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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000607-MR

STATE AUTO MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-002716

JOHN GREENROSE AND MARY GREENROSE — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

DYCHE, JUDGE: State Auto Mutual Insurance Company ("State Auto") appeals the order of the Jefferson Circuit Court granting summary judgment and attorney's fees in favor of John and Mary Greenrose. We affirm in part, vacate in part, and remand.

John and Mary Greenrose leased a rental home to Barry Holland. On January 11, 2004, Holland tripped and fell at the foot of the basement stairs. As he fell, Holland grabbed onto overhead piping in order to steady himself. Unfortunately, the

piping gave way spilling diesel heating oil into the basement. The piping and drum containing the heating oil were apparently part of the home's previous heating system, but were never removed.

Holland filed a complaint against the Greenroses in Jefferson Circuit Court seeking compensation for damage to his personal property. The Greenroses filed a third-party declaratory judgment action against State Auto seeking a determination that insurance coverage and a legal defense were owed under the insurance policy on the property. State Auto had previously denied coverage under a "pollution" exclusion. The trial court found that State Auto was required to provide coverage and awarded attorney's fees to the Greenroses. This appeal follows.

On appeal, the standard of review for summary judgment is whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). The court should view the record in a light most favorable to the party opposing summary judgment. Id. Summary judgment should only be granted if it appears impossible for the non-movant to produce evidence at trial that warrants a judgment in its favor. Hoke v. Cullinan, 914 S.W.2d 335, 337 (Ky. 1995).

State Auto argues that the trial court improperly granted summary judgment against it because the insurance policy excluded coverage for the discharge of pollutants in clear and unambiguous language.

The provisions at issue read as follows:

> This policy does not apply to:
>
> . . . .
>
> 3. bodily injury, personal injury, or property damage which would not have occurred in whole or part but for the actual, alleged, or threatened discharge, disposal, seepage, migration, release or escape of pollutants at any time;
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

This Court has considered an almost identically worded provision in Motorists Mutual Insurance Co. v. RSJ, Inc., 926 S.W.2d 679 (Ky.App. 1996). In that case, Motorists Mutual was not allowed to deny coverage under a pollution exclusion for damages arising from exposure to carbon monoxide fumes that leaked from the vent pipe of a dry cleaner's boiler.

This Court held that, although the words of the policy were unambiguous on their face, ambiguity arose in the application of the words to the particular facts of that case.

Id. at 680, 681. More generally, however, the Court found that pollution exclusions are to be construed narrowly. Id. at 682. This view is premised on three basic reasons. First, the diversity of judicial interpretation of similar policy language points toward, but is not determinative of, ambiguity. Id. at 681. Second, the terms of an insurance contract "'should be given their ordinary meaning as persons with the ordinary and usual understanding would construe them.'" Id. (quoting City of Louisville v. McDonald, 819 S.W.2d 319, 320 (Ky.App. 1991)). Specifically, the Court found that the use of environmental law terms of art reflected the exclusion's traditional purpose of avoiding liability related to intentional industrial pollution. Finally, a blind application of the literal terms of a pollution exclusion would lead to absurd results. Motorists Mutual, supra at 682.

We find that the pollution exclusion is ambiguous as applied to the facts of this case. Just as in Motorists Mutual, supra, we conclude that an ordinary person would not understand the provision as excluding coverage for a broken basement pipe given the "historical perspective" of the pollution exclusion and "the continued use of environmental law terminology." Id. at 682. Therefore, we affirm as to the trial court's determination that coverage was owed by State Auto.

State Auto next argues that the trial court erred by summarily granting attorney's fees to the Greenroses. If a reviewing court cannot ascertain from the record whether a trial court has abused its discretion in awarding attorney's fees, then it must remand for the trial court to make a finding. Angel v. McKeehan, 63 S.W.3d 185, 192 (Ky.App. 2001). The record in this case does not indicate the basis of such an award. Therefore, we vacate and remand for such a finding.

The judgment of Jefferson Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

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