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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000642-MR

KENTUCKY INSURANCE
GUARANTEE ASSOCIATION — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 12-CI-02000

WILLIAM A. ROOD, D.V.M.; AND
WILLIAM V. BERNARD, D.V.M. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: The Kentucky Insurance Guarantee Association (hereinafter "KIGA") appeals from two declaratory judgments of the Fayette Circuit Court holding that Dr. William Rood and Dr. William Bernard were each, not

collectively, entitled as claimants to the $300,000.00 maximum benefit under KRS[1] 304.36-080(1)(a). This followed a suit filed against their veterinary hospital. KIGA alleges that the trial court erred when it held that Rood and Bernard were each entitled to reimbursement when neither was a named party in the underlying suit. KIGA also challenges Rood and Bernard's standing to file a declaratory action and the trial court's holding that KIGA was not due an offset against its liability.

We conclude that Rood and Bernard could be reimbursed only for the single claim the third-party claimant brought against their veterinary hospital after a single insurable event. However, we agree with the trial court that KIGA was not entitled to reduce its obligation to Rood and Bernard by the amount received by the third-party claimant for his loss. Accordingly, we affirm in part, reverse in part, and remand.

Background

I. Factual History

In 2004, Rood and Bernard both served as equine veterinarians at Rood & Riddle Equine Hospital, P.S.C. ("the Hospital"). Effective January 1, 2004, Centennial Insurance Company ("Centennial") insured Rood and Bernard under a single policy but pursuant to separate certificates of insurance.[2] Rood and

[1] Kentucky Revised Statutes.

[2] The policy defined "Named Insured" as a person or entity named in Box 1 of the certificate of insurance. Rood's and Bernard's respective certificates each named the individual followed by "c/o Rood & Riddle, P.S.C."

Bernard paid separate and distinct premiums pursuant to this policy which provided coverage for "named insured" who were either individuals, corporations, or shareholders of a corporation and who "shall become legally obligated to pay as damages because of a Veterinary Incident…." The Hospital did not hold its own certificate of insurance, nor did it pay a separate premium.

In November 2004, a thoroughbred horse owned by Jim Plemmons entered the care of Dr. Bernard at the Hospital. At that time, Dr. Rood was responsible for communicable disease prevention protocols at the Hospital. Shortly after entering care at the Hospital, Plemmons's horse contracted a salmonella infection and was euthanized. As a result, Plemmons filed a claim on his own insurance policy, eventually receiving $250,000 for his loss.

Plemmons also filed a negligence action naming the Hospital as the sole defendant. The complaint mentioned neither Rood nor Bernard, other than naming Rood as the Hospital's registered agent. Instead, it alleged a failure to inform Plemmons of the Hospital's history of salmonella contamination and failure to provide "acceptable veterinary care" on the part of the Hospital and its "agents, servants, and employees[.]" As required under the Hospital's professional liability policy, Rood and Bernard each notified Centennial of Plemmons's suit, completing and submitting "Report of Claim" forms demanding coverage.

II. Procedural History

Centennial provided a defense for the Hospital until April 2011 when it entered liquidation. Pursuant to the Kentucky Insurance Guaranty Association

Act, KIGA continued to provide a defense for the Hospital; however, it submitted a reservation of rights letter to Dr. Rood questioning its liability based upon several exclusions in Centennial's policy. Throughout litigation and leading up to a May 2012 trial date, KIGA asserted that its maximum liability was $50,000 – the statutory maximum of $300,000 on a single claim less the $250,000 paid to Plemmons under his own insurance policy. Prior to trial, counsel for the Hospital and Plemmons settled the underlying negligence case for a confidential amount.

Around the same time, and based upon KIGA's continuing denial of liability, Rood and Bernard filed the declaratory action which is the basis of this appeal seeking judgment concerning the fact and amount of KIGA's liability to each of them as separate claimants. Following Rood and Bernard's subsequent motion for partial declaratory judgment, the trial court issued a January 29, 2013 order holding that Plemmons's complaint sufficiently "implicated" Rood and Bernard to make each a "claimant" for purposes of coverage. The trial court left the question of the amount of coverage unresolved.

Following discovery, several motions, and argument on the remaining issues, the trial court entered a February 5, 2014 order which held that KIGA was not entitled to an offset of $250,000 based on funds already paid to Plemmons from his own insurance company. The trial court concluded that KIGA was liable under KRS 304.36 up to $600,000, and the trial court granted Rood and Bernard a judgment in the full amount of the confidential settlement. KIGA now appeals from both the January 2013 and February 2014 orders of the trial court.

Standard of Review

KIGA's appeal challenges the trial court's interpretation and application of KRS 304.36, as well as the insurance policy. Even in a declaratory action, we review the trial court's orders under the Civil Rules and usual appellate standards. *See* KRS 418.060; *see also Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001). Accordingly, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or unsupported by substantial evidence; however, we review *de novo* the trial court's identification and application of legal principles, *see Wilder* at 340 and CR[3] 52.01, as well as the trial court's interpretation of statutes. *See Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325 (Ky. 2008), *citing Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

Analysis

KRS 304.36-080 obligates KIGA to honor "covered claims existing prior to the order of liquidation" of an insolvent insurer. This obligation is met, and a claim is honored, upon KIGA's payment of, *inter alia*, "[a]n amount not exceeding three hundred thousand dollars ($300,000) per claimant for all … covered claims[.]" KRS 304.36-080(1)(a)3. The statue also states that KIGA shall not be required "to pay a claimant an amount in excess of the obligation of the insolvent insurer under the policy or coverage from which the claim arises." KRS 304.36-080(1)(b). In other words, KIGA stands in the shoes of an insolvent

[3] Kentucky Rules of Civil Procedure.

insurer and is liable only to the extent that insurer would have been under the original policy, up to $300,000 per claimant.

KIGA appeals on several bases, the most fundamental of which calls into question Rood's and Bernard's respective standing to file a declaratory action against KIGA. However, we do not observe in the record where or how the parties afforded the trial court an opportunity to rule on the issue of standing. Hence, this issue is not preserved for appeal, and we proceed to those issues that are.

I. Coverage under the Centennial Policy

Before proceeding to the other issues KIGA raises on appeal, we must first determine whether the claim, or claims, in question were "covered" for purposes of statute and the Centennial policy. KRS 304.36-050(6)(a) defines a "covered claim," in pertinent part, as: 1) an unpaid claim; 2) submitted by a "claimant[;]" 3) "which arises out of and is within the coverage[;]" and 4) "is subject to the applicable limits of an insurance policy to which this subtitle applies…." It is uncontroverted that the statute applies to the policy in question and that, at the time Rood and Bernard filed this declaratory action, the demands for coverage they filed as a result of Plemmons's suit against the Hospital were unpaid. Furthermore, KIGA concedes that Rood and Bernard were both "claimants." Therefore, by necessity, we first focus our analysis upon whether the claim or claims in question arose "out of and within the coverage" provided for in Centennial's policy.

KIGA argues that it was not liable to Rood or Bernard under the original policy because Plemmons's suit was against the Hospital only. To resolve this, we look first to the express language of the policy with Centennial. In doing so, we apply traditional principles of contract, keeping in mind that ambiguities must be resolved in favor of coverage and that exclusions must be narrowly read. *See K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751, 753 (Ky. App. 2005); *see also State Auto Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801, 803 (Ky. App. 1985). However, unambiguous terms will be assigned their plain and ordinary meaning. *See K.M.R.* at 753.

The policy provided professional liability coverage as follows:

> 1. Individual Coverage
> If the Named Insured is an individual, the Company shall pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of a Veterinary Incident….
>
> 2. Partner/Shareholder Coverage
> If the Named Insured is a partner, member of a Limited Liability Company or a shareholder the Company shall pay on behalf of the Named Insured all sums which the Insured shall become legally obligated to pay as damages because of a Veterinary Incident…, but only resulting from the Named Insured's status as a partner and/or shareholder in the practice of veterinary medicine.

KIGA cites this language as support for its argument that Rood and Bernard never became obligated because Plemmons did not name them as defendants in the underlying suit. We disagree.

The policy defines a "Named Insured" simply as "the individual or entity named in item 1 of the Declarations." It is uncontroverted that Rood and Bernard each fit this description for their respective certificates of insurance. The policy more importantly defines "Insured" as follows:

> 1. The Named Insured and his or her spouse provided the spouse is not a licensed veterinarian;
>
> 2. Any Veterinary Partnership, Veterinary Corporation or Veterinary Limited Liability Company, its officers, directors, shareholders, partners, or members but only as respects liability arising out of a Veterinary Incident committed by any person described in 1. above or 3. below;
>
> 3. Any employee or volunteer of the Insured described in 1., or 2., above but only for liability arising out of his, her or their duties for the Named Insured, or for an insured Veterinary Partnership, Veterinary Corporation, or Veterinary Limited Liability Company. However, regardless of his, her or their duties a person other than the Named Insured who is a licensed veterinarian shall not be considered an Insured under this definition.

Pursuant to these definitions, the trial court was correct that Rood and Bernard were each a "Named Insured" on their respective certificates of insurance and under the Centennial policy. The court was also correct that the Hospital was a separate "Insured" under the same policy, and Rood and Bernard were also each an "Insured" under the above definitions. Hence, coverage extended not only to sums which "Named Insureds" became obligated to pay, but to sums which any and all "Insureds" became obligated to pay. This included the Hospital, as a "veterinary corporation," and Rood and Bernard, as named insureds.

Using these definitions, the Centennial policy's individual coverage provision can be read as follows:

> 1. Individual Coverage
> If [Rood and Bernard] [are] … individual[s], the Company shall pay on behalf of [Rood and Bernard or the Hospital] all sums which the [Rood and Bernard or the Hospital] shall become legally obligated to pay as damages because of a Veterinary Incident….

Therefore, Plemmons's claim against the Hospital, and Rood's and Bernard's demands for coverage, were within the scope of coverage and payable under the Centennial policy. The fact that Plemmons sued neither Rood nor Bernard is inconsequential to coverage.

II. Number and Amount of Claims

We have established that the requirements for a "covered claim" under KRS 304.36-050(6)(a) are satisfied. However, our analysis does not end here. The parties settled for a confidential amount for which Centennial, and now KIGA, is responsible to pay on behalf of its Insured. KIGA contests whether it could be required to indemnify Rood and Bernard for an amount exceeding the statutory maximum of $300,000 in light of the fact that Plemmons sustained only one loss. KIGA also asserts that, regardless of the amount of the award, it is entitled to an offset of $250,000 due to Plemmons's recovery from his own insurance company stemming from the same loss. We address these issues in turn.

A. Number of Claimants and Claims

KIGA initially argued that Plemmons was the only "claimant" for purposes of liability under the Centennial policy. However, KIGA abandoned this argument and eventually conceded at oral argument and in supplemental filings that Rood and Bernard were also claimants. This is important because KRS 304.36-080(1)(a)(3) provides that KIGA is obligated to pay a maximum of $300,000 per claimant. Though KIGA has now conceded that Rood and Bernard also meet the definition of "claimants" under the statute, it continues under the theory that it had no duty to indemnify Rood and Bernard because Plemmons was the claimant for purposes of coverage. We must agree.

Rood and Bernard argue that Plemmons, as a third party to the policy between the Hospital and Centennial, cannot be a "claimant." However, KRS 304.36.050(3) states that, in addition to persons making a first-party claim, a "claimant" can include "any person instituting a liability claim…." Plemmons fits this description. It was Plemmons's suit against the Hospital which gave rise to the issue of Centennial's, and now KIGA's, obligation to the Hospital and Rood and Bernard. In fact, Rood and Bernard submitted their demands for coverage in response to Plemmons's suit. Therefore, Plemmons is a "claimaint."

More importantly, we conclude that Plemmons is the sole "claimant" for purposes of coverage. Rood and Bernard argue that they should each be considered "claimants" for purposes of coverage, and therefore each be entitled to up to $300,000 under the policy and statute. We confess our conflict on this point. The Centennial policy and the statutes comprising the Kentucky Insurance

Guarantee Act combine to form a labyrinth of ambiguous, and perhaps irreconcilable, terms. For example, it seems that Plemmons's suit as well as the demands Rood and Bernard each filed with Centennial for coverage could all qualify as a "claim" under the policy and statute. This fact notwithstanding, we cannot escape the fact that there was but one event and one suit which gave rise to the present litigation. Indeed, under the construct and purpose of KIGA and its supporting statutes, the prospect of Rood and Bernard both recovering for their respective roles in a single loss troubles us greatly. Had there been twenty veterinarians employed at the Hospital and who had some role in the death of the animal in this case, we could not conclude that it serves the intent behind KRS 304.36-080(a) to allow each of them to recover up to $300,000. Surely it does not.

Nor is that intent served by providing Rood and Bernard separate payments in this case. The limit of KRS 304.36-080(1)(a)3. of up to $300,000 per claimant limited KIGA's responsibility in this case to a maximum of $300,000 on one claim by one claimant, Plemmons.

B. KIGA's Entitlement to an Offset

Finally, KIGA argues that the trial court erred in refusing to award it an offset of $250,000 due to Plemmons's recovery from the separate insurance policy he maintained on his horse. We must disagree.

KRS 304.36-120(1) states:

> Any person having a claim against an insurer under any provision in an insurance policy other than the policy of an insolvent insurer which is also a covered claim shall

> be required to exhaust first his right under the policy. Any amount payable on a covered claim under this subtitle shall be reduced by the amount of recovery under the insurance policy.

This Court has previously held that KRS 304.36-120 "evinces a legislative intent that [KIGA's] liability shall be reduced by any amount recovered from a claimant's own insurer by reason of the same insured event for which the KIGA claim is made." *Hawkins v. Kentucky Ins. Guar. Ass'n*, 838 S.W.2d 410, 411 (Ky. App. 1992).

KIGA was not entitled to benefit from Plemmons's separate insurance policy and recovery. Neither doctor had a policy other than the Centennial policy which the above provision required them to exhaust prior to seeking recovery from KIGA. KIGA argues that the statute does not require a payment from the separate policy to be paid to the insured under that policy before an offset is required. Our conclusion in *Hawkins* belies this argument, and we stand by that opinion again today. Though Plemmons filed suit against the Hospital and was the "claimant" for purposes of coverage, that he received payment from an insurance policy has no bearing on KIGA's entitlement to an offset of the amount he received. Only payment to Rood or Bernard would compel such a result. They are the only persons to whom the offset mandate of KRS 304.36-120 could apply; and as they had no other malpractice policy, that mandate did not apply.

Conclusion

Accordingly, we affirm in part and reverse in part the Fayette Circuit Court's declaratory judgments of January 29, 2013, and February 5, 2014. Furthermore, we remand to the trial court for entry of an order which reflects KIGA's maximum liability of $300,000.

ALL CONCUR.

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