RENDERED: MAY 4, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000160-MR

BRENDA PERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 06-CI-006873

DAMON KELTY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND CAPERTON, JUDGES.

CAPERTON, JUDGE: The Appellant, Brenda Perry, appeals the December 22, 2010, order of the Jefferson Circuit Court, granting summary judgment in favor of the Appellees, Damon Kelty and State Farm Mutual Automobile Insurance Company, concerning Perry's claim for underinsured motorist coverage. On

appeal, Perry argues that the court erred in granting summary judgment. Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

Perry was the holder of an insurance policy[1] issued by State Farm. Perry brought suit against State Farm for underinsured motorist coverage following a motor vehicle accident in which she and Kelty were involved on August 5, 2005. When that accident occurred, Perry was driving a 1994 Ford Thunderbird. Below, Perry conceded that a certified copy of the policy issued by State Farm, with all attachments and endorsements, was a true and accurate copy of the policy in effect on or about August 5, 2005, the date of the accident.

Perry received the Declaration Page for the policy, which confirmed the initial policy period from September 10, 2003, to March 8, 2004, and that the policy consisted of the Declaration Page, the policy booklet-form 9817.5, and any endorsements issued to her with any subsequent renewal notice. State Farm asserts that the Declaration Page also advised Perry of the endorsements to her policy, and specifically referenced Endorsement 6126GP, which provided that policy holders had to file a claim for underinsured benefits within two years from the date of the accident or from the last basic or added reparation payment made by any reparation obligor, whichever later occurred. Perry acknowledged that she did not commence the action against State Farm for underinsured benefits within two (2) years of the

[1] Policy number 519572-17A was issued for a 1994 Ford Thunderbird. The Declaration Page of that policy indicated that it was effective from September 10, 2003, through March 8, 2004.

August 5, 2005, motor vehicle accident, or within two years of the last basic or added reparation benefits.

On March 30, 2009, Perry issued summons against State Farm, commencing an action for underinsured benefits. State Farm asserted the affirmative defense of statute of limitations based upon what Perry asserts was an undelivered and unsigned contract with an amendment that reduced her right to sue from fifteen years to two years. State Farm moved for summary judgment.

Perry asserted, in her response, non-delivery of the written contract and of the amendatory endorsement. She argues that State Farm presented no evidence that the 1994 Ford Thunderbird insurance contract, along with its amendatory endorsement, was ever delivered, received, signed, and/or acknowledged by Perry. Regardless, the trial court granted State Farm's motion for summary judgment on December 22, 2010. It is from that order that Perry now appeals to this Court.

On appeal, Perry makes one argument – namely, that in the absence of a signed, written contract, the statute of limitations was fifteen years to bring suit, and not two years, as urged by State Farm. Accordingly, she argues that the court below erred in entering its order of summary judgment. In making this argument, Perry acknowledges that the contract policy specifies a term of two years in which to bring suit. Nevertheless, she argues that a genuine issue of material fact existed concerning her notice and receipt of the new insurance policy along with its amendatory endorsement limitations.

Perry admits the attempts of State Farm to establish that she received a copy of the insurance coverage contract for another vehicle that she owned, namely, a 1996 Dodge.[2] However, Perry asserts that coverage for the Dodge was cancelled because she no longer owned the vehicle. Further, she notes that the two vehicles had different policy numbers and different premium amounts. Thus, Perry argues that a whole new contract was developed when she purchased the Thunderbird, and that the terms and conditions were never delivered to her.

Perry asserts that without notice of the terms, conditions, and limitations of the new contract, the default statute of limitations should be fifteen years instead of two. Perry argues that State Farm had the burden of proving that she had received and signed the new contract with the specified terms, and that she had accepted them, and that without such proof, the court must favor the insured. She asserts that her admission that the policy was in effect was not determinative of the underlying issue as to whether she was provided with a copy of the contract and put on notice of its new limitations and conditions.

In response, State Farm argues that Perry's physical receipt of a copy of the policy, or lack thereof, is not a material fact in this matter. State Farm argues that Perry acknowledged receipt of the Declaration Page and the premium notices for her policy, all received from September of 2003 until her motor vehicle accident in August of 2005. Further, it asserts that Perry availed herself of the policy terms and conditions when she commenced her action, albeit untimely,

[2] Policy number 519572-C08-17.

against State Farm for underinsured benefits. State Farm asserts that receipt of the Declaration Page, which indentified the contents of her policy, and her affirmative action of paying premiums, as well as her citation to a provision of the written policy to support an action for benefits, all confirm Perry's acceptance of the policy. State Farm argues that in availing herself of one of the provisions of the policy, Perry bound herself to all of the policy's provisions, terms, and conditions, including the time limitations on when she had to commence an action for underinsured benefits. Accordingly, it argues that summary judgment was appropriately entered.

The law on matters of summary judgment in this Commonwealth concerning appeals from an order granting summary judgment is well-established. This Court must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is only appropriate 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 a judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. For summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). Thus, the proper function of summary judgment is to terminate litigation when, as a matter of law, 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 Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Further, we note that appellate courts are not required to defer to the trial court when factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in the opposing party's favor. *Steelvest,* 807 S.W.2d at 480. However, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Id.* at 482. We review the arguments of the parties with these standards in mind. Having reviewed the record and applicable law, we are compelled to affirm the court below in granting State Farm's motion for summary judgment. A review of the law of this Commonwealth establishes that the two-year limitation to commence an action for underinsured benefits set forth in Perry's policy is the same limitation as that set for an action against a tortfeasor in the Kentucky Motor Vehicle Reparations Act, as codified at Kentucky Revised Statutes (KRS) 304.39-230(6). As this Court has previously held, a two-year limitation of this nature for suits against an underinsured carrier is not unreasonable. *See Elkins v. Kentucky Farm Bureau Mutual Ins. Co.*, 844 S.W.2d 423 (Ky.App. 1992).

Perry advises this Court that she did not receive a copy of the policy, or Endorsement 6126GP, nor was she aware of the terms and conditions contained therein, a contention disputed by State Farm. Without question, however, Perry paid the premiums on the policy and admitted receipt of the Declaration Page outlining the contents of the policy. In so doing, Perry bound herself to the terms of the policy, including the limitation for filing an action contained therein. Furthermore, our courts have clearly held that the lack of knowledge of the contents of a written contract of insurance cannot serve as a legal basis for voiding its provisions. *Midwest Mutual Insurance Co. v. Wireman*, 54 S.W.3d 177 (Ky. App. 2001).

Our review of the record reveals that the limitation contained in the policy is clearly set forth in Endorsement 6126GP, which was referenced in the Declaration Page that Perry admittedly received. Unawareness of the content of the provisions referenced therein cannot serve as a basis for invalidating same.

Wherefore, for the foregoing reasons, we hereby affirm the December 22, 2010, order of the Jefferson Circuit Court, granting summary judgment in favor of the Appellees.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian K. Darling
Louisville, Kentucky

BRIEF FOR APPELLEES:

Dennis R. McGlincy
Louisville, Kentucky