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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002317-MR
AND
NO. 2011-CA-002340-MR

PILES CHEVROLET PONTIAC BUICK, INC. — APPELLANT/CROSS-APPELLEE

v.

AUTO OWNERS INSURANCE COMPANY — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 09-CI-00049

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MAZE, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case involves an insurance coverage dispute between Piles Chevrolet Pontiac Buick, Inc. ("Piles") and its Commercial Liability carrier, Auto Owners Insurance Co. ("Auto Owners"). The Grant Circuit Court concluded that Piles was entitled to recovery for one occurrence of employee embezzlement

under three applicable provisions of the Commercial Umbrella Policy ("Policy") and to that extent, granted summary judgment requiring Auto Owners to pay $35,000 to Piles in accordance with the Policy. Piles appeals, and Auto Owners cross-appeals, from the summary judgment. For the following reasons, we affirm.

The underlying facts of this case are not in dispute.[1] Piles is a car dealership located in Williamstown, Kentucky and employed Lorna Sluder as a bookkeeper, who was entrusted to prepare checks drawn on Piles's checking account. Over the course of nine months, Lorna conspired with her husband, Robert Sluder, to defraud Piles and steal over $572,283.50. The Sluders utilized two different methods to defraud Piles. First, Lorna wrote unauthorized checks to herself, Robert, and BBD Auto d/b/a Robert Sluder. She then hid these checks in a pile of legitimate checks to be signed and presented the pile of checks to authorized persons for signature. Second, Lorna and Robert purchased vehicles from Piles, and Lorna used her knowledge of the bookkeeping to ensure the checks they wrote to obtain title to the vehicles were never cashed. In total, the Sluders engaged in twenty-eight vehicle transactions and forty-five unauthorized check transactions.

Under the Policy, Auto Owners insured Piles up to $15,000 for commercial crime caused by employee dishonesty, up to $10,000 for loss of property caused by employee dishonesty, and up to $10,000 for loss of property caused by forgery or alterations to negotiable instruments. The coverage was limited in that "[t]he most [Auto Owners] will pay for loss in any one 'occurrence' is the applicable Limit of

[1] The parties filed an Agreed Order of Stipulation of Facts.

Insurance shown in the Declarations." "Occurrence" is defined under the Policy as "all loss caused by, or involving one or more 'employees', whether the result of a single act or series of acts."

Auto Owners refused to cover Piles for the full amount of loss suffered as a result of the Sluders's actions. Piles filed the underlying action seeking coverage for the loss.[2] Since no facts were in dispute, and only legal issues were before the court, the parties filed competing motions for summary judgment. The primary legal issue before the trial court was whether the actions of the Sluders constituted one "occurrence" or multiple "occurrences" under the Policy. The trial court held that the Sluders' actions were a series of events causing loss to Piles, and amounted to one occurrence, rather than multiple occurrences. As a result, the trial court ruled that Piles was entitled to the Policy limits for one occurrence under each applicable provision of the Policy and ordered Auto Owners to pay $35,000 to Piles. These appeals followed.

Generally, the proper interpretation of an insurance policy "is a matter of law to be decided by a court; and, thus, an appellate court uses a *de novo*, not a deferential, standard of review." *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010) (emphasis added) (citation omitted). Similarly, when reviewing a summary judgment, "we must determine whether the trial court correctly found that there were no genuine issues of material fact; as findings of

[2] Other parties were also named in the lawsuit, but are not parties to the appeal.

fact are not at issue, the trial court's decision is entitled to no deference." *Id*. (citation omitted).

Piles argues the trial court erred by not finding the term "occurrence" as used in the Policy to be ambiguous and by not finding that the Sluders's actions constituted multiple "occurrences" for purposes of recovery under the Policy. We disagree.

When the terms of an insurance contract are unambiguous and not unreasonable, the terms will be enforced as written. *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 685 (Ky. 2012) (citations omitted). Only when a term is not unambiguously defined under the insurance policy should we afford it its ordinary meaning. *Cincinnati Ins. Co.*, 306 S.W.3d at 73. (citation omitted).

The parties cite to various jurisdictions' opinions addressing the issue of whether an employee's series of fraudulent actions amount to one occurrence or multiple occurrences. The majority of courts interpret an embezzlement scheme carried out by a single employee as one occurrence because it constitutes a series of acts, each one following the other. *See Glaser v. Hartford Cas. Ins. Co.*, 364 F.Supp.2d 529, 535-37 (D. Md. 2005) (holding, under almost identical definition of "occurrence," that a single occurrence arose when an employee committed a series of dishonest acts, despite employee's use of different means to defraud at different times); *Wausau Bus. Ins. Co. v. U.S. Motels Mgmt., Inc.*, 341 F.Supp.2d 1180, 1183-84 (D. Colo. 2004) (rejected company's attempt to distinguish

employee's various means of embezzlement because occurrence was defined by cause and all the loss was caused by employee's dishonesty); *Bethany Christian Church v. Preferred Risk Mut. Ins. Co.*, 942 F.Supp. 330, 333-35 (S.D. Tex. 1996); *Diamond Transp. Sys., Inc. v. Travelers Indem. Co.*, 817 F.Supp. 710, 712 (N.D. Ill. 1993); *Employers Mut. Cas. Co. v. DGG & CAR, Inc.*, 183 P.3d 513, 515-16 (Ariz. 2008); *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*, 660 So.2d 1136, 1137 (Fla. Dist. Ct. App. 1995). The only case cited in favor of Piles's argument on this issue is *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.* 854 A.2d 378 (N.J. 2004). There, a series of fraudulent sales made by an employee was held to constitute multiple occurrences under a policy which similarly defined the term. *Id*. at 396. However, in doing so, the court noted that the fraudulent sales were each made to different customers, which particularly distinguished it from the myriad of embezzlement cases where an employee steals from an employer as part of an ongoing scheme to defraud. *Id*. at 397. We do not believe the reasoning set forth in *Gentilini* creates an ambiguity in the Policy language at issue in the present case. *Gentilini* is distinguishable; the facts here clearly establish an ongoing scheme by Lorna and her husband to defraud Piles. For those reasons, we do not find the word "occurrence" to be ambiguous as defined in the Policy. The Policy clearly defines "occurrence" as "all loss caused by, or involving one or more 'employees', whether the result of an act or series of acts." Thus, we hold the trial court did not err by concluding that Lorna's actions amounted to one occurrence under the Policy.

On cross-appeal, Auto Owners argues the trial court incorrectly determined that Piles was covered under the Policy section that provided for recovery for loss of property caused by forgery or alteration of any negotiable instrument because the section excluded from coverage any "loss resulting from any dishonest or criminal act committed by any [Piles] employees . . . whether acting alone or in collusion with other person." We disagree.

Auto Owners contends that because the Agreed Order of Stipulated Facts states that Lorna Sluder was "at all times relevant . . . employed at Piles as a bookkeeper[,]" she was an employee under the terms of the Policy. The Policy defines an employee as "any natural person: while in [Piles's] service; whom [Piles] compensates directly by salary, wages or commissions; and whom [Piles has] the right to direct and control while performing services for [Piles.]" The trial court found that Lorna was not an employee of Piles while she fraudulently drafted the first thirteen checks. The record reveals that although Lorna was performing work for Piles, she was paid by and under the control of a company called Addeco Group until May 20, 2007, when she altered thirteen of the forty-five checks at issue. Therefore, despite the stipulation of facts, Lorna was not an employee until May 20, 2007 per the terms of the Policy. *See Cincinnati Ins. Co.*, 306 S.W.3d at 73 (if unambiguous, the terms and definitions of the insurance contract control) (citation omitted). Since the loss was caused by a non-employee under the terms of the Policy, Piles is not excluded from coverage under that provision on this basis.

Additionally, Auto Owners argues on cross-appeal that Lorna did not forge or alter the checks, but rather deceived her supervisors at Piles to sign legitimate checks. We disagree. Forgery is not defined under the Policy; therefore, we must afford it its plain meaning. *See id*. Under the applicable criminal statute, a forged instrument is defined as a written instrument which has been falsely made, completed, or altered. KRS 516.010(8). Here, Lorna was essentially altering checks prior to their completion by the drawer. Such action amounts to forgery under its plain meaning. Accordingly, we do not find the trial court erred by determining Lorna's actions triggered coverage under the forgery and alteration provision of the Policy.

The judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

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