RENDERED: AUGUST 10, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT:
MAY 14, 2008
(FILE NO. 2007-SC-0638-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001552-MR

JOSEPH M. CODISPOTI AND
PRESTON HIGHWAY MOTORS, INC. APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 04-CI-002391

FIRST FINANCIAL INSURANCE COMPANY
AND ERIC JAMESON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

THOMPSON, JUDGE: The appellants, Preston Highway Motors, Inc., a Kentucky corporation, and Joseph M. Codispoti filed a declaratory judgment action in the Jefferson Circuit Court seeking a declaration of rights as to their rights, duties and obligations arising under a policy of insurance issued by the appellee, First Financial Insurance Company. The circuit court entered summary judgment in which it held that an employee exclusion in the policy precluded coverage to Preston Highway Motors and Joseph M. Codispoti. This appeal followed.

The facts are not disputed. On March 19, 2002, Eric Jameson was driving a vehicle in which Codispoti, the owner and president of Preston Highway Motors, was a passenger. Jameson was an independent contractor and, therefore, not an employee of Preston Highway Motors. On behalf of Preston Highway Motors, the two men were taking the vehicle, a 2000 Saturn, to sell at auction in Indianapolis, Indiana. Approximately five miles outside of Indianapolis, Jameson fell asleep, hit a guardrail to the left of the roadway and then bounced to the right where the vehicle hit a wall. Both Codispoti and Jameson sustained personal injuries.

On the date of the accident, a policy of insurance issued by First Financial Insurance naming Preston Highway Motors as the named insured was in effect and covered the vehicle involved in the accident. First Financial does not deny that pursuant to the terms of the policy, Jameson was a permissive user of the vehicle and, therefore, an insured. However, it contends that Codispoti's status as an employee of Preston Highway Motors, precludes coverage under the policy terms. The exclusion at issue states as follows:

B. EXCLUSIONS

This insurance does not apply to any of the following:

EMPLOYEE INDEMNIFICATION AND EMPOYER'S LIABILITY

"Bodily injury" to:

a. An "employee" of the "insured" arising out of and in the course of:

(1) Employment by the "insured"; or

(2) Performing the duties related to the conduct of the "insured's" business.

The appellants argue that the exclusion does not apply because Jameson is not an employee of Preston Highway Motors or, in the alternative, that the enforcement of the exclusion violates public policy. Finally, they contend that if Jameson is not covered under the policy, then Codispoti is entitled to coverage pursuant to the policy's uninsured motorists endorsement.

The construction of insurance contracts is generally a matter of law for the court. *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc*., 82 S.W.3d 869, 871 (Ky. 2002). Where there are no material issues of fact in dispute, the circuit court can properly resolve the case by entry of a summary judgment. *Steelvest, Inc. v. Scansteel Serv. Center, Inc*. 807 S.W. 2d 476 (Ky. 1991).

The exclusion in question is unambiguous, yet, the appellants contend that Jameson is an "insured" under the policy and therefore, the exclusion applies only to his employees and not to Codispoti, an employee of Preston Highway Motors. We have

unsuccessfully attempted to find logic in appellant's construction of the policy. There is no dispute that Jameson, a permissive user, is an insured. However, it is equally clear that the named insured, Preston Highway Motors, is also an insured. Since Codispoti is an employee of the named insured, regardless of Jameson's status as an insured, coverage for Codispoti's injuries is precluded. There is no ambiguity in the plain language used in the policy and, therefore, no need to resort to the principle that ambiguities must be resolved in favor of insurance coverage. *State Auto Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801, 803 (Ky.App. 1985).

Kentucky has enacted the Motor Vehicle Reparations Act (MVRA) for the purpose of mandating minimum bodily injury insurance for every vehicle owned and operated in the Commonwealth. To further that purpose, KRS 304.39-100(2) states that every automobile insurance policy "shall be deemed to provide the basic reparation benefits coverage and minimum security for tort liabilities required . . . ." Following the enactment of the MVRA, the courts have been confronted with challenges to policy exclusions which purport to deny coverage.

In *Bishop v. Allstate*, 623 S.W.2d 865 (Ky. 1981), the Kentucky Supreme Court held that a family exclusion in an automobile policy violated the strong public policy of the Commonwealth against defeating coverage. In doing so it reasoned that:

> An exclusionary clause in an insurance contract which reduces below minimum or eliminates either of these coverages effectively renders a driver uninsured to the extent of the reduction or elimination. Because the stated purpose of the MVRA is to assure that a driver be insured to a minimum level, such an exclusion provision contravenes the purpose and policy of the compulsory insurance act. Consequently, family or household exclusionary clauses in insurance

> contracts that dilute or eliminate the minimum requirements of BRB or tort liability coverage are void and unenforceable.

Id. at 866 (citations omitted). In *Lewis v. West American Ins. Co*., 927 S.W.2d 829 (Ky. 1996), the Court reaffirmed that a "household" exclusion violated the stated public policy.

In *Brown v. Indiana Ins. Co*. 184 S.W.3d 528 (Ky. 2005), our Supreme Court considered the precise exclusion contained in the the First Financial policy. In that case, Jose Garcia and Chase O'Banion were both employed with Willowbank Garden Company when the pickup truck in which they were passengers collided with a CSX train. At the time of the accident, the truck was being driven by Darren Akers, also a Willowbank employee. Willowbank had not purchased workers' compensation insurance and had not qualified as a self-insurer. Thus, pursuant to KRS 342.690(2), the estates of Garcia and O'Banion brought a wrongful death action against Willowbank, Akers and CSX.

Before discussing the law set forth in *Brown*, we candidly state our recognition of a factual distinction between this case and *Brown*. Unlike in *Brown* where the accident victim and the tort-feasor were employees of the named insured, Jameson was was not an employee of the named insured. However, after careful analysis of the Supreme Court's opinion, we find this factual distinction immaterial to our result.

The Supreme Court began its discussion by emphasizing that regardless of whether the estates elected to pursue workers' compensation claims, in which case benefits would be paid by the uninsured employer's fund, it was only significant that such benefits could be pursued. *Id*. at 532-533. Ultimately, the Court upheld a workers' compensation exclusion in the policy and then turned its attention to the employee

exclusion. *Id.* at 535. To emphasize the identical language in the policy before this court and the policy at issue in *Brown*, we quote from the latter:

> **B. Exclusions**
>
> **4. Employee Indemnification and Employer's Liability**
>
> "Bodily injury" to:
>
> a. An "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
>
> (2) Performing the duties related to the conduct of the "insured's" business . . . .

The Court emphasized that the exclusion "is not limited to injuries for which workers' compensation benefits are sought or payable, but applies to any injury to any employee of the insured . . . arising out of and in the course of employment . . . ." *Id*. The Court unequivocally held such exclusion valid and did so in reliance on established precedent when it stated:

> Our courts have long upheld automobile liability insurance exclusions for injuries to the insured's employees sustained while in the course and scope of employment, *Craddock v. Imperial Cas. & Indem. Co.,* 451 S.W.2d 658, 661 (Ky.1970); *Commonwealth, Dept. of Pub. Safety v. Robinson,* 435 S.W.2d 447, 448 (Ky. 1968), even in response to arguments that the exclusion violated the financial responsibility law. *Nat'l Union Indem. Co. v. Miniard,* 310 S.W.2d 793, 794 (Ky.1958).
>
> To find otherwise would encourage employers to ignore their obligation to obtain workers' compensation insurance and rely on their general liability policy, which in turn necessarily would require a higher premium schedule reflecting the additional risk. Such a result would create an imbalance in procurement of insurance and compound confusion and enforceability of the comprehensive and basic social policy

> enunciated by the Act. This decision does not preclude appellants from seeking damages directly from the employer-intervenors *and places the risk and payment for damages where it belongs.*

Id. at 536.

We can find nothing in the Court's strong language which even hints that an employee exclusion is against any public policy of the Commonwealth. To the contrary, the Court found that the exclusion furthers the policy of the Commonwealth that an employee's remedy against an employer be through the Workers' Compensation Act. Because of the decisive language used by the Court and its application to the present case, we quote the opinion at length:

> An employer obtains a liability policy to cover *its liability to the public* for negligence of its agents, servants and employees under the doctrine of respondeat superior. This is because compliance with the provisions of the Workers' Compensation Act constitutes the full extent of an employer's liability for any injuries sustained by its employees, direct or statutory, arising out of and in the course of their employment. The intent of commercial general liability policies is to protect against the unpredictable and potentially unlimited liability that can result from accidents causing injury to other persons or their property. A commercial general liability policy does not cover the insured's obligations under a workers' compensation policy or bodily injury to the insured's employees arising out of the employment. The primary purpose of an employee exclusion clause is to draw a sharp line between employees and members of the general public.
>
> *Tickle,* 99 S.W.3d at 29 (internal citations and quotations omitted).
>
> The rule of strict construction against an insurance company certainly does not mean that every doubt must be resolved against it and does not interfere with the rule that the policy must receive a reasonable interpretation consistent with the parties' object and intent or narrowly expressed in the plain

> meaning and/or language of the contract. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. We consider that courts should not rewrite an insurance contract to enlarge the risk to the insurer.
>
> *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.,* 870 S.W.2d 223, 226-27 (Ky. 1994).
>
> We decline to rewrite this policy of insurance so as to shift the consequences of Willowbank's irresponsible failure to obtain workers' compensation insurance onto Kentucky's responsible business owners in the form of increased automobile and CGL insurance premiums for duplicative workers' compensation insurance coverage. Instead, those consequences remain where they properly belong, *Inman,* 641 A.2d at 331, *i.e.,* on Willowbank, the party that could have avoided them by complying with its statutory duty to purchase workers' compensation insurance coverage.

Id. at 540 (emphasis original).

Although Jameson was not an employee of Preston Highway Motors, the issue in this case, as in *Brown*, is the coverage afforded Preston Highway Motor's employee, Codispoti. Pursuant to *Brown*, the employee exclusion is valid in this commercial general liability policy. Thus, we reject the appellants' contention that the exclusion is void.

Appellant's final attempt to find coverage is through the policy's uninsured motorists endorsement which states:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle".
>
> This is not an uninsured motorist claim. The operator of the vehicle, Jameson, is an insured under the First Financial policy. Because of the employee

exclusion in the policy, Codispoti, who seeks damages from Jameson, is not covered under any of its provisions, including the uninsured motorists provision.

Based on the forgoing, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS PRESTON HIGHWAY MOTORS, INC. AND JOSEPH M. CODISPOTI:

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NO BRIEF FILED FOR APPELLEE ERIC JAMESON:

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