RENDERED: MAY 13, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002361-MR

THE ESTATE OF BENITA WIRLEEN DIXON, BY AND THROUGH GREG DIXON, ADMINISTRATOR; AND GREG DIXON, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NOS. 06-CI-00599 & 07-CI-00047

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Estate of Benita Wirleen Dixon, by and through Greg Dixon, Administrator, and Greg Dixon, individually (hereinafter collectively referred to as "Dixon"), appeal from the Pike Circuit Court order granting

summary judgment in favor of State Farm Mutual Automobile Insurance Company ("State Farm"). For the following reasons, we affirm.

In 2006, Lafe Ward, a West Virginia resident and 50% owner and vice president of Ward and Associates, a West Virginia law firm, was operating a Lincoln Aviator owned by the law firm when he was involved in a car accident in Kentucky with Benita Wirleen Dixon, also a West Virginia resident. Benita Dixon died from the injuries she sustained in the accident.

Dixon filed the underlying declaratory judgment action, seeking a determination by the Pike Circuit Court that the State Farm policy issued to Lafe's wife, Anna, covered Lafe for the car accident at issue. Dixon and State Farm filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of State Farm, finding the policy did not cover the Lincoln Aviator. This appeal followed.

Summary judgment shall be granted only 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[1] 56.03. The trial court must view the record "in a light most favorable to the party opposing the 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) (citations omitted). Further, "a party opposing a properly supported

[1] Kentucky Rules of Civil Procedure.

summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review 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." *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the trial court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Dixon maintains the trial court erred by finding the State Farm policy did not provide coverage for the Lincoln Aviator that Lafe was operating at the time of the accident. Specifically, Dixon contends the Lincoln Aviator is covered under the "non-owned" vehicle provision of the policy; the language of the policy is ambiguous and unenforceable; and the failure to find coverage in this case violates the public policy of Kentucky.[2] We disagree.

[2] Dixon also argues that because Lafe "reasonably expected" that the Lincoln Aviator was covered under the State Farm policy, coverage should exist; however, the record reveals that this argument was not made before the trial court and thus, we decline to address it on appeal. *See Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007) (holding that failure to raise an issue in the trial court precludes appellate review, absent manifest injustice); *McBrearty v. Kentucky Cmty. & Technical Coll. Sys.*, 262 S.W.3d 205 (Ky.App. 2008) (holding that failure to raise an issue to the trial court precludes consideration of such issue on appeal).

The record reveals that the policy covered Lafe as a spouse of the insured, Anna, for vehicles listed on the policy's declarations page, which the Lincoln Aviator was not. The terms of the policy extended liability coverage to the use, by an insured, of a "non-owned" vehicle, defined in the policy as a vehicle that is not owned by, registered to or leased to: the insured or the insured's spouse; a relative under certain conditions; persons residing in the same household as the insured; and **an employer of the insured, the insured's spouse or any relative.**[3] Further, under the policy, a "non-owned" vehicle "does not include a *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days." Since the Lincoln Aviator was owned by the law firm and had been in Lafe's possession for personal and professional use for approximately two years, the trial court concluded that the Aviator was not a "non-owned" vehicle under the policy and thus, was not covered. This determination was not clear error.

Regarding Dixon's assertion that the policy provisions are ambiguous and unenforceable, we note that West Virginia courts have repeatedly held that "[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Ward v. Baker*, 425 S.E.2d 245, 251 (W.Va. 1992) (citations omitted). In this case, the trial court found that the plain meaning

[3] On appeal, Dixon debates the definition of "employer," but since this issue was not raised before the trial court, we decline to address it.

of the policy provisions was clear and that no ambiguity existed in terms of the policy. On appeal, Dixon fails to allege which provisions are ambiguous or why they are ambiguous. Dixon simply alleges that because Lafe thought the Lincoln Aviator was covered under the policy, the policy is ambiguous. We find no ambiguity in the provisions previously addressed and find no error by the trial court.

With respect to Dixon's final claim that the enforcement of these policy provisions violates the public policy of Kentucky, we note that "[t]he terms of an insurance contract must control unless [they] contraven[e] public policy or statute." *York v. Kentucky Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 294 (Ky. 2005) (citation omitted). Further, "[r]easonable conditions, restrictions, and limitations on insurance coverage are not deemed *per se* to be contrary to public policy." *Hugenberg v. West American Ins. Co./Ohio Cas. Group*, 249 S.W.3d 174, 186 (Ky.App. 2006) (citation omitted).

The trial court found the pertinent conditions, restrictions, and limitations contained in the policy to be reasonable, and further noted that Dixon failed to articulate how these provisions violated public policy. On appeal, Dixon alleges that public policy is contravened by finding the Lincoln Aviator is not covered by an insurance policy; however, this argument must fail since the record reflects that the Lincoln Aviator is in fact insured under a policy purchased by the law firm. Thus, we find no violation of public policy resulting from the trial court's interpretation of the State Farm policy.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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