

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000164-MR

S. ARLENE BARNES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 99-CI-005780

KENTUCKY FARM BUREAU MUTUAL INSURANCE
COMPANY; AND RANDALL McCLEARN

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS AND PAISLEY, JUDGES; AND JOHN D. MILLER, SPECIAL
JUDGE.¹

PAISLEY, JUDGE. This is an appeal from a summary judgment entered by the Jefferson Circuit Court. Appellant argues that the trial court erred by entering summary judgment, and by failing to find appellees estopped from denying insurance coverage for a motor vehicle accident in which she was involved.

¹ Senior Status John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

However, after reviewing all the arguments presented and finding no error, we affirm.

In June 1998, appellant bought a home in Louisville, Kentucky after moving there from New York City. On June 4, 1998, after closing on her new home, appellant went to the office of Randall McClearn, an insurance agent, to obtain homeowner's insurance through Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau). While she was in McClearn's office, appellant, who had never before owned a vehicle, informed McClearn that she intended to purchase a vehicle very quickly, and that she wanted to obtain auto insurance through his office in addition to her homeowner's policy. McClearn advised appellant that an auto policy with Farm Bureau would entitle her to a discount on her homeowner's insurance. Since appellant intended to immediately purchase a vehicle, McClearn went ahead and gave her the discount so that she would not have to wait until her renewal period the next year to take advantage of the reduced premium.

It is undisputed that before appellant left McClearn's office, he told her that once she bought a vehicle, she would need to call his office with the vehicle's specifics, including make, model and VIN number. The record clearly reflects that McClearn told appellant that he needed this information in order

to issue the auto policy, and that she understood that coverage would not commence until she called McClearn with these details.

Some eight days later, appellant purchased a vehicle from the dealership of Metropolitan Lincoln Mercury, Inc. (Metro). At the time of the purchase, appellant told the Metro salesman that she had already made arrangements to obtain car insurance from Farm Bureau through McClearn's office, and that she needed to supply McClearn with the specifics of the purchased vehicle. The salesman allegedly told appellant that Metro would take care of all that, and she did not need to do anything. Unfortunately, neither appellant nor the dealership contacted McClearn's office with the details of the new vehicle.

Nearly four months later appellant was involved in an auto accident, which she reported to McClearn's office. When McClearn informed appellant that she did not have coverage with Farm Bureau, appellant immediately purchased such a policy from him.

As a result of the accident, two different parties made claims against appellant, who in turn filed this action against Farm Bureau, McClearn, and Metro. The circuit court granted summary judgment in favor of Farm Bureau and McClearn, but denied a similar motion filed by Metro. This appeal followed.

Appellant contends for several reasons that the trial court erred by granting summary judgment to appellees. Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436 (2001), provides a review of the standards for summary judgment in Kentucky as follows:

The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest* used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. (Citations omitted.)

Appellant raises several different arguments to support her position that summary judgment was improper. First,

she argues that there was an oral agreement between the parties whereby McClearn would provide auto insurance to appellant through Farm Bureau. Appellant further claims that proof of this agreement is evident from both the homeowner's declaration sheet which provided a discount for active auto insurance, and a document from Farm Bureau dated October 12, 1998, which listed Farm Bureau as appellant's previous insurer. We do not believe that either of these documents establishes an agreement by appellees to provide auto insurance to appellant.

Specifically, several elements are necessary to the formation of such an agreement. KRS 304.14-150 provides:

- (1) Every policy shall specify:
 - (a) The names of the parties to the contract.
 - (b) The subject of the insurance.
 - (c) The risks insured against.
 - (d) The time when the insurance thereunder takes effect and the period during which the insurance is to continue.
 - (e) The premium.
 - (f) The conditions pertaining to the insurance.
 - (g) Benefits payable.

State Automobile Mutual Insurance Company v. Bowie, 280 Ky 696, 134 S.W.2d 601 (1939), and Hartford Accident & Indemnity Company v. Middlesboro-LaFollette Bus Line, inc., Ky. App., 357 S.W.2d 671 (1962), also clearly hold that these elements, with the exception of any conditions, are necessary for either a written or an oral contract of insurance.

Here, as appellant had not yet purchased a vehicle or completed an auto insurance application at the time of the alleged agreement, the only element which was satisfied was that of identification of the parties. Moreover, appellant makes no reference to any other genuine issues of material fact as to whether the remaining requirements of KRS 304.14-150 for a contract of insurance had been satisfied. Thus, the court did not err by finding that there was no genuine issue of material fact with regard to this argument.

Next, appellant argues that an issue existed as to whether she tendered any consideration for auto insurance. She first attempts to support this argument by claiming that her payment of the homeowner's premium included payment for auto insurance. However, the evidence indicates that the entire amount paid by appellant was consideration exclusively for her homeowner's policy, and there is no evidence that she ever paid any sums for auto insurance.

Appellant also claims that she provided consideration in the form of a discount that Farm Bureau gave her on her homeowner's insurance premium for an active auto policy. However, this position lacks merit. As a general matter, consideration is defined as:

"A benefit to the party promising, or a loss or detriment to the party to whom the promise is made. 'Benefit,' as thus

employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise."

Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704, 707 (2000), quoting Phillips v. Phillips, 294 Ky. 323, 335, 171 S.W.2d 458, 464 (1943). It is clear in the present case that the discount was actually consideration given by Farm Bureau, not by appellant. As no other evidence has been brought to our attention to support the argument that appellant provided consideration, no further discussion is warranted.

Next, appellant asserts that a genuine issue of material fact exists as to whether appellees were negligent, both because McClearn failed to follow-up with appellant concerning the status of her endeavor to purchase a vehicle, and because appellees misrepresented in the homeowner's declaration sheet that appellant was receiving a discount for an active auto policy. We disagree.

McClearn had no express duty to contact appellant to discern whether she had purchased a vehicle. Indeed, the record shows that appellant was clearly informed and aware that it was her responsibility to contact McClearn with the make, model, and VIN number of the particular vehicle that she purchased before insurance could be issued.

Further, McClearn had no implied duty to contact appellant to discern whether she had purchased a vehicle. In accordance with Mullins v. Commonwealth Life Insurance Co., Ky., 839 S.W.2d 245, 248 (1992), one of the following circumstances must be present in order to establish such an implied duty:

(1) the insured pays the insurance agent consideration beyond a mere payment of premium; (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on; or (3) the insured clearly makes a request for advice. (Citations omitted.)

Here, appellant has provided no evidence to indicate that any one of these circumstances existed in this case. Instead the record indicates that there was no consideration given by appellant for an auto policy, that there was no course of dealing between the parties, and that appellant made no request that McClearn follow-up with her. It follows, therefore, that McClearn had no implied duty to contact appellant to see whether she had procured a vehicle.

Appellant also argues that the discount created a false impression that she had auto insurance, and that appellees were negligent for failing to correct this impression.

For the same reasons, she argues that appellees should be estopped from denying coverage of the auto accident. We reject both arguments.

Appellant refers us to Howard v. Motorists Mutual Insurance Company, Ky., 955 S.W.2d 525, 527 (1997), which sets out the elements of estoppel as:

- (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;
- (2) the estopped party is aware of these facts;
- (3) these facts are unknown to the other party;
- (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and
- (5) the other party in fact relied upon this conduct to his detriment.

Appellant claims that the first, second, and third elements are satisfied because Farm Bureau's act of listing the active auto policy discount on the homeowner's declaration sheet, along with McClearn's failure to follow-up with appellant after he allegedly promised to provide coverage, amounted to the knowing representation or concealment of material facts of which appellant was unaware. However, the record clearly shows that appellees did exactly what they told appellant they would do. Specifically, they provided a discount for an auto policy based on appellant's assurance to McClearn that she would very shortly procure a vehicle and insure it with appellees. In addition, McClearn was ready and willing to provide the insurance coverage

that appellant requested as soon as he was provided with the details of the purchased vehicle. Appellant was admittedly aware of these circumstances, and she herself failed to provide McClearn with the required information. Clearly, there was no concealment of any material fact by appellees.

In addition, appellant cannot satisfy the remaining elements of estoppel. There is no evidence in the record which would support the argument that appellees knew or should have known that appellant would rely on the homeowner's declaration sheet for the mistaken belief that she had auto insurance. The declaration sheet clearly stated that it pertained to a homeowner's insurance policy, and appellant clearly was aware that she was going to receive the benefit of the discount. Appellant admits that she never filled out an application for auto insurance, received a copy of an auto policy, received a bill for auto insurance, or called McClearn's office to inquire about any of the above-mentioned circumstances. There is nothing in the record to suggest that appellees intended or expected that appellant would rely on appellees' conduct as providing a basis for appellant's mistaken impression that she had auto insurance during the four months prior to the accident. Contrary to appellant's contention, we do not believe that she established any reasonable basis for her reliance on any action

or inaction by appellees. Hence, the trial court did not err by refusing to declare appellees estopped from denying coverage.

The summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Andrew Draut
Louisville, Kentucky

BRIEF FOR APPELLEES:

Wayne J. Carroll
J. Scott Sweeney
Louisville, Kentucky