

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA12-613

NATIONWIDE MUTUAL  
INSURANCE CO.

APPELLANT

V.

JOHN MATTHEWS, JASON D.  
BENNETT, JERRY B. DOSSEY, and  
LINDA J. DOSSEY

APPELLEES

Opinion Delivered March 13, 2013

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT  
[NO. CV-08-1866]

HONORABLE GARY ARNOLD,  
JUDGE

REVERSED AND REMANDED

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## BILL H. WALMSLEY, Judge

Appellant Nationwide Mutual Insurance Company (Nationwide) brings this appeal from the trial court's order granting summary judgment to appellee John Matthews. We reverse and remand.

Jason Bennett, the son of Linda Dossey, was driving a 1998 Honda Civic on March 31, 2007, when he was involved in an accident, and his passenger, John Matthews, was injured. Nationwide filed a complaint seeking a declaratory judgment of rights under insurance policies issued to Jerry and Linda Dossey. In paragraph seven of its complaint, Nationwide alleged that there was no policy covering the Civic on the date of the accident because the Dosseys had removed the Civic from their policy effective in 2003. Alternatively, Nationwide asserted that, if a policy did cover the Civic on the date of the accident, Nationwide was entitled to rescind the policy and afford no coverage to Matthews beyond



the compulsory insurance minimum of \$25,000. Nationwide based this right of rescission on material misrepresentations by the Dosseys concerning failing to list Bennett as an insured driver, falsely representing that the Civic was garaged in Bella Vista, misrepresenting the ownership of the Civic, and failing to inform Nationwide of Bennett's DWI citations and suspensions of license.

Nationwide filed a motion for partial summary judgment on its second theory for relief—that Nationwide was entitled to rescind the policy to the compulsory insurance minimum. This motion was denied. Matthews filed a counterclaim against Nationwide seeking a declaratory judgment that he was entitled to make a claim against the policy up to the policy limits of \$500,000 and that Nationwide was obligated to provide a defense for Bennett in a separate lawsuit Matthews had filed against him. Bennett also filed a counterclaim requesting a declaratory judgment that the Civic was insured by Nationwide and that as the operator of the Civic, he was an insured person under the terms of the policy to the full limits of liability.

On July 22, 2011, Matthews filed a motion for summary judgment. He argued that the Dosseys had made timely payments via automatic bank draft on the policy covering the Civic since 2002. He claimed that because the Dosseys were of the belief that the Civic had been removed from the policy in 2003, they could not have made any misrepresentations to Nationwide. Matthews also argued that it was contrary to case law and public policy to allow an insurer to deny coverage and refuse to cover extensive medical bills of an innocent third party.



In support of his motion, Matthews included an affidavit of Linda Dossey, stating that she called the Jim Jefferson Nationwide agency on December 15, 2003, and informed Shaila Witt that title and registration to the Civic had been transferred to Bennett, that he had purchased his own policy of insurance, and that the Civic should be removed from the Dosseys' policy. Linda stated that until she and her husband were notified by Nationwide after the accident, they were not aware that the Civic had remained on the policy and that they had been paying premiums for coverage of that vehicle. Linda said that she then provided Jefferson with verification that Bennett had purchased a liability insurance policy on December 15, 2003. She said that Jefferson investigated the matter, informed the Dosseys of the mistake made by his office, apologized for the inconvenience, and assured them that the premiums would be returned and their policy would not be canceled.

Nationwide filed a response to the motion for summary judgment, arguing that the policy included the following conditions:

The policyholder has a duty to notify us as soon as possible of any change which may affect the premium or the risk under this policy. This includes, but is not limited to, changes in:

- (1) the principal garaging address of the insured vehicle(s), which must be reported to us within 30 days of the date the address change becomes effective;
- (2) drivers;
- (3) use of the insured vehicle(s).

Nationwide also pointed to a section in the policy on fraud and misrepresentation, which includes a statement that Nationwide may void the policy or deny coverage if any insured person knowingly or unknowingly concealed, misrepresented, or omitted any material fact at any time during the policy period. Nationwide argued that they were never informed that



Bennett was a driver of the vehicle, and if they had been, they would have monitored his driving record and taken appropriate underwriting action on any violations that occurred, including cancelling the policy after Bennett's 2004 DWI. Nationwide also claimed that it had no record of Linda's alleged phone call in 2003 and that the Dosseys never informed them of the change in garaging location or change in ownership. They argued that even if the phone call was made, material misrepresentations had been made prior to the call.

Matthews filed a reply, arguing in part that when Linda Dossey first insured the Civic with Nationwide in 2000, she informed Jefferson that Bennett was the primary driver of the vehicle. Matthews argued that Jefferson said that he would not contradict this claim. Matthews argued that Nathan Combs, a Nationwide agent, testified that it was common practice for insureds' children to maintain their parents' address and not change the garaging location of the vehicle. Thus, Matthews claimed that there was no misrepresentation because Bennett was a college student when he moved from Benton County to Washington County. Regarding the change in ownership, Matthews argued that it did not occur until December 2003, when the vehicle was supposed to be removed from the policy.

After a hearing on the motion, the trial court entered its order granting summary judgment on May 18, 2012, stating in part that

[f]rom the record before this Court, by the actions taken by Nationwide in July and August of 2007 after being told of this telephone call by Linda J. Dossey, after being provided with documentation of the December 15, 2003 American National policy, after having the opportunity to investigate the matter to its satisfaction, in electing to reinstate the Dossey's policy without interruption in coverage, and in refunding the Dossey's premiums back to the very date of December 15, 2003, Nationwide has clearly acknowledged that the call in question was made. There is no other reasonable explanation for Nationwide's decision to refund the premiums collected after that very



date other than the fact that it had accepted responsibility for the mistake. Nationwide's attorney did not offer any argument concerning the intention of Nationwide's actions when specifically requested by the Court to do so. Nationwide's decision to retroactively cancel the insurance coverage for the Honda automobile back to the December 15, 2003 date served as a settlement and resolution of the disputed coverage between Nationwide and the Dosseys; however, that retroactive cancellation of the policy is not binding on the Counter-Claimants, John Matthews and Jason D. Bennett . . . .

The court also found that after the 2003 phone call, the Dosseys had no further duty to notify Nationwide of any matter pertaining to the vehicle or its driver; that the Dosseys did not make misrepresentations to Nationwide in securing the coverage for the Civic; and that no genuine issue of material fact remained. The court concluded that Nationwide was liable up to the policy limits. Nationwide filed a timely notice of appeal.

A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Neill v. Nationwide Mut. Fire Ins., Co.*, 355 Ark. 474, 139 S.W.3d 484 (2003). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Nationwide argues that material questions of fact remain as to whether the 2003 cancellation phone call occurred and whether the Dosseys misrepresented material facts



concerning their policy. Nationwide claims that the phone call was clearly disputed by Shaila Witt. Witt testified in her deposition that she kept careful records of her contacts with policyholders and that she had no record of a request to discontinue coverage of the Civic. Noting that the Dosseys continued to receive policy-renewal notices and proof-of-insurance cards for the Civic, Nationwide argues that serious concerns are raised about the Dosseys' testimony and belief that the Civic had been dropped from coverage. This conflicts with the Dosseys' claim that the premiums were refunded based on the phone call and that Jefferson had admitted to them that a mistake had occurred in his office.

There was conflicting evidence as to whether the phone call was made and thus, whether the Dosseys had a continuing duty to notify Nationwide. It is not the role of the trial court, in deciding whether to grant summary judgment, to weigh and resolve conflicting testimony. *Turner v. Nw. Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 105, 133 S.W.3d 417, 424 (2003). It is improper for the trial court to make findings of facts as the purpose of summary judgment is to determine if there are issues of fact to be tried. *See Vang Lee v. Mansour*, 104 Ark. App. 91, 96, 289 S.W.3d 170, 174 (2008). We hold that the trial court erred in finding that Nationwide had acknowledged the call by its actions and that its actions constituted a settlement of the disputed coverage. The trial court should deny summary judgment if, under the evidence, reasonable minds might reach different conclusions from the same undisputed facts. *Bryan v. City of Cotter*, 2009 Ark. 457, 344 S.W.3d 654. We find that reasonable minds might reach different conclusions as to the motivation for Nationwide's actions. Furthermore, if there was no settlement of coverage, then questions of fact also



Cite as 2013 Ark. App. 175

remain as to the alleged misrepresentations. Therefore, we reverse the summary judgment.

Reversed and remanded.

GLOVER and BROWN, JJ., agree.

*Elliott & Smith, P.A.*, by: *J. Timothy Smith*, for appellant.

*Jerry B. Dossey* and *Linda J. Dossey*, pro se appellees.