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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000665-MR

RONALD KILLIN — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 03-CI-01194

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.; EARL WINDELL; LORETTA FERRO D/B/A JUNE'S TOUCH OF CLASS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES, SENIOR JUDGE.[1]

GRAVES, SPECIAL JUDGE: Ronald Killin appeals from an order of the Boyd Circuit Court granting summary judgment to State Farm Mutual Automobile Insurance Co. upon the issue of whether the liability provisions of an automobile insurance policy it issued to Earl Windell provides coverage in connection with an accident

[1] Senior Judge J. William 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 (KRS) 21.580.

caused by Windell while he was delivering flowers while driving a vehicle owned by Loretta Ferro d/b/a June's Touch of Class.[2] The circuit court determined that an exclusion contained in the policy exempting from coverage non-owned cars "used in any other business or occupation" was applicable under the undisputed facts of this case. For the reasons stated below, we reverse the judgment of the circuit court, and remand for entry of summary judgment in favor of the appellant.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute. On June 16, 2002, Windell was in the process of making a floral delivery for June's Touch of Class, a corporation solely owned by Loretta Ferro. He was making the delivery in a vehicle titled to Ferro – but purchased for business use - a 1987 Ford Aerostar van. Windell is a friend of Ferro, and was making the delivery as a favor to her. He was not compensated for the delivery. Windell was not at the time, nor was he ever, an employee of the business. Windell had, however, gratuitously made deliveries for Ferro on other occasions.

In the course of making the June 16, 2002, delivery, Windell collided with a motorcycle ridden by Ronald Killin. As a result of the collision Killin incurred substantial head injuries. It is undisputed that Windell was at fault in causing the accident.

[2] This is the designation used by Killin for Ferro and her business in his notice of appeal. We follow that designation herein.

Killin subsequently filed a lawsuit against Loretta Ferro d/b/a June's Touch of Class and Windell in Boyd Circuit Court. State Farm had written the automobile insurance coverage for both the Loretta Ferro d/b/a June's Touch of Class vehicle and for Windell's personal automobile insurance policy. State Farm settled for the policy limits of $50,000.00 on the Loretta Ferro d/b/a June's Touch of Class policy, but initiated the present declaratory judgment action seeking a declaration of non-coverage under the Windell automobile policy. The grounds for State Farm's assertion that it was not obligated under the Windell policy was an exclusion contained in the policy for non-owned cars "used in any other business or occupation."

On March 1, 2007, the circuit court entered an order granting summary judgment to State Farm on the basis that coverage under the policy for the June 16, 2002, accident was excluded under the policy's non-owned cars "used in any other business or occupation" provision. This appeal followed.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[3] 56.03. "The record must be viewed in a light most favorable to the party opposing the

[3] Kentucky Rules of Civil Procedure.

motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.1991). "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

DISCUSSION

Before us, Killen contends that the circuit court erred in awarding summary judgment to State Farm. He contends (1) that the exclusion of coverage for non-owned cars used in any other business or occupation is inapplicable under the facts of this case and (2) that the Ford Aerostar van constitutes a private passenger car subject to coverage under the policy.

The Liability Coverage section of the policy provides that "liability coverage extends to the use, by an insured, of . . . a non-owned car." However, the policy also contains an exception to the foregoing. The exception provision states, in relevant part, as follows:

> THERE IS NO COVERAGE FOR **NON-OWNED CARS**:[4]
>
> . . . .
>
> 2. WHILE:
>
> a. BEING REPAIRED, SERVICED OR USED BY ANY **PERSON** WHILE THAT **PERSON** IS WORKING IN ANY **CAR BUSINESS**; OR

[4] Capitalization and emphasis in original.

> b. USED IN ANY OTHER BUSINESS OR OCCUPATION. This does not apply to a ***private passenger*** car driven or ***occupied*** by the first ***person*** named in the declaration, his or her ***spouse*** of their ***relatives***.

Interpretation of an insurance policy is a question of law which we review *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky.App. 1998). The goal of any court in interpreting a contract is to ascertain and to carry out the original intentions of the parties, *Wilcox v. Wilcox*, 406 S.W.2d 152, 153 (Ky.1966), and to interpret the terms employed in light of the usage and understanding of the average person. *Fryman v. Pilot Life Insurance Co.*, 704 S.W.2d 205, 206 (Ky.1986). 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." *Id.*; *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 811 (Ky.App.2000). However, under the "doctrine of reasonable expectations," an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy. *Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky.App.1991); *Woodson v. Manhattan Life Ins. Co.*, 743 S.W.2d 835, 839 (Ky.1987).

Further, a policy of insurance is to be construed liberally in favor of the insured and if, from the language, there is doubt or uncertainty as to its meaning, and it is

susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be adopted. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 227 (Ky. 1994). But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn. *Osborne v. Unigard Indemnity Co.*, 719 S.W.2d 737, 740 (Ky.App. 1986); *Woodard v. Calvert Fire Ins. Co.*, 239 S.W.2d 267, 269 (Ky. 1951). 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. *Moore v. Commonwealth Life Ins. Co.*, 759 S.W.2d 598, 599 (Ky.App. 1988).

Giving the phraseology its most natural meaning, we construe the plain meaning of the language as intending that sections 2(a) and 2(b) are to be read together as part of the same sentence and the term "other business" to refer back to "car business." *See Wilson v. Gilde*, 514 N.W.2d 520 (Mich.App. 1994) (Reaching this interpretation). Thus the intent of 2(b) is to exclude coverage for a non-owned vehicle "while: [the vehicle is] . . . being . . . used in any other business or occupation [other than a car business.]"

Applying the foregoing construction to the facts at bar, the non-owned vehicle (the 1987 Ford Aerostar) was being used (it was being driven by Windell) in a business (June's Touch of Class) other than a car business (a flower business).

Thus pursuant to the plain meaning of the provision, the exclusion applies.

Killen asserts, however, that "the most rational and common sense interpretation of the exclusion . . . would require some connection to a business or occupation being pursued **on behalf of Windell**." Pursuant to his interpretation, in order for the provision to apply the insured must have been engaged in a business or occupation for his personal profit or gain, and since Windell was delivering the flowers gratuitously at the time of the accident, the exclusion does not apply. However, the plain language of the provision provides only that the vehicle be "being . . . used in . . . [a] business" for the exclusion to apply. The appellant is reading language into the provision that is not there. The courts may not use a nonexistent ambiguity to rewrite the insurance policy in favor of the insured. *Motorists Mutual Insurance Company v. RSJ, Inc.*, 926 S.W.2d 679, 680 (Ky.App. 1996). As such, we are unpersuaded by this argument. Nor, based upon the language, do we believe that the reasonable expectation of the policy holder would require that the business use be for the personal gain or profit of the policy holder. *Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d at 938.

Alternatively, Killin contends that the the private passenger car provision of paragraph 2(b), which states "[t]his [the non-owned business vehicle exclusion] does not apply to a ***private passenger*** car driven or ***occupied*** by the [insured],"

vitiates the non-owned business vehicle exclusion. Based upon this provision's positioning relative to the exclusion which precedes it, we agree that the provision is a vitiating exception to the exclusion and is applicable under the facts at bar.

The policy defines a private passenger car as follows:

> **PRIVATE PASSENGER CAR** - means a **car**:[5]
>
> 1. with four wheels;
>
> 2. of the private passenger or station wagon type; and
>
> 3. designed solely to carry **persons** and their luggage.

A car is defined as an automobile. *The American Heritage Dictionary*, Second College Edition, p. 238. (1985). In turn, an automobile is defined as "[a] self-propelled passenger vehicle that usually has four wheels and an internal-combustion engine, used for land transport." *Id.* at pg. 143.

We believe the 1987 Ford Aerostar meets all of the foregoing criteria to fall within the definition of a private passenger car. It makes no difference that it is a "minivan." Under the above definitions a minivan is a car.

Further, the vehicle had four wheels.

Moreover, it was of the private passenger **type**. That is, a Ford Aerostar van is, as we construe the model, a **type** of vehicle primarily designed to carry private passengers.[6]

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[5] Capitalization and emphasis in original.

[6] While State Farm appears to argue that the vehicle had in some way been modified for flower delivery, Ferro testified in her deposition that it had not been modified in any way at the time she bought it, and nor had she

Finally, we believe that a 1987 Ford Aerostar van was **designed** solely to carry persons and their luggage. It was not, for example, as are a pickup truck or utility van, designed to haul cargo and/or work tools.

Conspicuously absent from any of the foregoing definitional criteria to qualify as a "private passenger car" is a requirement that the vehicle not be in use for a business or commercial purpose at the time of the occurrence.[7] While the circuit court determined the fact that the vehicle was being used for a business purpose as decisive in awarding summary judgment to State Farm, we find no limitation in the language which would mandate that the vehicle not be in use for a commercial or business purpose at the time of the covered occurrence. Such language is simply nonexistent.

While the use of the term "private" could, in the proper context, be construed as intending to distinguish a non-business use from a commercial/business use, criteria two of the policy's "private passenger car" definition refers to a private passenger **type**. Hence, under the language of the policy, what is relevant is the **type** of vehicle, not the **use** to which it is being put. Hence we do not construe the term "private," in the present context, as requiring that the vehicle not be in use for

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modified it after she acquired it.

[7] Nor would it make sense to have such a criteria since the purpose of this vitiating provision is to carve out an exception to the non-owned/business use exclusion. If the exclusion applied to a non-owned private passenger car being used in a business to begin with, there would be no need for a private passenger car exception to the exclusion.

a commercial or business purpose at the time of the covered occurrence.

Based upon the foregoing discussion, if the plain language of the policy does not explicitly cover the Aerostar under the facts of this case, coverage under the private passenger car provisions is, at best, ambiguous. Ambiguous coverage exclusions are generally strictly construed against the insurer. *Kemper National Insurance Companies v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873-874 (Ky. 2002). In addition, if an insurance exclusion is subject to two reasonable interpretations, the interpretation which is more favorable to the insured must be adopted. *Motorists Mutual*, 926 S.W.2d at 680. Upon application of these rules of construction in the case of the present ambiguity, we are constrained to hold that the Ford Aerostar van is a "private passenger car" and, as a consequence, the non-owned/business use exclusion does not apply.

CONCLUSION

For the foregoing reasons the judgment of the Boyd Circuit Court is reversed, and the cause is remanded for the entry of summary judgment in favor of Killin.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Albert B. McQueen, Jr. Lexington, Kentucky	Susanne M. Cetrulo Edgewood, Kentucky