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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001998-MR

DARREN CUMMINS AND
MELISSA CUMMINS — APPELLANT

v. — APPEAL FROM BOYD CIRCUIT COURT
HONORABLE DAVID C. HAGERMAN, JUDGE
ACTION NO. 01-CI-00960

RICHARD MOORE, D/B/A MOORE
INSURANCE COMPANY AND
ALPHA PROPERTY & CASUALTY
INSURANCE COMPANY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Darren and Melissa Cummins appeal from a verdict and judgment of the Boyd Circuit Court in favor of the defendants Richard Moore, Moore Insurance Agency and Alpha Property and Casualty Company. We affirm.

Darren Cummins was riding a Honda XL 600R motorcycle on July 25, 1995 when he collided with a bicycle ridden by Matthew Lyons, a minor. Both Matthew and Darren were hurt. Matthew, through his father and next friend Thomas Lyons, filed suit against Darren in Greenup County, where the accident occurred. Glen Falls Insurance Company (Glen Falls), Thomas Lyons' automobile insurance carrier, was also joined as a defendant because Matthew alleged that Darren was uninsured at the time of the accident. The jury returned a verdict for Matthew against Darren and Glen Falls for $28,128.02, $10,000.00 of which was for pain and suffering and the rest for medical bills. The parties stipulated that Glen Falls had paid Matthew's medical bills in the amount of $18,128.02. The Greenup Circuit Court gave Glen Falls credit for that amount in its judgment. Glen Falls assigned the credit to Matthew, who filed a judgment lien on Darren's property in Boyd County.

Although the Greenup County tort action provides the factual background, it is only marginally related to this case. When the Greenup County judgment lien was filed against their property in Boyd County, Darren and Melissa Cummins filed this action in Boyd Circuit Court against their insurance agent Richard Moore, Moore Insurance Company and Alpha Property and Casualty Company (Alpha), the company that issued the policy on the Cummins' motorcycles.

In the complaint Darren and Melissa claimed that they purchased insurance on a Kawasaki motorcycle from Moore Insurance Company on June 9, 1994 and that on August 1, 1994 they purchased a different policy on the Honda that Darren was riding at the time of the accident. They alleged that the policy period on the Honda was one year, that the premium was paid and that insurance should have been in force through August 1, 1995, but that Alpha refused either to defend Darren in the suit filed by Matthew or to pay the claim. Darren and Melissa alleged that Richard Moore either didn't purchase insurance on the Honda at all, or that he cancelled it without their knowledge or permission. They also claimed breach of contract and bad faith by Alpha.

The defendants presented a different version of the facts. Richard Moore claimed that Darren and Melissa had been insurance customers of his for several years and that it was their practice to frequently drop and add vehicles on their automobile policies. According to Richard, Melissa bought insurance on the Kawasaki motorcycle on June 9, 1994. When Darren bought the Honda in August, it was added to the existing Kawasaki policy as an endorsement rather than a new policy being issued. Darren was only charged a pro-rated premium for ten and one-half months, which was the balance of the term of the Kawasaki policy. Both motorcycles were listed under the same

policy number, No. 06010689, which was the number that was issued when the Kawasaki policy was written. According to Richard, price was always important to Darren when buying insurance and it was cheaper to add the Honda as an endorsement to the Kawasaki policy than to write a new policy. Although Darren had originally been given an insurance card showing coverage through August 1, 1995, Richard claimed that was a mistake by the secretary in his office, who was not an insurance agent and had no authority to bind insurance. On August 5, 1994 a corrected card was issued to Darren showing the expiration date as June 18, 1995. Darren and Melissa sold the Kawasaki in January 1995, leaving the Honda as the only motorcycle they owned and the only vehicle covered by the insurance policy. On April 3 and May 3, 1995, notices were sent to Darren and Melissa stating that Policy No. 06010689 would expire unless the premium was paid before the expiration date, June 18, 1995. Richard claimed that he reminded Darren of the impending expiration of the policy three days before it expired and Darren said he wasn't going to renew it. The accident happened on July 25, 1995.

The case was tried to a Boyd Circuit Court jury on July 8, 2003. The jury returned a verdict for the defendants, and this appeal followed. Darren and Melissa raise three issues on appeal: first, that the jury was improperly instructed;

second, that hearsay evidence was improperly admitted, and third, that Alpha failed to give notice of cancellation of the insurance policy.

JURY INSTRUCTIONS

Darren and Melissa's theory of the case was that when Moore Insurance issued a handwritten proof of insurance card with dates on it and accepted Darren's check, an insurance contract was formed for a one-year period and that this contract could not then be modified without Darren and Melissa's consent. The trial court rejected the Cummins' tendered instructions on those theories and instead gave instructions briefly explaining the parties' relative positions regarding the date of expiration of the policy. The explanation was followed by a simple interrogatory in which the jury was told to place an "x" by the date on which they found the policy expired. They were given the choice of June 18, 1995 or August 1, 1995. This instruction presumed, of course, that there was insurance on the motorcycle and asked the jury to determine only when the insurance expired. If they found that the policy expired June 18, 1995 the jury was instructed to proceed to Verdict Form A and enter their verdict for the defendants.

Kentucky law requires that trial courts use a "bare bones" approach to jury instructions. Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 824 (Ky. 1992). In

instructing the jury the court is to frame the dispositive issue, applying rather than stating the underlying legal principles. Counsel may then put flesh on the bones of the instructions in closing argument. Ford Motor Co. v. Fulkerson, 812 S.W.2d 119, 122 (Ky. 1991). In this case the dispositive question "when did the insurance policy expire?" was properly framed by the court. It appears from the record that counsel for Darren and Melissa fully presented their theories to the jury for its consideration. There was no error.

HEARSAY EVIDENCE

The appellants objected to the introduction of insurance documents offered in evidence by the appellees, as hearsay. The documents fell into two broad categories: those about the policy involved in this case, and those that illustrated Darren and Melissa's customary insurance dealings with Richard and his company over a period of approximately five years.

The appellees respond that the admitted documents aren't hearsay; that if they are hearsay they were admissible under exceptions to the hearsay rule and if they were inadmissible hearsay their introduction was harmless error.

After a lengthy bench conference the trial court overruled the appellants' objection to insurance records pertaining to the policy involved in this case on the grounds

that they were admissible under KRE[1] 803(6), the business records exception to the hearsay rule. That rule states:

> **Rule 803. Hearsay Exceptions: availability of declarant immaterial.**
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> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> . . . .
>
> (6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Darren and Melissa insist that as to the records introduced Richard Moore is neither a "custodian" nor an "other qualified witness" as required by the rule. The records at issue are three pages captioned "motorcycle policy" and listing information including the policy period, policy number,

[1] Kentucky Rules of Evidence.

coverages, year, make, model and serial number of the insured motorcycle, and other similar information.

The decision whether to admit evidence is vested in the sound discretion of the trial court and will not be reversed absent a showing of abuse of discretion. Young v. J.B. Hunt Transportation, Inc., 781 S.W.2d 503, 509 (Ky. 1989). We have reviewed the record and conclude that the trial court properly ruled that the first group of documents, those pertaining to the policy at issue in this case, were admissible under the business records exception to the hearsay rule, KRE 803(6). Autopsy reports,[2] drug testing data[3] and records of the Department of Corrections[4] are examples of records which have been held admissible as business records. It appears from the trial record that the records of the motorcycle insurance policies discussed here were made at or near the time, by a person with knowledge, were kept in the course of a regularly conducted business activity, and that it was the regular practice of Moore Insurance and Alpha to make and keep those records. For purposes of KRE 803(6) Richard fulfills all the requirements of a "qualified witness" with regard to the terms of policies he sold to Darren and Melissa. The trial court properly admitted

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[2] Kirk v. Commonwealth, 6 S.W. 3d 823 (Ky. 1999).

[3] Mollette v. Kentucky Personnel Board, 997 S.W. 2d 492 (Ky. App. 1999).

[4] Jones v. Commonwealth, 907 S.W. 2d 783 (Ky. App. 1995).

the documents. See Kirk v. Commonwealth, 6 S.W.3d 823, 828 (Ky. 1999). Having ruled that the documents were properly admitted as business records, we need not reach the appellees' arguments that they might also have been admitted under KRE 801A (statements offered against a party . . . of which the party has manifested an adoption or belief in its truth) or under KRE 803(3) (evidence of the declarants' then existing state of mind).

The other group of documents objected to as hearsay were automobile insurance applications and Kentucky Endorsement Requests pertaining to various vehicles owned by the Cumminses over a period of approximately five years. These documents were offered in evidence to show that Darren and Melissa were very familiar with the process of requesting endorsements for additional vehicles on insurance policies. They were not offered to show that Darren and Melissa had insurance coverage on those vehicles at the times shown on the documents.

KRE 801(c) says: ""Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Because the documents were not offered to show the truth of their contents, they are not hearsay. The documents were properly admitted. Since the documents are not hearsay it is not necessary to discuss hearsay exceptions suggested by the

appellees under which the questioned documents might also have been admitted.

FAILURE TO GIVE NOTICE OF CANCELLATION

Darren and Melissa contend that the trial court should have directed a verdict in their favor because Alpha failed to give notice of cancellation of the motorcycle insurance policy as required by KRS[5] 304.20-040(3), requiring notice of cancellation of an insurance policy at least fourteen days prior to the effective date of cancellation, and 806 KAR[6] 20:020, requiring that reasons for cancellation or non-renewal be given in the notice. The appellees respond that the policy wasn't cancelled at all but lapsed for non-payment of the premium. They also argue that notices were in fact sent that the policy was about to expire, and that even if no notices were sent the penalty for failure to comply with KRS 304.20-040 is meted out by the Commissioner of Insurance, not the courts.

The Cumminses cite Kentucky Farm Bureau v. Gearhart, 853 S.W.2d 907 (Ky.App. 1993) in support of the argument that the court erred by failing to direct a verdict. In its facts, Gearhart is almost the photographic negative of the case before us. In that case Gearhart had three separate policies covering three separate vehicles. He sold a 1982 Isuzu on which he

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[5] Kentucky Revised Statute.

[6] Kentucky Administrative Regulation.

carried full coverage and bought a 1980 Ford van. He went to the insurance office to tell his agent that he'd sold the Isuzu and that he needed to obtain liability insurance on the Ford. There was premium credit remaining on the Isuzu policy which Gearhart was told would be applied to the insurance on the Ford. He was given a temporary insurance certificate for the Ford so that he could transfer the title. The number on the certificate was the same as the number had been for the Isuzu. The insurance company sent Gearhart a cancellation notice referring only to the Isuzu. Since he'd already sold that vehicle, Gearhart could have reasonably assumed that the insurance company was merely advising him that his policy no longer covered the Isuzu. He was never sent a cancellation notice, a renewal notice or anything else that notified him that the coverage on the Ford van was about to lapse; all the documents referred to the Isuzu. When the Ford was involved in an accident the insurance company refused to pay or defend Gearhart. Gearhart sued his insurance company and the jury found in his favor. The insurance company appealed, arguing among other things that a directed verdict should have been granted in their favor because they properly cancelled the insurance policy on the Ford. The Kentucky Supreme Court held that KRS 304.20-040(3) requires a "proper designation of the vehicle covered" and that the notice given was inadequate as a

matter of law because the vehicle on which coverage was cancelled was not specifically described. Gearhart, supra, at 909. In affirming the jury verdict and judgment the court stated that the "issue regarding cancellation need not have been submitted to the jury". Id.

There are important factual differences between Gearhart and this case. A renewal notice was sent to Melissa in April 1995 specifically describing the Honda and stating at the top that the policy was "due to lapse on 6/18/95 . . . ." By the time the notice was sent there was only one motorcycle left on the policy, because the Cumminses had sold the Kawasaki and notified Richard they didn't own it anymore. An additional reminder was sent to Melissa in May with the subject "motorcycle policy" followed by the policy number, stating that the policy would expire on June 18, 1995. Unlike Gearhart, neither of these notices described a different vehicle than the one insured. This case would only come within the facts of Gearhart if the notices described the Kawasaki rather than the Honda. We are unable to say that the notice given here was inadequate as a matter of law, and therefore the question was properly submitted to the jury.

The judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

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