

RENDERED: JUNE 3, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001144-MR

STATE FARM FIRE &  
CASUALTY COMPANY

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE WILLIAM F. STEWART, JUDGE  
ACTION NO. 02-CI-00201

JASON PATRICK RICE, AS  
CO-ADMINISTRATOR OF THE ESTATE  
OF BAILEY DAWN RICE; JASON PATRICK  
RICE, INDIVIDUALLY; JASON  
PATRICK RICE, AS FATHER OF  
BAILEY DAWN RICE; APRIL DAWN  
RICE, AS CO-ADMINISTRATOR OF  
ESTATE OF BAILEY DAWN RICE;  
APRIL DAWN RICE, INDIVIDUALLY;  
APRIL DAWN RICE, AS MOTHER OF  
BAILEY DAWN RICE; AND CYNTHIA  
BAUMGARDNER

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

EMBERTON, SENIOR JUDGE: State Farm appeals from a declaratory judgment construing the liability coverage of its homeowner's policy written to Cynthia Baumgardner. The issue presented relates to the question of coverage for the death of an infant that occurred while at Cynthia's home. State Farm contends that coverage for injuries is excluded under the clear and unambiguous terms of the insurance policy. We agree.

Cynthia quit work outside the home and stayed home with her children and, to earn income, she kept children other than her own. She did not, however, have her home certified for child-care as provided for in KRS 199.8982. After advertising her services, in March 2001, Cynthia began watching Taylor and Bailey Rice and shortly thereafter three more children. Four of the five children, including Bailey, were in Cynthia's home five days per week.

On June 25, 2001, Cynthia fed Bailey, changed her diaper, and laid her on a sofa to sleep. After Bailey fell asleep, Cynthia picked her up from the sofa and noticed that she was not breathing. Attempts to resuscitate her failed.

After an action was filed against Cynthia, she filed a third party complaint for declaration of rights against State Farm. State Farm subsequently filed a motion for declaratory judgment asking the court to hold that based on Cynthia's deposition, it had no obligation to defend or indemnify. The

circuit court denied State Farm's motion and held that the policy provided coverage.<sup>2</sup>

The interpretation of an insurance policy is a question of law and one that we review de novo.<sup>3</sup> The general rules of construction applicable to the court's interpretations are summarized in Goodman v. Horace Mann Ins. Co.<sup>4</sup>:

[I]n this state doubts concerning the meaning of contracts of insurance are resolved in favor of the insured. But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn. 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." 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.<sup>5</sup>

The State Farm policy contains a business pursuit exclusion that denies coverage for an injury arising from any business pursuit of the insured. In Foster v. Allstate

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<sup>2</sup> Although titled an "order", the body states it is a judgment and we will refer to it as a judgment.

<sup>3</sup> Cinelli v. Ward, 997 S.W.2d 474 (Ky.App. 1998).

<sup>4</sup> 100 S.W.3d 769 (Ky.App. 2003).

<sup>5</sup> Id. at 772 (citations omitted).

Insurance Company<sup>6</sup>, a case factually similar to the present, the court interpreted a business pursuit in a homeowner's policy. A review of cases from various jurisdictions differences in interpretation of the provision. Child care services, even if compensation is received, in some jurisdictions are considered a domestic activity and the exclusion does not apply. Other jurisdictions, however, view the determination to depend on when and how the injury occurs, specifically, whether it is incident to the business pursuit. Rather than attempt to reconcile the reasoning of the line of cases cited, the court found that the exclusion is susceptible to various meanings and is, therefore, ambiguous. Citing our rules of interpretation, the court held that the policy must be construed so as to make the insurance effective.<sup>7</sup> If the general business pursuit exception was the only provision applicable to the facts, we would agree with the Appellee's contention and the result reached by the circuit court; the homeowner's policy, however, also contains a specific provision applicable to child care services rendered in the insured's home. The pertinent provision provides that coverage does not apply to:

- i. any claim made or suit brought against any insured by:

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<sup>6</sup> 637 S.W.2d 655 (Ky.App. 1981).

<sup>7</sup> Id. at 656-658.

- (1) any person who is in the care of any insured because of child care services provided by or at the direction of:
  - (a) any insured;
  - (b) any employee of any insured; or
  - (c) any other person actually or apparently acting on behalf of any insured; or
  
- (2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:
  - (a) any insured;
  - (b) any employee of any insured; or
  - (c) any person actually or apparently acting on behalf of any insured.

This exclusion does not apply to the occasional child care services provided by any insured, or to the part-time child care services provided by any insured who is under 19 years of age;. . . .

The Appellees contend that the exclusion is ambiguous and, therefore, the circuit court correctly held that there is coverage.

The term "occasional" is unambiguous and is easily understood. "Terms used within insurance contracts are to be given their ordinary meaning as persons with the ordinary and

usual understanding would construe them.”<sup>8</sup> “Occasional” is commonly used to mean that something occurs infrequently and is not a regular occurrence.<sup>9</sup> Cynthia testified that at least two of the children were in her home five days per week on a regular basis and the others at scheduled times. She further testified that she was paid for her services and considered it to be a full-time job. Under the undisputed facts, there is no question of material fact that the child care services provided by Cynthia were on a regular basis. The exception to the exclusion has no application.

The child care exclusion contained in the policy is unambiguously specific and State Farm is not obligated to defend nor indemnify Cynthia on the claim presented. The judgment of the Shelby Circuit Court is reversed and the case is remanded for entry of a judgment consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lee E. Sitlinger  
SITLINGER, MCGLINCY, THEILER  
& KAREM  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mark D. Dean  
Shelbyville, Kentucky

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<sup>8</sup> Sutton v. Shelter Mut. Ins. Co., 971 S.W.2d 807, 808 (Ky.App. 1997).

<sup>9</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed. 2000).