RENDERED: MARCH 18, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000164-MR

MICHELLE PUCKETT; WILLIAM PUCKETT; WILLIAM PUCKETT AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BRYAN E. PUCKETT — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 00-CI-02471 & 00-CI-03051

NATIONWIDE FIRE INSURANCE COMPANY; KAREN MURPHY; GEORGE MURPHY — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE[1]

MILLER, SENIOR JUDGE: This is a wrongful death and declaratory judgment action in which Michelle Puckett and William Puckett, and William Puckett as Personal Representative of the Estate of

[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.

Bryan E. Puckett, appeal from an order of the Fayette Circuit Court granting summary judgment to appellee Nationwide Fire Insurance Company (Nationwide) pursuant to Ky. R. Civ. P. (CR) 56.03. The appellants contend that the trial court erroneously determined that their homeowner's policy did not apply to an off-premises incident which resulted in Bryan's death by hyperthermia as a result of being left in a motor vehicle by Karen Murphy on a hot July day. Because the circuit court properly concluded that the homeowner's policy issued by Nationwide to Karen and George Murphy does not cover the incident, we affirm.

The factual background of the case is as follows. On July 13, 1999, Karen Murphy was babysitting eleven-month-old Bryan Puckett. In addition to Bryan, Karen was also caring for her own children, one-year-old Jason Murphy and four-year-old Rachel Murphy.

At approximately 2:00 p.m., Karen arrived at the Once Upon A Child consignment shop, a second-hand children's clothing store located in a shopping center off Richmond Road in Lexington. Karen went into the store to shop, taking Rachel with her and leaving Bryan and Jason locked in the car with the windows rolled up. The outside temperature was approximately 81 degrees Fahrenheit. Karen and Rachel remained in the store for approximately two hours.

At approximately 4:00 p.m., nearly two hours after she had left Brian and Jason locked in the car, Karen left the store. Shortly thereafter, other persons realized that Bryan and Jason were locked in Karen's car. Someone notified a passing deputy sheriff of the situation. The deputy broke the window to gain access to the children, and paramedics were called to the scene.

When Bryan was removed from the vehicle, he was unconscious. Expert testimony revealed that the estimated temperature inside the vehicle had reached levels of between 145 and 165 degrees Fahrenheit during the time Bryan and Jason were locked in the vehicle. Brian was transported to the hospital, where he died of hyperthermia (a.k.a. heat stroke). Jason was also taken to the hospital, where he recovered.

On September 14, 1999, Karen was indicted for second-degree manslaughter on the basis that she wantonly caused the death of Bryan Puckett; second-degree criminal abuse on the basis that she wantonly placed Jason Murphy in a situation that might cause serious physical injury; and endangering the welfare of a minor on the basis that she failed to exercise diligence in the control of Rachel Murphy to prevent her from becoming neglected or dependent.

The trial was held in August 2000. Karen was found guilty but mentally ill of all charges. She was sentenced to

ten years' imprisonment on the manslaughter conviction, three years' imprisonment on the criminal abuse conviction, to run consecutively with the manslaughter sentence, and twelve months' imprisonment on the endangering the welfare of a minor conviction, to run concurrently, for a total sentence of thirteen years.

Civil action number 00-CI-2471 commenced when, on July 6, 2000, William and Michelle Puckett filed a complaint in Fayette Circuit Court seeking damages for the wrongful death of Bryan Puckett, and associated loss of consortium, against Karen and George Murphy. Civil action 00-CI-3051 commenced when, on August 21, 2000, Nationwide filed an action seeking a declaration of rights pursuant to Kentucky Revised Statutes 418.040 that any liability for damages incurred by the Murphys as a result of Bryan’s death was not covered under a homeowner’s policy issued by Nationwide to the Murphys. The cases were subsequently consolidated.

On December 24, 2003, the trial court entered an order granting summary judgment to Nationwide pursuant to CR 56.03. This appeal followed.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a 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, 916 S.W.2d 779, 781 (Ky. App. 1996).

Interpretation of an insurance policy is a question of law which we review de novo. Cinelli v. Ward, 997 S.W.2d 474 (Ky. App. 1998). The goal of any court in interpreting a contract is to ascertain and to carry out the original intentions of the parties, Wilcox v. Wilcox, 406 S.W.2d 152, 153 (Ky. 1966), and to interpret the terms employed in light of the usage and understanding of the average person. Fryman v. Pilot Life Insurance Co., 704 S.W.2d 205, 206 (Ky. 1986). Unless the terms contained in an insurance policy have acquired a technical 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." Id.; Stone v. Kentucky Farm Bureau Mut. Ins. Co., 34 S.W.3d 809, 811

(Ky. App. 2000). However, 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. Hendrix v. Fireman's Fund Ins. Co., 823 S.W.2d 937, 938 (Ky. App. 1991); Woodson v. Manhattan Life Ins. Co., 743 S.W.2d 835, 839 (Ky. 1987).

Further, 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 be adopted. St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 227 (Ky. 1994). But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn. Osborne v. Unigard Indemnity Co., 719 S.W.2d 737, 740 (Ky. App. 1986); Woodard v. Calvert Fire Ins. Co., Ky., 239 S.W.2d 267, 269 (Ky. 1951). 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. Moore v. Commonwealth Life Ins. Co., 759 S.W.2d 598, 599 (Ky. App. 1988).

Section II of the Murphys' homeowner's policy provides that the company "will pay damages the insured is legally

obligated to pay due to an occurrence." An "occurrence" is defined to include "bodily injury . . . resulting from an accident[.]" "Bodily injury" is defined to include death. Pursuant to these provisions, the appellants contend that the Murphys' homeowner's policy applies to the incident which resulted in Bryan's death.

However, the Section II exclusion provisions of the policy provide that "Coverage E – Personal Liability . . . do[es] not apply to bodily injury or property damage: . . . arising out of the ownership, maintenance, or use of . . . a motor vehicle owned or operated by, or rented or loaned to an insured." We believe that this exclusion provision is dispositive of the issue at hand.

The terms at issue have previously been interpreted in the context of automobile insurance coverage. In this regard, we believe that Insurance Co. of North America v. Royal Indem. Co., 429 F.2d 1014, 1017 (6th Cir. 1970) provides a correct statement of the interpretation of these terms. "The words 'arising out of * * * use' in an automobile liability insurance policy, are broad, general and comprehensive terms meaning 'originating from,' or 'having its origin in,' 'growing out of' or 'flowing from[.]' Id. at 1017 -1018 *(citing* Carter v. Bergeron, 102 N.H. 464, 160 A.2d 348 (1960); Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S.W.2d 181 (1944)). All

that is required to come within the meaning of the words 'arising out of the * * * use of the automobile' is a causal connection with the accident. Id. at 1018 (citing Richland Knox Mut. Ins. Co. v. Kallen, 376 F.2d 360 (6th Cir. 1967), Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co., 403 Pa. 603, 170 A.2d 571 (Pa. 1961); and 89 A.L.R.2d 150 (1963)).

Pursuant to the foregoing, we interpret the automobile exclusion as applying to the July 13, 1999, incident. Bryan suffered the bodily injury at issue (i.e., death due to hyperthermia) as a result of the high temperatures produced within the passenger compartment of the Murphys' motor vehicle. The expert testimony at the criminal trial established that those excessive temperatures were produced as a result of the physical properties of the vehicle. This establishes a causal relationship between the motor vehicle and Bryan's injury.

Further, Karen used the motor vehicle as transportation to reach the shopping center, and it was her intention to use the vehicle for transportation upon her departure from the location. In the meantime, Karen was "using" the motor vehicle as a location of repose for Bryan and Jason while she shopped. Hence, Bryan's injury had its origin in Karen's use of the vehicle the afternoon of July 13, 1999.

Within the ordinary meaning of the word, Karen was clearly "using" the vehicle at the time Bryan suffered his

bodily injury. Moreover, because the physical properties of the vehicle resulted in the excessive temperatures, Bryan's bodily injury arose from the use of the vehicle.

In summary, there is a direct nexus between Bryan's bodily injury and Karen's use of the motor vehicle in which the injury occurred. As such, we interpret the July 13, 1999, incident as being specifically excluded under the Murphys' homeowner's policy.

Moreover, we believe this exclusion extends to the Pucketts' claim against George Murphy for failing to warn them about Karen's mental health disorders. With respect to this claim, the fact remains that the bodily injury arose from the use of a motor vehicle, and such occurrences are specifically excluded under the Murphys' homeowner's policy.

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Heidi Engel
Winchester, Kentucky

BRIEF FOR APPELLEE:

D. Craig Dance
Lexington, Kentucky