Affirmed; Opinion Filed May 4, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01502-CV

JOHN DEMPSEY, Appellant
V.
ACCC INSURANCE COMPANY, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-08932

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Myers

This is an appeal from a summary judgment entered in favor of appellee ACCC Insurance Company and against appellant John Dempsey. In two issues, appellant argues the trial court erred by granting appellee's traditional motion for summary judgment. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

Appellee ACCC Insurance Company (ACCC) brought this declaratory judgment action against Shashawna Clifton for a judgment declaring it had no liability under a policy of automobile liability insurance issued to her husband, Sherman Clifton, alleging Shashawna Clifton was an excluded driver under Sherman Clifton's policy. Shashawna Clifton was driving a 2006 Chevrolet Trailblazer that rear-ended another vehicle driven by appellant John Dempsey on July 24, 2012.

At the time of the accident, ACCC had issued an auto insurance policy to Sherman Clifton that insured the 2006 Chevrolet Trailblazer Shashawna Clifton was driving on the date of the

accident. The policy, however, contained a "named driver exclusion" that specifically excluded "Shashawna Clifton" and "Shashawna K. Clifton" from coverage under the policy. The named driver exclusion is found in the application for insurance, which is part of the policy. It states:

> **IMPORTANT – READ BEFORE YOU SIGN!**
> **515A. EXCLUSION OF NAMED DRIVER AND PARTIAL REJECTION OF COVERAGES**
> **WARNING!! READ THIS ENDORCEMENT CAREFULLY!!**
>
> This acknowledgment and rejection is applicable to all renewals by us or any affiliated insurer. However, we must provide a notice with each renewal as follows: "This Policy contains a named driver exclusion."
>
> You agree that none of the insurance coverages afforded by this Policy shall apply while
>
> The Excluded Driver(s)
>
> | Name | Date of Birth | Name | Date of Birth |
> |---|---|---|---|
> | Shashawna Clifton | 7/2/1976 | Shashawna K. Clifton | 7/2/1976 |
>
> is (are) operating your covered auto or any other motor vehicle. You further agree this endorsement will also serve as a rejection of Uninsured/Underinsured Motorist Coverage and Personal Injury Protection Coverage while your covered auto or any other motor vehicle is operated by the excluded driver(s).

Sherman Clifton's signature appears on the acknowledgement just below the named driver exclusion, along with the date and time, which was December 30, 2011, at 11:47 a.m. The renewal certificate of the policy for the period of June 30, 2012 to December 30, 2012, during which the underlying accident took place, includes the phrase, "This policy contains a named driver exclusion," along with the names of Shashawna Clifton and Shashawna K. Clifton listed as excluded drivers under the policy.

Dempsey submitted a claim to ACCC for personal injuries and property damage allegedly caused by Shashawna Clifton's negligence. On August 6, 2012, ACCC wrote to Dempsey's attorney stating there was no coverage:

> Upon review, our records indicate that the 2006 CHEVROLET TRAILBLAZER LS/LT, VIN IGNDSl3S462353750, involved in the accident/loss does not have Coverage for Damage to Your Auto (Collision or Other Than Collision) or Uninsured Motorist Property Damage coverage on ACCC Insurance Company, policy number TUD7082847-0.

> Since the vehicle did not have Coverage for Damage to Your Auto or Uninsured Motorist Property Damage coverage at the time of the accident/loss, we will be unable to honor any claim regarding those coverages. Should you have any additional information that you feel would alter our decision, please forward for our review.

Notwithstanding the denial of coverage, on August 13, 2012, an ACCC adjuster inspected Dempsey's damaged truck and prepared an estimate of the loss, and on August 20, 2012, ACCC issued a $650 check payable to John Dempsey for total loss to his vehicle, a 1994 Toyota. On May 2, 2013, ACCC wrote to Dempsey's counsel advising him it was reviewing the documents submitted on behalf of counsel's client. On June 27, 2013, ACCC offered Dempsey $6,500 to settle this claim.

Dempsey brought suit against Shashawna Clifton. ACCC provided Shashawna with a defense to the lawsuit. Following a trial before a jury, Dempsey secured a judgment against Shashawna for $36,354.79, and he subsequently intervened in this declaratory judgment action to assert his right to recover under the ACCC policy. The petition in intervention argued, in part, that ACCC waived any claim it might have had that there was no coverage under the policy, and that it was estopped from denying coverage in this case.

ACCC moved for traditional summary judgment, arguing (1) the court should find there was no coverage under the policy because Shashawna Clifton was a named excluded driver under the policy, and (2) neither waiver nor estoppel could be used to rewrite the contract of insurance and provide coverage for risks not insured. The trial court agreed and granted the summary judgment motion, finding there was no coverage for the automobile accident between Shashawna Clifton and John Dempsey because Shashawna was an excluded driver under the policy issued to Sherman Clifton. The court also found that the summary judgment evidence offered by John Dempsey was irrelevant under rule 401 of the Texas Rules of Evidence. This appeal followed.

DISCUSSION

Appellant's two issues, which can be addressed together, are as follows:

> 1. The trial court erred in granting the defendant's traditional motion for summary judgment because the plaintiff had waived the excluded driver provision relating to Shashawna Clifton.
>
> 2. The trial court erred in granting the defendant's traditional motion for summary judgment because the plaintiff was estopped to assert the excluded driver provision relating to Shashawna Clifton.

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 548–49; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

The record shows that Dempsey is not, nor was he ever, insured under the ACCC policy. Dempsey did not purchase insurance from ACCC. The policy was issued to Sherman Clifton and it specifically excluded any coverage under the policy for Shashawna Clifton. ACCC and Sherman Clifton contractually agreed Shashawna Clifton would not be insured under the policy. Sherman Clifton's signature appears on the acknowledgement below the named driver exclusion, indicating his awareness that the policy did not provide any coverage for Shashawna Clifton. The renewal certificate for the policy period of June 30, 2012 to December 30, 2012, during which the

underlying accident occurred, likewise names Shashawna Clifton as an excluded driver under the policy.

The fact that an ACCC adjuster may have inspected Dempsey's damaged truck and prepared an estimate of the loss, issued a check payable to Dempsey for the total loss of his vehicle, or negotiated with Dempsey's attorney in an effort to reach a settlement on outstanding claims, all after initially denying there was any coverage under the policy, cannot be used to create a contract of insurance between Dempsey and ACCC where none otherwise existed. Dempsey's waiver and estoppel argument is foreclosed because, as ACCC correctly points out, Texas law is clear that "the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured." *Ulico Casualty Co. v. Allied Pilots Assoc*., 262 S.W.3d 773, 775 (Tex. 2008); *see also Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 836 (Tex. 2009); *Tex. Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602–03 (Tex. 1988); *Washington Nat'l Ins. Co. v. Craddock*, 109 S.W.2d 165, 166–67 (Tex. 1937). As explained by the Texas Supreme Court:

> Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel cannot create a new and different contract with respect to risks covered by the policy.

McGuire, 744 S.W.2d at 603 (quoting *Great Am. Reserve Ins. Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex. App.—San Antonio 1960, writ ref'd)). The Supreme Court of Texas has further stated:

> We do not agree . . . that "noncoverage" of a risk is the type of right an insurer can waive and thereby effect coverage for a risk not contractually assumed. As we said in *Block*, 744 S.W.2d at 943–44, the insurer does not bear the burden of showing that it does not have a policy in place to cover a particular risk; the insured bears the burden to show that a policy is in force and that the risk comes within the policy's coverage. An insurer's actions can result in it being estopped from refusing to make its insured whole for prejudice the insured suffers because the insurer assumed the insured's defense, but estoppel does not work to create a new insurance contract that covers a risk not agreed to by the contracting parties. *See McGuire*, 744 S.W.2d at 602–03. Thus there is no "right" of noncoverage that is subject to being waived by the insurer, even by assumption of the insured's defense

> with knowledge of facts indicating noncoverage and without obtaining a valid reservation of rights or non-waiver agreement.

Ulico Cas. Co., 262 S.W.3d at 781–82 (citing *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943–44 (Tex. 1988), and *McGuire*, 744 S.W.2d at 602–03). Therefore, we conclude the trial court did not err by granting ACCC's traditional summary judgment motion, and we overrule Dempsey's first and second issues.

Another matter we must address concerns ACCC's request that we sanction Dempsey for filing what ACCC argues is a frivolous appeal, and that we award "appropriate damages," including attorney's fees.

Rule 45 of rules of appellate procedure permits courts of appeals to award "just damages" to a prevailing party on the determination, after considering the record, briefs, and other papers filed with the court, that an appeal is frivolous. *See* TEX. R. APP. P. 45. "An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed." *Woods v. Kenner*, 501 S.W.3d 185, 198 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 290 (Tex. App.—Dallas 2012, no pet.). "Rule 45 does not mandate that this court award just damages in every case in which an appeal is frivolous." *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Rather, the decision to award damages for frivolous appeals is a matter within the court's discretion. *Id.*; *see Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). Although imposing sanctions is within our discretion, we will do so only in circumstances that are truly egregious. *Owen*, 380 S.W.3d at 290.

We deny ACCC's request for sanctions. Although Dempsey was not successful in this appeal, he did make an argument—both in his briefing and during oral argument—for why the trial court's summary judgment should be reversed, claiming there was an issue of fact that

prevented summary judgment. That argument was unpersuasive, but this case does not present the sort of egregious circumstances that would warrant the imposition of sanctions. Consequently, we exercise our discretion and decline to impose sanctions on Dempsey.

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN DEMPSEY, Appellant	On Appeal from the 116th Judicial District Court, Dallas County, Texas
No. 05-16-01502-CV V.	Trial Court Cause No. DC-15-08932.
ACCC INSURANCE COMPANY, Appellee	Opinion delivered by Justice Myers. Justices Lang-Miers and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee ACCC INSURANCE COMPANY recover its costs of this appeal from appellant JOHN DEMPSEY.

Judgment entered this 4th day of May, 2018.