

RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002339-MR

KENNETH KININMONTH AND
SANDRA KININMONTH, AS
PARENTS AND NEXT FRIENDS
OF HEATHER KININMONTH

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA ECKERLE, JUDGE
ACTION NO. 07-CI-008539

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,¹ SENIOR JUDGE.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: Kenneth and Sandra Kininmonth, as the parents of Heather Kininmonth, appeal the Jefferson Circuit Court's granting of summary judgment in favor of Appellee Kentucky Farm Bureau Mutual Insurance Company ("KFB") as a matter of right. For the reasons stated herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On a weekend trip to Dale Hollow Lake, David Osborne was pulling Heather Kininmonth on a tube tied to his wave runner when a section of the tube assembly separated from the tube, propelling Heather into the side of Osborne's nearby houseboat. Heather's parents filed suit against Osborne and HO Sports Company, Inc., the manufacturer of the tube, for Heather's injuries. They also sued KFB, with whom Osborne had a homeowner's insurance policy, and State Farm Fire & Casualty Company, with whom he had an insurance policy on his houseboat, for a declaration of rights concerning whether either insurer owed coverage to any party in the case. Osborne also had a personal watercraft insurance policy in effect at the time of the accident.

Osborne's homeowner's policy with KFB had an exclusion which stated that liability coverage would not apply to bodily injury or property damage claims:

g. Arising out of:

(1) The ownership, maintenance, use, loading or unloading of an excluded watercraft described below;

* * *

Excluded watercraft are those that are principally designed to be propelled by engine power or electric motor, or are sailing vessels whether owned or rented to an “**insured.**”

KFB notified Osborne that coverage would not be provided under the policy and filed a motion for summary judgment based on this exclusion.

The trial court granted KFB’s motion for summary judgment based upon its determination that Heather’s claimed injuries arose out of Osborne’s use of the wave runner, an excluded watercraft under the exclusion. Thereafter, the Kininmonths filed a timely notice of appeal of the final judgment.

STANDARD OF REVIEW

When a trial court grants a motion for summary judgment, the relevant standard of review 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.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). The party opposing summary judgment must present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must “view the evidence in

the light most favorable to the nonmoving party.” *Id.* (quoting *Steelvest*, 807 S.W.2d at 480-82). Because summary judgment involves only legal issues, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis*, 56 S.W.3d at 436.

DISCUSSION

The Kininmonths first claim that the trial court erred in its interpretation of the “arising out of” language contained in the homeowner’s policy. Under the “reasonable expectations” 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.” *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003). Kentucky courts have consistently held that “[w]here the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written.” *Kemper Nat’l Ins. Co. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002). 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.” *Snow v. West American Ins. Co.*, 161 S.W.3d 338, 341 (Ky. App. 2004).

In this case, the doctrine of reasonable expectations need not be applied, as the watercraft exclusion in the policy is unambiguous. Therefore, it must be determined whether Heather’s claims “arise out of” Osborne’s use of the

wave runner. Kentucky’s Court of Appeals examined the meaning of the phrase “arising out of” in *Hugenberg v. West American Ins. Co.*, 249 S.W.3d 174 (Ky. App. 2006), and found that the phrase should be defined broadly. In *Hugenberg*, the plaintiff suffered brain damage in an automobile accident in which he was a passenger. The plaintiff sued the driver and the driver’s parents, the Hugenbergs, claiming negligent supervision of their minor child. The Hugenberg’s homeowner’s insurance denied coverage citing an exclusion for “bodily injury . . . [a]rising out of . . . [t]he ownership, maintenance, use, loading or unloading of motor vehicles . . . owned or operated by or rented or loaned to an ‘insured.’” *Id.* at 186. The Court determined that, with regard to whether the accident “arose out of” the use of the motor vehicle, all that was necessary was “a causal connection with the accident.” *Id.*

Here, Heather’s injuries were causally connected to Osborne’s use of the excluded wave runner. As stated by the trial court, whether the phrase “is construed expansively or narrowly, the result in this case would be the same. There cannot be a genuine dispute of fact that [Heather] would not have suffered the injuries that gave rise to the pending cause of action but for [Osborne’s] use of the Wave Runner.” Therefore, Heather’s injuries fall under the policy’s exception and are not covered.²

² The Kininmonths also argue that the anchored houseboat with which Heather collided was not an excluded watercraft. However, the watercraft exclusion applies regardless of the object that Heather struck. Heather’s injuries clearly still “arose out of” the use of the excluded wave runner.

Although the Kininmonths argue that issues of fact remain with respect to their negligent supervision claim against Osborne, the theory of liability is immaterial to the operation of the exclusion. Whether the theory is negligence, negligent supervision, or products liability, coverage is inapplicable if Heather's injuries arose from Osborne's operation of the wave runner.

The Kininmonths further argue that the watercraft exclusion is against public policy. No public policy against watercraft exclusions is designated, however. Narrowly-drawn, reasonable watercraft exclusions such as the one contained in KFB's homeowner's policy do not contravene public policy and are enforceable, just as this Court found enforceable the virtually identical motor vehicle exclusion discussed in *Hugenberg*.

Finally, notwithstanding the Kininmonth's arguments to the contrary, resolution of the foregoing issues did not necessitate additional discovery or resolution of disputed facts. As stated by this Court, "[w]hether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007). Further discovery would not alter the fact that Heather's injuries were a direct consequence of Osborne's use of the wave runner, an excluded watercraft under the policy. Therefore, the trial court's grant of summary judgment to KFB was both well-timed and appropriate.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court
is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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