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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-001725-MR

LAKE CUMBERLAND RESORT COMMUNITY ASSOCIATION, INC., a Kentucky Corporation; DAVE REMLEY; GARY SEAGRAVES; ROBERT KEISER; ANTHONY ROGERS; GREG LUCAS; KEITH STOCKBERGER; and STEVE MIKLAVIC — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CI-00317

AUTO OWNERS INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND STUMBO, JUDGES.

COMBS, JUDGE: Lake Cumberland Resort Community Association, Inc., (the "community association"), Dave Remley, Gary Seagraves, Robert Keiser,

Anthony Rogers, Greg Lucas, Keith Stockberger, and Steve Miklavic appeal from a final order of the Pulaski Circuit Court entered August 3, 2010, which finalized a summary judgment entered in favor of Auto Owners Insurance Company ("Auto Owners") on May 17, 2010. After our review, we affirm.

The issue on appeal is whether the trial court erred by concluding that Auto Owners is not obligated to provide coverage under a policy of insurance between Auto Owners and the community association, its directors, and its officers ("the board"). The community association and its board were insured under a commercial policy by Auto Owners from May 4, 2008 till May 4, 2009. They sought coverage under the policy after they were sued by William and Theresa Thompson, resort property owners, on April 25, 2008. They were seeking indemnity for whatever liability might arise from the lawsuit; they also turned to their insurer for their defense.

The Thompsons filed the 2008 action seeking to enjoin the board from taking any further actions on behalf of the community association; to compel the board to resign; to permit only Class "A" members of the community association to participate in a new board election; to compel a complete accounting of all action taken by the board; to force the rescission of all unauthorized acts; and to obtain reimbursement of all unauthorized expenditures. In September 2008, Michael and Gayle Westendorf, fellow resort property owners, filed a motion to intervene in the action. They sought a declaration that certain board members were not in "good-standing" as defined by the community association's by-laws. They

also sought the appointment of a receiver to audit the community association's revenues and expenses and to collect accounts receivable. Finally, they sought to have the individual members of the board held liable to the community association for any funds for which a proper accounting could not be made. Auto Owners provided for the legal defense of its insureds.

In January 2010, Auto Owners filed its motion to intervene in the action and an intervening complaint for declaratory relief. After its motion to intervene was granted, Auto Owners filed a motion for summary judgment. Following oral argument, the motion was granted by the trial court on May 5, 2010. The circuit court ruled that there was no genuine issue of material fact and that Auto Owners was entitled to judgment as a matter of law, holding that an indemnification provision in the insurance policy activated a valid policy coverage exclusion. The community association and its board filed a timely motion to alter, amend, or vacate. The motion was denied on August 3, 2010, and this appeal followed.

The community association and its board contend that the circuit court erred by rendering summary judgment. At issue is an indemnity exclusion; *i.e.,* a policy provision that excludes coverage of claims for which the community association's officer or director receives indemnity from the association or has a right to be indemnified by the association. The appellants argue that the indemnity exclusion cannot be enforced because it contravenes public policy, renders the coverage provided by the policy completely illusory, and defeats their reasonable expectations. They also contend that the community association is an insured that

is separate and apart from the directors and officers; therefore, they believe that the community association is entitled to separate coverage. Finally, they contend that the court erred by failing to conclude that Auto Owners waived and/or was estopped from denying coverage.

Summary judgment is proper where there exists no material issue of fact and the movant is entitled to judgment as a matter of law. Kentucky Rule(s) of Civil Procedure (CR) 56. The interpretation of an insurance policy is a question of law that we review *de novo. K.M.R. v. Foremost Ins. Group,* 171 S.W.3d 751 (2005) *citing Cinelli v. Ward,* 997 S.W.2d 474 (Ky.App.1998). In undertaking our review, we are mindful of two cardinal principles:

> (1) the contract should be liberally construed and all doubts resolved in favor of the insureds; and (2) exceptions and exclusions should be strictly construed to make insurance effective.

*Kentucky Farm Bureau Mutual Ins. Co. v. McKinney,* 831 S.W.2d 164 (Ky.1992), *quoting Grimes v. Nationwide Mutual Ins. Co.,* 705 S.W.2d 926 (Ky.App.1985) and *Tankersley v. Gilkey*, 414 S.W.2d 589 (Ky.1967). However, where the terms of the policy are clear and unambiguous, we must accord them their "plain and ordinary meaning." *Nationwide Mutual Ins. Co. v. Nolan*, 10 S.W.3d 129, 131-32 (Ky.1999). The material facts of this case are undisputed. Therefore, we must determine from an examination of the provisions of the insurance policy whether Auto Owners is entitled to judgment as a matter of law.

The directors' and officers' liability endorsement of the disputed policy provides as follows:

> We will pay those sums the insured becomes legally obligated to pay as "damages" because of any negligent act, error, omission or breach of duty directly related to the management of the premises, shown in the Declarations, which occurs during the policy period. We will settle or defend, as we consider appropriate, any claim or "suit" for damages covered by this policy. We will do this at our expense, using attorneys of our choice. This agreement to settle or defend claims or "suits" ends when we have paid the limit of our liability.

In an article entitled "Exclusions," the endorsement provides that the coverage ***does not apply***, "[t]o any claims for which your officer or director receives indemnity from [the community association] or has a right to be indemnified by [the community association]." It is undisputed that the community association's articles of incorporation provide for the mandatory indemnification of its directors and officers "to the fullest extent of the law, from and against any and all the expenses or liability incurred in defending a civil or criminal proceeding. . . ."

Auto Owners argues that this policy provision clearly excludes coverage of claims for which an officer or director of the community association receives indemnity from the association or has a right to be indemnified by the association. And the appellants contend that the indemnity exclusion cannot be enforced because it renders the coverage provided by the policy completely

illusory and contravenes public policy. They contend that the exclusion defeats their reasonable expectations for coverage. We disagree with each of these contentions.

The exclusion for indemnity in the policy endorsement was triggered solely by the provisions of the community association's own articles of incorporation. While corporations, both for-profit and non-profit, are authorized by statute to include indemnity provisions like the one utilized by the community association in this case, they ***are not required*** to indemnify their directors and officers. In this case, the community association chose to indemnify its directors and officers in its articles of incorporation. The community association and its board were in the best position to review the corporate documents -- including the articles of incorporation -- at the time that they contracted for and purchased their insurance policy. The community association remained at liberty to amend the articles ***at any time*** to eliminate the indemnification of its directors and officers in light of the clear and unambiguous indemnity exclusion in its insurance policy. Had it done so, it could have prevented the triggering of the exclusion about which it now complains. Under the circumstances, we cannot agree that the exclusion renders the policy's coverage illusory or that it contravenes public policy in any manner. Nor can we agree that it defeated any reasonable expectations for coverage because of the clear and unambiguous nature of its language.

Next, the community association contends that it enjoys a status as an independent insured that is separate and apart from the directors and officers.

Therefore, it argues that it is entitled to separate coverage not subject to the indemnity exclusion since it does not indemnify itself. The exclusion applies to all insureds. Since the community association can act only through its directors and officers, we conclude that it cannot evade the indemnity exclusion.

Finally, the community association and its board contend that the court erred by failing to hold that Auto Owners had waived and/or was estopped from denying coverage in this case. They argue that because Auto Owners had undertaken their defense, its subsequent withdrawal was untimely and impermissible since it would result in prejudice to the insureds. We disagree.

There is nothing in the record to support the community association's assertion that the withdrawal of Auto Owners at this point in the litigation will result in any prejudice to the appellants. There is absolutely no indication that the insurer's withdrawal deprives the appellants of an adequate opportunity to prepare for their defense or that the representation once provided by Auto Owners can in any way impede or restrict the appellants from proceeding with their own defense. Instead, it appears that the representation provided by Auto Owners was competent, productive, and valuable. Their timely motion to intervene was appropriate under the circumstances.

We affirm the order of summary judgment by the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

John T. Pruitt, Jr.
Somerset, Kentucky

BRIEF FOR APPELLEE:

Guy R. Colson
Jana Smoot White
Lexington, Kentucky