

RENDERED: JANUARY 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002463-MR

ANGELA RICHARDSON;
ERIC RICHARDSON

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CI-01373

PROGRESSIVE NORTHERN
INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Angela Richardson¹ appeals from the Hardin Circuit Court's judgment and orders granting summary judgment in favor of appellee

¹ Although Eric Richardson was named in the notice of appeal, he was not awarded damages below and he raises no issues on appeal. In fact, the cover pages and arguments discussed in both parties' briefs on appeal treat Angela Richardson as the sole appellant in this proceeding.

Progressive Northern Insurance Company, and dismissing Progressive as a party to the action below. We affirm.

Richardson was seriously injured in an April 2003 collision when a truck driven by Gene Boes, and owned by Terry Stanton d/b/a Rock Bottom Trucking, turned in front of her car. Richardson's subsequent claim was filed against Boes and Stanton in Division III of the Hardin Circuit Court. The claim also named Progressive as Stanton's insurer, and alleged in part that Progressive had acted in bad faith and had violated the Unfair Claims Settlement Practices Act.

In April 2004, Progressive filed a declaratory action in Division II of the Hardin Circuit Court, seeking a ruling as to whether it was obligated to provide coverage to Boes and Stanton in Richardson's Division III proceeding. A default judgment in favor of Progressive was entered in Division II after Boes and Stanton failed to respond.

Subsequently, Progressive filed a motion in the proceeding below, seeking summary judgment on the ground that Stanton had failed to pay the insurance premium due for the period between November 7, 2002, and May 7, 2003, i.e., the period including the collision date. Further, Progressive produced documentary evidence to show that on December 18, 2002, it sent Stanton a "notice of cancellation due to non-payment of premium" which advised that his insurance would be canceled as of December 31, 2002, unless he paid his premium by that date. The notice further advised Stanton that if he already had sent his

payment, he would “receive a reinstatement notice soon. If you do not receive a reinstatement notice, this cancellation remains in effect.”

Although Boes and Stanton indicated below that they believed insurance coverage was in effect at the time of the collision, they produced no documentation to show that the premium was paid, the insurance was reinstated, or the cancellation did not occur. After entering numerous discovery orders, including for the purpose of discovering whether insurance coverage existed, in August 2005 the court granted Progressive’s motion seeking:

Summary Judgment on all claims asserted by Kentucky Farm Bureau Mutual Insurance Company against Progressive Northern relating to the alleged subrogation rights for basic reparation benefits and uninsured motorists benefits it paid to Plaintiff Angela Richardson, and the parties presently before the Court having had an opportunity to respond, and the Court being otherwise sufficiently advised,*

IT IS HEREBY ORDERED AND ADJUDGED that Progressive Northern Insurance Company’s Motion for Summary Judgment is GRANTED thereby dismissing all claims of Kentucky Farm Bureau Mutual Insurance Company against Progressive Northern, with prejudice.

The court’s order included the judge’s asterisked, handwritten notation referencing the Division II proceeding but stating that:

[r]egardless of the default judgment in other litigation without Farm Bureau’s participation, Progressive Northern has presented proof of cancellation in this case. No evidentiary response has been made to oppose this. Farm Bureau has had adequate time for discovery as is evidenced by the order entered on December 10, 2003.

The court subsequently dismissed the remaining claims against Progressive.

Eventually, a jury awarded Richardson damages against Boes and Stanton in the total amount of \$940,258.39. This appeal from the Division III orders, awarding summary judgment and dismissal in favor of Progressive, followed.

First, Richardson asserts that the trial court erred by granting summary judgment and dismissing her claim against Progressive, as genuine issues of material fact exist as to Progressive's coverage of Boes and Stanton. We disagree.

A summary judgment shall be granted only if:

the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR² 56.03. As the movant for summary judgment bears the burden of establishing the nonexistence of any genuine issue of material fact, all doubts must be resolved in favor of the nonmovant, and summary judgment should be granted only if it would be impossible for the nonmovant to prevail at trial. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991); *Gullett v. McCormick*, 421 S.W.2d 352 (Ky. 1967). If the uncontroverted evidence shows the absence of a genuine issue of material fact, the burden falls on the nonmovant to show that evidence does in fact exist to justify a trial on the issue. *Continental Cas. Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914 (Ky. 1955).

² Kentucky Rules of Civil Procedure.

Here, as noted above, Progressive provided documentary evidence that Stanton was billed but failed to pay the insurance premium to secure coverage for the period during which the collision occurred. Moreover, Progressive asserted that Stanton did not pay the premium even after he was notified of the policy's pending cancellation, and that the policy was canceled effective December 31, 2002. Thus, according to Progressive's evidence, the policy was not in effect when the collision occurred in April 2003. Despite a lengthy discovery period, Richardson produced nothing to indicate that coverage in fact existed at the time of the collision.

Richardson nevertheless argues that genuine issues of material fact exist as to whether Boes or Stanton knew of the cancellation or believed the truck was insured by Progressive at the time of the collision. However, as any such beliefs, without more, were irrelevant to the determination of whether coverage existed, summary judgment was not precluded on this ground. Similarly, the issue of whether the company with which Stanton contracted, TS Trucking, knew whether a policy was in effect was irrelevant to determining whether coverage existed. Therefore, no genuine issue of material fact existed as to whether insurance coverage was in effect at the time of the collision, and the trial court did not err by granting summary judgment and dismissing the claim against Progressive.

Finally, we are not persuaded by Richardson's contention that the trial court prematurely dismissed her bad faith claim against Progressive. As

Progressive had no contractual obligation to pay a claim arising out of the collision, we are constrained to conclude that the insurer did not act in bad faith, “either at common law or by statute,” by failing to settle the claim arising out of that collision. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000). Moreover, any issues relating to the proper service of Boes, Stanton and TS Trucking in the Division II proceeding are irrelevant to this proceeding, given that the trial court expressly declined to rely on the outcome of the Division II proceeding.

The court’s judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Chandrika Srinivasan
Louisville, Kentucky

BRIEF FOR APPELLEE:

Tracey Clemmons Smith
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