

RENDERED: MARCH 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000530-MR

WAYNE FLEMING

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NOS. 01-CI-00029 & 01-CI-00202

CS&W INSURANCE SERVICES, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

VANMETER, JUDGE: Wayne Fleming appeals from a summary judgment granted in favor of appellee, CS&W Insurance Services, Inc.

(CS&W), by the Letcher Circuit Court. Fleming contends that the court erred by finding that there were no genuine issues of material fact. We agree.

Fleming owned and operated his business in a building which was destroyed by fire in 2000. In the four years

before the fire, Fleming purchased four consecutive property insurance policies through CS&W, an independent insurance agency which procured the policies through Penn-America Insurance, Inc. (Penn-America). The parties disagree as to the intended coverage of the policies. Fleming contends that he expressed to the CS&W agent that he wanted coverage for both the physical building and its contents, and that he believed he had such coverage although he never read the declaration sheets or any of his policies before the fire. CS&W contends, by contrast, that Fleming requested coverage only for the physical structure, and that all of the policies and declaration sheets clearly indicated that the building contents were not covered. At the time of the fire, the insurance coverage of \$65,000 provided by Penn-America covered only the building, and not its contents.

Initially Penn-America refused to make payments and Fleming filed two suits, one against Penn-America for breach of contract and the other against CS&W for the negligence of its agent. The two suits were consolidated by an order of the Letcher Circuit Court entered March 13, 2002. After Fleming and Penn-America reached an agreement, the court dismissed Fleming's claim against Penn-America with prejudice. The trial court subsequently granted CS&W's motion for summary judgment as to Fleming's claim that CS&W did not obtain the coverage he requested, stating that

four(4) separate policies were issued to Wayne Fleming that were very clear on their face that the policy only covered the building in the amount of \$65,000.00. If there was any mistake or problem of whether there was coverage for the contents, Mr. Fleming received four (4) notices and could have contacted the Defendant and paid for the coverage of contents at any time over the years. . . . Mr. Fleming was on notice that he did not have and was not paying for insurance on the contents, and could have corrected any mistake or failure of [CS&W] between January 24, 1997, and the time of the fire.

The court overruled Fleming's motion for reconsideration. This appeal followed.

An appellate court's review of a trial court's grant of summary judgment requires a determination of "whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."¹ If there are no genuine issues of material fact, the appellate court shall conduct a *de novo* review of the legal issues addressed by the trial court and raised on appeal.²

On appeal, CS&W frames the issue as one of contract, as to whether the insurance contract may be reformed to provide contents coverage. Our review of the record, however, shows

¹ *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 704 (Ky. App. 2004) (citing *Palmer v. Int'l Ass'n of Machinists*, 882 S.W.2d 117, 120 (Ky. 1994)). See CR 56.03.

² See *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

that Fleming's claim below was based on the alleged negligence of CS&W in failing to provide the coverage Fleming requested. The trial court's judgment then addressed Fleming's claim by finding that his failure to respond to the policy declaration notices precluded liability on the part of CS&W.

The decision of the trial court, however, cannot be reconciled with the holding of the Kentucky Supreme Court in *Grigsby v. Mountain Valley Insurance Agency, Inc.*³ The Supreme Court held in *Grigsby* that "a claim based upon the negligence of the agency to properly provide coverage is . . . not affected by the insured's failure to read and understand the policy."⁴ The court further noted:

Where an "insurance agent or broker has failed to procure a policy which in terms and coverage is of the type specified by the insured, and the insured consequently suffers an uninsured loss, the agent or broker cannot successfully contend that he is relieved of liability by reason of any contributory negligence on the part of the insured in not having read and familiarized himself with the contents of the policy." 43 Am.Jur.2d Sec. 141.⁵

Fleming still must prove the negligence of CS&W, *i.e.*, that he requested contents coverage and that CS&W failed to

³ 795 S.W.2d 372 (Ky. 1990).

⁴ *Id.* at 374.

⁵ *Id.* at 375.

procure it. That determination, however, is a genuine issue of material fact which is not appropriate for summary judgment.

The judgment of the Letcher Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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