

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000704-MR

DEBORAH L. FLOYD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 01-CI-01938

KENTUCKY NATIONAL  
INSURANCE COMPANY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE. Deborah Floyd filed this action alleging that Kentucky National Insurance Company breached a contract of insurance when it refused to pay her the retail value of her lost or stolen jewelry. The Fayette Circuit Court found that Kentucky National's offer of the amount with which it could replace the jewelry complied with the contractual provisions.

Although Floyd also alleged violations of the Consumer Protection Act, the Unfair Settlement Practices Act, and bad faith, those claims were held in abeyance pending a ruling by this court on the breach of contract claim.

In April 1997, Floyd purchased a homeowner's policy from Kentucky National with a rider to the policy insuring certain items of jewelry. Although not required by Kentucky National, she submitted an appraisal obtained from Hopson Jewelers, Inc., of Prestonsburg, valuing the specified jewelry at its retail value.

In January 2001, Floyd traveled to Florida for a job interview and took with her various pieces of jewelry. Upon her return to Kentucky she found the jewelry missing. She immediately filed a claim with Kentucky National and notified the local Florida officials. By mid-February Kentucky National agreed that it was liable on the claim and paid the policy limits on the unscheduled jewelry in the amount of \$1,000. A dispute arose, however, over the amount of Kentucky National's obligation on the scheduled jewelry. Floyd maintained that she was owed \$17,100, the appraised retail value of the lost or stolen jewelry. Kentucky National sought first to replace the jewelry and requested Floyd meet with William Callis, a local retailer, to select replacement pieces. After Floyd refused, at Kentucky National's request Callis estimated the amount for

which he could replace the jewelry at \$9,283.48. Although Kentucky National tendered a check in that amount, Floyd rejected it and this action ensued.

Although on discovery Floyd deposed two witnesses as experts, neither disputed Callis's estimate that the jewelry could be replaced at wholesale value for \$9,283.48. The only dispute is whether Kentucky National must pay the loss based upon the jewelry's retail value.

The terms in an insurance contract must be given their plain and ordinary meaning.<sup>1</sup> When reading any contract, including an insurance contract, if the terms are not ambiguous, the court is not free to rewrite its terms.<sup>2</sup>

The Kentucky National policy states that "the value of the property is not agreed upon but will be ascertained at the time of the loss or damage," thus by its terms, the appraisal submitted by Floyd did not bind Kentucky National to pay the appraised value of the jewelry. The policy, an open policy, left the value of the jewelry to be ascertained at the time of loss or damage.<sup>3</sup> The policy further provides Kentucky National with the following four options when determining the value of missing jewelry:

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<sup>1</sup> Nationwide Mut. Ins. Co. v. Nolan, Ky., 10 S.W.3d 129 (1999).

<sup>2</sup> Windham v. Cunningham, Ky. App., 902 S.W.2d 838, 841 (1995).

<sup>3</sup> See National Fire Ins. Co. of Hartford v. Hutton, Ky., 396 S.W.2d 53 (1965).

- (1) The actual value of the property at the time of loss or damage;
- (2) The amount for which the property could reasonably be expected to be repaired to its condition immediately prior to loss;
- (3) The amount for which the article could reasonably be expected to be replaced with one substantially identical to the article lost or damaged; or
- (4) The amount of insurance.

Under option (3), Kentucky National clearly could elect to pay the amount required to produce substantially identical replacements and Callis estimated that he could do so for \$9,238.48. Floyd's contention that the jewelry must be replaced for the retail value is contrary to the express terms of the policy. Although Kentucky National could have chosen option (1), requiring it to pay the actual value at the time of loss, its retail value, the policy permits it to pay only the amount needed to replace the jewelry.

Floyd contends that her premium was calculated on the appraisal submitted and that, therefore, there was an implied promise to pay the claim based on the retail value. The policy unequivocally provides that the value would be determined at the time of loss, not based on a predetermined value. Although it may be common for an insured not to read the entire policy, the

law does not recognize lack of knowledge of the contents of a policy as a basis for avoiding its provisions.<sup>4</sup>

Finally, we agree with Floyd that under the terms of the policy, only if the jewelry were damaged could Kentucky National require her to accept replacement jewelry. In the event of loss, it was bound to pay one of four determined amounts; we do not find, however, that this breach was material. Although Kentucky National's initial offer made on March 26, 2001, to replace the jewelry was not in compliance with the policy, it did not force Floyd to accept the replacement jewelry, and after learning that she would not accept, on May 4, 2001, sent her a draft in the amount of \$9,283.48. We find no material breach of the policy terms.

The order and judgment of the Fayette Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR  
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ORAL ARGUMENT FOR APPELLEE:

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<sup>4</sup> Midwest Mut. Ins. Co. v. Wireman, Ky. App., 54 S.W.3d 177 (2001).

