RENDERED: APRIL 8, 2005; 2:00 P.M.
MODIFIED: APRIL 22, 2005; 2:00 p.m.
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT: DECEMBER 14, 2005 (2005-SC-0350 & 0356-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000557-MR

WESTFIELD COMPANIES, INC.; KENTUCKY ASSOCIATED GENERAL CONTRACTORS SELF INSURERS' FUND — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-01396

QUALITY SIGNS & SERVICE, INC. — APPELLEE

OPINION
AFFIRMING

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

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Westfield Companies, Inc. (Westfield) and Kentucky Associated General Contractors Self Insurers' Fund (Kentucky Associated) appeal from a judgment of the Boone Circuit Court determining that they have a duty to defend, and

[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.

potential duty to indemnify, Quality Signs & Service, Inc. (Quality Signs) in an action brought by the Estate of Christopher House in Clermont County, Ohio, seeking recovery of damages for Christopher's accidental death while acting in the scope of his employment with Quality Signs. The Estate pleads causes of action under Ohio's common law workplace intentional tort precedents. For the reasons stated below, we affirm.

Christopher House was a resident of Florence, Kentucky. He was employed by Quality Signs, which is headquartered in Burlington, Kentucky. On October 30, 2001, House traveled by company vehicle from Burlington to Clermont County, Ohio. He planned to return to the Quality Signs facility in Burlington before the end of his workday. While performing a repair job at a motel located in Clermont County, House was killed while acting within the scope of his employment. House's death was as a result of being thrown from a crane basket while working on a sign approximately 55 feet above ground level.

On May 13, 2002, the Estate filed suit against Quality Signs in the Court of Common Pleas in Clermont County, Ohio, seeking recovery under Ohio's common law workplace intentional tort precedents. The action alleged counts for wrongful death, for survivorship damages, and for punitive damages. Each count

alleged that the accidental death of House was “substantially certain” to occur from the standpoint of Quality Signs.

At the time of House’s death, Quality Signs was covered by insurance policies issued by Westfield and Kentucky Associated. The Westfield policy provided a primary Comprehensive General Liability Policy, and a Commercial Umbrella Policy. Quality Signs seeks coverage related to the Ohio lawsuit under the umbrella policy only. Kentucky Associated provided Quality Signs with a Workers’ Compensation Policy and an Employers’ Liability Policy.

Kentucky Associated agreed to payment under the Workers’ Compensation section of the policy, and workers’ compensation coverage is not an issue in this case. However, Quality Signs claims coverage related to the Ohio action under the Employers’ Liability section of the Kentucky Associated policy.

Both Westfield and Kentucky Associated denied coverage associated with the Ohio action under their respective policies, though Westfield later agreed to defend Quality Signs in the action under a “reservation of rights,” pending the outcome in the instant action.

On October 7, 2002, Quality Signs filed an action in Boone Circuit Court which, among other things, sought a declaration of rights that it was entitled to a defense and, if

held liable, to indemnification, in the Ohio action under the policies issued by Westfield and Kentucky Associated. On February 16, 2004, the circuit court rendered an order determining that Westfield and Kentucky Associated had a duty to defend, and a potential duty to indemnify, Quality Signs in the Estate's Ohio intentional tort lawsuit. This appeal followed.

STANDARD OF REVIEW

We begin by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Ky. R. Civ. P. (CR) 52.01; Largent v. Largent, 643 S.W.2d 261 (Ky. 1982). The trial court's conclusions of law, however, including its interpretation of the written contract, are subject to independent appellate determination. Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893 (Ky. 1992).

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., 239 S.W.2d 267, 269 (Ky. 1951). Although a broad interpretation of a standardized "adhesion" contract is favored, it is not 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).

WESTFIELD INSURANCE POLICY

Westfield contends that the circuit court erroneously determined that it had a duty to defend, and potentially indemnify, Quality Signs in the Estate's Ohio lawsuit against the appellee. We disagree.

Quality Signs is broadly covered for damages it is legally obligated to pay under the umbrella policy issued by Westfield. However, various exclusions are contained in Section I Subsection 2 of the policy. Westfield alleges that the exclusion contained in Section I Subsection 2a of the policy relieves it from coverage in the Ohio action. The exclusion states as follows:

> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property. (Emphasis added.)

Westfield does not allege that Quality Signs calculatingly intended the accident and resulting death of Christopher House. Rather, Westfield alleges that, because of inadequately maintained equipment and poor training of the crane basket operator, Quality Signs could have "expected" the accident to occur within the meaning of the policy exclusion.

The causes of action in the Ohio case sound in Ohio's "substantial certainty" employer intentional tort law. This type of employer intentional tort occurs when the employer does not directly intend to injure the employee, but acts with the belief that injury is substantially certain to occur. *See* Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, 522 N.E.2d 489 (1988). Citing to various Ohio cases, Westfield argues that to a "substantial certainty" is the functional equivalent of "expected," and since Quality Signs is alleged to have known to a "substantial certainty" that the accident and ensuing death would occur, it should be considered to have "expected" such results. Under this interpretation, the exclusion would apply and Quality Signs would not be entitled to coverage under its umbrella policy with Westfield.

While we agree with Westfield that Ohio has equated "expected" with "substantial certainty" in its interpretation of "intended or expected" insurance policy exclusions, *see*, *e.g.*,

Wedge Products, Inc. v. Hartford Equity Sales Co., 31 Ohio St.3d 65, 509 N.E.2d 74 (1987), Kentucky has adopted a different interpretation of such exclusions. James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991) squarely addresses the issue:

> The "expected or intended" exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim. Patrons-Oxford Mutual Insurance Company v. Dodge, Me., 426 A.2d 888 (1980). We believe this to be the majority rule, and we agree that 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. *Cf.* City of Johnstown v. Bankers Standard Insurance Company, 877 F.2d 1146 (2nd Cir. 1989).

Id. at 278.

Neither Westfield in the present case, nor the Christopher House Estate in the Ohio litigation, alleges that Quality Signs specifically and subjectively intended the injury giving rise to the Ohio claim (Christopher House's death). As such, the "expected" exception contained in Section I Subsection 2a of the Westfield umbrella policy does not operate to deny coverage to Quality Signs in the Ohio action.

The duty to defend is separate and distinct from the obligation to pay any claim. Brown Foundation at 279. If, in the Ohio action, there were to be a finding by the jury that Quality Signs deliberately intended House's death, the exclusion would apply to Westfield's obligation to pay the resulting judgment. However, pursuant to Brown Foundation, the exclusion cannot be applied at this stage to avoid providing Quality Signs with a defense in the Ohio litigation.

KENTUCKY ASSOCIATED INSURANCE POLICY

Kentucky Associated contends that the circuit court erred in its determination that it had a duty to defend, and potentially indemnify, Quality Signs in the Christopher House Estate's action against the appellee in Ohio under the Employers' Liability section of the policy issued to Quality Signs.

First, Kentucky Associated contends that the Ohio action is excluded from coverage pursuant to Part Two Section A2 of the policy. This section of the policy states as follows:

> A. **How This Insurance Applies**
>
> This employers' liability group self insurance policy applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
>
> . . . .

> 2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.

In support of its argument that this exclusion defeats coverage under the policy, Kentucky Associated filed a document captioned "Information Page" for "ABC Corporation" stamped "Sample" which it alleges is identical to the Information Page applicable to Quality Signs' Employers' Liability policy. Item 3.A. of the sample information page states as follows:

> Part One of the policy applies to the workers' compensation law and any occupational disease law of each of the states listed here: KY.

Kentucky Associated argues that this provision means that the employers' liability policy applies only to accidents occurring in Kentucky.

Kentucky Associated stated that it does not keep copies of the information pages issued with individual policies. While the relevant policies were stipulated to at the outset of the litigation, the sample information page was not part of that stipulation, and Quality Signs denies that it received an information page corresponding to the sample page. Moreover, Kentucky Associated did not produce the sample information page and raise this argument until it filed its reply brief in circuit court. Quality Signs objected to the introduction of the sample information page on the basis of Kentucky

Associated's failure to authenticate the document and its late submission. In its February 16, 2004, order the circuit court stated that "Quality Signs' points are well taken in this regard." We construe this as a ruling granting Quality Signs' objection to the use of the document in this litigation. Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). In consideration that the exhibit, as admitted by Kentucky Associated, is demonstrably not a copy of the Information Page actually issued to Quality Signs, the circuit court did not abuse its discretion in ruling the sample page as incompetent evidence.

In any event, even if this provision could be interpreted as argued by Kentucky Associated, other sections of the policy contradict the provision. Part 3.B. of the sample information page states as follows:

> Part Two of this policy applies to employers' liability insurance for work in each state listed in Item 3.A. **and 3.C**. . . . (emphasis added).

In turn, Item 3.C. states as follows:

> Part Three of this policy applies to other states, if any, listed here: **All states except IL**. (Emphasis added).

The employer's liability section of the policy is Part Two. In plain language Part 3.B. of the sample information page

indicates that the states listed in item 3.C. are covered under Part Two, the employers' liability section of the policy. Item 3.C. provides that the coverage applies to all states except Illinois. This would include Ohio. It is well-settled that when interpreting insurance policies, "the contract should be liberally construed and any doubts [as to coverage should be] resolved in favor of the insured." Davis v. American States Insurance Co., 562 S.W.2d 653, 655 (Ky.App. 1977).

In light of the self-contradictory nature of the sample page, Kentucky Associated's admission that it cannot produce a copy of the actual information page sent to Quality Signs, and Kentucky Associated's failure to authenticate the actual page, we conclude that the exclusion contained in Section A2 of Part Two of the employer's liability policy cannot operate to defeat coverage.

Next, Kentucky Associated contends that provisions three and eight of Part 2, Section D of the employers' liability policy exclude coverage of the Ohio litigation. Part 2, Section D provides as follows:

> D. Exclusions
>
> 3. punitive or exemplary damages on account of bodily injury to which this group self insurance applies, where such bodily injury resulted from any act committed by you with the **deliberate intention** of producing such bodily injury; (emphasis added).

8. bodily injury **intentionally caused** or aggravated by you; (emphasis added).

"The words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning." Nationwide Mutual Insurance Co. v. Nolan, 10 S.W.3d 129, 131 (Ky. 1999). In its Ohio pleadings, the Christopher House estate does not contend that Quality Signs with deliberate intention brought about the death of House, nor does it contend that Quality Signs intentionally caused his death. Within the plain and ordinary meaning of these terms, Kentucky Associated does not argue that Quality Signs intended the death of Christopher House. We reject the arguments of Kentucky Associated to the effect that Quality Signs' alleged failure to maintain its equipment and train its employees amounts to a deliberate or intentional effort to cause the death of Christopher House. These exclusions do not defeat coverage under the facts of this case.

Next, Kentucky Associated contends that Ohio case law prohibits insurance coverage for this claim. This refers to holdings in Ohio to the effect that "expected or intended" exclusions in an insurance policy provide a valid exclusion in "substantially certain" employer tort cases. *See*, *e.g.*, Wedge Products, Inc. v. Hartford Equity Sales Co., 31 Ohio St.3d 65, 509 N.E.2d 74, 76 (1987). In essence, these cases equate

expected with "substantial certainty." As previously noted, however, Kentucky does not follow this interpretation of these terms. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991). As we are applying Kentucky law in our interpretation of these insurance policies, and since our Supreme Court has spoken on the issue, the holdings of the Ohio courts in this area are not pertinent.

Next, Kentucky Associated contends that the circuit court erred by concluding that the Stop Gap provisions contained in Part Two, Section C, provide an independent basis for finding coverage under the employers' liability policy. As we have concluded that the employers' liability policy does extend coverage to the Ohio litigation under its basic terms, we need not address whether the Stop Gap coverage provides a second and independent basis for coverage.

Finally, Kentucky Associated contends that coverage is not applicable on the basis of the exclusive remedy provisions of the Kentucky Workers' Compensation Act as set forth in KRS 342.610(4). KRS 342.610(4) provides as follows:

> If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If

> injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.

Kentucky Associated does not cite us to any provision of the contract which includes this as an exclusion and, in its brief, admits "[t]he election of remedies does not apply to the civil suit brought in Ohio because Ohio allows such suits." As the exclusive remedy provisions of KRS Chapter 342 are not incorporated into the employers' liability policy issued by Kentucky Associated to Quality Signs, we conclude that this argument is without merit.

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

ALL CONCUR.

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