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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

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Ben E. Keith Company, Inc.

v.

Lyndon Southern Insurance Company

**Appeal from Tallapoosa Circuit Court
(CV-19-900094)**

WISE, Justice.

Ben E. Keith Company, Inc. ("BEK"), appeals from an order by the Tallapoosa Circuit Court entering a summary judgment in favor of Lyndon Southern Insurance Company ("Lyndon") on Lyndon's complaint for a declaratory judgment. We reverse and remand.

Facts and Procedural History

On December 14, 2018, Felicia Edwards and Robert Allen Marak were involved in a motor-vehicle accident in Dadeville. Felicia was driving a 2009 Toyota Camry automobile that was owned by Annette Edwards and insured by Lyndon. Marak was driving a tractor-trailer that was owned by BEK. As a result of the accident, BEK incurred damage to its tractor-trailer.

On September 26, 2019, BEK sued Felicia and Annette in the Tallapoosa Circuit Court. The complaint stated claims of negligence and wantonness against both Felicia and Annette and a claim of negligent entrustment against Annette.¹ BEK later amended the complaint to add a negligent-maintenance claim against Annette.

¹On September 1, 2020, BEK filed a motion for the entry of defaults and for the entry of default judgments against Felicia and Annette based on their failure to respond to its complaint against them. On September 17, 2020, Felicia and Annette filed answers to BEK's complaint. They denied BEK's claims and asserted multiple affirmative defenses.

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On September 30, 2019, Lyndon filed a complaint for a declaratory judgment against Felicia, Annette, and BEK in the Tallapoosa Circuit Court. In its complaint, Lyndon included the following factual allegations:

"6. Annette Edwards completed an Application for Automobile Insurance with Lyndon Southern Insurance Company on April 9, 2018.

"7. Annette Edwards is the only identified driver on the Application for Automobile Insurance with Lyndon Southern Insurance Company.

"8. The Application for Automobile Insurance does not identify any excluded drivers.

"9. On the Application for Automobile Insurance, Annette Edwards agreed that all people who resided in her household, including children away at school, had been disclosed on the Application, either listed as a driver or excluded from coverage.

"10. On the Application for Automobile Insurance, Annette Edwards certified that she listed all persons in her household and all drivers of the vehicles as well as all children whether living with her or not and that she understood that no coverage would be provided for drivers that are not listed on her Policy whether they are in her household now or enter it later.

"11. Annette Edwards signed the Application for Automobile Insurance as well as all certifications contained within the Application for Automobile Insurance on April 9, 2018.

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"12. Lyndon Southern Insurance Company issued a Declarations Page to Annette Edwards based on the information she provided in the Application for Automobile Insurance.

"13. The Policy Declarations Page identified the Policy term as April 9, 2018, through October 9, 2018.

"14. The Declarations Page identified Annette Edwards as the only covered driver.

"15. The Declarations Page did not identify any excluded drivers.

"16. Lyndon Southern issued a Renewal Automobile Policy Declarations page to Annette Edwards for a Policy term of October 9, 2018, through April 9, 2019.

"17. The Renewal Automobile Policy Declarations page identified Annette Edwards as the only covered driver.

"18. The Renewal Automobile Policy Declarations page did not identify any excluded drivers.

"19. The Renewal Automobile Policy Declarations page identified a 2009 Toyota Camry

"20. Felicia Edwards is Annette Edwards's daughter.

"21. Felicia Edwards is under the age of 25 years old.

"22. Felicia Edwards lived with Annette Edwards on April 9, 2018.

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"23. Felicia Edwards lived with Annette Edwards on October 9, 2018.

"24. Felicia Edwards lived with Annette Edwards on December 14, 2018.

"25. Felicia Edwards has lived with Annette Edwards during all Policy periods of the Lyndon Southern Policies.

"26. Felicia Edwards was involved in a motor vehicle accident on December 14, 2018.

"27. The motor vehicle accident occurred in Dadeville, Tallapoosa County, Alabama.

"28. Felicia Edwards did not have a valid driver's license at the time of the motor vehicle accident.

"29. Felicia Edwards was driving the 2009 Toyota Camry identified on the Renewal Automobile Policy Declarations page issued by Lyndon Southern Insurance Company to Annette Edwards."

Lyndon also asserted that the policy it issued to Annette excluded coverage for "[a]ny operator of a vehicle who is not listed as a driver on the Policy Applications, Declarations, and/or added by Endorsement who is under the age of twenty-five and is either a Family Member or resides in the same household as the Named Insured" and for "[a]n operator of a vehicle who is an unlicensed driver or whose driving privileges have been

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terminated or suspended." Lyndon requested, in pertinent part, the following:

"... That the Court order, adjudge, and decree that this is a proper cause for an action of declaratory judgment and that there is a bona-fide controversy between the parties as to their legal rights, duties, status, and liabilities.

"... That the Court declare that Lyndon Southern has no duty to defend nor indemnify Annette Edwards under the Policy.

"... That the Court declare that Lyndon Southern has no duty to defend or indemnify Felicia Edwards under the Policy."

On November 4, 2019, BEK filed an answer to Lyndon's complaint for a declaratory judgment. On November 4, 2019, BEK moved to have the two actions consolidated. On November 5, 2019, the trial court granted that motion.

On November 14, 2019, Lyndon filed motions for the entry of defaults against Annette and Felicia based on their failure to file answers to its declaratory-judgment complaint. On September 21, 2020, the trial court granted Lyndon's motion for entry of defaults against Felicia and Annette. It then set the matter for further hearing on October 19, 2020.

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On October 7, 2020, Lyndon filed a motion for a summary judgment on its complaint for a declaratory judgment. It argued that Annette had

"made material misrepresentations on her Insurance Application by failing to identify her daughter, Felicia Edwards, as a household resident and potential driver. As such, the [policy] is void and does not afford Felicia Edwards or Annette Edwards coverage for the subject accident as the unidentified Felicia Edwards was driving."

Lyndon asserted that those alleged misrepresentations were material and caused the policy to be void ab initio. It also argued that the policy did not afford any coverage because Felicia was an unlicensed driver and was, therefore, a noncovered person. Finally, Lyndon argued that, because the vehicle was being driven by a noncovered person, there was no coverage for Annette with regard to BEK's negligent-entrustment and negligent-maintenance claims.

On October 19, 2020, the trial court conducted the scheduled hearing.

On November 3, 2020, BEK filed a Rule 56(f), Ala. R. Civ. P., motion for a continuance to complete discovery so that it could respond to

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Lyndon's motion for a summary judgment.² In that motion, BEK asserted, in part:

"3. Lyndon bases its motion on the unsupported allegation that Annette Edwards misrepresented certain facts on her application for the insurance policy and that Felicia Edwards is not a covered driver because she was unlicensed.

"4. However, Lyndon has submitted no admissible evidence to support either of these factual, allegations -- presumably because no discovery has taken place in this matter."

BEK supported its motion with an affidavit from its attorney.

²On that same date, BEK filed a motion for a new trial and/or for reconsideration of the trial court's alleged October 19, 2020, oral ruling granting Lyndon's motion for a summary judgment. Specifically, it noted in that motion that "counsel for the Edwards[es] informed the undersigned that the court had granted Lyndon's motion for a summary judgment from the bench." Counsel for Lyndon repeated that assertion during a second hearing on December 21, 2020. However, nothing in the transcript of the hearing on October 19, 2020, or from the case-action-summary-sheet in the trial court indicates that the trial court actually granted Lyndon's motion for a summary judgment on October 19, 2020. Rather, the case-action-summary-sheet includes the notation "Summary Judgment/No Action" on October 19, 2020. Instead, as is discussed *infra*, the trial court entered a written order granting the motion for a summary judgment on January 8, 2021.

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On December 21, 2020, the trial court conducted a status conference.

On January 8, 2021, the trial court entered the following written order granting Lyndon's motion for a summary judgment:

"Before this Honorable Court is Lyndon Southern Insurance Company's Motion for Summary Judgment pertaining to its Complaint for Declaratory Judgment Oral Argument was heard on the Motion in open Court on October 19, 2020, and again on December 21, 2020. Based upon a review of the Motion for Summary Judgment, including the factual and legal arguments, and Oral Argument, this Court hereby grants Lyndon Southern's Motion for Summary and in doing so, Orders, Declares, and Finds that Lyndon Southern Insurance Company has no duty to defend nor indemnify Felicia Edwards or Annette Edwards for the claims and causes of action asserted by Ben E. Keith Company, or any other entity, whether named or unnamed, whether currently pending or arising in the future, regarding the motor vehicle accident that occurred on December 14, 2018.

"This is a final order addressing all claims asserted in the Complaint for Declaratory Judgment."

BEK appealed the trial court's judgment to the Court of Civil Appeals, and that court transferred the appeal to this Court.

Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial

court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

"Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

"The role of this Court in reviewing a summary judgment is well established -- we review a summary judgment de novo, " 'apply[ing] the same standard of review as the trial court applied.' " ' Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d 63, 69 (Ala. 2007) (quoting Stokes v. Ferguson, 952 So. 2d

355, 357 (Ala. 2006), quoting in turn Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004). ' "If the movant meets [its] burden of production by making a prima facie showing that [it] is entitled to a summary judgment, 'then the burden shifts to the nonmovant to rebut the prima facie showing of the movant.' " ' Horn, 972 So. 2d at 69 (quoting American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807, 811-12 (Ala. 2004), quoting in turn Lucas v. Alfa Mut. Ins. Co., 622 So. 2d 907, 909 (Ala. 1993)).

" ' "[T]he manner in which the [summary-judgment] movant's burden of production is met depends upon which party has the burden of proof ... at trial." Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)). If ... " 'the movant has the burden of proof at trial, the movant must support his motion with credible evidence, using any of the material specified in Rule 56(c), [Ala.] R. Civ. P. ("pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits").' " 769 So. 2d at 909. " 'The movant's proof must be such that he would be entitled to a directed verdict [now referred to as a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.] if this evidence was not controverted at trial.' " Id. In other words, "when the movant has the burden [of proof at trial], its own submissions in support of the motion must entitle it to judgment as a matter of law." Albee Tomato, Inc. v. A.B. Shalom Produce Corp., 155 F.3d 612, 618 (2d Cir. 1998) (emphasis added). See also Equal Employment Opportunity Comm'n v. Union Independiente de la Autoridad de Acueductos y

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Alcantarillados de Puerto Rico, 279 F.3d 49 (1st Cir. 2002); Rushing v. Kansas City Southern Ry., 185 F.3d 496 (5th Cir. 1999); Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); Calderone v. United States, 799 F.2d 254 (6th Cir. 1986).'

"Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1195 (Ala. 2002). Moreover, we review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986)."

White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 10-11 (Ala. 2009).

Discussion

BEK argues that the trial court erroneously granted Lyndon's motion for a summary judgment because Lyndon did not produce substantial admissible evidence to establish that Felicia was a noncovered person under the policy that insured Annette's vehicle at the time of the accident. Specifically, it contends that Lyndon did not produce substantial admissible evidence to establish that Felicia did not have a valid driver's license at the time of the accident or to establish Felicia's age and residence at the time of the accident.

Lyndon attempted to support its contention that Felicia did not have a valid driver's license with a copy of an Alabama Uniform Traffic Crash

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Report ("the accident report"). It offered the accident report to establish that Felicia did not have a valid driver's license at the time of the accident because the investigating officer used a code for "Not Applicable" in the blank where Felicia's driver's license number was to be recorded. However, even assuming that the accident report was admissible, Lyndon did not present any evidence to establish that that code meant that Felicia did not have a driver's license. Therefore, the accident report, standing alone, was not sufficient to make a prima facie showing that there was no genuine issue of material fact as to whether Felicia had a valid driver's license at the time of the accident.

Lyndon attempted to support its contention that Felicia resided in Annette's household with copies of two "Domestic Return Receipts" that were addressed to Felicia and Annette at an address on Walker Road in Camp Hill; that were both apparently signed for by Annette; and that indicated a date of delivery of October 3, 2019. However, even assuming that they were admissible, the copies of the "Domestic Return Receipts," standing alone, did not establish that Felicia resided with Annette. At best, they established that Annette signed the return receipts sent to the

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address on Walker Road on October 3, 2019. See Johnson v. State, 421 So. 2d 1306 (Ala. Crim. App. 1982). Further, even though Lyndon alleged in its motion for a summary judgment that Felicia resided at the Walker Road address and that the accident report showed that Felicia resided at that address, the accident report actually lists Felicia's address as being on MLK Street in Camp Hill. Therefore, the evidence Lyndon submitted was actually in conflict and was not sufficient to make a prima facie showing that there was no genuine issue of material fact as to whether Felicia resided in Annette's household at the time of the accident.

Citing Dorcal, Inc. v. Xerox Corp., 398 So. 2d 665 (Ala. 1981), Lyndon also argued that the entry of defaults against Felicia and Annette constituted full proof of the allegations that were included in its complaint for a declaratory judgment. In Dorcal, this Court stated:

"The general effect of an entry of default is that of a decree pro confesso or a judgment by nil dicit at common law. 6 Moore's Federal Practice § 55.03(2) at 55-32 (2nd ed. 1976); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2681 (1971). Under a decree pro confesso, the defaulting party loses his standing in court, cannot appear in any way, cannot adduce any evidence and cannot be heard at the final hearing. Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927)."

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(Emphasis added.) Although the holding in Dorcal may apply to Felicia and Annette, there is no indication that that holding would apply to a third party such as BEK. In fact, the application of the Dorcal holding to a party like BEK, which answered and challenged the allegations in the complaint for a declaratory judgment, is counterintuitive and unwarranted. Cf. McDaniel v. Harleysville Mut. Ins. Co., 84 So. 3d 106 (Ala. Civ. App. 2011). Therefore, we conclude that Lyndon could not rely on the allegations that are included in its complaint for a declaratory judgment to establish any undisputed facts with regard to BEK.

For these reasons, Lyndon did not produce substantial evidence to establish that Felicia did not have a valid driver's license at the time of the accident and did not produce substantial evidence to establish that Felicia was under the age of 25 and resided in Annette's household at the time of the accident. Therefore, Lyndon did not shift the burden of proof to BEK. Accordingly, the trial court erred in granting Lyndon's motion for a summary judgment.

Conclusion

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For the above-stated reasons, we reverse the trial court's judgment and remand this case for proceedings that are consistent with this opinion.

REVERSED AND REMANDED.

Shaw, Bryan, and Mitchell, JJ., concur.

Bolin, Sellers, Mendheim, and Stewart, JJ., concur in the result.

Parker, C.J., dissents.