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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000818-MR

MOTORISTS MUTUAL INSURANCE COMPANY APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 01-CI-005857

CINCINNATI INSURANCE COMPANY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Motorists Mutual Insurance Company appeals from a Jefferson Circuit Court order granting summary judgment in favor of The Cincinnati Insurance Company. We vacate and remand to that court.

In 1994-95, Elite Homes, Inc. built and sold a house to Lawrence and Jennifer Mintman. At the time, Elite was covered under a comprehensive general

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

liability policy issued by Motorists. Effective July 1, 1996, Elite procured a commercial liability policy from Cincinnati.

In 2001, the Mintmans brought this action against Elite alleging serious latent structural defects as a result of substandard work performed by Elite and/or its subcontractors. The defects included cracks in the drywall and exterior brick walls, defective windows and doors, sagging floors, separation of brick veneer from exterior walls, and leaning walls. Ultimately, construction experts determined that subcontractors hired by Elite to perform framing and foundation work had done the work improperly.

Elite notified both Motorists and Cincinnati of the action. Cincinnati refused to investigate or defend Elite. In its letter declining coverage, Cincinnati informed Elite:

> In review of this matter, It [sic] would appear that the damage in part or all may fall prior to the policy period. We must note that even if part of the damage falls within our policy it would appear that there is a question if all claims fit the definition of property damage in the policy. The allegations do not appear to have arisen from an occurrence as defined in the policy. We also note the above-cited exclusions are on point for the allegations, as the damages are claimed for the house itself and do not involve damage to other property. Therefore in light of the information obtained, we have determined there to be no coverage under our policy for this claim.

Motorists defended Elite and paid $130,000 to settle the case with the Mintmans. Motorists also took an assignment from Elite and the Mintmans for any claim they might have against Cincinnati, and filed a third-party complaint against Cincinnati to recover the settlement payment plus fees and costs of approximately $62,000 incurred in defending Elite.

The applicable provisions of the Cincinnati policy included, in Section I(A)(1):

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

The definitions set out in Section V of the policy included the following:

> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> 15. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

In addition, Cincinnati's policy contained several exclusions, including the following exclusions to property damage coverage, as set out in Section I(A)(2)(j):

> (5) That particular part of real property on which you or any contractors or subcontractors working directly on your behalf are performing operations, if the "property damage" arises out of those operations; or

> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Both Motorists and Cincinnati filed motions for summary judgment. The trial court granted Cincinnati's motion on the basis that the Mintmans' claim did not qualify as an "occurrence" causing "property damage" under the policy. The court agreed with Cincinnati that the policy did not provide coverage for faulty workmanship in the work product itself, but instead provided coverage for a situation in which such faulty workmanship caused bodily injury or property damage to something other than the work product. Motorists appeals.

On appeal, Motorists cites *James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273, 278 (Ky. 1991), arguing that the purpose of a comprehensive general liability policy is to provide broad comprehensive insurance, including coverage of all risks not expressly excluded. Motorists further argues that since Cincinnati's policy applies to property damage caused by an occurrence, which is defined as an accident, and that since Elite certainly did not plan or intend the damages which occurred to the Mintmans' house, then such damages must properly be characterized as accidental property damage which is covered under Cincinnati's policy.

Recently, the Kentucky Supreme Court restated the rules of construction governing insurance policies in general, and comprehensive general liability policies in particular:

> As a general rule, the construction and legal effect of an insurance contract is a matter of law for the court. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) ("The construction as well as meaning and legal effect of a written instrument, however compiled, is a matter of law for the court."). As noted by this Court in

> *Brown Found.*, Kentucky has consistently recognized that an ambiguous policy is to be construed against the drafter, and so as to effectuate the policy of indemnity. 814 S.W.2d at 279, citing *Wolford v. Wolford*, 662 S.W.2d 835, 838 (Ky. 1984). *See also Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992). In *Wolford*, this Court's predecessor made it clear that ambiguous language must be liberally construed so as to resolve all doubts in favor of the insured. 662 S.W.2d at 838. "[W]here not ambiguous, the ordinary meaning of the words chosen by the insurer is to be followed." *Brown Found.*, 814 S.W.2d at 279, citing *Washington Nat'l Ins. Co. v. Burke*, 258 S.W.2d 709 (Ky. 1953). Or stated another way, words which have no technical meaning in law, must be interpreted in light of the usage and understanding of the common man. *See Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986).
>
> **A. Purposes behind Commercial General Liability Policies**
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> As we consider the policy *sub judice*, we are mindful that this Court has recognized that "[t]he primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance." *See Brown Found.*, 814 S.W.2d at 278. Further, "the very name of the policy suggests the expectation of maximum coverage." *Id.* To that end, this Court stated that "[a]ll risks not expressly excluded [under the CGL policy] are covered, including those not contemplated by either party." *Id.*
>
> In *Brown Found.*, this Court recognized that "[t]he insurer's responsibility under a comprehensive policy is not measured by its intent." *Id.* at 277. Rather, "[t]he insured is entitled to all coverage he may reasonably expect under the policy." *Id.* As it relates to exclusions in a CGL policy, this Court made it clear that "[o]nly an unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage will defeat this expectation." *Id.*

Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633, 638 (Ky. 2007).[2]

In addition, like any contract, a court will construe an insurance policy as a whole, rather

[2] While *Bituminous* became final during the pendancy of this appeal, we remind counsel for both parties that the citation of nonfinal opinions is never permissible. Additionally, the citation of unrelated state circuit court opinions is unacceptable.

than viewing only certain parts or fragments thereof. *Equitable Life Assurance Soc'y v. Hall*, 253 Ky. 450, 454, 69 S.W.2d 977, 979 (1934).

In analyzing the policy provisions at issue in *Bituminous*, the court additionally stated:

> [A] CGL policy covers all risks not expressly excluded by its terms. *See Brown Found.*, 814 S.W.2d at 278. Thus, having concluded the damage to the Turners' property fell within the CGL policy, we must now consider whether the coverage is precluded under either of the exclusions relied on by BCC. These exclusions are known as the business risk exclusions.
>
> The purpose of the business risk exclusions in CGL policies is to allocate the risk between the insured and insurer as it relates to damages arising out of the insured's business. The business risk exclusions are intended to distinguish between contract liability and tort liability. *See Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 881 (Minn. 2002). These exclusions "are based on the apparently simple premise that [a CGL policy] is not intended as a guarantee of the quality of an insured's work product." *Schauf*, 967 S.W.2d at 77. Thus, the risk that the product provided or the work performed will not meet contract requirements is a risk not covered under the policy. *Thommes*, 641 N.W.2d at 880. *See also Standard Constr. Co., Inc. v. Maryland Cas. Co.*, 359 F.3d 846, 852-53 (6th Cir. 2004).

Bituminous, 240 S.W.3d at 640.

Both Motorists and Cincinnati cite cases from other jurisdictions supporting their respective arguments. *See, e.g.*, *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 75-76 (Wis. 2004) (holding that building subsidence and buckling as a result of contractor's inadequate site preparation was accidental and met the policy's definition of an "occurrence"); *but see, e.g., Kvaerner Metals Div. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (holding that "definition of 'accident' required to establish an 'occurrence' . . . cannot be satisfied by claims based upon faulty

workmanship”). In addition, the United States District Court for the Western District of Kentucky has held that a claim of faulty workmanship in work product itself did not constitute “property damage” as defined in a commercial general liability policy. *Assurance Co. of America v. Dusel Builders, Inc.*, 78 F.Supp.2d 607, 609 (W.D. Ky. 1999). Of course, federal court decisions interpreting state law are not binding on state courts. *See Embs v. Pepsi-Cola Bottling Co. of Lexington, Ky., Inc.*, 528 S.W.2d 703, 705 (Ky. 1975).

While Cincinnati’s argument is compelling, our view, guided by the decision in *Bituminous*, is that since comprehensive general liability policies are designed to cover broad risks, Motorists has the better argument. The damage to the Mintmans’ house was clearly property damage and was caused by an “occurrence” since the damage was undoubtedly accidental in the sense that it was not intentional. Thus, the trial court erred in finding that the damages to the Mintmans’ house should not be construed as constituting an “occurrence.” However, as the trial court did not consider all of Cincinnati policy’s provisions, specifically those exclusions related to Elite’s work product, no determination has been made as to whether coverage is otherwise precluded.

Therefore, we vacate the Jefferson Circuit Court’s opinion and order and remand this matter to that court for reconsideration in light of all the policy provisions and the Kentucky Supreme Court’s opinion in *Bituminous*.

ALL CONCUR.

BRIEF FOR APPELLANT:

William P. Swain
Paul J. Bishop
D. Sean Ragland
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael D. Risley
Louisville, Kentucky