RENDERED: APRIL 18, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2007-CA-000664-MR

GUY GRAY, as Administrator of the Estate of Teresa Rae Ethridge; GUY GRAY, Individually; BURT GRAY; and BRANDIE GRAY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 01-CI-004359

SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY and RENIS JOEY COLE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Guy Gray, as administrator of the estate of Teresa Rae Ethridge, appeals the January 11, 2007, and March 16, 2007, opinions and orders granting summary judgment for Renis Joey Cole and Southern Farm Bureau Life Insurance Company ("SFB"), respectively, in a breach of contract action. We affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On January 24, 2001, Ethridge contacted Cole, an agent for SFB, requesting a quote on life insurance. Cole gave her a quote for a $100,000.00 policy and made arrangements with Ethridge for her to come into his office the next day. On January 25, 2001, Ethridge arrived at Cole's office to apply for a life insurance policy. Ethridge was accompanied by her friend, Anna Horsman. During their meeting, Ethridge disclosed to Cole that she was scheduled for a gastric bypass revision the next morning, January 26, 2001. After undergoing a medical evaluation, at Cole's request, Ethridge filled out and signed the application for coverage and a conditional receipt[2] and tendered a check to Cole for her first premium.[3] The policy was for $300,000.00, which included $100,000.00 whole life plus a $200,000.00 twenty-year term rider.

Ethridge underwent surgery, as planned, and was released from the hospital on February 1, 2001. Ethridge's application was received by the home office on February 2, 2001 by underwriter Freddie Blanks and assigned a reference number. Ethridge's premium check was received by the home office and forwarded for deposit. The application was reviewed by Blanks and the underwriting group and it was concluded that the application should be denied.

On February 6, 2001, Ethridge was readmitted to the hospital due to complications arising from her surgery. On February 7, 2001, Blanks sent a computer message to Cole stating that Ethridge's application had been declined and that it should

[2] The conditional receipt stated that insurance coverage could not become effective until all of several conditions had been met.

[3] There is conflicting testimony regarding whether or not Cole placed a call to home office regarding Ethridge's application prior to accepting her check.

have been submitted on a "trial basis."[4] A letter was also sent to Ethridge, advising her that she was not eligible for coverage and refunding her premium payment. This letter was sent to the address listed on the application. On February 16, 2001, Guy and Burt Gray visited Cole's office to inquire about the policy. Cole showed them the February 7, 2001, letter and informed them that the application had been denied. On February 27, 2001, Ethridge died from complications associated with her surgery. Ethridge never testified about the circumstances surrounding her application process or dealings with Cole or SFB.

Concurrent to the activities between February 2, 2001, and February 27, 2001, Ethridge's premium check was deposited by SFB. On February 8, 2001, it was not honored due to insufficient funds. The check was submitted for payment a second time and again not honored on February 15, 2001. Subsequently, the check was honored.

On April 6, 2001, Brandie Gray contacted SFB with a question about the cancelled policy. Richard McClure, the Vice President of claims, informed her that the application had been denied. On April 9, 2001, a stop payment was placed on the refund check, sent to Ethridge in February, because Brandie indicated it had never been received. On April 12, 2001, Bobbie Jo Myers, Blanks' regional manager, sent a follow-up letter to Burt, indicating that a new refund check for the premium was being reissued. On April 23, 2001, McClure sent a letter to Brandie, reiterating that the application had been cancelled; a cancellation letter and refund check had been sent to Ethridge; and a

[4] Applications that are submitted on a trial basis are those submitted without a premium check and without a preliminary exam. According to SFB, the process of taking applications on a trial basis does not change the underwriting process, it is merely a method in which the company attempts to prevent waste of resources.

new cancellation letter and refund check were being sent to Ethridge to replace the mailing that was apparently never received.

Ethridge's beneficiaries filed suit against SFB and Cole, alleging, in summation, breach of contract, for failure to provide insurance; failure to timely notify of declination of insurance; and negligence. Cole moved for summary judgment and on January 11, 2007, an opinion and order was entered in his favor. SFB moved for summary judgment and on March 16, 2007, an opinion and order was entered in its favor. This appeal followed.

The standard of review of a trial court's grant of 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins.* Co., 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Appellants make the following arguments on appeal: 1) the language contained in the conditional receipt was ambiguous, thereby subject to different interpretations, triggering the doctrines of ambiguity and reasonable expectation; 2) material factual disputes surround Cole's actions and scope of authority, thus precluding summary judgment; and 3) SFB ratified Cole's actions.

In its opinion and order granting summary judgment for Cole, the trial court, looking to *Eastham v. Stumbo*, 279 S.W. 1109 (KY. 1926) for guidance, found that Cole did not owe a duty to Ethridge. In support of this finding, the trial court concluded that Cole and Ethridge had not entered into a contract and Cole had not made fraudulent representations to Ethridge. In its opinion and order granting summary judgment for SFB, the trial court, looking to the language of the conditional receipt and application, and found that a contract did not exist between Ethridge and SFB.

Section 1(c) of the conditional receipt reads as follows:

> **1. NO INSURANCE WILL BECOME EFFECTIVE PRIOR TO DELIVERY OF THE POLICY UNLESS AND UNTIL EACH AND EVERY ONE OF THE FOLLOWING CONDITIONS HAVE BEEN FULFILLED EXACTLY:**
>
> (c) on the Effective Date, as defined below, the Company at its Home Office must be satisfied that each person proposed for insurance in this application is a risk insurable by the Company at no greater than standard premium rates under its rules, limits, and standards for the plan and the amount applied for without any modification either as to plan, amount, riders, or supplemental agreements.

(Emphasis in original). Appellants argue that language found in the conditional receipt is ambiguous. Specifically, they argue the ambiguity of the term "effective date" and cite to section 1(c) and the following language of the conditional receipt:

> 1. (c) on the Effective Date, as defined below, the Company at its Home Office must be satisfied that each person proposed for insurance in this application is a risk insurable by the Company at no greater than standard premium rates under its rules, limits, and standards for the plan and the amount applied for. . .
>
> 2. . . . "Effective Date", as used herein, is the latest of: (a) the date of completion of the application question, or (b) the date of completion of all medical examinations, tests, x-rays, and electrocardiograms required by the

> Company, or (c) date of issue, if any, requested in the application.

We do not believe this language to be ambiguous. In fact, it appears to the Court that, because this section of the conditional receipt pertains to the effective date of a *policy*, it is irrelevant to appellant's argument. Because Ethridge was not approved for coverage, she did not have a policy, and thus did not have an effective date. Appellants argue that while the conditional receipt delineates when the home office must be satisfied, it is silent as to what constitutes satisfaction. We disagree. Section 1(c) clearly states that satisfaction is determined by the rules, limits, and standards set out for each plan by the company. Satisfaction of insurability is decided by underwriters who are specifically trained to determine insurability. This practice is no different than any other profession; lawyers determine if clients are warrant representation and doctors determine if patients warrant treatment. The language found in the conditional receipt is not ambiguous and therefore does not fall under the doctrine of ambiguity.

Appellants next argue that Cole's conduct, the communication between SFB's home office and Cole, and SFB's business practice of handling Ethridge's cancellation created a reasonable expectation of coverage in Ethridge. We disagree. As discussed above, the conditional receipt made it clear that certain conditions must be met before Ethridge's insurance would become effective. Ethridge failed to meet these conditions and therefore insurance was never effective. The conditional receipt contains Ethridge's signature, denoting her understanding of its meaning. If a phone call did take place between Cole and the home office, it does not change the validity of Ethridge's signature. When appellants refer to SFB's business practice of handling

Ethridge's cancellation, we assume they mean denial of coverage. Because a policy was never created, there was not a policy to be cancelled. Instead, SFB denied the application. Notification of denial benefits was sent out in a timely manner and a replication of that notification was sent out promptly after notification that the original was not received. Any delay by the postal service or failure of Ethridge or her children to discover the notification is not fault attributable to SFB. Furthermore, the doctrine of reasonable expectation is applicable only when ambiguity exists. *Myers v. Kentucky Medical Insurance Co.*, 982 S.W.2d 203 (Ky.App. 1997).

Appellants argue that Cole's conduct, accepting the application with a check and after a physical exam, created a reasonable expectation of coverage in Ethridge. We disagree. The manner in which Cole is to accept an application is determined by his job duties, as outlined by SFB. His accepting the application with a check and after an exam does not rise to the level of creating a reasonable expectation of coverage. It does not stand to reason that Ethridge is unaware of the underwriting process that a policy requires, but is somehow aware of the nuances in which applications must be accepted and submitted to the home office. We do not believe that Ethridge had any understanding of what was to accompany her application to the home office, except what was communicated to her by Cole. Therefore, the physical examination and tendering of her premium check does not give rise to a reasonable expectation of coverage. Any error by Cole, in failing to submit the application on a trial basis, does not rise to the level of liability to Ethridge.

Appellants argue that agency is a question for the jury to consider when facts are in dispute. We do not agree. KRS 304.9-020 legally defines agent as "an

individual or business entity appointed by an insurer to sell or to solicit applications for insurance or annuity contracts or to negotiate insurance or annuity contracts on its behalf."

Appellant's final arguments center around Cole and his representations to Ethridge. Those arguments are: 1) if Cole acted within his scope of authority as an agent then SFB will be liable; 2) if Cole acted outside his scope of authority, then he is individually liable; and 3) SFB ratified agent Cole's actions. Appellants claim that Cole assured Ethridge that she would be provided insurance. Horsman testified that Cole had stated "I don't think" there will be a problem. Horsman did not testify that Cole stated Ethridge was covered or insured. Cole testified that he explained the application process to Ethridge and explained that the application would have to go through the underwriting process for acceptance or denial and that he had no influence over whether an application was accepted or denied. Appellants have failed to show any act for which liability is present. The record reveals no evidence of fraudulent representation, as appellants claim, and therefore these arguments must also fail.

For the foregoing reasons, the January 11, 2007, and March 16, 2007, opinions and orders of the Jefferson Circuit Court are hereby affirmed.

ALL CONCUR.

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