RENDERED: DECEMBER 24, 2003; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000113-MR

INDIANA INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM STEWART, JUDGE
ACTION NO. 01-CI-00580

CHARLES K. BROWN, ADMINISTRATOR OF
THE ESTATE OF JOSE GARCIA;
MARIA PUENTE SALANDA, INDIVIDUALLY
AND AS NEXT OF FRIEND OF RUBEN VILLICANA PUENTE,
MARIA CONSUELO VILLICANA, JESUS VILLICANA PUENTE;
DARREN AKERS; SHELBY AND FINCH GARDEN, LLC,
D/B/A WILLOWBANK GARDEN COMPANY;
MATT ZEHNDER; CSX TRANSPORTATION;
AND WENDY O'BANION, AS ADMINISTRATRIX
OF THE ESTATE OF CHASE O'BANION — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, TACKETT, AND VANMETER, JUDGES.

KNOPF, JUDGE: Indiana Insurance Company appeals from a summary judgment in a declaratory judgment action finding that it is obligated to defend and indemnify its named and additional insureds under a commercial automobile liability policy issued to

Shelby and Finch Garden, LLC, d/b/a Willowbank Garden Company (Willowbank). Indiana Insurance Company argues that the policy clearly excludes coverage of injuries to Willowbank's employees, and hence it has no duty to defend or indemnify Willowbank or its additional insured against a claim brought by the estates of two employees who were killed during the course of their employment. Because we agree that the individuals involved in the accident were clearly employees within the plain meaning of the policy, we reverse and remand for entry of a summary judgment order in favor of Indiana Insurance.

Matt Zehnder is a principal of Willowbank, which provides gardening and landscaping services to the public. Darren Akers, Jose Garcia, and Chase O'Banion were employees of Willowbank. On June 19, 2001, Akers was driving a pickup truck owned by Zehnder, and Garcia and O'Banion were passengers in the truck. As the truck proceeded across a railroad track, it was struck by a train, and Garcia and O'Banion were killed. Subsequently, Garcia's estate and Garcia's family filed a wrongful-death action against Zehnder, Willowbank, Akers, and CSX Transportation, the owner of the railroad crossing where the accident occurred.

At the time of the accident, Willowbank did not have workers' compensation coverage for its employees. However, Willowbank had obtained a business automobile liability insurance

policy through Indiana Insurance Company covering the pickup truck. In response to the complaint by Garcia's estate, Indiana Insurance filed an intervening complaint and a petition for declaration of rights. Indiana Insurance also named O'Banion's estate as a third-party defendant.

Indiana Insurance argued that its policy specifically excluded coverage of employees, and that Willowbank's failure to obtain workers' compensation coverage did not extend the scope of its coverage. Following cross-motions for summary judgment, the trial court found, in an order entered on October 22, 2002, that the policy did provide coverage in this situation, and that Indiana Insurance is obligated to defend and indemnify its named and additional insureds under the policy. By an order entered on December 13, 2002, the trial court made its summary judgment order final and appealable.

The trial court did not set out its reasons for finding coverage under the policy. However, the central issue in this case is undisputed: Does the policy exclude coverage for employees such as Akers, Garcia, and O'Banion? We begin our analysis with Section III, Paragraphs B3, B4, and B5 of the policy, which provide in relevant part:

> This insurance does not apply to any of the following:
>
> . . . .

> **3. Workers' Compensation**
> Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits, or unemployment compensation law or any similar law.
>
> **4. Employee Indemnification and Employer's Liability**
> "Bodily injury" to:
> a. An "employee" of the "insured" arising out of and in the course of:
> (1) Employment by the "insured"; or
> (2) Performing the duties related to the conduct of the "insured's" business; . . .
>
> **5. Fellow Employee**
> "Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

Clearly, the policy excludes coverage to any employee of Willowbank. More specifically, the policy excludes coverage for any employee to whom Willowbank may be liable for workers' compensation benefits, for injuries to an employee arising out of the scope of employment, and for injuries caused to an employee by a fellow employee. Garcia and O'Banion argue that the workers' compensation exclusion in the policy does not apply in this case because Willowbank failed to obtain workers' compensation coverage and is not immune from civil liability under the Act.[1] However, Willowbank's failure to obtain workers' compensation coverage for its employees, and its potential

[1] KRS 342.690(2); *See also* Matthews v. G & B Trucking, Inc., Ky. App., 987 S.W.2d 328 (1998), holding that an employer who fails to obtain workers' compensation coverage does not retain immunity under the Act, even if an up-the-ladder employer or other entity is held liable for payment of workers' compensation benefits.

liability to them in a civil action, does not enlarge the scope of coverage under the policy.

The question of coverage under the policy ultimately turns on the policy definition of the term "employee." Although the policy does not specifically define who is an employee, Section V, paragraph E states that "'[e]mployee' includes a 'leased worker'. 'Employee' does not include a 'temporary worker'." The policy goes on to define the terms "leased worker" and "temporary worker":

> **H.** "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker."
>
> . . . .
>
> **N.** "Temporary worker" means a person who is furnished to you for a finite time period to support or supplement your workforce in special work situations such as "employee" absences, temporary skill shortages and seasonal workloads.

Interpretation of an insurance policy is a question of law which we review *de novo*.[2] A policy of insurance is to be construed liberally in favor of the insured and if, from the language, there is doubt or uncertainty as to its meaning, and it is susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will

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

be adopted.[3] But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn.[4] Although restrictive interpretation of a standardized adhesion contract is not favored, neither is it the function of the courts to make a new contract for the parties to an insurance contract.[5] Under the "doctrine of reasonable expectations," an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy.[6]

The goal of any court in interpreting a contract is to ascertain and to carry out the original intentions of the parties,[7] and to interpret the terms employed in light of the usage and understanding of the average person.[8] Unless the terms contained in an insurance policy have acquired a technical

---

[3] St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., Ky., 870 S.W.2d 223, 227 (1994).

[4] Osborne v. Unigard Indemnity Co., Ky. App., 719 S.W.2d 737, 740 (1986); Woodard v. Calvert Fire Ins. Co., Ky., 239 S.W.2d 267, 269 (1951).

[5] Moore v. Commonwealth Life Ins. Co., Ky. App., 759 S.W.2d 598, 599 (1988).

[6] Hendrix v. Fireman's Fund Ins. Co., Ky. App., 823 S.W.2d 937, 938 (1991); Woodson v. Manhattan Life Ins. Co., Ky., 743 S.W.2d 835, 839 (1987).

[7] Wilcox v. Wilcox, Ky., 406 S.W.2d 152, 153 (1966).

[8] Fryman v. Pilot Life Insurance Co., Ky., 704 S.W.2d 205, 206 (1986).

meaning in law, they "must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured."[9]

The appellees focus on the definition of “temporary worker”, noting that it includes seasonal workers. In particular, they note that Willowbank employed Garcia and O’Banion only for the summer months when its business peaked. In contrast, Indiana Insurance argues that the term includes only temporary workers who are “furnished to” the employer implying that the employer has contracted with some outside entity to “furnish” the employee. The parties agree that Zehnder directly hired Garcia and O’Banion without using any outside placement service. Indiana Insurance further maintains that its interpretation of the term “temporary employee” is consistent with the definition of “temporary worker” used in the Workers’ Compensation Act.[10]

Recently, two courts in other jurisdictions have reached different conclusions over the interpretation of identical “temporary worker” definitions in liability insurance

---

[9] Id.

[10] KRS 342.615(1)(e).

policies. Ayers v. C & D General Contractors,[11] considered the scope of coverage under a contractor's general liability (CGL) policy and an umbrella policy issued to the employer, C&D General Contractors (C&D), by American States and American Economy Insurance Companies (American States). The policies at issue contained the same exclusion for "employees", as the policy in the current case, and also included nearly identical definitions of "leased worker" and "temporary worker." C&D hired Ayers to assist with a dock-replacement project located on the Ohio River. His employment was limited to that single project. Ayers was killed after a truck-crane collapsed on the dock and pinned him under the water.

After settling Ayers's administrative claim, his estate brought tort-actions against C&D and its insurer, American States.[12] American States argued that its policies clearly excluded coverage to C&D's employees. Ayers's estate argued that Ayers was a "temporary worker" because C&D hired him only for this particular task. The United States District Court for the

[11] 237 F.Supp.2d 764 (W.D. Ky., 2002).

[12] Because C&D's dock-replacement project was located in a navigable waterway, Ayers's administrative claim fell under the maritime jurisdiction of the Federal Longshoreman's and Harbor Workers' Compensation Act. Unlike the Kentucky Workers' Compensation Act, the Federal Act authorizes a covered employee to bring third-party negligence actions against his or her employer.

Western District of Kentucky struggled with the definition of "temporary worker" in the CGL and umbrella policies, ultimately concluding that the phrase "furnished to you" was too ambiguous to be given a literal interpretation. Furthermore, the court concluded that "[t]he purpose of the overall definition is clear. If an employee is hired to fill-in for a permanent employee on leave or to meet a short-term need, the CGL policy classifies that employee as a 'temporary worker' and thus exempt from the coverage's exclusion for bodily injuries to an 'employee'."[13]

In contrast, the Eastern District of the Missouri Court of Appeals reached the opposite conclusion in American Family Mutual Insurance Company v. Tickle,[14] involving a situation strikingly similar to the facts and issues presented in the current case. American Family issued a CGL policy to Kemper, d/b/a ATO Irrigation Service, which in turn hired James Tickle as a seasonal employee in its landscaping service. Tickle was injured during the scope of his employment and, apparently, ATO did not have workers' compensation coverage. The CGL policy at issue, like the policies in Ayers and in the current case, excluded coverage for bodily injuries to an "employee." However, American Family's policy also contained the same form language

[13] 237 F.Supp.2d at 769.

[14] 99 S.W.3d 25 (Mo. App., 2003).

providing that a “temporary worker” is not a “leased worker” or an employee, and a nearly identical definition of “temporary worker.” Tickle argued that his periodic employment with ATO rendered him a “temporary employee” and not excluded from coverage under the policy. He further asserted that the “furnished to you” language in the definition of “temporary worker” was ambiguous and should be narrowly construed.

The Missouri Court of Appeals disagreed, first looking to the purpose of the insurance policy:

> An employer obtains a liability policy to cover *its liability to the public* for negligence of its agents, servants and employees under the doctrine of respondeat superior. . . . This is because compliance with the provisions of the Workers' Compensation Act constitutes the full extent of an employer's liability for any injuries sustained by its employees, direct or statutory, arising out of and in the course of their employment. The intent of commercial general liability policies is to protect against the unpredictable and potentially unlimited liability that can result from accidents causing injury to other persons or their property. . . . A commercial general liability policy does not cover the insured's obligations under a workers' compensation policy or bodily injury to the insured's employees arising out of the employment. . . . The primary purpose of an employee exclusion clause is to draw a sharp line between employees and members of the general public.[15]

[15] Id. at 29 (*citations, footnotes and internal quotations omitted*).

Because the CGL policy did not define the term "employee", the Missouri court then looked to the definitions in that state's workers' compensation act. Missouri's workers' compensation statutes,[16] like Kentucky's, distinguish between employee leasing arrangements and temporary help service arrangements. An employer who obtains part of his work force through an employee leasing service is generally required to obtain workers' compensation coverage for those employees. However, temporary help service arrangements are specifically excluded from the definition of "employee leasing arrangement."[17]

In this context, the Missouri Court of Appeals then turned to the definition of "temporary worker" as used in the CGL policy:

> Mr. Tickle contends that the CGL policy definition of "temporary worker" is ambiguous because it is unclear whether the verb "is furnished" applies to a person who meets seasonal or short-term workload conditions. Mr. Tickle suggests that the phrase "is furnished" only applies to those persons who substitute for a permanent employee and not to those who meet seasonal or short-term workload conditions. To determine if the application of "is furnished" to the succeeding clause and phrase in the sentence is ambiguous, we examine the syntax and

[16] Mo. Rev. Stat. § 287.282.

[17] KRS 342.615 is more specific than Mo. Rev. Stat. § 287.282, explicitly providing that "[a] temporary help service shall be deemed the employer of a temporary worker and shall be subject to the provisions of this chapter." KRS 342.615.

> arrangement of the sentence. State Farm v. Chambers, 860 S.W.2d 19, 20 (Mo.App.1993).
>
> The structure of the sentence defining "temporary worker" indicates that the clause "who is furnished to you to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions" is a subordinate adjective clause modifying "person". See DIANA HACKER, THE BEDFORD HANDBOOK 758-60 (5th ed.1998). Within this clause, the parallel infinitive phrases "to substitute for a permanent employee on leave" and "to meet seasonal or short-term workload conditions" both function as adverbs or verbal modifiers that modify the verb "is furnished" and both restrict the persons covered under this definition. Id. at 763-64, 766. Because these phrases are separated by the word "or," a coordinating conjunction that is ordinarily used to connect grammatically equal elements, they equally modify the verb "is furnished." Id. at 740. It is grammatically impossible to read the phrase "to meet seasonal or short-term workload conditions" without the verb "is furnished" because the phrase has no meaning without the antecedent verb it modifies. There is no ambiguity in the relationship of "is furnished" to its modifier "to meet seasonal or short-term workload conditions."
>
> Because Mr. Tickle admits that he was not "furnished" to Mr. Kemper, he was not a "temporary worker" as that term was defined in the policy. The trial court did not err in declaring that Mr. Tickle was an employee.[18]

We find the reasoning of American Family Mutual Insurance Company v. Tickle to be more persuasive than that of Ayers v. C&D General Contractors. In particular, the Tickle

[18] Id at 30-31.

court analyzed the meaning of the term "temporary worker" as it is commonly understood in business settings. In so doing, the Missouri court was able to give effect to the entire definition, including the somewhat problematic "furnished to you" language. In contrast, the Ayers court attempted to interpret the definition in isolation, and concluded by simply disregarding the phrase "furnished to you." [19]

[19] Furthermore, the cases cited by the appellees which found coverage are not convincing. In Erie Insurance Property and Casualty Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257 (W.Va., 2001) and Baker v. Aetna Casualty & Surety Co., 669 N.E.2d 553 (Ohio, 1995), the employers purchased "stop-gap" coverage, which specifically covered bodily injuries to employees arising out of the scope of employment. The courts in those cases held that the specific coverage terms in the stop-gap provision of the policy superceded the employee exclusion in the general liability portion of the policy. In the current case, Willowbank did not purchase stop-gap coverage.

Similarly, Willett Trucking Co. v. Liberty Mutual Insurance Co., 88 Ill. App.3d, 410 N.E.2d 376, 43 Ill. Dec. 376 (1980), Virginia Electric and Power Co. v. Northbrook Property and Casualty Insurance Co., 475 S.E.2d 264 (Va., 1996), and Greaves v. Public Service Mutual Insurance Co., 4 A.D.2d 609, 168 N.Y.S. 107 (N.Y.App.Div., 1957), each involved claims brought by persons who were not employees of the insured. The courts in those cases held that the workers'compensation exclusions in those policies did not apply even though the third-party plaintiffs were covered by workers' compensation through their own employers. In this case, Akers, Garcia, and O'Banion were clearly employees of the insured, Willowbank.

Finally, in Concord General Mutual Insurance Co. v. Home Indemnity Co., 368 A.2d 596 (Me., 1977), the Supreme Judicial Court of Maine held that fellow-employee and workers' compensation exclusions did not preclude coverage to a school bus driver who was sued by the widow of another city employee. The court held that they were not fellow employees because they were employed by distinct legal entities within the city. The Maine court also concluded that the workers' compensation exclusion did not apply because the school bus driver was not an employer. In

Based upon this interpretation of the Indiana Insurance policy, we conclude that Garcia and O'Banion were not "temporary workers" within the meaning of the policy. First, the appellees assert that the definition of "temporary worker" should be read to mean a person: (1) who is furnished to you; (2) for a finite time period; *or* (3) to support or supplement your workforce in special work situations such as employee absences, temporary skill shortages and seasonal workloads. Since Akers, Garcia, and O'Banion were hired for a special work situation – a seasonal workload – the appellees contend that they were temporary workers within the meaning of the policy. However, this disjunctive reading would require this Court to insert commas and an "or" into the contract definition where none exist. Furthermore, as noted by the Missouri court in Tickle, the appellees' interpretation contradicts the commonly understood rules of grammar.[20]

---

the current case, Akers, Garcia and O'Banion were all employed by Willowbank. Furthermore, Indiana Insurance does not argue that the workers' compensation exclusion applies to Akers. Rather, while Indiana Insurance concedes that Akers is an additional insured under the policy, it argues that the fellow employee exclusion precludes coverage under the facts of this case.

[20] Although the definition of "temporary worker" in Tickle was slightly different that the one contained in the Indiana Insurance policy, the Missouri court's reasoning is equally applicable in this case. The phrase "who is furnished to you" modifies the word "person." This phrase is qualified by the prepositional clause "for a finite period", and is further qualified by the infinitive clauses "to support or [to]

Moreover, while the phrase "furnished to you" might be considered ambiguous when viewed in isolation, it is not ambiguous when interpreted in light of the purpose of the policy exclusion. The policy clearly excludes employees, including "leased workers" for whom Willowbank had a statutory obligation to obtain workers' compensation coverage. However, "temporary workers" who are "furnished" by a temporary help service are not included in the definition of employee because Willowbank would have no obligation to obtain workers' compensation coverage for such employees. Garcia and O'Banion were not "furnished" to Willowbank by a temporary help service, but were hired directly by Zehnder.[21] Although they were hired as seasonal employees, they are still employees within the meaning of the policy and are therefore excluded from coverage.

Likewise, the policy specifically excludes coverage for bodily injury to an employee, and separately, for bodily injury to an employee caused by a fellow employee. The clear purpose of

---

supplement your workforce in special work situations." The remaining portion of the definition merely sets forth examples of such special work situations, including "seasonal workloads." When read in its entirety the definition sets out a single class of persons who are deemed to be temporary workers. It cannot be read to set out separate classes of persons.

[21] Willowbank belatedly argues that Garcia and O'Banion were "furnished to" it because they were referred to Zehnder by third parties. However, we cannot agree that such a referral would constitute "furnishing" an employee, even using the broadest possible interpretation of the phrase.

the policy was to indemnify Willowbank and its employees for liability to third parties arising out of the use of Willowbank's truck, not to indemnify Willowbank and its employees for injuries to employees. Because Garcia and O'Banion were clearly fellow employees of Akers, Indiana Insurance is not obligated to defend or indemnify Akers under the policy. Consequently, the trial court erred in finding that Indiana Insurance has a duty to defend or indemnify Zehnder, Willowbank, and Akers in this case.

Accordingly, the judgment of the Shelby Circuit Court is reversed, and this matter is remanded for entry of a summary judgment order in favor of Indiana Insurance Company.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT INDIANA INSURANCE COMPANY:

Allan Weiss
Ferreri & Fogle
Louisville, Kentucky

BRIEF FOR APPELLEE CHARLES K. BROWN, ADMINISTRATOR OF THE ESTATE OF JOSE GARCIA:

C. Lewis Mathis, Jr.
Nathan T. Riggs
Mathis, Riggs & Prather, P.S.C.
Shelbyville, Kentucky

BRIEF FOR APPELLEES SHELBY AND FINCH GARDEN, LLC AND MATT ZEHNDER:

C. Gilmore Dutton, III
John C. Robinson
C. Gilmore Dutton, III & Assoc.
Shelbyville, Kentucky

BRIEF FOR APPELLEE
WENDY O'BANION,
ADMINISTRATRIX OF THE ESTATE
OF CHASE O'BANION:

Glenn A. Cohen
Paul J. Hershberg
Seiller & Handmaker, LLP
Louisville, Kentucky

BRIEF FOR APPELLEE
CSX TRANSPORTATION, INC.:

David R. Monohan
James T. Blaine Lewis
Woodward, Hobson & Fulton
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE
CHARLES K. BROWN,
ADMINISTRATOR OF THE ESTATE
OF JOSE GARCIA:

Nathan T. Riggs
Shelbyville, Kentucky

ORAL ARGUMENT FOR APPELLEES
SHELBY AND FINCH GARDEN, LLC
AND MATT ZEHNDER:

C. Gilmore Dutton, III
Shelbyville, Kentucky

ORAL ARGUMENT FOR APPELLEE WENDY O’BANION ADMINISTRATRIX OF THE ESTATE OF CHASE O’BANION:

Paul J. Hershberg
Louisville, Kentucky

ORAL ARGUMENT FOR CSX TRANSPORTATION, INC.:

James T. Blaine Lewis
Louisville, Kentucky