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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001430-MR

THOMAS SERGENT, ON HIS
OWN AND AS EXECUTOR OF THE
ESTATE OF DARLA JO SERGENT — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CI-01459

AUTO-OWNERS LIFE INSURANCE
COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE,

CLAYTON, JUDGE: Thomas Sergent, Executor of the Estate of Darla Jo Sergent, appeals from a Boone Circuit Court's order granting summary judgment in favor of Auto-Owners Life Insurance Company. Finding no error, we affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

During the application process for new auto and home insurance, Sergent claims that, in order to receive the best price for the insurance, he also applied for a life insurance policy. Jack Lillie, an insurance agent with Auto-Owners Life Insurance Company (hereinafter "Auto-Owners") assisted him. When Sergent realized that neither he nor his wife qualified for the "Simplified Issue 5 Year Term Life Insurance," he decided to apply for life insurance for his adult daughter, Darla Jo Sergent. This particular life insurance policy does not require a health examination.

To complete the application for the life insurance policy for Sergent's daughter, Lillie says that he asked Sergent several questions about his daughter's health. Sergent claims that he explained that his daughter had a muscular disorder that prevented her from using her hands and legs. From the information indicating a physical handicap, Lillie determined that such a muscular disorder did not affect Darla's eligibility for coverage and issued the policy. Apparently, Sergent either failed to mention or, as he contends, did not know that his daughter had been diagnosed since childhood with peripheral neuropathy. Significantly, he has never denied that she was, in fact, diagnosed with peripheral neuropathy. Furthermore, Sergent, who was listed as the "owner/applicant," on the policy signed not only his name under this designation but also signed Darla's name under the designation of "proposed insured."

Eight months later, on July 28, 2007, Darla died from an acute cardiac arrest. After Sergent attempted to collect on the policy, Auto-Owners discovered from Darla's medical records that she had been diagnosed with peripheral neuropathy. On the basis of this medical diagnosis, Auto-Owners denied the claim and returned Sergent's premium payment. It said that, had it known about the diagnosis, it would not have accepted the application and issued the policy. Moreover, Auto-Owners maintains that Sergent's signing of Darla's name on the application, rather than Darla, also voided the policy.

Thereafter, Sergent filed suit against Auto-Owners for breach of policy. Because of alleged misrepresentations in the application for the policy, Auto-Owners denied the existence of a valid policy. Both Sergent and Auto-Owners filed motions for summary judgment. The circuit court found that there were no genuine issues of material fact and that Auto-Owners was entitled to judgment as a matter of law. It denied Sergent's motion for summary judgment and granted Auto-Owners' motion. Sergent appeals from this decision.

STANDARD OF REVIEW

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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App.

1996); Kentucky Rules of Civil Procedure (CR) 56.03. "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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). In addition, "[t]he 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.'" Lewis, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. And the trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. Finally, since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court is not required to defer to the trial court's decision and reviews the issue de novo. *Scifres*, 916 S.W.2d at 781. With that standard of review in mind, we turn to the issues in this case.

ISSUE

The issue before this Court involves whether the contract for life insurance between Sergent and Auto-Owners is enforceable. Sergent argues that the circuit court erred in granting Auto-Owners' motion for summary judgment since genuine issues of material fact exist as to whether he made any material misrepresentations on the life insurance application. Sergent argues that a policy

cannot be declared void unless there was a material misrepresentation or a fraudulent representation, and he asserts that such a claim did not occur because he informed Lillie about Darla's condition. It is Sergent's contention that it is immaterial whether he provided the name of the specific condition because he fully informed Lillie about Darla's condition.

Therefore, based on Sergent's rendition, he claims that Lillie knew of Darla's health problems and still chose to issue a life insurance policy. Sergent contends too that Auto-Owners is liable for the acts of its agents when the agents are acting in the capacity as representatives of the insurance company and within the scope of their authority. Finally, Sergent bolsters the argument that no misrepresentation occurred by noting that her medical diagnosis had no relationship to the actual cause of her death. From this position, he avows that even if Auto-Owners could have voided the contract because of a misrepresentation, it can no longer do so since Darla died before it disavowed the contract. Sergent does not specifically address the argument that he forged Darla's signature in his brief, but counters in his reply brief that the evidence proffered by him shows that there are genuine issues of material fact as to whether Darla was dependent and consented to the life insurance policy.

Conversely, Auto-Owners maintains that misrepresentations in an insurance application render the policy void. Thus, it declares that the policy was void because Sergent misrepresented both Darla's health and that she signed the policy. Misrepresentation is material even if innocently done. Second, Auto-

Owners states that KRS 304.14-070 renders life insurance policies void if the proposed insurer did not seek the insurance or consent in writing to its procurement. Needless to say, Auto-Owners maintains that since Darla was an adult and did not sign the insurance application, she did not seek or consent to the application for insurance. Thus, the insurance policy is void. In sum, the ultimate issue is whether the circuit court's grant of Auto-Owners' motion for summary judgment was proper and that no genuine issues of material fact existed regarding the denial of the life insurance benefits to Sergent.

ANALYSIS

1. Contract void for misrepresentation

Kentucky courts have said that, "[w]hen an insured misrepresents material facts on the application, the insurer is justified in denying coverage and rescinding the policy." *Hornback v. Bankers Life Ins. Co*., 176 S.W.3d 699, 705 (Ky. App. 2005). Statutory guidance is provided by KRS 304.14-110:

> All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in

> the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. . . .

Thus, the statute itself states, in contravention to Sergent's assertion that it is too late to rescind the policy, that misrepresentations shall not prevent a recovery under the policy unless one of the listed exceptions occurs. In the situation at hand, it appears that two exceptions exist. First, Sergent's misrepresentation were material to the acceptance of risk and also that Auto-Owners would not have provided coverage if it had known the true facts. "[O]ur courts have in several instances applied the principles set forth in that statute to invalidate various policies of insurance based upon fraudulent or material misrepresentations." *State Farm Mut. Auto. Ins. Co. v. Crouch*, 706 S.W.2d 203 (Ky. App. 1986); *Prudential Insurance Co. v. Lampley*, 297 Ky. 495, 180 S.W.2d 399 (1944); *Citizens Insurance Co. v. Whitley*, 252 Ky. 360, 67 S.W.2d 488 (1944); *Ford v. Commonwealth Life Ins. Co*., 252 Ky. 565, 67 S.W.2d 950 (1934). The law is that if an insured obtained a policy of insurance through a material misrepresentation, the policy is void.

"The rule is that a false answer is material if the insurer, acting reasonably and naturally in accordance with the usual practice of . . . insurance companies under similar circumstances, would not have accepted the application if the substantial truth had been stated therein." *Cook v. Life Investors Ins. Co. of Am.*, 126 Fed.Appx. 722, 724 (6th Cir. 2005) (quoting *Mills v. Reserve Life Ins. Co.*, 335 S.W.2d 955, 958 (Ky.1960)). And if the misrepresentation is material, as

the misrepresentation in this case, then the applicant's intent in making the misrepresentation has no consequence. *John Hancock Mut. Life Ins. Co. v. Conway*, 240 S.W.2d 644, 646 (Ky. 1951). Thus, even if Sergent unknowingly answered the questions incorrectly, it does not change that under the statute, either an innocent material misrepresentation or a fraudulent non-material misrepresentation may void the contract.

It is undisputed that Auto-Owners would not have issued a life insurance policy on Darla if it had known that she had a nervous system disorder. Sergent never contradicts that Lillie went over the questions on the application with him and that he answered "no" to them. Moreover, it also is undisputed that Sergent signed the application form and attested that the answers were correct, that is, he said that Darla had no nervous system disorder.

By the same token, the insurance policy application says:

> I represent that the statements and answers recorded on this application are true and complete and agree that they will form a part of any insurance policy issued hereon. I also understand that the information on this application will be relied upon to determine insurability and that incorrect information may result in coverage being voided, subject to the policy Incontestability Provision.

Sergent's signature on the application represents that he had read the questions and the answers in the application. It also puts forward that the information provided by him was complete, true, and correctly recorded. Kentucky's courts have insisted that the parties to a contract exercise "at least the degree of diligence which may be fairly expected from a reasonable person." *Mayo Arcade Corp. v. Bonded Floors*

Co., 240 Ky. 212, 41 S.W.2d 1104, 1109 (Ky. App. 1931)(internal quotation marks and citations omitted). From this legal admonition we believe that Sergent must be responsible for his proffered answers on the relatively simple insurance application form, which confirmed that his daughter had no "brain or nervous system disorder."

Regarding Sergent's reliance on *Rudolph v. Shelter Insurance Company*, 2008 WL 4091648 (Ky. App. 2008)(2007-CA-000799-MR), we note initially that it has been ordered not to be published. Moreover, the situation therein involved an insurance application where the questions on the insurance application were not asked of the applicants. Here, no one disputes that Lillie asked Sergent all the questions.

But Sergent's answers were not accurate or complete. Based on the wording in the application, he was on notice that he was attesting that his answers were truthful. Even if, as he maintains, he did not know the name of his daughter's diagnosis, he certainly knew that she had been treated since childhood for more than weakness in her arms and legs. His suggestion that he did not know about her diagnosis, or in the alternative, that he explained the disorder adequately to the agent, is at the least disingenuous, and mitigates against his claim to the life insurance policy proceeds. Further, the application, signed by Sergent, clearly states that coverage will not be issued to the "proposed insured" if she suffers from certain health conditions. He most certainly understood the ramifications of this

clause as he was aware that neither he nor his wife would qualify for the life insurance.

So we surmise no uncertainty in our belief that Sergent's failure to inform the insurance agent about his daughter's nervous system disorder was a material misrepresentation. Consequently, if Auto-Owners had known, it would not have issued the policy.

On another note, we also concur with Auto-Owners that Sergent's decision to sign Darla's name on the application is also a material misrepresentation and voids the policy. Sergent indicated to Lillie that he was taking the application home to discuss it with his wife and daughter. Lillie had no reason or ability to ascertain whether this implied action occurred. Sergent admits that he did not discuss it with his wife or daughter. And he acknowledges that he signed Darla's name. His explanation for signing her name was that he owned the policy. Regardless of Darla's health issues, Auto-Owners would not have issued the policy had it known that Darla did not sign it. Indeed, the application requires that the "proposed insured" sign it. Obviously, one rationale behind such a requirement is that the insured could verify the truth of the answers. Hence, we do not find that any genuine issue of material fact has been demonstrated that would allow for this case to go forward on whether the misrepresentations were material. They were.

2. Contract void because Darla did not seek or consent to it.

The second reason that Auto-Owners argues the life insurance policy was void is also based on the fact that Sergent signed Darla's name to the application. In general, it is necessary for the insured to initiate the insurance herself or consent in writing to the application being made on her behalf. This requirement is delineated in KRS 304.14-080:

> No life or health insurance contract upon an individual, except a contract of group life insurance or of group or blanket health insurance, shall be made or effectuated unless at the time of the making of the contract the individual insured having the power to contract as provided in KRS 304.14-070 applies therefor or has consented thereto in writing, except in the following cases:
>
> (1) A spouse may effectuate the insurance upon the other spouse.
>
> (2) Any person having an insurable interest in the life of a minor, or any person upon whom a minor is dependent for support and maintenance, may effectuate insurance upon the life of or pertaining to the minor.
>
> (3) Family policies may be issued insuring any two (2) or more members of a family on an application signed by either parent, a step-parent, or by a husband or wife.

None of the exceptions to the statute apply here. Exception 1 and 2 are not relevant since Darla is Sergent's 41-year old adult daughter. Exception 3 is not applicable because the policy only insured one family member, Darla. Because Darla did not know the application for life insurance was made and because she did not sign the application, none of the exceptions to the statutory provisions were met. Darla did not authorize Sergent to sign the application and she was competent to sign the application herself.

Sergent's suggestion that it is unclear whether Darla was dependent is erroneous. She was 41 years old, drove her own car, insisted on having her own car insurance, attended her own church, and there were allegations or actions suggesting any type of legal incapacity.

Moreover, Lillie was under the impression, based on Sergent's actions and words, that, after he signed the application as the owner of the policy, he was taking it home for discussion with his wife and daughter, and also for Darla's signature. Under these circumstances, Lillie could not have known that Sergent did not discuss it with his family members. If Auto-Owners had known Darla did not sign the application, it would not have issued the policy, but the actions of Sergent gave them no notice that Darla was not consenting to the application for life insurance.

Again, no genuine issues of material fact exist. Therefore, the trial court did not err in its grant of summary judgment.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

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