RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002039-MR

SMITH FOGLE — APPELLANT

v. — APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CI-00065

GENERALI - U.S. BRANCH — APPELLEE

AND — NO. 2005-CA-002040-MR

REBECCA BROUGHTON — APPELLANT

v. — APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 98-CI-00065

GENERALI - U.S. BRANCH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,[1] SPECIAL JUDGE.

[1] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

GUIDUGLI, JUDGE: Smith Fogle and Rebecca Broughton (collectively "the appellants") have appealed from the decision of the Marion Circuit Court deeming Generali – U.S. Branch's cancellation of Fogle's automobile liability insurance policy to be effective. This case turns on the interpretation of KRS 304.20-040, and the appellants have raised three issues on appeal, namely: 1) whether Generali proved it mailed the cancellation notice; 2) whether the notice was ineffective because it lacked a description of the vehicle; and 3) whether the cancellation was premature, and therefore ineffective, because it was dated prior to the premium due date. Because we have concluded that Generali's notice was effective to cancel Fogle's insurance coverage, we affirm.

FACTUAL BACKGROUND

On February 6, 1997, Fogle met with Don Talbert, owner of the J.C. Riley Insurance Agency, to apply for and purchase a 6-month automobile liability insurance policy to cover a 1985 Mercury Marquis that he had recently bought from his father. Fogle obtained coverage through Generali, and the policy (PAKY99093) was administered by Graward General. Fogle made an initial cash payment to Talbert of $104.29, which he forwarded to Generali the same day. Generali received the payment by February 11, and sent Fogle a payment schedule ten days later, detailing that he was to make four additional payments of $71.87

on March 5, April 3, May 3, and June 2, and stating that he would be receiving a bill two weeks in advance of each due date. On March 4, Generali prepared a cancellation notice that was mailed the following day, indicating that coverage on the Mercury Marquis was being canceled effective March 21, 1997, for nonpayment of premium. On March 21, Generali followed up with a Special Notice indicating that the policy had been canceled that morning.

On February 8, 1997, two days after he had obtained coverage, Fogle wrecked the Mercury in a single-vehicle accident when he slid off the road and into a fence. The Mercury was a total loss. Fogle sought treatment a few days later at Spring View Medical Center, and Generali paid the bill submitted for this treatment under his PIP coverage. On March 10, Fogle purchased a 1986 Chevrolet Celebrity from Variety Auto in Lexington, Kentucky to replace the Mercury. Fogle maintained that he provided Variety Auto with proof of insurance. He further maintained that he returned to the insurance agency the following day to discuss insurance on the new car with Talbert. At that time, Fogle claims that Talbert told him he did not have to get a new policy, as the new car would automatically replace the Mercury on the policy, and that he gave Talbert $100 in cash. Talbert does not recall that the meeting took place, and neither Talbert nor Fogle could produce a copy of the receipt

for the $100 cash payment. The parties do not dispute that Fogle did not make any additional premium payments.

On June 5, 1997, while driving the Celebrity and attempting to pass another car in a no-passing zone, Fogle was involved in a head-on collision with the vehicle driven by Broughton. Both Fogle and Broughton were seriously injured in the accident and were hospitalized. As a result of the accident, Fogle was charged in Marion County with first-degree assault and operating a motor vehicle under the influence of drugs.[2] He entered a guilty plea to an amended charge of second-degree assault and was sentenced to five years in prison to run concurrently with an eighteen-month sentence for a cocaine possession conviction he received in Nelson County.[3] He served out the sentences and was released in March 2002. Also as a result of the accident, Fogle entered a guilty plea to charges of no insurance and improper passing in Marion District Court.[4] He was fined $1000, plus costs, for these offenses.

PROCEDURAL BACKGROUND

Coincidentally, Generali provided automobile insurance coverage for Broughton at the time of the June 1997 accident. As her insurer, Generali paid Broughton $10,000 in PIP benefits

[2] Marion Circuit Court case number 98-CR-00013.

[3] Nelson Circuit Court case number 97-CR-00020.

[4] Marion District Court case number 98-T-00080.

as well as $25,000 in uninsured motorist benefits for damages she sustained in the accident. Generali then instituted the present subrogation action against Fogle to recover the $35,000 paid to Broughton, plus costs and interest, as a result of his being uninsured at the time of the accident. The circuit court permitted Broughton to intervene as a plaintiff to assert a claim for additional damages. Fogle did not answer either the complaint or the intervening complaint. Accordingly, Generali and Broughton both moved for a default judgment, which the circuit court granted. Generali obtained a judgment for $35,000 plus costs against Fogle on May 23, 1998. Following a damages hearing, the circuit court entered a supplemental judgment on March 29, 1999, awarding Broughton damages in the amount of $1,093,274.76. Fogle did not appeal from either final judgment.

Shortly after the entry of the supplemental judgment, Broughton moved for permission to file a supplemental complaint against Auto-Owners Insurance Company. Auto-Owners provided liability insurance coverage for Variety Auto and its owner, Michael Louis Ott, which coverage, Broughton claimed, extended to Fogle as a permissive driver of the Celebrity. Broughton argued that Variety Auto failed to comply with the statutory requirement that it had to obtain proof of insurance before it could sell the Celebrity to Fogle. That dispute is apparently still pending below, and we shall not address it any further

because it has no bearing on the issues presently before this Court.

In early 2000 and at Broughton's request, Generali produced records revealing that it had provided coverage for Fogle on the Mercury from February 6 through March 21, 1997, and that the policy had been canceled for nonpayment of the premium. Several months later, Fogle made his first appearance in the action when he moved the circuit court to file a counterclaim against Generali and to set aside the $35,000 default judgment. As grounds for his motions, Fogle disputed the sufficiency of the March 21, 1997, notice, pointing out that the notice did not identify an automobile. After considering Fogle's motion and the various responses, the circuit court set aside the default judgment to Generali and permitted Fogle to file a counterclaim. In doing so, the circuit court noted that the policy cancellation was a viable issue to be litigated. In the counterclaim, Fogle alleged that Generali had breached various covenants under his insurance contract and requested that Generali's complaint against him be dismissed, that Generali be required to satisfy the judgment entered for Broughton, and that he be awarded punitive damages for Generali's egregious conduct.

In early 2004, Fogle filed a motion for partial summary judgment against Generali, asserting that its cancellation of his policy was ineffective because the notice

did not contain a description of the vehicle and was sent prior to the premium due date, and because Generali could not establish proof of mailing of the notice. The circuit court denied the motion, and scheduled a jury trial for March 16, 2005. However, the case was remanded from the trial docket in early 2005, and the circuit court indicated that it would revisit Fogle's partial summary judgment motion. The parties entered into an Agreed Order that the circuit court would rule on the cancellation issue as a question of law. If the policy had been canceled, they agreed that a jury issue would remain as to whether Fogle made an additional premium payment and the effect such a payment had on his coverage. If the circuit court deemed the cancellation to be ineffective, other issues would have arisen.

On June 1, 2005, the circuit court entered an order addressing the cancellation issue, which we shall set out in full below:

> This matter is before the Court on an Agreed Order whereby the parties agreed for the Court to determine three issues of law before proceeding further in this matter. The Court will address each issue separately.
>
> **A. Whether the "Special Notice" allegedly mailed by Generali was ineffective as a cancellation for lack of description of the vehicle subject to cancellation.**

The Defendant claims the cancellation notice was defective because the notice did not describe the vehicle subject to cancellation. The Defendant relies upon Kentucky Farm Bureau Ins. Co. v. Gearhart, Ky.App., 853 S.W.2d 907, wherein the court held a notice of cancellation was ineffective to cancel insurance coverage where the notice failed to include a proper description of the vehicle. In Gearhart, there were three separate insurance policies for three separate vehicles. That is not the case here. In this case, there is only one insurance policy for one vehicle. There is no reason to conclude that the cancellation was inadequate. There is no need to designate the automobile when there is a single insurance policy on a single vehicle. The insured could not be confused as to what policy is being canceled when there is but one policy and one vehicle.

B. Whether the "Cancellation Notice" allegedly mailed by Generali was ineffective to cancel coverage because it was dated prior to Fogle's premium due date.

The cancellation notice was dated March 4, 1997, and was mailed on March 5, 1997. The premium was not due until March 5, 1997. There is no question that the premium was not paid by March 5, 1997. Also, the policy had only been in effect since February 6, 1997. KRS 304.20-040 states in pertinent part

> (2) (a) A notice of cancellation of a policy shall be effective only if it is based on one (1) or more of the following reasons:
>
> 1. Nonpayment of premium; . . .
>
> (b) This subsection shall not apply to any policy or coverage which has been in

> effect less than sixty (60) days at the time notice of cancellation is mailed. . .
>
> No notice of cancellation of a policy to which subsection (2) of this section applies shall be effective unless mailed . . . at least twenty (20) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium, at least fourteen (14) days' notice of cancellation accompanied by the reason therefore shall be given . . .

The insurance contract specifies that the policy may be canceled by the insurer by mailing the insured notice of cancellation:

> a. At least 10 days notice:
>
> (1) if cancellation is for nonpayment of premium; or
>
> (2) if notice is mailed during the first 60 days this policy is in effect and this is not a renewal or continuation policy.

In this case, the policy itself was less than 60 days old. The fact that the cancellation notice was dated March 4, 1997, the day before the premium was due, is not dispositive of this issue. Under both the statute and the policy terms, upon proper notice, the policy could be canceled for any reason within the first sixty days of the policy. That would be the case here. Also, the cancellation notice was definite and gave a specific date of cancellation. Even

though the notice was dated March 4, 1997, it was not sent out until March 5, 1997, the day the premium was due.

The case of Mackey v. Bristol West Ins. Serv. of California, Inc., 105 Cal.App.4th 1247 is distinguishable from this case. In Mackey, the notice was sent out weeks in advance of the premium due date. It also served a dual purpose as a premium due notice and notice of cancellation. These type [of] notices appear to be a demand for payment and the cancellation was conditioned upon failure to send the payment in on time. In the case at bar, the notice was a cancellation notice and nothing more. Thus the notice mailed by Generali was not rendered ineffective because it was dated prior to the premium due date.

C. Whether Generali's mailing procedures as claimed are sufficient to meet the proof of mailing standard.

The parties agree that the controlling case on this issue is Goodin v. General Accident Fire & Life Ass. Co., Ky. 450 S.W. 252 [(1970)]. The parties do not agree as to what Goodin requires. In Goodin, the Court held that proof of mailing of cancellation of insurance coverage may be satisfied by showing compliance with business usage provided such usage embodies sufficient evidentiary safeguard to satisfy need for protection of affected party in the particular transaction concerned. Goodin did not set forth the standard required in the industry but rather held that the usage established in its case was sufficient. Each case is to be examined on its own to determine whether the business usage contains sufficient safeguards to determine whether cancellations were mailed.

In this case, there is a list of cancellations generated by the insurance company listing the notices that were being

> sent. A clerk of the insurance company checked the list with the notices themselves before mailing and initialed the last page. The clerk then runs the list through the postage meter and then affixes a postage stamp from the Post Office to the lists. All of this was done in this particular case.
>
> Generali had a definite and specific mailing procedure and it complied with business usage when it mailed the cancellation in this case. These procedures are sufficient to meet the proof of mailing standard for cancellation as per Goodin.
>
> THEREFORE, IT IS HEREBY ORDERED as follows:
>
> 1. The "Special Notice" and "Cancellation Notice" sent by the Plaintiff are not ineffective to cancel coverage.
>
> 2. Generali's mailing procedures are sufficient to meet the proof of mailing standard for cancellation.
>
> 3. The parties are to appear before the Marion Circuit Court on June 20, 2005, at 2:10 p.m., for a status conference to determine how to proceed further in this case.

By Agreed Order entered September 6, 2005, the parties agreed that Fogle would abandon further pursuit of any additional jury issues and that the June 1 order would constitute a final and complete adjudication of all claims pending between Generali and Fogle in Generali's favor. As other claims between the intervening parties remained, the circuit court included the necessary recitations to make the June 1 order final and

appealable. Both Fogle and Broughton appealed separately. By order of this Court, the two appeals were consolidated and the appellants have proceeded jointly in prosecuting their respective appeals.

In their joint brief, the appellants have continued to argue that Generali's cancellation of Fogle's policy was ineffective, while Generali has continued to dispute this argument. We agree with Generali that its cancellation of Fogle's policy was effective to cancel his coverage as of March 21, 1997, meaning that he was uninsured at the time of the June 1997 accident with Broughton. We shall address each issue raised by the appellants in turn.

ANALYSIS

Our standard of review in this case is provided by CR 56.03, which states that a summary judgment is proper if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*."[5] For purposes of this appeal, there are no

[5] Lewis v. B&R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001).

disputed facts and as our review is of a purely legal question, our review is *de novo*.

1) PROOF OF MAILING

Cancellation of an automobile insurance policy is generally governed by KRS 304.20.040. In that statute, the Legislature required that a cancellation be based upon one or more of several listed reasons, including nonpayment of premium, but that requirement would not apply for policies that had been in effect for less than sixty days.[6] For nonpayment of premium, at least fourteen days' notice must be given.[7] The statute also provides that "[p]roof of mailing of notice of cancellation . . . to the named insured at the address shown in the policy shall be sufficient proof of notice."[8]

Fogle's policy is very similar to the statute, providing in the TERMINATION portion for cancellation as follows:

> 2. We may cancel by mailing to the named insured shown in the Declarations at the address shown in this policy:
>
> a. at least 10 days notice:
>
> (1) if cancellation is for nonpayment of premium; or

[6] KRS 304.20-040(2)(a) and (b).

[7] KRS 304.20-040(3).

[8] KRS 304.20-040(9)(b).

> (2) if notice is mailed during the first 60 days this policy is in effect and this is not a renewal or continuation policy[.]

Just as in the statute, the policy provides that "[p]roof of mailing of any notice shall be sufficient proof of notice."

Although it was rendered prior to the enactment of KRS 304.20-040, the seminal case addressing the necessary proof of mailing for effective cancellation of an insurance policy is Goodin v. General Accident Fire & Life Assurance Corp., Ltd.[9] Goodin provides that "[w]here cancellation is authorized by the insurance contract, there can be a cancellation only upon strict compliance with the provisions of the contract[.]"[10] More specifically, the court held "the proof of mailing of such notice should be of definite and specific character . . . [and] may be satisfied by showing compliance with business usage."[11] The business usage, however, "must embody sufficient evidentiary safeguards to satisfy the need for protection of the affected party in the particular transaction concerned."[12] In Goodin, the court held that the business usage of the insurance company met the necessarily high requirements in that it required a postal receipt, a record certification, a return address on the

[9] 450 S.W.2d 252 (Ky. 1970).

[10] Id. at 255.

[11] Id. at 256-57.

[12] Id. at 257.

envelope, and the use of first-class mail as the means of transmittal. Several years later, this Court addressed Goodin's holding in Osborne v. Unigard Indemnity Co.,[13] indicating that in cases where an insurance contract provides for notice of cancellation to be satisfied by mailing of the notice, "definite and specific proof of mailing of the notice in compliance with business usage would be sufficient to prove cancellation."[14]

In their brief, the appellants argue that because Generali's business usage did not meet the four-prong test they assert Goodin requires, the attempted cancellation of Fogle's policy was not effective. We disagree with the assertion that Goodin provided such a test, but rather held that the business usage in that particular case met the necessarily high requirements for insurance cancellation. The business usages utilized by various companies must be examined on a case-by-case basis to determine whether the varied usages meet the necessary safeguards.

In this case, we agree with the circuit court that Generali's business usage for canceling insurance policies met the necessary safeguards and was used in this particular case. Dorothy Hildabrand, who in 1997 was the Assistant Vice President of Underwriting with Graward, testified concerning the method

[13] 719 S.W.2d 737 (Ky.App. 1986).

[14] Id. at 740.

the company used to cancel policies. The cancellation report was the last one run on a particular day, and she or another employee would go through the list and the cancellation notices to match the list to the notices before the notices were put into envelopes. The clerk would affix postage to the list, and then the list and envelopes would be taken to the Post Office. At the Post Office, the postmaster would count the envelopes to insure that the number of envelopes matched the number on the cancellation list before applying a postmark to the list. Generali produced the portions of the March 4, 1997, cancellation list, showing Fogle's name and address as well the postage and postmark certifying the mailing on the last page of the list. We hold that Generali's business usage was sufficient in this case to meet the high standard required by Goodin, and that Generali complied with this business usage in this particular case.

We find no error in the circuit court's ruling that Generali's mailing procedure in this case was sufficient to meet the proof of mailing for cancellation of an insurance policy.

2) VEHICLE DESCRIPTION

The appellants next argue that Generali's cancellation notice was inadequate because it did not include a proper description of the covered vehicle. They maintain that the purported cancellation notice did not contain a description of

the covered vehicle. However, as pointed out by Generali, the document the appellants reference is actually a Special Notice dated March 21, 1997, informing Fogle that his policy had been canceled that day. The actual Cancellation Notice dated March 4, 1997, did identify the vehicle covered by the policy, which was listed as the Mercury Marquis, the vehicle for which Fogle originally sought coverage.

The appellants rely upon this Court's decision in Kentucky Farm Bureau Ins. Co. v. Gearhart[15] for its statement that "the cancellation notice of a policy must include a proper designation of the vehicle covered." The Court went on to state that "requiring proper designation of the covered vehicle will serve to alert the ordinary and reasonable person that coverage is about to expire, unlike the mere indication of a policy number, which the vast majority of people simply do not know."[16] The facts of Gearhart are distinguishable from the present case, as Gearhart had three separate policies covering three different vehicles. Only one of the policies Gearhart had was the subject of the cancellation, but because of a clerical error the notice listed a previously owned car that had been removed from coverage rather than the replacement vehicle. Based upon that specific factual pattern, the Court held that the notice of

[15] 853 S.W.2d 907, 909 (Ky.App. 1993).

[16] Id.

cancellation was not sufficient. Unlike Gearhart, Fogle had one automobile covered by one policy, negating any confusion that might have arisen had he owned multiple cars covered by multiple policies simultaneously. This is true despite the fact that the Cancellation Notice, which was dated prior to his purchase of the Chevrolet Celebrity, listed the Mercury Marquis and the Special Notice did not list a vehicle. The two documents were sufficiently clear to put Fogle on notice that his policy of insurance for whatever vehicle he owned was going to be, and was ultimately, canceled.

We perceive no error in the circuit court's ruling on this issue.

3) TIMING OF CANCELLATION

Finally, the appellants argue that Generali's cancellation notice for nonpayment of premium was ineffective because it was dated prior to the due date of Fogle's next installment payment. The appellants rely on opinions from several foreign jurisdictions, including the California court's opinion of Mackey v. Bristol West Ins. Serv. of California, Inc.,[17] to argue that a notice of cancellation issued before a premium is actually due is not effective to cancel a policy for the nonpayment of premium.

[17] 105 Cal.App.4th 1247, 130 Cal.Rptr.2d 536 (2003).

As Generali points out, the cancellation notice was issued during the first sixty days that Fogle's policy was in effect, meaning that the requirements of KRS 304.20-040 are inapplicable and that the policy itself controls. The policy permits Generali to cancel a policy for any reason if notice is mailed during the first sixty days it is in effect by giving ten days' notice, which is the case here. We must hold that this fact is dispositive, despite the listed reason on the cancellation notice, as Generali had the ability to cancel Fogle's policy for any reason during the first sixty days of its existence by giving proper notice. In Florida, the appellate court has addressed and upheld the sixty-day "carte blanche" given to insurance companies that allows the cancellation of an insurance policy for any reason during that period. The Florida court held that cancellations for an unauthorized reason or for no reason at all were effective because the notices of cancellation were mailed within the first sixty days the policies were in effect.[18] We distinguish Mackey and the cases the Mackey court relied upon in that the sixty-day "carte blanche" period did not apply. In the case of Mackey,

[18] Bankers Ins. Co. v. Ramirez, 597 So.2d 366 (Fla.3d DCA 1992), Sauvageot v. Hanover Ins. Co., 308 So.2d 583 (Fla.2d DCA 1975).

Proposition 103 negated the right of insurers to cancel a policy in effect for less than sixty days for any reason.[19]

The circuit court did not commit any error in ruling that the cancellation notice was effective, although it was dated one day prior to the premium due date, as the notice was issued and mailed during the first sixty days the policy was in existence.

CONCLUSION

For the foregoing reasons, the Order of the Marion Circuit Court is affirmed.

ALL CONCUR.

JOINT BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Joseph H. Mattingly, III Lebanon, Kentucky	Ben S. Harralson Louisville, Kentucky
Robert Spragens, Jr. Lebanon, Kentucky	

[19] Mackey, 105 Cal.App.4th at 1258, FN6.