

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001747-MR

DAVID SCOTT CHISM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-007126

NATIONWIDE MUTUAL
FIRE INSURANCE COMPANY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: KELLER, MOORE, AND STUMBO, JUDGES.

KELLER, JUDGE: David Scott Chism (Chism) appeals from the circuit court's order granting summary judgment to Nationwide Mutual Fire Insurance Company (Nationwide). On appeal, Chism argues that the circuit court's judgment was improper because a question of material fact existed; that Nationwide's payments to Chism's ex-wife under a homeowner's policy were excessive; and that the

circuit court's actions deprived him of the right to due process. For the following reasons, we vacate and remand.

FACTS

The underlying facts are, for the most part, not in dispute. Chism and his wife, Stephanie, had separated and were in the process of dissolving their marriage, when Chism set fire to and destroyed the marital home (the house). Three days after the fire, Stephanie sought an emergency protective order (EPO), which the family court entered. Stephanie also filed a domestic violence petition alleging that: Chism had made a number of threats to burn down or blow up the house; she believed Chism had been trying to trap her in the house; Chism intentionally burned the house down; Chism pulled her from a chair and threw her, after which she had to undergo spinal fusion surgery; Chism destroyed a dresser with a sledge hammer; Chism hit her in the face with a remote control; Chism beat her head against a wall; Chism broke Stephanie's front teeth; and Chism threatened to shoot her.

The family court held a hearing approximately one month later. It is unclear from the record what took place at that hearing, however, it is clear that Chism, on advice of counsel, did not testify. Following the hearing, the family court found that an act or acts of domestic violence or abuse had occurred and it issued a domestic violence order (DVO). However, the family court's order does not specifically state that Chism's burning of the house was an act of domestic violence.

Stephanie then filed a claim with Nationwide under the Chisms' homeowner's policy. That policy contains an intentional act exclusion. However, the intentional act "exclusion does not apply to an insured who is the victim of domestic abuse or domestic violence and claims loss to covered property which is damaged as a result of an act of domestic abuse or domestic violence" The policy also provides for the right of subrogation against an insured who commits an act of domestic violence that results in a loss.¹

Although it is not clear from the record before us, it appears that Stephanie filed a motion for declaratory relief in the family court action. In that motion, Stephanie apparently asked the family court to determine whether Chism was entitled to any portion of the homeowner's insurance policy proceeds. Nationwide apparently intervened in that action for the sole purpose of joining in Stephanie's motion. The family court found that Chism was not entitled to any proceeds payable under the policy, that any amounts payable under the policy were to be paid to Stephanie, and that Nationwide retained the right of subrogation against Chism for damage to the covered property.

Nationwide paid Stephanie \$245,921.62 for the loss of the house and its contents. In July 2008, Nationwide filed a complaint asserting its right of subrogation against Chism. The complaint, in pertinent part, alleged that: Chism

¹ We note that the section of the policy providing for coverage, refers to damage resulting from either domestic abuse or domestic violence. However, the section providing for subrogation only refers to acts of domestic violence. We are not certain why that distinction is made in the policy, and it is not relevant to this appeal. However, because only the subrogation portion of the policy is at issue, we refer primarily to domestic violence.

intentionally set fire to the house; “because of the fire,” Stephanie sought an EPO and DVO; the family court issued a DVO; and Chism was indicted for and ultimately pled guilty to arson and wanton endangerment. Chism admitted that those allegations were true in his answer.

In May 2009, Nationwide filed a motion for summary judgment. In support of its motion, Nationwide stated that Chism “admitted that he intentionally set the fire to the [house], and that setting the fire was determined to be an act of domestic violence.” To support the amount of damages claimed, Nationwide attached a number of documents including an exhaustive list of personal property and an appraisal of the real property.

In his response to Nationwide’s motion, Chism agreed that he had admitted to the allegations in Nationwide’s complaint. However, he argued that none of those allegations stated that his burning of the house was an act of domestic violence or abuse. Furthermore, Chism stated that nothing in the records related to the EPO/DVO or the criminal action indicated that the fire was an act of domestic violence or abuse. To the contrary, Chism stated that those records would support his contention that he started the fire with the intention of committing suicide. Finally, Chism argued that: the amount paid by Nationwide was excessive, noting that the house had been appraised before the fire for substantially less than Nationwide paid; various items of personal property either were not present when the fire occurred or were not damaged in the fire; and the living expenses submitted by Stephanie for reimbursement were unreasonable.

Chism attached to his response a copy of the plea agreement in the criminal case and a letter from his treating psychiatrist. The plea agreement does not address whether the arson was an act of domestic violence. However, the letter indicates that Chism started the fire with the sole intention of harming himself, not anyone else. Chism did not attach any other records from the EPO/DVO or criminal actions and he did not attach any appraisals or other documents that would support his claim that Nationwide overpaid Stephanie.

In its reply, Nationwide argued that the family court, when it issued the DVO, made a determination that the fire was the result of an act of domestic violence. In support of this argument, Nationwide states that “[t]he simple facts are that [Chism] intentionally set his house on fire, his ex-wife petitioned the Court for protection from [Chism] and the Court issued a Domestic Violence Order based on [Chism’s] intentional burning of his house.” Nationwide based this argument on Stephanie’s petition for the DVO and the family court’s order granting that petition.

As to Chism’s argument that its payments were excessive, Nationwide noted that the proof provided by Stephanie in support of her claim was reasonable and that payment was made pursuant to the policy.

Based on the preceding, the circuit court granted Nationwide’s motion and ordered Chism to pay Nationwide \$245,921.62 plus interest. In doing so, the circuit court noted the family court’s finding of domestic violence and that court’s order stating that Nationwide retained the right of subrogation against Chism.

Based on these findings, the circuit court concluded that “there is no question of fact that domestic violence occurred and that [Nationwide’s] right of subrogation has been invoked.” As to the alleged excessiveness of Nationwide’s payments, the court found that Chism’s statements were “unsworn and unsupported by any form of credible evidence.”

Chism appealed from the circuit court’s order and attempted to put in the record on appeal the record from the family and criminal court proceedings. Nationwide objected to the inclusion of those records because they had not been before the circuit court. The circuit court granted Nationwide’s motion and limited the record on appeal to the record it reviewed. Chism then moved this Court for leave to supplement the record, a motion which this Court denied.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. However, a party opposing a summary judgment

motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact. An opposing party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481. With these standards in mind, we address the issues raised by Chism on appeal.

ANALYSIS

At the outset, we note that, in its complaint, Nationwide only asked the circuit court to determine that it had a right of subrogation against Chism and the amount to which it was subrogated. The court found that such a right existed and that, as a result, Chism owed Nationwide \$245,921.62 plus interest. Although Chism makes a number of wide ranging arguments, we limit our review to those two issues.

We first address Chism's argument that Nationwide made excessive payments to Stephanie under the policy and that the subrogated amount should be reduced accordingly. As noted above, a party who opposes a motion for summary judgment must present some affirmative evidence in order to defeat the motion. Chism stated in his response to Nationwide's motion that Nationwide paid Stephanie for certain items of personal property that were not present when the house burned or that were not damaged by the fire. Chism also stated that the house had been appraised before the fire for significantly less than what Nationwide paid. However, as noted by the circuit court, Chism did not present any sworn statements nor any other evidence in support of his arguments.

Therefore, the circuit court properly granted summary judgment as to the subrogated amount.

Next, we address Chism's argument that the circuit court improperly granted summary judgment regarding Nationwide's claim for subrogation, an argument with which we reluctantly agree. At the outset of this portion of our analysis, we note that we have little sympathy for Chism. He destroyed the house and its contents not only to Stephanie's detriment but to that of his children. However, as unsympathetic as we might be toward Chism, he is entitled to the same rights as every other litigant. One of those rights is to have the circuit court base its summary judgment on the facts viewed most favorably to him.

The homeowner's policy in question provided a right of subrogation against an insured who committed an act of domestic violence that resulted in damage to covered property. In order for Nationwide to avail itself of the right of subrogation against Chism, it was required to prove that there was a loss to covered property and that the loss was occasioned by an act of domestic violence committed by Chism. No one disputes that a loss to covered property occurred. Therefore, Nationwide has met its first burden of proof. However, viewing the record in the light most favorable to Chism, Nationwide has not met its second burden of proof, that the loss was occasioned by an act of domestic violence.

Nationwide has argued throughout the proceedings that Chism admitted that burning the house was an act of domestic violence and that the

family court found Chism's burning of the house was an act of domestic violence.

We analyze each argument separately.

Nationwide alleged in its complaint and Chism admitted in his answer that:

[b]ecause of the fire set by the Defendant, his then spouse, Stephanie Chism, petitioned the Court for an Emergency Order of Protection on February 17, 2008. A Domestic Violence Order was subsequently issued by the Jefferson Family Court, Division 2, Case No. 07-D-500490-001 on March 21, 2007.

In the light most favorable to Chism, this statement alleges, and Chism admitted, that the house fire motivated Stephanie to file for an EPO and DVO and that the family court then issued the requested orders. However, it does not allege, and Chism did not admit, that the fire was the result of an act of domestic violence. At most, Chism admitted that the fire, Stephanie's motion, and the court's order all occurred contemporaneously. He did not admit that there was a causal connection between the fire and the family court's order. Therefore, Chism's admission to this allegation in his answer to Nationwide's complaint is not sufficient to support the circuit court's judgment.

Next we examine the findings of the family court. As noted above, Stephanie alleged in her petition for a DVO that Chism burned the house in an apparent attempt to harm or kill her. However, Stephanie also alleged a number of other serious acts of domestic violence, one of which resulted in the need for a spinal fusion. The family court did not delineate which specific act or acts

motivated it to issue the requested orders. Nor did the court state specifically that Chism's burning of the house amounted to an act of domestic violence. Despite those deficiencies, the family court's order, standing alone, might have been sufficient to support the circuit court's judgment.

However, the family court's order was not the only evidence before the circuit court. Chism provided a letter from his psychiatrist indicating that he intended to injure only himself and no one else. That letter, viewed in conjunction with the failure of the family court to identify which particular act or acts justified the DVO, creates a genuine issue of fact. Thus the circuit court's judgment was not appropriate.

We note that the circuit court relied, in part, on the family court's holding that Chism was not entitled to any proceeds that might be paid under the policy and that Nationwide retained its right of subrogation. That order, read in the light most favorable to Chism, simply states that Nationwide has not lost the right of subrogation against Chism. It does not state that Nationwide is entitled to exercise that right or that Chism has committed an act of domestic violence.

Finally, Chism argues that he was denied due process because the circuit court did not review the records of the family court and criminal court proceedings. Because we are vacating and remanding, that issue is moot. Therefore, we will not address it.

CONCLUSION

Based on the preceding, we vacate the circuit court's judgment and remand this matter for whatever additional proceedings the court deems necessary. We note that, given appropriate supporting evidence, Nationwide may succeed on a subsequent motion for summary judgment. Nothing in this Opinion should be viewed as proscribing such a motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David S. Chism, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Michael T. Burns
Louisville, Kentucky