In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00235-CV

ANGELA N. ANTOINE AND ERICA NICOLE ANTOINE, Appellants

V.

AMERICAN SERVICE INSURANCE COMPANY, INC., Appellee

On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-189,319

MEMORANDUM OPINION

In this appeal, we consider whether the trial court properly held that an insurance policy provided no coverage for an accident that resulted from a collision that involved two vehicles. We hold that the insurer established that it was entitled to summary judgment on its claim that the policy it issued to its insured did not cover the collision. Because the court properly granted the insurer's motion for summary judgment, the judgment is affirmed.

Factual and Procedural Background

In 2007, American Service Insurance Company, Inc. insured Herman Berry's truck through a policy that excluded certain drivers. On February 22, 2008, Nakia Mazeil was driving Berry's truck when he hit an SUV that was occupied by Angela and Erica Antoine. Subsequently, the Antoines sued Berry and Mazeil, claiming that they had been injured in the February 2008 collision.

In February 2011, American Service sued Berry, Mazeil, and the Antoines for declaratory judgment. In its suit, American Service asked the trial court to declare that Berry's policy did not cover the collision because Berry's truck was being driven by Mazeil, a driver the policy specifically excluded as a driver the policy covered. Subsequently, American Service filed a motion for summary judgment asserting that its policy provided no coverage for the collision at issue because Berry's truck was being driven by Mazeil, who the policy identified as one of the drivers excluded from coverage.

American Service's motion included several affidavits and exhibits, which American Service used to authenticate the policy on Berry's truck. Joe Shugrue, American Service's vice-president, provided one of the affidavits that was used to authenticate the policy. The copy of the policy on Berry's truck filed to support

American Service's motion includes a provision that excludes Mazeil from being a covered driver under American Service's policy on Berry's truck.

The Antoines responded to American Service's motion, producing additional evidence; however, the Antoines' summary judgment evidence does not contradict American Service's evidence that the policy on Berry's truck, in force when Mazeil collided with the Antoines, lists Mazeil as an excluded driver. While the Antoines raised a variety of objections with the trial court regarding whether it should consider American Service's summary judgment evidence, the arguments they advance in their brief do not include any argument that the copy of the policy in the summary evidence was not a true and correct copy of the policy in force when Mazeil collided with the SUV being driven by Angela Antoine.

Following the hearing on American Service's motion for summary judgment, the trial court rendered an order declaring American Service owed no "duty to defend and does not owe a duty to indemnify [Berry and Mazeil]" from the Antoines suit.[1] In a single issue, the Antoines raise the following arguments to

[1] Because the order from which the Antoines appealed did not dispose of American Service's claims against the Antoines for attorney's fees and costs, the order was not final. After our Court questioned whether the trial court's order was final, the parties filed an agreed motion to abate the appeal to allow the trial court to clarify its order and to make it final. After we abated the appeal to allow the trial court to decide whether it would dispose of the remaining issues that prevented its order from being final, the trial court rendered a final judgment, disposing of

support their claim that the trial court's judgment should be reversed. First, the Antoines argue that the trial court erred in overruling their objections to American Service's summary judgment evidence. Second, the Antoines argue that American Service failed to prove that Berry signed the excluded-driver endorsement on the policy covering Berry's truck before the collision between Berry's truck and the Antoines occurred. Third, the Antoines argue that American Service failed to prove that Berry's signature on the excluded-driver endorsement was authentic.

Standard of Review

A trial court's decision to grant a traditional summary judgment is reviewed using a *de novo* standard. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Under Rule 166a(c) of the Texas Rules of Civil Procedure, a summary judgment is properly granted only when a movant establishes that no

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American Service's remaining claims for attorney's fees and costs. Neither American Service nor the Antoines filed a new notice of appeal complaining of the rulings incorporated into the final judgment. However, the Antoines prior notice of appeal, appealing the order that the parties agreed was not final, is deemed effective with respect to the issues raised in the parties' briefs. *See* Tex. R. App. P. 27.1(a) (making a prematurely filed notice of appeal effective and timely with respect to the final judgment that begins the period for perfecting an appeal); Tex. R. App. P. 27.2 (allowing the appellate court to allow an appealed order that is not final to be modified to make it final); *Moritz v. Preiss*, 121 S.W.3d 715, 718 (Tex. 2003) (stating that Rule 27.2 of the Rules of Appellate Procedure allows an appealed order that is not final to be modified so that it can be made final). We further note that neither party supplemented its brief after the final judgment was filed with our Court to complain about the manner the trial court disposed of American Service's claims for attorney's fees and costs.

genuine issues of material fact exists, such that it is entitled to have judgment rendered in its favor as a matter of law. Tex. R. Civ. P. 166a(c); *Knott*, 128 S.W.3d at 215-16. To obtain a favorable ruling on a traditional motion for summary judgment, the movant must conclusively prove all of the elements of the claim on which it has moved for summary judgment. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999).

In deciding whether American Service met its burden of proof, all reasonable inferences from the evidence considered by the trial court in the summary judgment hearing are to be resolved in favor of the Antoines. *See Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548-49 (Tex. 1985). If American Service's summary judgment evidence conclusively established that its policy excluded Mazeil, the burden then shifted to the Antoines to produce evidence sufficient to raise a genuine issue of material fact to show that American Service's policy covered Mazeil for the collision at issue. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

Several of the Antoines' arguments assert the court erred in failing to sustain their objections to portions of the summary judgment evidence relied on by American Service. We review a trial court's evidentiary rulings using an abuse-of-discretion standard. *In the Interest of J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A

trial court abuses its discretion when it acts without regard to the guiding rules or principles governing the admission of evidence, or if its decision to admit evidence is shown to have been arbitrary or unreasonable. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Summary Judgment

First, we consider whether American Service's summary judgment evidence conclusively proved that its policy excluded Mazeil. According to the Antoines, American Service did not meet its burden because the various affidavits American Service filed in support of its motion were insufficient to authenticate the copy of the policy American Service issued on Berry's truck. According to the Antoines, the affidavits American Service used to authenticate its policy were inadequate because the individuals who signed the affidavits are interested parties who did not have personal knowledge of the facts, their affidavits included statements that were hearsay, included statements that lacked relevance, included statements that violated the best evidence rule, and included statements that are conclusory.

To conclusively prove its claim that it had no duty to defend and indemnify Berry and Mazeil under its policy on Berry's truck, American Service was required to prove that its policy did not cover Berry's truck when the collision at issue occurred. *See* Tex. R. Civ. P. 166a(c); *see also Nixon*, 690 S.W.2d at 548. Initially,

we address whether American Service met the authentication requirements required to establish that the copy of the policy in the summary judgment evidence is a true and correct copy of the policy it issued on Berry's truck. *See* Tex. R. Evid. 902(10) (Business Records Accompanied by Affidavit). To authenticate the policy, American Service's summary judgment motion relied on Joe Shugrue's affidavit. Affidavits used to support motions for summary judgment must be made on personal knowledge, they must set forth facts that would be admissible in evidence, and they must affirmatively show that "the affiant is competent to testify to the matters stated therein." Tex. R. Civ. P. 166a(f). Any documents attached to the affidavits shall be "[s]worn or certified copies of all papers" referred to in the affidavit. *Id*.

In his affidavit, Shugrue stated that he had "personal knowledge of all of the facts[.]" *See id*. According to Shugrue, he is the "custodian of records of American Service automobile insurance policies[,]" and the documents that were attached to his affidavit, which included a copy of American Service's policy on Berry's truck, were "exact duplicates of documents" that American Service kept in the regular course of its business. We conclude that Shugrue's affidavit was sufficient to establish that the policy the trial court considered in ruling on American Service's

motion was a true and correct copy of the insurance policy that covered Berry's truck on February 22, 2008, the date of the collision at issue.

Copies of the original and amended insurance policies, both of which bear the same policy number, were attached to Shugrue's affidavit. The original policy on Berry's truck, effective November 26, 2007, identifies Berry's truck. The police report from the collision involving the Antoines shows that the truck involved in the collision is the same truck that American Service insured. The copy of the original policy on Berry's truck provides coverage for a six-month period, which began on November 26, 2007. The policy declarations page, which accompanied Berry's original policy, states: "This policy contains a named driver exclusion."[2]

The copy of the amended policy, which is the policy relevant to the trial court's judgment, reflects that the amended policy became effective on January 25, 2008. The amended policy shows that the policy was amended when Berry added an additional vehicle to the policy of insurance he obtained covering the vehicles that he owned. Like the original policy, the amended policy also contains a named driver exclusion that excludes Mazeil. The policy declarations page for the

[2] The declaration page also reflects that the policy included a 515A endorsement, and that number is consistent with the numbered endorsement form that is attached to Berry's policy. Endorsement 515A excludes coverage for Mazeil while he was driving Berry's truck.

amended policy reflects that the amended policy was processed on January 25, 2008, and the declarations page states: "This policy contains a named driver exclusion."[3] An excluded-driver endorsement was also attached to the amended policy. The endorsement in force on Berry's policy when Mazeil collided with the SUV driven by Angela Antoine lists two drivers as having been excluded by Berry's policy—Mazeil is one of them. Finally, Berry's signature is located on the excluded-driver endorsements that are in evidence,[4] and there is no evidence in the summary judgment record to indicate that Berry was not the person whose signature is located on the excluded-driver endorsements.

Shugrue's affidavit and the original and amended insurance policy attached to it conclusively established that a valid contract for automobile liability insurance existed between American Service and Berry. The amended policy and the excluded-driver endorsement found in the summary judgment evidence conclusively established that Mazeil was excluded under Berry's policy in force at the time the collision between Berry's truck and the SUV driven by Angela Antoine occurred.

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[3] The declarations page on the amended policy also reflects that a 515A endorsement was attached to the policy.

[4] The endorsements bear a policy form number 515A, and the endorsements reflect that they form a part of the policy covering Berry.

Because American Service met its initial summary judgment burden to prove that its policy did not cover Mazeil for the collision at issue, the burden shifted to the Antoines to respond with evidence to show that some genuine issue of material fact existed sufficient to preclude the court from granting American Service's motion. *See Clear Creek Basin Auth.,* 589 S.W.2d at 678. In their response to American Service's motion, the Antoines argued that American Service failed to prove that the excluded-driver endorsement was in force when the February 2008 collision occurred because it failed to produce any evidence to show that Berry's signature was genuine or to show that Berry had signed the endorsement before the collision. In their appeal, the Antoines also argue that the excluded-driver endorsement is ambiguous, vague, and unenforceable. However, the Antoines filed no summary judgment evidence to support their claim that Berry's signature was not authentic, or to show that Berry failed, before the collision at issue, to sign the excluded-driver endorsement on the policy that was in force on Berry's truck when the collision at issue occurred.

A non-movant resisting a summary judgment motion must expressly present summary judgment proof when it is necessary to establish that a fact issue exists. *Id*. The Antoines presented no proof that the signature on the endorsements is not Berry's, that the endorsements were issued after they collided with Berry's truck,

or that Mazeil was not excluded from the coverage provided by the insurance Berry obtained on his truck. Additionally, the Antoines have not briefed their argument that the excluded-driver endorsement is ambiguous, vague, or unenforceable; therefore, those arguments are waived. *See* Tex. R. App. P. 38.1(i) (requiring briefs to have clear and concise arguments and citations to authorities and the record). *Magana v. Citibank, N.A.*, 454 S.W.3d 667, 680-81 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (appellate court may deem an issue waived due to inadequate briefing).

We conclude that American Service established that Mazeil was not a covered driver under the policy it issued on Berry's truck. We further conclude the Antoines, in their response to American Service's motion, failed to demonstrate that any genuine issue of material fact existed on the question of whether American Service's policy covered Berry's truck while it was being driven by Mazeil.

As the Antoines remaining objections to American Service's summary judgment evidence do not address whether the copy of the amended policy in evidence was authentic, resolving the Antoines' remaining arguments, which address the admissibility of summary judgment evidence other than the validity and authenticity of the policy in force when the collision at issue occurred, is not necessary to resolve whether the judgment of the trial court was proper. *See* Tex.

R. App. P. 47.1. Because the trial court's ruling on American Service's motion is supported by competent summary judgment evidence, the trial court's judgment is affirmed.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on March 10, 2015
Opinion Delivered February 4, 2016

Before McKeithen, C.J., Kreger and Horton, JJ.