

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001026-MR

TILMOND DURHAM, TERRILL DURHAM, and
WALTER POWELL III, d/b/a DP ENTERPRISES;
IMA RUTH THRASHER, EXECUTRIX OF THE ESTATE
OF HOWARD THRASHER; IMA RUTH THRASHER,
INDIVIDUALLY; IMA RUTH TRASHER and BARRY
DOUGLAS THRASHER, EXECUTORS OF THE ESTATE
OF REBA COOPER; SALLY B. THRASHER

APPELLANTS

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 93-CI-00160

BITUMINOUS CASUALTY CORP.

APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART
* * * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Tilmond Durham, Terrill Durham, and Walter Powell III, d/b/a DP Enterprises; Ima Ruth Thrasher, individually and as executrix of the estate of Howard Thrasher; Barry Douglas Thrasher and Ima Ruth Thrasher as executors of the estate of Reba Cooper; and Sallie B. Thrasher, appeal the Clinton Circuit Court's summary judgment in favor of Bituminous Casualty

Corporation (BCC). The court concluded that BCC did not insure Tilmond Durham, Terrill Durham, and Walter Powell III, d/b/a DP Enterprises, against damages arising from the flow of noxious fumes from their oil wells onto and around the property of others. This appeal followed.

On November 13, 1993, Alvis Howard Thrasher, who is now deceased, Ima Ruth Thrasher, Barry Douglas Thrasher, Reba Cooper, who is now deceased, and Sallie B. Thrasher filed a civil complaint in the Clinton Circuit Court against Tilmond Durham, Terrill Durham, Walter Powell III, d/b/a DP Enterprises and Robo Enterprises, Inc. The plaintiffs alleged that the defendants allowed noxious fumes from the oil wells they operated to go onto the plaintiffs' land. They presented claims for negligence, negligence per se, failure to warn, strict liability, outrageous conduct, nuisance, and trespass.

Appellee BCC intervened in the circuit court action. It sought declaratory relief to the effect that the Commercial Lines Policy of insurance it issued to DP Enterprises did not cover any damages arising from the type of pollution or contamination alleged by the plaintiffs. After discovery, BCC moved for summary judgment. Initially, the trial court denied the motion, but it later granted it, concluding that the policy was not ambiguous and did not cover the damages claimed by the plaintiffs. After the court denied a motion to reconsider and ruled that the summary judgment was final and appealable, Tilmond

Durham, Terrill Durham, and Walter Powell III, d/b/a DP Enterprises; Ima Ruth Thrasher, individually and as executrix of the estate of Howard Thrasher; Barry Douglas Thrasher and Ima Ruth Thrasher as executors of the estate of Reba Cooper; and Sallie B. Thrasher appealed.

The appellants do not challenge the trial court's conclusion that no genuine issue of material fact existed. Instead, they challenge the court's application of the law to the facts. Specifically, they argue that the trial court erroneously interpreted the insurance policy between DP Enterprises, the Durhams, and BCC.

Summary judgment is proper when no genuine issue of material fact exists and when the movant is entitled to judgment as a matter of law. CR¹ 56.03. See also Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

In the case *sub judice*, no genuine issue of material fact existed. Rather, the trial court interpreted an insurance contract and determined that the movant was entitled to judgment as a matter of law. The interpretation and construction of an insurance contract is a matter of law for the court.[@] Kemper Nat. Ins. Cos. v. Heaven Hill Distilleries, Ky., 82 S.W.3d 869, 871 (2002). The standard of review is *de novo*.

Insurance contracts should be interpreted and enforced according to the language chosen by the parties. Nationwide Mut.

¹ Kentucky Rules of Civil Procedure.

Ins. Co. v. Nolan, Ky., 10 S.W.3d 129, 131 (1999). However, when the chosen language creates an ambiguity, the court properly resorts to rules of construction. Meyers v. Kentucky Medical Ins. Co., Ky. App., 982 S.W.2d 203, 209-210 (1997). Among these is the rule that the reasonable expectation of the insured should be favored, see Philadelphia Indemnity Ins. Co. v. Morris, Ky., 990 S.W.2d 621, 625 (1999), and the rule that the policy should be construed against the insurer, see Employers Ins. of Wausau v. Martinez, Ky., 54 S.W.3d 142, 145 (2001). Appellants argue that rules of construction should be employed in this case because the insurance contract at issue was ambiguous. BCC disagrees and argues that the trial court correctly found no ambiguity and interpreted the policy according to its plain meaning.

The Commercial General Liability Coverage Form contained an exclusion for ~~A~~**b**odily injury=or ~~p~~roperty damage= arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.@

An endorsement to the policy concerning the pollution exclusion replaced the aforementioned language with **A****b**odily injury or **p**roperty damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.@ The endorsement also defined ~~A~~**p**ollutants@ as ~~A~~**any** solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.@

There was also an endorsement which changed the policy to provide ACONTAMINATION OR POLLUTION COVERAGE.@ That endorsement provided coverage with respect to Aproperty damage.@

The endorsement also contained a definition of Acontamination or pollution hazard.@ It read as follows:

Acontamination or pollution hazard@includes Aproperty damage@arising out of a sudden and accidental discharge, dispersal, release or escape of oil or other petroleum substance or derivative (including any oil refuse or oil mixed with wastes) upon surface land or water.

The trial court determined that the ACONTAMINATION OR POLLUTION COVERAGE@endorsement provided coverage to the insured for property damage due to a Acontamination or pollution hazard.@

Further, the court noted the aforementioned definition of Acontamination or pollution hazard.@ The court then noted that the endorsement provided Aa quite limited exception to the comprehensive pollution exclusion.@The court further stated that A[t]he limited coverage for property damage is only brought into reality by a sudden and accidental discharge or dispersal of petroleum pollution upon surface land or water.@The court thus held that Athe discharge of noxious fumes=hydrogen sulfide gas was not upon surface land or water.= Consequently, the limited property damage coverage extended by the contamination or

² The endorsement contained no reference to coverage for Abodily injury,@ and bodily injury caused by pollutants had been excluded by the prior endorsement.

pollution coverage=endorsement was not effectuated in this action.@

We disagree with the trial court's interpretation of the insurance contract. We agree that there was initially a pollution exclusion for bodily injury and property damage. We also agree that the ACONTAMINATION OR POLLUTION COVERAGE@ endorsement removed the pollution exclusion with respect to property damage. However, we do not agree with the trial court that the definition of Acontamination or pollution hazard@was limited to a sudden and accidental discharge or dispersal of petroleum pollution upon surface land or water.

The endorsement states that Acontamination or pollution hazard@includes property damage occurring due to a sudden and accidental discharge or release of a petroleum substance or derivative upon surface land or water. The appellants argue that the use of the word Aincludes@rather than words such as Alimited to@indicates that the described type of pollution is included and that coverage is provided for all kinds of pollution. We agree.

A common usage of the word Ainclude@is Ato take in or comprise as a part of a whole.@ Merriam-Webster's Collegiate Dictionary, Tenth Edition, page 587 (2002). We believe the definition in the endorsement clearly and unambiguously defines Acontamination or pollution hazard@to include the type of property damage mentioned but is not to be limited to it. Had

BCC intended to limit the coverage to that language, it appears to us that it would have used the words "limited to" rather than "includes." Even if this language is arguably not as clear and unambiguous as we believe it to be, but rather is ambiguous and subject to more than one interpretation, then the interpretation given should favor the insured rather than the insurer.

See Martinez, supra. At any rate, whether the language is clear and unambiguous as we believe it to be or whether it is merely ambiguous, we cannot conclude that the trial court's interpretation was correct. Thus, we conclude that the trial court erred in this regard and that this portion of the judgment should be reversed.³

BCC also argues that this court should hold that there is no coverage under the policy because it expressly excluded coverage for injuries and damages that were intended or expected.

They assert that the Durhams expected the gases to be released from the oil wells. Further, they note the policy provision which states that the policy does not apply to "bodily injury or property damage expected or intended from the standpoint of the insured."

While it may be apparent that the insured individuals expected the oil wells to emit noxious gases during their operation, there is no indication that the insured individuals

³ We are unaware of why the trial court did not address the meaning of the word "includes" in its judgment and, likewise, why BCC did not address it in its brief to this court.

expected bodily injury or property damage to result. Further, the record does not reveal evidence supporting a conclusion that one should necessarily expect injuries and damages when these gases are present. Therefore, we conclude that this exclusion is not applicable to this case.

The remaining issue concerns whether there was coverage for the remaining claims of the appellants. The trial court stated that the appellants were seeking additional claims for ~~A~~bodily injury~~@~~ and that their claims did not fall within the definition of ~~A~~personal injury.~~@~~ It is apparent that the pollution exclusion excludes coverage for bodily injury resulting from pollutants. Since the ~~A~~CONTAMINATION OR POLLUTION COVERAGE~~@~~ endorsement related only to property damage, the exclusion as to bodily injury still applied. Thus, there was no coverage of any of the appellants' remaining claims to the extent they asserted claims for bodily injury. Since the appellants have not challenged the trial court's characterization of their remaining claims as bodily injury claims rather than personal injury claims, we affirm this portion of the trial court's judgment.

Based on the foregoing, the judgment of the Clinton Circuit Court is affirmed in part and reversed in part.

ALL CONCUR.

BRIEF FOR APPELLANTS,
THRASHER, ET AL:

Robert E. Reeves
Lexington, Kentucky

Thomas E. Carroll
Monticello, Kentucky

ORAL ARGUMENT FOR APPELLANT,
THRASHER, ET AL:

Robert E. Reeves
Lexington, Kentucky

BRIEF FOR APPELLEE:

William B. Orberson
William P. Swain
Paul J. Bishop
Louisville, Kentucky

ORAL ARGUMENT FOR BITUMINOUS
CASUALTY CORP.:

Paul J. Bishop
Louisville, Kentucky