KRS 186A.220(5), Darrell Gentry was entitled to judgment as a matter of law on this issue.

H & H Auto argues that the policy behind KRS 186A.220(5) was met since, as it turned out, Joe did in fact

[15] H & H Auto has not argued that Phillip Duke Motors was the "owner" of the pickup truck at the time of the accident.

have insurance on the 1996 pickup truck. We disagree. KRS 186A.220(5) permits a car dealer, with the consent of the vehicle's purchaser, to retain the certificate of title following a sale and file the document on behalf of the purchaser at the county clerk's office. However, to prevent uninsured vehicles from being driven on the roadways, the statute mandates that a car dealer verify that the purchaser has obtained insurance on the vehicle prior to relinquishing possession. If the car dealer fails to do so, he takes the risk that he and/or his insurer will be held liable if the purchaser causes an accident prior to the transfer of the certificate of title for the newly-purchased vehicle. Therefore, the policy behind KRS 186A.220(5) would clearly not be met if H & H Auto was allowed to avoid liability after it failed to follow the requirements of the statute.

Finally, we address H & H Auto's claim that it was not properly named as a party defendant to the underlying action. According to H & H Auto, it was referred to throughout the proceedings below as "H & H Auto Sales," when in reality, H & H Auto's official corporate name is H & H Auto and Trailer Sales, Inc.[16] However, our review of the record shows that this issue

[16] H & H Auto Sales is a different corporate entity with its principal place of business located in Paducah, Kentucky.

and the possible applicability of CR[17] 15.03[18] were never raised before the trial court. Therefore, we will not consider it for the first time on appeal.[19]

Based on the foregoing, the order of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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[17] Kentucky Rules of Civil Procedure.

[18] CR 15.03 allows under certain circumstances for an amendment to a pleading to relate back to the date of the original pleading.

[19] See Abuzant v. Shelter Insurance Co., Ky.App., 977 S.W.2d 259, 262 (1998)(holding that an issue not presented to the trial court would not be considered for the first time on appeal).