RENDERED: December 10, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002414-MR

BITUMINOUS CASUALTY CORPORATION — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 02-CI-01424

KENWAY CONTRACTING, INC.,
JUDY TURNER, NEAL TURNER and
INTEGRA BANK, N.A. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Appellant Bituminous Casualty Corporation brings this appeal from a summary judgment entered in the Warren Circuit Court on October 24, 2003. We affirm.

Appellee Kenway Contracting Inc. (Kenway), owned by the Allen family, is engaged in the construction business in Warren County, Kentucky. In the spring of 2002, Appellee Neal Turner contacted Kenway to convert Turner's newly acquired

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

residential property, consisting of a house with an attached carport, to commercial use. Kenway was to demolish the carport. On May 8, 2002, Kenway sent their "trackhoe" operator to the Turner property to perform the carport demolition. Upon arrival, the trackhoe operator mistakenly began to demolish not only the carport but the entire house. When owner Jody Allen arrived shortly thereafter the house was essentially leveled.

At the time Kenway's business was insured under a Commercial General Liability insurance policy issued by Bituminous. Under the insuring agreement, Bituminous was obligated to pay for property damage to third parties caused by an "occurrence." The policy also contained several exclusionary provisions.

Kenway immediately notified Bituminous of the damage to the Turner property. Bituminous determined that the loss was not within the scope of its policy and denied coverage. Kenway thereafter filed the instant declaratory judgment action.[2] Kentucky Revised Statutes (KRS) 418.040. Kenway and Bituminous filed cross motions for summary judgment. Kentucky Rules of Civil Procedure (CR) 56. The trial court held in favor of Kenway, concluding that Bituminous was obligated under its policy to defend and indemnify. In so holding the trial court reasoned that the demolition of the Turner property qualified as

[2] Neal Turner, his wife, Judy Turner, and their mortgage holder, Integra Bank, N.A., were allowed to intervene in the action.

an occurrence within the meaning of the policy. Additionally the trial court held that certain policy exclusions did not apply because taken "from the standpoint of the insured" the destruction of the house was not expected or intended by the insured, Kenway.

Although we think the reasoning of the trial court was somewhat misplaced, we nevertheless affirm under the principle that a correct decision by the trial court is to be upheld on review notwithstanding that it was reached by improper route or reasoning. Revenue Cabinet v. Joy Technologies, Inc., Ky.App., 838 S.W.2d 406, 410 (1992).

On appeal the issues before us are (1) whether the mistaken demolition qualifies as an occurrence; and (2) if the demolition does qualify as an occurrence, is it excluded by any of the policy provisions. We conclude that the demolition does qualify as an occurrence. We further conclude that the coverage is not excluded by any provisions of the insuring agreement.

Before us Bituminous first argues that, due to Kenway's failure to properly instruct and supervise, the trackhoe operator's demolition of the residence was not accidental but intentional and foreseeable and therefore not an occurrence triggering Bituminous' duties to defend and indemnify. Bituminous argues in the alternative that if this Court concludes that the demolition was an occurrence, coverage

was still barred under two of the policy's exclusions: "Expected or Intended Injury" and "Damage to Property."

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996); CR 56.03. Neither party contends that genuine issues of fact exist that preclude summary judgment. We therefore must determine whether Kenway was entitled to judgment as a matter of law.

The interpretation, construction and legal effect of any contract is, of course, a matter of law for the court. Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992). In so doing the object is to ferret out the intention of the parties to the agreement. The rule does not obtain, however, in insurance contracts. In interpreting insurance contracts the focus is upon the reasonable expectation of the insured. James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Insurance Co., Ky., 814 S.W.2d 273 (1991).

With the foregoing in mind, we look to the provisions of Bituminous's policy:

> **SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **1. Insuring Agreement**

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. . .
> b. This insurance applies to “bodily injury” and “property damage” only if:
> (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”; and
> (2) The “bodily injury” or “property damage” occurs during the policy period.

SECTION V – DEFINITIONS defines “(o)ccurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Brown Foundation discusses at length the standard to be applied when interpreting the provisions of a comprehensive or commercial general liability policy, as we have here. “[T]he very name of the policy suggests the expectation of maximum coverage.” Id. at 278. And “[c]ourts and commentators alike are in agreement that the term “occurrence” is to be broadly and liberally construed in favor of extending coverage to the insured.” Id.

Brown Foundation instructs that the proper standard for the analysis of insurance contracts in Kentucky is a subjective one. Id. at 279. Terms of an insurance contract have no technical meaning in law and are to be interpreted according to the usage of the average person, resolving all

uncertainties and ambiguities in favor of the insured. Id.; (citing Fryman v. Pilot Life Ins. Co., Ky., 704 S.W.2d 205 (1986)). The court in Brown Foundation expressly rejected the insertion of tort principles, such as foreseeability, into the construction of insurance contracts. Id. Instead, insurance contracts are construed and respective duties ascertained according to the reasonable expectations of the insured:

> The insurer's responsibility under a comprehensive policy is not measured by its intent. The insured is entitled to all the coverage he may reasonably expect under the policy. Only an unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage will defeat this expectation.

Id. at 277.

In Brown Foundation at 278 the Court stated:

> . . . if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable. While the activity which produced the alleged damage may be fully intended, recovery will not be allowed unless the insured intended the resulting damages.

Although herein the act of destruction was intentional, Kenway did not intend the total destruction of the Turner residence. We think the tenor of Brown Foundation dictates that Kenway's total destruction of the home was an "occurrence" within the meaning of the policy. We so hold.

We now turn to the policy exclusions. Brown Foundation teaches that only an unequivocal, conspicuous, plain and clear manifestation of Bituminous's intent to exclude coverage will defeat the reasonable expectation of coverage.

Bituminous argues that the following exclusions are applicable:

> **SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
> **2. Exclusions**
> This insurance does not apply to:
> **a. Expected or Intended Injury**
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. . .
> **j. Damage to Property**
> "Property damage" to: . . .
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Bituminous contends the trial court erred in finding the exclusions inapplicable by impermissibly inserting the language ". . . from the standpoint of the insured," in the "Damage to Property" exclusion. This may be well taken. But that does not resolve the question of coverage which we are bound to determine. The question before us is whether any one

of the exclusions shall be interpreted so as to deny the coverage claimed by Kenway.

It is well settled in insurance law that each exclusion is read independently of every other exclusion. Kemper National Insurance Companies v. Heaven Hill Distilleries, Ky., 82 S.W.3d 869, 874 (2002). Reviewing the foregoing exclusions independently we are of the opinion that the "Expected or Intended Injury" exclusion offers Bituminous no succor. In the ordinary use of the language the act of demolishing the Turner home was not intended in any sense of the terms. The demolition was an accident or occurrence; an unfortunate event not expected or intended by the insured.

We turn our attention to the "Damage to Property" section. With regard to j(5), we cannot agree with Bituminous's reading of the provision so as to exclude destruction of the Turner home. While we find no decision in this Commonwealth squarely in point, the Missouri court considered a quite similar situation in Columbia Mutual Insurance Company v. Schauf, 967 S.W.2d 74 (Mo.1998). The exclusion was identical to our j(5) exclusion.

In Schauf the insured was a painter hired to paint the kitchen cabinets of a home. While cleaning his equipment at the end of the day, the painter started a fire which consumed the cabinets and eventually the entire home. The Court held that

the exclusion did exclude coverage for fire damage to the kitchen cabinets because the painter was performing operations upon the cabinets, but did not exclude coverage for fire damage to the entire home. So it is herein. We therefore hold the j(5) exclusion inapplicable.

Finally, we do not believe that Bituminous can take comfort under j(6). Clearly that provision is applicable to "poor workmanship," a circumstance not at issue here.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

McANULTY, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I concur in part and dissent on the non-application of provision (5) of the Damage to Property Exclusion. This exclusion unambiguously excludes coverage in this case. I would reverse the trial court and hold that Bituminous is not obligated to defend or indemnify Kenway for the Turner property damage.

Giving effect to the ordinary meaning of provision (5)'s language, I believe it is applicable because it states that this insurance does not apply to property damage to that particular part of real property on which you *are performing*

operations if the property damage arises out of those operations, not on which the insured *has contracted to perform operations*. See Columbia Mutual Insurance Company v. Schauf, 967 S.W.2d 74, 81 (Mo.1998). In this case, that particular part on which the trackhoe operator was performing operations, albeit mistakenly, was the house; thus, any property damage to the house is excluded from coverage.

Where the insured's actions are exactly the type of actions that the insurer envisioned when it drafted the unambiguous exclusion, courts are not free to rewrite the parties' contract to provide coverage. See Employers Ins. Of Wausau v. Martinez, Ky., 54 S.W.3d 142, 145 (2001). In my opinion, if provision (5) of the Damage to Property Exclusion does not apply in this case, it is meaningless.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Pamela Adams Chesnut Lexington, Kentucky	Brent Travelsted Bowling Green, Kentucky