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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001361-MR

CHRISTY FRAZIER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 10-CI-00580

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

LAMBERT, JUDGE: Christy Frazier has appealed from the order of the Perry Circuit Court dismissing her as an intervening plaintiff in an insurance claim on statute of limitations grounds. Frazier claims that she did not violate the one-year statute of limitations in the insurance policy because she intervened in the lawsuit

filed by her husband, Chris Frazier, which was filed within one year of the date of loss. After careful consideration of the parties' arguments and the record, we affirm.

In July 2009, Mr. Frazier purchased a one-year renewal policy of insurance from Kentucky Farm Bureau Mutual Insurance Company (KFB) covering the value of his mobile home, a 2002 Fleetwood, which he had been renting to another individual. The declaration listed Mr. Frazier as the only named insured, along with mortgagee Peoples Bank & Trust Company. The following month, the declaration was amended to increase the actual cash value of the mobile home to $64,500.00. We note that the policy contained a condition related to the insured's insurable interest, stating that "Even if more than one person has an insurable interest in the property covered, [KFB] will not be liable in any one loss A. to the INSURED for more than the amount of the INSURED'S interest at the time of the loss; or B. for more than the applicable limit of liability."

On October 31, 2009, while this policy was in effect, the mobile home was destroyed in a fire, resulting in a total loss of the home and all of its contents. Mr. Frazier notified KFB of the fire and his loss pursuant to the terms of the policy. When KFB failed to make proper payment pursuant to the insurance contract, Mr. Frazier filed a complaint against KFB on October 29, 2010. He sought compensatory damages for the value of the home, loss of rental income, loss of use, interest expenses, and other costs and expenses. In his first amended complaint, Mr. Frazier alleged that KFB had engaged in unfair claims settlement

practices and other bad faith conduct, entitling him to punitive damages. KFB filed answers to both the complaint and the amended complaint and raised several defenses, including Mr. Frazier's failure to state a cause of action, to join an indispensible party pursuant to Kentucky Rules of Civil Procedure (CR) 12, his failure to mitigate damages, the statute of limitations, and release, accord, and satisfaction. KFB moved to bifurcate the contract claim from the unfair claims settlement practices and bad faith claims, but the circuit court deferred its ruling on the motion.

On April 2, 2012, Mr. Frazier's wife, Christy Frazier, moved to intervene as a plaintiff.[1] She stated that her claims arose out of the same fire loss and bad faith conduct as in her husband's suit and that she intended to rely upon the same evidence at trial. Frazier indicated that she and her husband both owned the mobile home. In response, KFB argued that the motion should be denied because the insurance policy required any action to be brought within one year of the loss. Section 1 – Conditions, subpart 8, "Suit Against Us," of the policy booklet provided that, "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." Because Frazier sought to intervene more than one year after the 2009 loss, she should not be permitted to intervene. KFB went on to argue that the one-year statute of limitations set forth in the policy was valid in Kentucky. KFB also

[1] While the motion was captioned as a motion to intervene, Frazier states in her brief that her motion was brought pursuant to CR 20.01, which addresses permissive joinder.

questioned why Frazier was not named in the original complaint. The court granted the motion to intervene on May 16, 2012.

Once Frazier was permitted to intervene, KFB moved to dismiss her claims for violating the one-year statute of limitations, again contending that this shortening of the limitations period was valid under Kentucky law. KFB disputed that Frazier's claims were merely part and parcel of her husband's claims and argued that Frazier's rights to recovery were independent of Mr. Frazier's rights and therefore constituted a new cause of action. In response, Frazier argued that the term "action" was not defined within the policy and that the policy did not state that a claim not made within one year would be barred. Here, Frazier asserted that she had not filed a new action but had merely intervened in the timely action her husband filed. In reply, KFB continued to argue that Frazier's claim was separate from that of her husband. If that were true, according to KFB, Frazier would not have had to intervene, but an amended complaint would have been filed.

At the hearing on the motion to dismiss, KFB made similar arguments, including that Frazier did not timely file her motion to intervene pursuant to the terms of the policy and that she had separate claims from those of her husband. Furthermore, KFB argued that the one-year limitations provision on a fire loss case was valid. In response, Frazier argued that Kentucky law requires an insurance contract to be construed in favor of the insured. She argued that based upon the plain reading of the policy, an "action" was not the same as a "claim," and that she moved to intervene in the same civil action that had been

brought within one year. Frazier did not disagree that the one-year contractual statute of limitations was valid in Kentucky, but disagreed with KFB's parsing of the word "action." Finally, she argued that KFB had not presented evidence that she had signed the insurance policy, meaning that she could not be held to its terms. The court granted the motion in a bench ruling, reasoning that Frazier had her own cause of action.

By order entered July 26, 2012, the circuit court granted KFB's motion to dismiss Frazier, reasoning that the term "action" in the policy was synonymous with the term "claim" and that Frazier therefore failed to make her claim within one year pursuant to the terms of the policy. The court included the necessary CR 54.02 language to make the order final and appealable. This appeal now follows.[2]

On appeal, Frazier continues to argue that her claim is not time-barred based upon the terms of the insurance contract because the action filed by her husband, into which she intervened, was timely filed within one year of the loss. In response, KFB argued that there was no distinction between a "claim" and an "action" and that Frazier's intervening complaint raised a new cause of action because her claim was separate and distinct from her husband's claim.[3]

[2] On July 31, 2012, prior to the filing of the notice of appeal, KFB moved for summary judgment on Mr. Frazier's claims, arguing that he had been reimbursed for his one-half interest in the mobile home and that his claim had therefore been satisfied. Mr. Frazier disputed this argument and moved the court to hold the matter in abeyance pending resolution of his wife's appeal. The circuit court granted the motion to hold in abeyance by order entered August 27, 2012.

[3] KFB also argued that the one-year limitations period set forth in the insurance contract was a valid provision, citing several cases. In her reply brief, Frazier for the first time argues that the one-year limitations period was unreasonable and invalid. KFB moved this Court for leave to

"Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

> Interpretation of insurance contracts is generally a matter of law to be decided by the court. As such, it is subject to *de novo* review on appeal. Under the reasonable expectation doctrine, ambiguous terms in an insurance contract must be interpreted in favor of the insured's reasonable expectations and construed as an average person would construe them. But "[o]nly actual ambiguities, not fanciful ones, will trigger application of the doctrine." Absent ambiguity, terms in an insurance contract are to be construed according to their "plain and ordinary meaning." Insurance policies should be construed according to the parties' mutual understanding at the time they entered into the contract, with this mutual understanding to be deduced, if at all possible, from the language of the contract itself. Exceptions and exclusions in insurance policies are to be narrowly construed to effectuate insurance coverage. But "[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. Company/Ohio Cas. Group, 249 S.W.3d 174, 185-86 (Ky. App. 2006) (citations in footnotes omitted).

The question raised by the appeal is whether the terms "action" and "claim" are synonymous. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed.

file a sur-reply brief, presumably to address this argument, but the motion was denied. However, we shall decline to consider this argument because Frazier never raised it before the circuit court –her counsel stated at the hearing that he did not dispute the validity of the one-year limitations period – and she did not argue it in her appellant brief. *See Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980) ("The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.").

2005) defines an "action" as "the initiating of a proceeding in a court of justice by which one demands or enforces one's right; *also*: the proceeding itself." A "claim" is defined as "a demand for something due or believed to be due" or "a right to something[.]" Considering these terms in relation to the reasonable expectations of the insured and as an average person would construe them, it does appear that the words constitute two different concepts; an "action" is the actual lawsuit and a "claim" is the right that is being sought through the filing of the lawsuit. Therefore, we must hold that the circuit court erred in holding that the two terms were synonymous.

Our next inquiry would generally be whether Frazier's claim is separate from her husband's claim, or whether it would relate back. However, this analysis does not matter for purposes of our resolution of this appeal because we have identified a separate problem with Frazier's attempt to assert her claim.

While this issue was not raised by the parties, our *de novo* review of the court's ruling, including the insurance policy, has led us to conclude that Frazier was not an insured under the mobile home policy. *See Cooksey Bros. Disposal Co., Inc. v. Boyd County*, 973 S.W.2d 64, 70 n.3 (Ky. App. 1997) ("To the extent that we are affirming the trial court for different reasons than it gave in its judgment, we have the authority to do so. *See Revenue Cabinet v. Joy Technologies, Inc.*, Ky.App., 838 S.W.2d 406, 410 (1992)."). Under the Definitions section on page 1, the policy states: "Throughout the policy YOU and YOUR mean Named Insured shown in the Declaration *and the spouse if a resident*

of the same Mobile Home." (Emphasis added). "Insured" is defined as YOU and residents of YOUR Mobile Home who are: A. YOUR relatives; or B. other persons under the age of 21 and in the care of any person named above." Frazier was not listed as a named insured on the declaration page of either the 2009 renewal policy or the amended renewal policy; only her husband was listed. While the record establishes that they had at one point lived together in the mobile home, Frazier and her husband were no longer living there at the time of the loss. Rather, they had been renting the mobile home to another person, who had recently been evicted. Therefore, because Frazier was not living in the mobile home with her husband (the named insured) at the time of the loss, she cannot be considered an insured and she cannot make a claim under the policy. Accordingly, the circuit court properly dismissed Frazier's intervening complaint, albeit for a different reason.

For the foregoing reasons, the judgment of the Perry Circuit Court dismissing Frazier's intervening complaint is affirmed.

ALL CONCUR.

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