

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001167-MR

AMERICAN PREMIER INSURANCE COMPANY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CI-003053

LUCY M. DAVENPORT; JAMES DAVENPORT;
ALAN L. ALSTON AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: American Premier Insurance Company (American) appeals from orders, entered April 16, 2004, and June 9, 2004, in the Jefferson Circuit Court determining that a motor vehicle insurance policy issued by American provided coverage for claims asserted against its insured, Alan L. Alston. We affirm.

Lucy M. Davenport and James Davenport (collectively referred to as the Davenports) filed a complaint in the

Jefferson Circuit Court alleging personal injury to Lucy as the result of a May 15, 2001, automobile accident. The Davenports named the driver of the other vehicle, Alston, and State Farm Mutual Automobile Insurance Company (State Farm) as defendants. The vehicle driven by Alston was owned by his brother and his girlfriend. The Davenports asserted a claim against State Farm for uninsured and/or underinsured motorist benefits.

American subsequently filed an Intervening Complaint For Declaratory Relief. American stated it had issued a policy of automobile insurance to Alston, which was in effect at the time of the accident. American asserted, however, that policy exclusions precluded coverage for the claims asserted by the Davenports. Specifically, American argued that the automobile driven by Alston at the time of the accident was not covered under his policy. American sought a declaration that its policy did not provide coverage for any claims that could be asserted against its insured as a result of the subject accident.

The Davenports and American both filed motions for summary judgment on the issue of whether American's policy provided coverage for the claims asserted. By order entered February 13, 2004, the circuit court denied both motions. The Davenports subsequently filed a motion for reconsideration. By order entered April 16, 2004, the circuit court vacated and set aside its February 13, 2004, order and granted the Davenports'

motion for partial summary judgment. Therein, the circuit court held that the policy issued by American did provide coverage for the claims asserted by the Davenports. The partial summary judgment was made final and appealable on June 9, 2004, by an entry of an order that included Ky. R. Civ. P. 54.02 language. This appeal follows.

The standard of review on appeal from a summary judgment "is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."

Scrifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Since only issues of law are involved, our review is de novo.

Hallahan v. The Courier Journal, 138 S.W.3d 699 (Ky.App. 2004).

The insurance policy American issued to Alston named him as the insured and identified a 1988 Cadillac Deville and a 1968 Oldsmobile Cutlass under the "Description of Owned Automobiles." The American policy defined a "covered auto" as follows:

Any auto or trailer you do not own while used as a **temporary substitute** for any other vehicle described in the definition, when withdrawn from use because of its breakdown, repair, servicing, loss or destruction, provided its operation is with the permission of the owner and is within the scope of such permission.

The policy also contained the following exclusion:

We do not provide Liability Coverage:

. . .

6. For the ownership, maintenance or use of any vehicle, other than your covered auto, which is owned by or **furnished or available for the regular use** of you or any family member.

It is undisputed that at the time of the accident Alston was driving a Buick Skylark owned by Alston's brother and girlfriend. The issue presented is whether the Buick Skylark was a "temporary substitute" for Alston's own vehicle and thus, was a "covered auto" under the policy, or whether the Buick was "furnished or available" for Alston's "regular use" and thus, excluded from coverage under the policy.

The interpretation of an insurance policy is a question of law for the Court. Cinelli v. Ward, 997 S.W.2d 474 (Ky.App. 1998). "We review questions of law *de novo* and, thus, without deference to the interpretation afforded by the circuit court." Id. at 476. Furthermore, it is well-established that an exclusion in an insurance policy is to be interpreted narrowly, and all questions are to be resolved in favor of the insured. St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223 (Ky. 1994).

American contends the Buick Skylark was furnished or available for Alston's regular use. American asserts that Alston's testimony revealed that his brother had given Alston

the keys two or three days before the accident because the brother was going to prison. American asserts that Alston had free use of the Buick at the time of the accident. As such, American contends the exclusion applies and no coverage was provided by the policy.

The Davenports assert the testimony clearly established Alston intended to use the vehicle as a "temporary substitute" for his own vehicle. The Davenports point specifically to Alston's response when asked why he was driving the Buick Skylark on the day of the accident. Alston responded as follows: "My vehicle was broke down. I have two vehicles: One was being serviced - - I was getting ready to get it serviced; the other was broke down." Alston further testified that one of his vehicles was repaired and running a few days after the accident.

We believe the evidence clearly establishes that Alston's use of the Buick was as a "temporary substitute" for his own vehicle and that it was not "furnished or available" for his "regular use." Alston's own testimony, which was unrefuted, revealed that his two vehicles were not in working condition and that one of the two was repaired a few days following the accident. Thus, we conclude the circuit court properly determined that the insurance policy American issued to Alston provided coverage for the claims asserted by the Davenports

arising from Alston's use of the Buick owned by his brother and girlfriend. As such, the circuit court properly granted the Davenports' motion for partial summary judgment.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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