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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001277-MR

ERIC MITCHELL AND CANDACE SLADE — APPELLANTS

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. McGINNIS, JUDGE
ACTION NO. 02-CI-00067

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

KNOPF, JUDGE: Candace Slade and Eric Mitchell, who were injured in a single-car automobile accident, appeal from a summary judgment of the Harrison Circuit Court, entered June 4, 2004, declaring that an Allstate insurance policy did not provide coverage for the unauthorized driver of the vehicle. The appellants contend that whether the driver had permission to use the car is a factual question that should be submitted to a

jury. The trial court found that there was no issue of fact because the named insured had expressly forbidden the driver's use of the vehicle. We affirm.

In early March 2001, Rita Taylor loaned her 1989 Toyota Camry to her friend, Virginia Warner. The car was secured under a policy issued by Allstate in which Taylor and her husband were the named insureds. Apparently Warner had no other vehicle, and Taylor intended for her to have possession and general use of the Camry for an indefinite period. On April 1, 2001, Warner's son, Allan, was giving his friends Mitchell and Slade a ride in the Camry when he lost control of it and collided with a tree. Allan was killed in the accident, and Mitchell and Slade suffered serious injuries.

In December 2003, Allstate intervened in Mitchell and Slade's suit against Allan's estate. It sought a declaration that Allan could not be deemed an insured under the omnibus clause of the Taylors' policy because Allan did not have permission to drive the car. Allstate relied on Taylor's and Warner's depositions. Taylor testified that several days before the accident she had told Allan and his mother that Allan was not to drive the car because he had misused it on a prior occasion. Warner testified that, notwithstanding Taylor's admonition, on the day of the accident she had told Allan that he could use the car to go to work, but he was not to go

anywhere else and was not to have passengers. The trial court granted Allstate's petition, and Mitchell and Slade appealed.

An omnibus clause in a motor vehicle insurance policy extends liability coverage to persons, other than the named insured, who use the insured vehicle with permission. The effect of such clauses is to protect third parties wrongfully injured by the use of the insured vehicle by persons other than the owner.

Kentucky's compulsory automobile insurance law requires omnibus coverage. KRS 304.39-080(5) provides in pertinent part that

> every owner of a motor vehicle registered in this Commonwealth or operated in this Commonwealth **by him or with his permission** shall continuously provide with respect to the motor vehicle while it is either present or registered in this Commonwealth, . . . security for payment of tort liabilities, arising from maintenance or use of the motor vehicle. [Emphasis added.]

Under this statute, an owner's policy issued in Kentucky must provide liability coverage to persons using the insured vehicle with the permission of the named insured.

The parties have apparently agreed that the following definition of "insured persons" constitutes the omnibus provision in Allstate's policy with the Taylors:

1. You and any resident relative;

> 2. Any other person while in, on, getting into or out of an insured auto with your permission;
> 3. Any other person who is legally entitled to recover because of bodily injury to you, your resident relative, or an occupant of your insured auto with your permission.

Allstate contends that Allan cannot be deemed an insured person under this definition because he did not have Taylor's permission to use her car. There was no express permission because, on the contrary, Taylor had expressly forbidden Allan's use of the car. And there was no implicit permission because, even if his mother told him he could drive the car to work, she was not authorized to override Taylor's restriction, and even if she had been, Allan had exceeded her permission by having passengers in the car and by using it for a purpose other than going to work.

Mitchell and Slade maintain that Taylor's admonition against Allan's driving was not meant to rescind Warner's authority to let Allan use the car if she deemed it advisable and that Warner was aware that on other occasions Allan had driven the car with passengers and for reasons other than getting to work. Whether Allan had implicit permission to use the car as he did on the day of the accident is thus a question of fact, they contend, that precludes summary judgment.

Courts throughout the country have long remained divided over the scope to be given omnibus clauses in cases

where the permittee exceeds his or her permission.[1] Three approaches are common. Under the "conversion" rule, the permittee must strictly conform to any time, place and use restrictions specified or intended by the parties when permission is first granted. The slightest deviation from those restrictions will preclude coverage under the omnibus clause.[2]

The "minor deviation" rule is not as harsh. Under that rule, once permission is conferred, the protection afforded by the omnibus clause will not terminate unless the permittee deviates materially from the stated permission. Courts determine whether a deviation was material by considering the extent of any deviation in terms of time or place from the use originally contemplated, the purpose for which the vehicle was given, who was using the vehicle, and other factors. A deviation is not material unless it defeats or can be deemed alien to the original permitted objective or operation.[3]

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[1] Annotation, "Omnibus Clause of Automobile Liability Policy as Covering Accidents Caused by Third Person Who is Using Car with Consent of Permittee of Named Insured," 4 ALR3d 10 (1965); Jay M. Zitter, "Omnibus Clause as Extending Automobile Liability Coverage to Third Person Using Car with Consent of Permittee of Named Insured," 21 ALR4th 1146 (1983).

[2] Progressive Northern Insurance Company v. Concord General Mutual Insurance Company, 864 A.2d 368, 374-75 (N.H. 2005) (citations and internal quotation marks omitted).

[3] *Id.*

Under the "initial permission" rule (sometimes referred to as the "hell or high water" rule), even substantial deviations from the intended permission are immaterial. Coverage under the omnibus clause will extend to any use, even misuse, that does not rise to the level of theft or conversion.[4]

In Maryland Casualty Company v. Hassell,[5] a case that preceded the enactment of KRS 304.39-080 and the rest of the Motor Vehicle Reparations Act (MVRA),[6] the former Court of Appeals placed Kentucky in the intermediate or "minor deviation" camp. If this standard still applies, we agree with the trial court that Allstate is entitled to summary judgment.[7] Whatever may have been the understanding between Allan and his mother, Mitchell and Slade have proffered no evidence that would permit a jury to disregard Taylor's expressly forbidding Allan from driving her car. His doing so anyway, even with his mother's permission, was a major deviation from the permission Taylor conferred, and thus, under the "minor deviation" rule, was not covered by the omnibus clause.

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[4] *Id.*

[5] 426 S.W.2d 133 (Ky. 1967).

[6] KRS 304.39-010 to -350.

[7] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996) ("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.").

Several courts have held, however, that the more liberal "initial permission" rule is more consonant with compulsory insurance acts such as our MVRA. The liberal rule, according to these courts

> furthers the state's policy of compensating and protecting innocent accident victims from financial disaster, . . . serves to discourage collusion between lender and lendee in order to escape liability, and . . . greatly reduces a most costly type of litigation.[8]

If this rule applies, then Allan's use of Taylor's vehicle would be covered because, although that use frustrated Taylor's restrictions, it did not amount to a conversion.

Apparently the question has not been much litigated in Kentucky. But in Preferred Risk Mutual Insurance Company v. Kentucky Farm Bureau Mutual Insurance Company,[9] our Supreme Court indicated that the MVRA did not change our law with respect to omnibus clauses. In ruling that the Act did not mandate coverage for "an operator who does not have the owner's permission or who converts the vehicle to his own use," the

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[8] Progressive Northern Insurance Company v. Concord General Mutual Insurance Company, 864 A.2d 368, 375 (N.H. 2005) (citation and internal quotation marks omitted). O'Neill v. Long, 54 P.3d 109 (Okla. 2002); Zimmerman v. State Farm Mutual Automobile Insurance Company, 729 N.E.2d 70 (Ill.App. 2000); Farm Bureau Mutual Insurance Company of Idaho v. Hmelevsky, 539 P.2d 598 (Idaho 1975). *But see* State Farm Mutual Automobile Insurance Company v. Ragatz, 571 N.W.2d 155 (S.D. 1997) ("minor deviation" rule consistent with compulsory insurance law).

[9] 872 S.W.2d 469 (Ky. 1994).

Court stated, "[s]uch a policy was the law in this Commonwealth before the MVRA (effective July 1, 1975) and continues to be after its passage."[10]

We realize that Preferred Risk does not cite Maryland Casualty Company v. Hassell and that Preferred Risk concerned the conversion of a vehicle, not a use that began with permission. It appears, nevertheless, that the "minor deviation" rule remains the standard in Kentucky for determining the scope of an omnibus clause. Under that standard, as discussed above, the Taylors' policy does not extend to Allan's unauthorized use of the Camry. The Harrison Circuit Court did not err by so ruling. Accordingly, we affirm its June 4, 2004, summary judgment.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Dan E. Siebert
Siebert & Johnson, PLLC
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. Campbell Ewen
William P. Carrell II
Ewen, Kinney & Rosing
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

A. Campbell Ewen
Louisville, Kentucky

[10] 872 S.W.2d at 471.