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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001519-MR

GENERAL STAR INDEMNITY COMPANY — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 08-CI-90218

KRISSY MCKENZIE WITHROW AND JUSTIN MCKENZIE, CO-ADMINISTRATORS OF THE ESTATE OF KENNETH MCKENZIE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: General Tire Indemnity Company appeals from an Order and Final Judgment of the Bath Circuit Court in an action filed against it by the Estate of Kenneth McKenzie asserting two counts of bath faith. General Star argues that the circuit court erred in holding that Kentucky law prohibits incorporation by

reference in insurance contracts. We find no error, and AFFIRM the Order and Judgment on appeal.

Phoenix Transportation Company, LLC ("Phoenix") is a commercial trucking company with a fleet of over 100 vehicles. In 2008, Phoenix contracted with Continental Casualty Company ("CNA") to insure the entire fleet with a $1,000,000 limit of liability for property damage and bodily injury.

One of Phoenix's customers required Phoenix to obtain an additional $1,000,000 in excess insurance coverage for 21 of Phoenix's vehicles that transported the customer's products. In order to obtain the excess coverage, Phoenix contacted insurance agent Cottingham & Butler ("C&B"), who then utilized Colemont Insurance Brokers ("Colemont") to procure the desired excess coverage.

Communications ensued between C&B and Colemont in April, 2008, and early May, 2008, whereupon C&B provided Colemont with a vehicle schedule listing the make, model, vehicle identification number ("VIN") and Phoenix vehicle number of each of the 21 vehicles. An Excess Policy was issued by General Star on May, 15, 2008, which was retroactively effective beginning May 9, 2008. The Excess Policy provided Phoenix with $1,000,000 of liability coverage in excess of the underlying CNA Policy. The Excess Policy stated that, "Except for the express provisions of [the Excess Policy] and the attached endorsements, [the Excess Policy] follows the terms, conditions, agreements, definitions, exclusions and limitations of the controlling underlying policy", *i.e.,*

the CNA Policy. The Excess Policy additionally provided that "[s]hould there be a conflict between the provisions of [the Excess Policy], including any of its attached endorsements, and the underlying policy, then the provisions of [the Excess Policy] and its endorsements will govern." The underlying CNA Policy covered all of Phoenix's vehicles. As such, unless otherwise excluded by "the express provisions [or] the attached endorsements", the Excess Policy would provide coverage for all of Phoenix's vehicles.

Phoenix, through C&B and Colemont, sought to limit coverage of the Excess Policy to the 21 vehicles used to transport materials and products of the customer at issue. In order to achieve this goal, General Star appended to the Excess Policy with an EX932 endorsement titled "SCHEDULED DESIGNATED COVERED AUTOS" that sought to exclude the coverage of non-designated vehicles. Pursuant to EX932, "[t]he insurance provided by the policy is limited to . . . the designated covered auto(s) shown in the SCHEDULE below and applies only if the underlying insurance provides coverage for the designated covered vehicles." As such, the Excess Policy provided coverage for all Phoenix vehicles *except* 1) those not covered by the CNA Policy and those 2) "shown in the SCHEDULE below". No vehicles, however, were "shown in the SCHEDULE below", and this would later play a dispositive role in the instant litigation. Rather, the section titled "SCHEDULE OF DESIGNATED COVERED AUTOS" stated, "Per schedule on file with insurer."

On May 13, 2008 - which was four days after the Excess Policy went into effect - Kenneth McKenzie was travelling westbound on Interstate 64 near mile marker 12. The weather was foggy and McKenzie was stopped in heavy traffic so emergency vehicles could remove a wrecked vehicle from a bridge. At the same time, a Phoenix-owned 2004 Freightliner Tractor ("2004 Freightliner"), operated by a Phoenix driving team, was approaching the stopped vehicles from the east at approximately 72 miles per hour. This vehicle was not one of the 21 vehicles purportedly on the "SCHEDULE OF DESIGNATED COVERED AUTOS". The 2004 Freightliner struck McKenzie's vehicle, tragically resulting in McKenzie's death.

On September 3, 2008, McKenzie's estate ("the Estate"), through Co-Administrators Krissy McKenzie Withrow and Justin McKenzie, filed the instant action in Bath Circuit Court against Phoenix and other parties. CNA acknowledged coverage on the underlying policy and provided a defense in the litigation. Phoenix also contacted C&B about the vehicles insured under the General Star Excess Policy. C&B provided Phoenix with the schedule of the 21 insured vehicles, noting that the schedule is not listed in the Excess Policy as the policy states "per schedule with insurance company." Thereafter, the Estate filed an Amended Complaint and General Star was designated as a party defendant by way of an Order rendered on June 19, 2009.

About one year later, the Estate entered into a Settlement Agreement resolving all claims against all defendants except General Star. The Settlement

Agreement also assigned from Phoenix to the Estate any right of recovery from General Star to which Phoenix was entitled. On July 26, 2010, the Bath Circuit Court rendered a Judgment and Agreed Order of Dismissal awarding $5.5 million to the Estate as against Phoenix, and dismissing all claims against all parties except General Star.

The matter continued in Bath Circuit Court on the sole issue of Phoenix's assignment of its rights, if any, to the Estate arising under the Excess Policy issued by General Star. The issues focused on the Excess Policy's incorporation by reference of the schedule "on file with the insurer", and its effect, if any, on defining or limiting General Star's liability as to the May 13, 2008 accident involving Phoenix's 2004 Freightliner.

Thereafter, the parties filed competing motions for summary judgment on the Estate's claim for coverage under the Excess Policy, and oral arguments were heard. By way of an Order rendered on November 25, 2013, the circuit court determined that General Star's argument to deny coverage was based on the usage of an extraneous document, to wit, the schedule of 21 vehicles, which was not found within the four corners of the policy as required by Kentucky case law. As such, the court held that coverage was not limited to the 21 vehicles on the incorporated schedule, and concluded that the Excess Policy provided coverage for the 2004 Freightliner.

Additional briefs were then filed on other issues raised in the parties' motions for summary judgment, and more oral arguments were heard. On July 17,

2014, the court rendered an Order holding that consistent with *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004), the Excess Policy followed the terms and exclusions of the underlying CNA policy, that coverage under the Excess Policy was not limited to the 21 vehicles listed in the referred document, and that it provided coverage to the Estate's claim. Final Judgment was entered and this appeal followed.

General Star now argues that the Bath Circuit Court erred in holding that Kentucky law prohibits incorporation by reference in insurance contracts. It contends that the General Star policy does not cover the vehicle involved in the accident, that the contracting parties sought to insure only the vehicles listed on the Full Vehicle Schedule, and that the circuit court misinterpreted the law as to incorporation by reference. General Star also argues that even if incorporation by reference is prohibited, the circuit court nevertheless erred in failing to consider Phoenix's reasonable expectations regarding the scope of its coverage. Finally, General Star maintains that Phoenix never sought coverage and waived all rights under the General Star Policy. The corpus of its argument, however, is that the Excess Policy properly referred to the Full Vehicle Schedule listing the 21 insured vehicles, the 2004 Freightliner was not listed on that schedule and therefore was not insured under the Excess Policy, and the Bath Circuit Court erred in failing to so rule.

The matter before us turns on the question of whether the Bath Circuit Court properly determined that Kentucky law does not allow incorporation by

reference which results in a denial of coverage in insurance contracts. In reaching this conclusion, the court relied on *Twin City Fire Ins. Co. v. Terry*, 472 S.W.2d 248 (Ky. 1971), which states,

> It seems plain that the legislative policy in this jurisdiction, as interpreted in previous decisions by this court, requires that all terms of an insurance contract be 'plainly expressed' in the policy itself. *This would appear to foreclose the possibility of incorporation by reference as related to insurance policies*. For these reasons the court is not persuaded to follow the cases from foreign jurisdictions which are cited by the company. (Emphasis added).

Terry, 472 S.W.2d at 250. This language is clear and unambiguous, and comports with the related statutory law providing that, "[n]o agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy." KRS 304.14-180(1).

General Star maintains that *Terry* is distinguishable from the matter at bar because *Terry* addressed a factual scenario where no fair notice of the agreement's terms was provided to the insured. General Star also directs our attention to federal case law, unpublished Kentucky opinions, and general contract law in support of its claim that *Terry* should be narrowly applied and must not operate to undermine the clear intent of the parties herein. However, a close reading of General Star's written argument reveals no published Kentucky opinion in opposition to *Terry*, and it appears that EX932 does not identify what schedule,

if any, was "on file with the insurer." Also, as the Estate properly notes, the schedule is not dated, titled or signed by a representative of either party.

Terry does note that, "[a] contract of insurance may, and often does, consist of a policy and other instruments incorporated therein by reference." *Terry*, 472 S.W.2d at 249. However, it immediately goes on to state that, "[p]rovisions on the back of a policy may be made a part of the contract by reference thereto on the face thereof." *Id*. While provisions on the reverse side of the policy may be incorporated by reference, we cannot go so far as to conclude that separate, untitled documents "on file with the insurer" may also be incorporated by reference into the contract where those documents form the basis of a denial of coverage. Based on *Terry* and the record, we further conclude that the Bath Circuit Court's holding *is limited to the preclusion of denial of coverage* based on documents incorporated by reference. The *Terry* holding is not all-encompassing, and does not prevent incorporation by reference to documentation which does not form the basis for denial of coverage. The Excess Policy at issue, for example, properly refers to the underlying CNA policy from which its coverage provisions are derived.

Insurance policy interpretation is a question of law for the court. *Kemper Nat. Ins. Companies v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 871 (Ky. 2002). The express language of *Terry* forecloses the possibility of incorporation by reference giving rise to denial of coverage in insurance policies, and the Bath Circuit Court properly so found. The Excess Policy mirrors the provisions of the underlying CNA coverage. Since the terms of the CNA coverage

included the 2004 Freightliner, and as the Excess Policy did not limit within the four corners of the contract its coverage to the 21 vehicles, the circuit court properly concluded that the Excess Policy included coverage for the 2004 Freightliner.

General Star goes on to argue that even if incorporation by reference is prohibited, the circuit court nevertheless erred in failing to consider Phoenix's reasonable expectations. It contends that even if incorporation by reference is not allowed, the Excess Policy lacks sufficient clarity to be enforced on its own terms and extrinsic evidence, including the insured's reasonable expectations, must be considered. In addressing this issue, the Bath Circuit Court determined that "since there is no question as to coverage afforded under the Excess Policy, General Star's 'reasonable expectations' argument is inapplicable here." It went on to cite *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003), which held that "'[t]he mere fact that [a party] attempt[s] to muddy the water and create some question of interpretation does not necessarily create an ambiguity[.]' Only actual ambiguities, not fanciful ones, will trigger application of the doctrine."

General Star's argument on this issue appears to be grounded on its contention that the Bath Circuit Court acted in a fundamentally inconsistent matter by disallowing reference to the schedule on file with the insurer, while allowing reference to the underlying CNA policy. Based on this alleged inconsistency, General Star argues that the CNA policy cannot serve as the basis for establishing the scope of coverage under the Excess Policy and that the reasonable expectations

of the parties and parol evidence are therefore required. We do not find this argument persuasive. The circuit court below precluded *denial of coverage* based on documents incorporated by reference. There is no basis in the record or the law for precluding incorporation by reference to the underlying CNA policy. Rather, the Excess Policy expressly provides that its terms shall be same terms of the CNA policy subject to any exclusions. Because the CNA policy serves to determine the scope of the Excess Policy, there is no basis for relying on the reasonable expectations of the parties to establish the scope of coverage. We find no error.

Finally, General Star argues that Phoenix never sought recovery for the accident under the General Star policy, and therefore waived all rights arising under that policy. General Star contends that this waiver operates to bar Phoenix from assigning to the Estate any right of recovery from General Star. General Star notes that as Phoenix's assignee, the Estate stands in the shoes of Phoenix and all defenses to a coverage claim asserted by General Star against Phoenix apply equally to the claim asserted by the Estate. Since, in its view, Phoenix waived any claims it had as against General Star, there were no rights to assign to the Estate and the circuit court erred in failing to so find.

We find as persuasive the reasoning employed by the Bath Circuit Court on this issue. It determined that General Star failed to identify a single case - in Kentucky or elsewhere - standing for the proposition that an insured may waive coverage *after a loss*. Rather, if policy holders who injured or killed third parties were allowed to unilaterally waive coverage after the injury or death, the very

public policy of Kentucky insurance law - *i.e.,* to fully compensate victims - would be thwarted. *See State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 36 (Ky. 2004). We find no basis for concluding that Phoenix either could or did waive coverage after the accident involving its vehicle, and we find no error on this issue.

For the foregoing reasons, we AFFIRM the Order and Final Judgment of the Bath Circuit Court.

JONES, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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