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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002007-MR

HOB RICHARDS; RICHARDS BROTHERS LOGGING; AND KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLANTS

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 95-CI-00173

TIM MONTGOMERY AND MARY ANN BELLAMY, CO-EXECUTORS OF THE ESTATE OF J.C. MONTGOMERY, D/B/A J.C. MONTGOMERY USED CARS; REX BUNCH, ADMINISTRATOR OF THE ESTATE OF JAMES H. RICHARDS, DECEASED; JOHNNIE RICHARDS; AND LIBERTY MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING IN PART; REVERSING IN PART; VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Hob Richards, Richards Brothers Logging, and Kentucky Farm Bureau Mutual Insurance Company have appealed from an order of the Adair Circuit Court entered on August 17, 2001, which granted Liberty Mutual Insurance Company's motion for summary judgment on its cross-claim against Farm Bureau and its

insureds, Hob Richards and Richards Brothers Logging. The trial court ruled that Liberty Mutual was entitled to contribution from Farm Bureau in the amount of $50,000.00 and that Farm Bureau was obligated to pay Liberty Mutual for reasonable attorney's fees and defense costs. Having concluded that both Farm Bureau a Liberty Mutual were responsible for primary coverage under the insurance policies in question, we affirm on this issue. Having concluded that the trial court erred in setting the amount of the policy limits for Farm Bureau's coverage and by ordering Farm Bureau to pay its full policy limits without first determining a specific amount of damages and the apportionment of those damages, we reverse in part, vacate in part, and remand on these issues. Having further concluded that the issue of whether Liberty Mutual was entitled to an award of defense costs or attorney's fees is not ripe for our review, we remand as to that issue.

The facts and procedural history of this case are somewhat complex. In approximately late December 1994, J.C. Montgomery Used Cars sold a log truck to Sherman Greene, who subsequently sold the truck to Hob and Johnnie Richards. Hob and Johnnie, along with another brother, James, owned and worked for Richards Brothers Logging. In March 1995 Hob and Johnnie approached Tim Montgomery of J.C. Montgomery Used Cars, and requested his help in obtaining the certificate of title to the

log truck, which according to Greene had been lost. Tim Montgomery agreed to help and the parties reached an agreement whereby Greene would transfer the log truck back to J.C. Montgomery Used Cars, and the car dealership would then transfer the vehicle to Johnnie, who had already paid Greene for the log truck.[1]

On or about April 1, 1995, after the parties had obtained a duplicate title for the log truck, Greene transferred the title to the vehicle back to J.C. Montgomery Used Cars. During this time period, the Richards brothers had possession of the log truck, but they informed Tim Montgomery that the truck, which was in need of extensive repairs, would not be operated on the road until the transfer of title to Johnnie had been completed.

On April 27, 1995, James was driving the log truck on behalf of Richards Brothers Logging when it collided with a pick-up truck driven by Robert May. Both drivers were killed in the collision.[2] At the time of the accident, because the certificate of title evidencing the transfer of ownership to Johnnie had not yet been filed in the county clerk's office,

[1] At some point, the Richards brothers refused to have any further dealings with Greene. J.C. Montgomery Used Cars received no economic benefit for acting as a conduit in this agreement.

[2] The police report from the accident indicated that a load of logs shifted and caused James to lose control of the log truck, which then collided with Robert May's vehicle.

record title to the log truck remained in the name of J.C. Montgomery Used Cars.[3]

Insurance coverage for the log truck at the time of the accident was provided by a commercial liability insurance policy that J.C. Montgomery Used Cars had with Liberty Mutual covering its inventory. Additionally, Hob had obtained liability insurance on the log truck three months prior to the accident through Farm Bureau. Accordingly, on the date of the collision, there were two insurance policies in effect covering the log truck.

Following the accident in which her husband was killed, Mary Francis May, executrix of the estate of Robert May, filed suit in the Adair Circuit Court against, among others, J.C. Montgomery Used Cars. Liberty Mutual and Farm Bureau filed cross-claims against each other alleging that the other company's policy provided "primary" coverage and that their own coverage was limited to "excess" coverage. Both insurance companies' policies contained clauses relating to "primary" and "excess" coverage, which were tied to the concept of ownership. Thus, if the trial court found J.C. Montgomery Used Cars to be

[3] Just hours after the accident, a party acting on behalf of J.C. Montgomery Used Cars filed the certificate of title in the county clerk's office, which completed the transfer of ownership of the log truck to the Richards brothers. While the record is unclear concerning whether the Richards brothers had failed to timely act in regard to the transfer of title, it is undisputed that J.C. Montgomery Used Cars retained legal ownership of the truck at the time of the accident.

the sole “owner,” then its Liberty Mutual insurance policy would provide the “primary” coverage and the Farm Bureau policy obtained by Hob would provide only secondary or “excess” coverage, and vice versa.

In the trial court’s first ruling on the issue of ownership in an order entered on December 29, 1997, the trial court found that J.C. Montgomery Used Cars was the sole owner of the log truck at the time of the accident, and that Liberty Mutual was therefore responsible for the primary coverage of the vehicle. The circuit court granted partial summary judgment in favor of May on the issues of ownership and insurance coverage. Subsequently, after motions were filed by both parties and after a hearing was held, the trial court revisited the ownership issue. On June 4, 1999, the trial court granted J.C. Montgomery Used Cars’ motion for a declaratory judgment, finding that “Richards had primary custody and control of the vehicle.” The trial court ruled that Hob’s Farm Bureau policy would be responsible for primary coverage, while the Liberty Mutual policy would be responsible for secondary or excess coverage.

This second order prompted another series of motions from both parties, which resulted in the trial court once again revisiting the ownership issue. In an order entered on August 27, 1999, the trial court ruled that while the Richards brothers had custody and control of the vehicle, “primary liability

remains the responsibility of the owner -- which has previously been determined in this case to be J.C. Montgomery Used Cars." Thus, the trial court once again ruled that Liberty Mutual was responsible for primary coverage and Farm Bureau was responsible for secondary or excess coverage.

On October 4, 1999, Liberty Mutual settled May's claim within its policy limits,[4] but reserved its right to pursue cross-claims against Farm Bureau and its insureds for indemnity and/or contribution under the Farm Bureau policy. On October 15, 1999, the trial court entered an order dismissing May's complaint, but it reserved ruling on Liberty Mutual's right to pursue its cross-claims against Farm Bureau and the Richards brothers. On November 3, 1999, the trial court entered an order permitting the Richards brothers to file cross-claims against the estate of J.C. Montgomery and Liberty Mutual.[5] The parties were also ordered to file briefs regarding the issues of ownership and insurance coverage on the log truck.[6]

[4] Liberty Mutual's policy limits were for $350,000.00 and it agreed to pay May $283,000.00 and $1,137.20 in court costs in exchange for a full release of itself and its insureds. In addition, May released any claims she may have had against James, Hob, and Johnnie Richards, and Richards Brothers Logging.

[5] J.C. Montgomery, owner of J.C. Montgomery Used Cars, died during this litigation.

[6] Judge Paul Barry Jones retired without ruling on the competing cross-claims. Judge James G. Weddle signed the final order from which this appeal was taken.

On August 17, 2001, the trial court granted Liberty Mutual's motion for summary judgment. Relying on this Court's decision in Omni Insurance Co. v. Kentucky Farm Bureau Insurance Co.,[7] the trial court stated as follows:

> Farm Bureau did not condition liability coverage on the Richards having obtained a certificate of title to the 1973 International log truck. Accordingly, the Omni case controls and liability must be apportioned between [J.C. Montgomery Used Cars'] insurer -- Liberty Mutual -- and the [Richards brothers'] insurer -- Farm Bureau.
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> [B]oth [J.C. Montgomery Used Cars] and the Richards are "owners" of the 1973 International log truck and Liberty Mutual, as insurer for [J.C. Montgomery Used Cars] is entitled to indemnity and/or contribution from Farm Bureau, as the insurer for the Richards. . . .

The trial court ordered Farm Bureau to pay its policy limits of $50,000.00 to Liberty Mutual as contribution toward Liberty Mutual's settlement with May. Farm Bureau was also ordered to pay Liberty Mutual's defense costs and reasonable attorney's fees.[8] This appeal followed.

Farm Bureau claims the trial court erred (1) by ordering liability to be apportioned between it and Liberty Mutual; (2) by ordering it to pay the full policy limits of its

[7] Ky.App., 999 S.W.2d 724 (1999).

[8] While the summary judgment was made final and appealable under CR 54.02, it also provided that "[t]he exact amount of said defense costs and attorney fees shall be established by separate order."

coverage to Liberty Mutual as contribution; and (3) by requiring it to pay Liberty Mutual's defense costs and attorney's fees.

Farm Bureau first argues that liability should not have been apportioned between itself and Liberty Mutual, since J.C. Montgomery Used Cars as the record title holder on the date of the accident was the only "owner" of the log truck. In Omni, this Court was presented with a factual scenario much like the one in the case at bar. A father, Thomas, had purchased an automobile for his son, Mark, who was at the time living in Virginia. Thomas added the vehicle to his existing insurance policy. Mark subsequently took possession of the car and procured his own insurance policy with Omni. However, Mark was involved in an accident before the record title had been transferred in the county clerk's office from Thomas to him. At the time of the accident, the policies held by Thomas and Mark were both in effect. Omni argued that since title of the vehicle had not been transferred to Mark, he was not an owner of the car for purposes of coverage under his Omni insurance policy. This Court rejected that argument and stated:

> There is no question that Mark was the "owner" of the automobile as contemplated by his policy with Omni. Mark is listed as the "named insured" and as the "driver" on the declarations page of the policy.... Obviously, when Omni accepted Mark's premium and issued the policy, it did not do so conditioned upon Mark obtaining a Certificate of Title pursuant to Kentucky's

titling and registration statutes within any prescribed time period.[9]

Similarly, Farm Bureau did not condition the issuance of its policy with Hob upon him obtaining record title pursuant to Kentucky's titling and registration statutes. Hob testified that he purchased an insurance policy for the log truck from Farm Bureau, that he paid premiums to Farm Bureau pursuant to that policy, and that Farm Bureau gave him a copy of said policy showing his coverage. Therefore, Hob was an "owner" for purposes of the insurance policy issued by Farm Bureau.

As Omni makes clear, the liability of Farm Bureau and Liberty Mutual must "be determined by the terms and provisions of the respective policies. . . ."[10] The interpretation of an insurance policy is a question of law which is subject to de novo review on appeal.[11] When interpreting words of an unambiguous contract provision, the words will be given their plain and ordinary meaning.[12]

Thus, we turn to the language of Farm Bureau's and Liberty Mutual's policies to determine their respective

[9] Omni, 999 S.W.2d at 728.

[10] Id. at 727 (quoting Royal-Globe Insurance Companies v. Safeco Insurance Co. of America, Ky., 560 S.W.2d 22, 24-25 (1977)).

[11] Cinelli v. Ward, Ky.App., 997 S.W.2d 474, 476 (1998).

[12] Nationwide Mutual Insurance Co. v. Nolan, Ky., 10 S.W.3d 129, 131 (1999).

liability. The relevant portion of Farm Bureau's policy covering the log truck reads as follows:

> 6. OTHER INSURANCE
>
> a. For any a covered auto you own, this policy provides primary insurance. For any a covered auto you don't own, the insurance provided by this policy is excess over any "other collectible insurance" [emphases original].[13]

As we discussed previously, under the principles announced in Omni, the log truck was an "a covered auto" "owned" by Hob for purposes of coverage under the Farm Bureau policy. Thus, according to the plain and ordinary meaning of the above contract provision, Farm Bureau is liable for primary coverage on the log truck. Accordingly, the trial court did not err by ruling that Farm Bureau's policy as well as Liberty Mutual's policy provided primary coverage.

Farm Bureau next argues that the trial court erred by ordering it to pay its full policy limits of $50,000.00 to Liberty Mutual as contribution. There are three separate aspects to this issue. First, Farm Bureau claims the trial court erred by setting its liability at the maximum of $50,000.00 per accident, instead of the maximum of $25,000.00

[13] Liberty Mutual's policy has almost identical language: "For any covered auto you own, this Coverage Form provides primary insurance. For any covered auto you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance" [emphases original].

per person. Liberty Mutual's only response to this argument is in a footnote which states "[t]he $50,000.00 coverage limit from the Kentucky Farm Bureau policy applies (as opposed to the $25,000.00 limit) because multiple persons were involved in this accident – Robert May and James Richards." Liberty Mutual cites no authority for this argument, and we would not expect there to be any. Clearly, Farm Bureau's declarations page by referring to a limitation on coverage of $25,000.00 per person is referring to a person asserting a claim against its insured, not James Richards, who was its insured. Even if Liberty Mutual were correct that Farm Bureau had additional exposure of $25,000.00 because James Richards was also killed, that additional coverage of $25,000.00 would apply to James's damages, not May's. Thus, Farm Bureau's contribution toward May's damages is limited to $25,000.00.

The second aspect of this issue relates to the trial court's failure to apportion each insurance company's contribution to the settlement. This issue of apportionment in cases involving an "other insurance" provision is a topic that has been written about extensively.[14] There are three approaches that have been taken by the courts.[15] While Kentucky has yet to

[14] Susan Randall, Coordinating Liability Insurance, 1995 Wis.L.Rev. 1339 (1995).

[15] Mission Insurance Co. v. Allendale Mutual Insurance Co., 626 P.2d 505 (Wash. 1981).

choose a method of apportionment in such cases, it is not necessary for us to do so in the case sub judice since Liberty Mutual's policy[16] contractually designated the method of apportionment that is most favorable to Farm Bureau.[17] Thus, each company's share is based on the proportion of its applicable policy limits to the other company's applicable policy limits.

The third aspect of this issue relates to the trial court ordering Farm Bureau to pay its full policy limits[18] to Liberty Mutual without making any factual findings regarding the amount of damages arising from the accident in question. If Farm Bureau wishes to litigate the extent of May's damages, it is entitled to factual findings on this issue. Of course, if May's damages are $375,000.00 or greater, Farm Bureau's per person limits of $25,000.00 will be exhausted.[19] Otherwise, Farm

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[16] "5. Other Insurance.

. . .

d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis."

[17] See Dairyland Insurance Co. v. Drum, 568 P.2d 459, 463 (Colo. 1977). Unfortunately, Farm Bureau has failed to provide us with the provision in its policy addressing apportionment.

[18] In our discussion of the first aspect of this issue, we held that the trial court erred by setting the policy limits at $50,000.00 instead of $25,000.00.

[19] It is our understanding that there is no factual dispute that Farm Bureau provided coverage limits of $25,000.00 per person and Liberty Mutual provided coverage limits of $350,000.00. Thus, Farm Bureau's proportional share would

Bureau's proportional share will be 1/15th of May's total damages.

Accordingly, the order directing Farm Bureau to pay the full policy amount is vacated. This matter is remanded to the trial court so that factual findings can be made with respect to the amount of damages arising from the accident and the apportionment of those damages between Farm Bureau and Liberty Mutual. Farm Bureau's maximum contribution shall not exceed $25,000.00.

Finally, Farm Bureau argues that the trial court erred by ordering it to pay Liberty Mutual's defense costs and attorney's fees. In response, Liberty Mutual argues that it was entitled to such fees on the basis that Farm Bureau received a benefit from Liberty Mutual's settlement with May. While there is some precedent for an apportionment of defense costs in cases involving two insurance companies with primary coverage,[20] in the case sub judice this issue was reserved by the trial court for a future ruling. At this juncture of the case, the trial court has yet to exercise any discretion in setting the amount of reimbursement. Accordingly, we hold that the trial court's

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be 1/15th of the damages as determined by the fact-finder, but in no event greater than its policy limits of $25,000.00. Therefore, if the damages are $375,000.00 or less, Farm Bureau would be required to contribute 1/15th of that amount; but if the damages exceeded $375,000.00, its contribution would be limited to $25,000.00.

[20] Pacific Indemnity Co. v. Federated American Insurance Co., 499 P.2d 247, 249 (Wash.App. 1972).

order requiring Farm Bureau to pay Liberty Mutual's defense costs and attorney's fees is not ripe for our consideration and this issue must be considered by the trial court on remand.[21]

Based on the foregoing reasons, the order of the Adair Circuit Court is affirmed in part, reversed in part, vacated in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel R. Smith
Jamestown, Kentucky

BRIEF FOR APPELLEE:

John David Cole
Matthew P. Cook
Bowling Green, Kentucky

ORAL ARGUMENT FOR APPELLEE:

John David Cole
Bowling Green, Kentucky

[21] Stephenson v. Burton, Ky., 246 S.W.2d 999, 1000 (1951); Stephens v. Kidd, 298 Ky. 38, 43, 181 S.W.2d 688, 690 (1944).