

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001377-MR

ROBERT GANT AND DONNA GANT

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 07-CI-00825

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY d/b/a STATE
FARM INSURANCE COMPANIES

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: Robert and Donna Gant appeal the Scott Circuit Court's entry of summary judgment in favor of State Farm Mutual Automobile Insurance Company. After a careful review of the record, we affirm.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

On November 12, 2005, Donna Gant and her minor son were involved in a motor vehicle accident in which her minor son sustained injuries that required Donna to temporarily forego operating her daycare business to care for him. On June 5, 2007, Donna submitted a Kentucky No-Fault Application for Benefits-Personal Injury Protection (PIP) to State Farm claiming lost wages. She prepared and attached a spreadsheet to her application entitled “Donna Gant Lost Income.” Because Donna was self-employed, State Farm responded on August 27, 2005, with a request for her to provide her tax return so that her lost wages could be calculated. On that same day, State Farm sent a letter to Donna’s counsel requesting verification of her lost wages. Donna failed to provide any additional information to substantiate the amount of her lost wages.

On that basis, State Farm moved for summary judgment. Donna offered oral testimony and a spreadsheet she had attached to her application for benefits. She argued at the hearing on the motion that this was sufficient evidence to survive summary judgment. Donna further indicated that she planned to acquire bank statements and affidavits from clients to prove her lost wages, but she gave no reason for her failure to do so in the approximately two years since filing her claim. Instead, Donna acknowledged that the spreadsheet that she had originally produced entitled “Donna Gant Lost Income” was the only evidence that she had to produce at the summary judgment hearing. She also indicated that she had been

unable to locate her tax returns. However, Donna informed the court that she would “endeavor to get more” evidence.

The circuit court ruled in favor of State Farm, finding that Donna had failed to provide reasonable proof of her wage loss, pursuant to KRS 304².39-210(1). In doing so, the court relied upon *Kentucky Farm Bureau v. Troxell*, 959 S.W.2d 82, 84 (Ky. 1997) for the proposition that a claimant’s statement of lost wages, without additional proof, is “wholly insufficient” to reasonably prove lost wages. The court therefore found that Donna had not produced reasonable evidence.

Donna now appeals. Although Donna presents several points, they fall within two distinct arguments supporting why the court erred: 1) the circuit court improperly weighed evidence at the summary judgment stage, and 2) the trial court improperly overlooked evidence produced by Donna, which in her opinion, sufficed to meet her burden on summary judgment.

The standard for summary judgment is as follows: “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

² Kentucky Revised Statute.

CR³ 56.03. Summary judgment is appropriate when it “appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Also, summary judgment cannot be avoided solely on the basis that a party hopes to obtain evidence in the future that will create a genuine issue of material fact. *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968). However, “summary judgment is only proper after a party has been given ample opportunity to complete discovery[.]” *Pendleton Brothers Vending, Inc. v. Commonwealth Finance and Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1998). It is not necessary that a party actually complete discovery, only that they had an opportunity to do so. *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979). We review a grant of summary judgment *de novo*. *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474, 475 (Ky. App. 2010).

With respect to Donna’s first argument, Donna asserts that State Farm did not meet its initial burden of proof and that the court improperly weighed evidence at the summary judgment stage. Ordinarily, the movant bears the initial burden of proof when seeking summary judgment. *First Fed. Sav. Bank v. McCubbins*, 217 S.W.3d 201, 203 (Ky. 2006). However, KRS 304.39-210(1)

³ Kentucky Rule of Civil Procedure.

requires a claimant to provide “reasonable proof of the fact and amount of loss realized” before an insurer will be obligated to pay a claim.⁴ *Automobile Club Ins. Co. v. Lainhart*, 609 S.W.2d 692, 694 (Ky. App. 1980). As such, Donna bore the burden of proof from the outset. However, she overlooked this fact, and the circuit court did no more than remind her of her burden. In doing so, the court did not weigh the evidence but simply determined that Donna had not presented affirmative evidence when faced with a motion for summary judgment.

Alternatively, Donna argues that, even if the burden was on her, the spreadsheet that she produced entitled “Donna Gant Lost Income” was sufficient to meet that burden.⁵ Donna also argues that she would have produced additional evidence at trial. Regardless, this evidence is insufficient as a matter of law. Self-serving evidence, when not accompanied by any other evidence, is wholly insufficient to support damages for lost wages. *Troxell*, 959 S.W.2d at 84 (finding that the evidence was insufficient to prove lost wages where the only evidence the

⁴ As an aside, we note that Donna’s assertion that reasonable proof is necessary only to prove that benefits are overdue is misplaced, as the plain language of the statute indicates that no duty arises on the part of the insurer to pay a claim until a claimant has produced reasonable proof of a loss. See KRS 304.39-210(1).

⁵ We further note that Donna is confused as to the trial court’s order. Donna argues that the court erred by requiring her to produce her tax returns, or other documentation, in order to prevail at summary judgment. However, the court conceded that production of her tax returns was unnecessary, but granted summary judgment on the basis that Donna had failed to produce any substantiated evidence *whatsoever*.

plaintiff produced was his oral testimony and receipts he had prepared months after the work was completed).⁶

Thus, under the summary judgment standard and the guidance of *Troxell*, Donna's testimony and unsubstantiated itemization of her lost wages were insufficient to defeat summary judgment. The court also properly disregarded Donna's assurances that she would endeavor to produce additional evidence in the future, as such hope that a party will obtain evidence in the future will not suffice to survive summary judgment. *Neal*, 426 S.W.2d at 479-80. Donna had ample opportunity to conduct discovery. She had approximately two years prior to the motion for summary judgment in which to conduct discovery, yet she failed to produce any evidence to meet her burden when confronted with a summary judgment motion. *See Hartford*, 579 S.W.2d at 630. Finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael A. Galasso
Cincinnati, Ohio

BRIEF FOR APPELLEE:

David Klapheke
Ian C. B. Davis
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⁶ Although *Troxel* was decided at the directed verdict stage, it is nonetheless applicable for the proposition that self-serving evidence is insufficient as a matter of law to prove a claim for lost wages.