RENDERED: SEPTEMBER 17, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF AUGUST 28, 2009, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001248-MR

AIG DOMESTIC CLAIMS, INC. AND
NATIONAL UNION FIRE INSURANCE COMPANY APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 06-CI-00231

TAMMY TUSSEY; PIKE COUNTY BOARD OF
EDUCATION; AND EDDIE MCCOY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, THOMPSON, AND WINE, JUDGES.

CAPERTON, JUDGE: National Union Fire Ins. Co. and AIG Domestic Claims, Inc. appeal a decision of the Pike Circuit Court extending coverage under the terms of a "claims-made" insurance policy. They argue on appeal that the Pike Circuit

Court erred in its interpretation of the policy when it granted summary judgment in favor of the Appellees, Tammy Tussey and the Pike County Board of Education. Upon a review of the policy in question, we are in agreement with the Circuit Court insofar as it found that the Board was continually covered under the policy from July 1, 2005, to July 1, 2007. Accordingly, we affirm.

On February 20, 2006, Tammy Tussey, a gym teacher for Pike County High School, filed a claim against the Pike County Board of Education (the Board) for gender discrimination related to her employment. The Board filed its answer on April 24, 2006. At the time the action was filed, the Board had an insurance policy issued by National Union Fire Insurance Company, whose parent company is AIG Domestic Claims (hereinafter "National Union"). The policy at the time was effective from July 1, 2005, to July 1, 2006. At the end of that term, the policy was renewed with an effective period from July 1, 2006, to July 1, 2007. It is undisputed that the Board was continuously covered through National Union at all times relevant herein. It is likewise undisputed that the Board's claim was not reported until the "second" policy period.

On April 23, 2007, nearly a year after filing its answer, the Board made a claim under the "first" policy. The Board avers that the delay in time was due primarily to a change in administration that took place around the time the complaint was filed. National Union denied coverage under the first policy. On January 8, 2008, Tussey filed an Amended Complaint alleging that the acts complained of in her complaint were covered under the second policy. Likewise,

on January 22, 2008, the Board filed a cross-claim against National Union, similarly alleging that the second policy covered the claim.

National Union again denied coverage and moved the Pike Circuit Court for summary judgment thereafter. Specifically, National Union contended that the insurance policies in question were "claims-based" policies, and that claims not reported within the policy period were not covered under the policy. Tussey and the Board filed cross-motions for summary judgment contending that the claim was covered under the policy. The Pike Circuit Court denied National Union's motion for summary judgment and granted judgment in favor of Tussey and the Board, prompting the present appeal. As the denial of a motion for summary judgment is treated as an interlocutory order which is not appealable, we will only address the order granting summary judgment in favor of Tussey and the Board.

In reviewing the arguments of the parties, we recognize that summary judgment is improper unless it appears "impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991), *citing Paintsville Hospital v. Rose*, 683 S.W.2d 255 (Ky. 1985). Upon appellate review of a denied motion for summary judgment, the relevant inquiry is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules

of Civil Procedure (CR) 56.03; and *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

The construction and interpretation of insurance contracts are questions of law for the court. *Kemper National Insurance Companies v. Heaven Hill Distilleries, Inc.,* 82 S.W.3d 869 (Ky. 2002). As such, we give no deference to the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000). Consequently, our review is *de novo*. *K.M.R. v. Foremost Insurance Group*, 171 S.W.3d 751 (Ky.App. 2005). Having so stated, we do note that it is a fundamental rule of construction in the Commonwealth that insurance policies are to be liberally construed, with any doubts resolved in favor of the insured. Kentucky Revised Statute ("KRS") 446.080; and *State Farm Mutual Auto Ins. Co. v. Shelton*, 413 S.W.2d 344, 347 (Ky. 1967). Limitations or exclusions of coverage must be clearly stated in an insurance policy so as to apprise the insured of such limitations. *St. Paul Fire & Marine Ins. Co.*, 870 S.W.2d at 227. Further, where the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written. *Kemper,* 82 S.W.3d at 873. However, ambiguous exclusions of coverage are to be strictly construed so as to make insurance effective. *Id.*

The policy at issue between the parties states as follows:

> NOTICE: THIS IS A CLAIMS-MADE FORM: EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS LIMITED GENERALLY TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED IN WRITING TO THE COMPANY WHILE THE

> POLICY IS IN FORCE. PLEASE REVIEW THE POLICY CAREFULLY AND DISCUSS THE COVERAGE WITH YOUR INSURANCE AGENT OR BROKER.
>
> In addition, the policy specifies that:
>
> [National Union agrees t]o pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages resulting from any Claim *first made against the insured and reported to the company during the Policy Period* for any Wrongful Act of the Insured in the performance of duties for the School Entity.

(Emphasis added). Furthermore, the "Special Provisions" section on page 4 of the policy includes a provision entitled "Discovery Period," which reads as follows:

> If [National Union] or the School Entity shall cancel or refuse to renew this policy, the School Entity shall have the right, upon payment of an additional premium ... to a period of twelve (12) months following the effective date of such cancellation or non-renewal in which to give written notice to the Company of any Claim made against the Insured during the said twelve (12) month period for any Wrongful Act before the end of the Policy Period.

It is the above "Discovery Period" provision, in particular, which is central to the arguments of both parties. The Board contends that the provision implies that the only circumstance where an insured would need to purchase an additional twelve-month reporting period would be in the case of cancellation or non-renewal. Thus, upon the Board's argument, renewal implies an extended reporting period where coverage remains continuous. National Union, however, argues that it means exactly the opposite. National Union contends that the

reporting period ends when the effective policy ends, and that an insured is only entitled to an extended period of reporting if the insured purchases an extension for an additional premium.

As National Union correctly notes, there are two primary types of errors and omissions policies:[1] "occurrence" policies and "claims-based" policies. A claims-based policy, they argue, is often offered at a lower premium to an insured because such a policy is limited to claims made and reported during the policy period. An occurrence policy, on the other hand, is typically offered at a higher premium because of the insurer's exposure to indefinite future liability.

Thus, on appeal, National Union argues that the Board's claim is not covered because it was made after the reporting period for the claims-based policy (hereinafter, "the policy"). National Union contends that the policy is unambiguous in its requirement that the claim be made within the policy period in which the claim arose. Accordingly, it asserts that to extend coverage to the Board's claim here would be tantamount to giving the Board a benefit for which it did not bargain.

Having reviewed the arguments of the parties and the applicable law, we note that claims-made policies are designed to provide coverage for claims made against the insured during the policy period regardless of when the incident

[1] Errors and omissions policies protect against liability based upon the failure of an insured, in their professional capacity, to comply with the standard of care for that profession. 1 Couch on Insurance 3d § 131:38 (3d ed. 2008). Such policies are designed to protect an insured against liability arising from special risks such as negligence, omissions, or mistakes inherent in the practice or profession. 9A Couch on Insurance 3d §131:38 (3d ed. 2008)

giving rise to the claim occurred. In this case, the alleged incident and the claim occurred under the first policy period; thus if the policy had expired and no additional premium was paid for an extension of coverage, we would agree that National Union must prevail. Nevertheless, we have difficulty reaching the same result where, as here, the policy was renewed and there was no lapse in coverage. Accordingly, this Court is of the opinion that when the Board renewed its claims-based policy at the precise time the earlier policy expired, its coverage was continuous.

The policy was in force from July 1, 2005, through July 1, 2007, during which time the terms of the policy remained identical, creating seamless coverage over the two-year period. It is difficult to fathom that a claim accruing during the two policy periods would not be covered by either policy. *See Cast Steel Products, Inc. v. Admiral Ins. Co.,* 348 F.3d 1298 (11th Cir. 2003).

We believe the policy evidences that it was the expectation of the parties that renewal of the policy carried with it a continuation of coverage. The "discovery period" provision in the policy states that only if the policy is cancelled or National Union refuses to renew the policy, can coverage be extended by the payment of an additional premium. Thus, following the logic argued by National Union, renewal of the policy leaves the insured with no means of protecting against claims made after the first policy expired. This conclusion is both illogical and inequitable. *Id.*

A more sensible interpretation of the contract is that because the discovery provision sets forth only two circumstances when the purchase of an extension is necessary to maintain coverage, the renewal of the policy provides a continuation of coverage and the purchase of an extension is unnecessary. We are in agreement with the Court in *Helberg v. National Union Fire Ins. Co.*, 102 Ohio App. 3d 679, 683, 657 N.E.2d 832, 835 (Ohio App. 6 Dist. 1995), when it stated:

> Applying the time-honored maxim of construction, *expressio unius est exclusio alterius,* the inclusion of specific things implies the exclusion of those not mentioned, this court can only conclude that the inclusion of "nonrenewal" of the policy as one of those circumstances demanding the purchase of an extended reporting endorsement excludes a "renewal" as a circumstance which demands such a purchase. Since appellant's position here was a renewal rather than "nonrenewal" or "cancellation," this court concludes that the language of the contract does not deny coverage in this context.

Accordingly, we are of the opinion that the renewal of the policy provided continual and seamless coverage to the Board. Accordingly, we affirm.

In affirming, we briefly note the issue which has come to the attention of this Court on appeal concerning the timeliness of the Board's notice of its claim, particularly, the provision in the policy at issue which provides that the Board shall "give written notice as soon as practicable" to National Union of any claim made against the Board. One issue presented upon appeal centered upon whether the fourteen-month delay on the part of the Board in giving notice was unreasonable.

Having reviewed the record, we find that this issue was neither raised before, nor addressed by, the court below. As we have repeatedly held, errors to be reviewed by the appellate court must be precisely preserved and identified in the lower court. *See Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Essentially, appellants are not permitted to feed one can of worms to the trial judge and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Accordingly, as this issue was neither raised nor addressed below, we decline to address it now for the first time on appeal.

Wherefore, for the foregoing reasons, we hereby affirm the summary judgment of the Pike Circuit Court, extending coverage under the claims made policy.

THOMPSON, JUDGE, CONCURS.

WINE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

WINE, JUDGE, DISSENTING: I must respectfully dissent from the majority. This case involves an errors and omissions policy which is "claims-based" in nature, and thus would preclude a finding in favor of Tussey and the Pike County Board of Education for an after-reported claim.

As the majority correctly notes, errors and omissions policies are a type of professional liability policy designed to protect an insured against liability associated with their particular profession --namely failure to comply with the standard of care for that profession. 1 Couch on Insurance 3d §1:35 (2008). Again, as the majority aptly notes, such policies are designed to insulate an insured

from professional negligence or other special liability arising from the risks inherent in their profession. 9A Couch on Insurance 3d §131:38 (3d ed. 2008).

However, errors and omissions policies are of two primary types: "occurrence-based" and "claims-based." Although the majority recognizes this distinction, it fails to see its significance. Occurrence-based policies are typically offered at much higher premiums and cover all occurrences that take place during the policy period. Claims-based policies, on the other hand, are typically offered at lower premiums and only cover occurrences which accrue and are reported during that same policy period. Claims-based policies are often offered at lower premiums to an insured precisely because of the lower burden of risk carried by the insurer. Conversely, occurrence-based policies are typically offered at much higher premiums because the insurer is exposed to indefinite future liability. It is through this lens that we must view the present case.

At first blush, the majority's argument may have intuitive appeal, as it seems that situations could arise where occurrences accrue close to the end of a policy period and cannot reasonably be known or reported until after the policy period has lapsed. However, it is important to note that this is <u>not</u> such a case. The school board had over four months left in their policy period in which to make a claim *after* Tussey filed her suit in the Pike Circuit Court. Instead, the Board waited more than a year before finally deciding to make a claim under the policy. This was not an occurrence happening in the "eleventh hour," so to speak.[2]

[2] Moreover, the Board is a sophisticated entity which was represented by counsel, who clearly should have been aware of the nature of the insurance policy under which it was covered.

Further, it is important to remember that the reporting period is what defines coverage under "claims-made" policies of insurance. It is this very requirement which distinguishes claims-made policies from occurrence-based policies. Indeed, "[t]o read an 'inherent' extended reporting period into a renewal policy [for claims-based policies] would 'creat[e] a long [and unbargained-for] tail of liability exposure, the avoidance of which forms the conceptual framework'" for claims-based coverage in the first place. *CheckRite Limited v. Illinois National Insurance Co*., 95 F.Supp.2d 180, 194 (S.D.N.Y. 2000), *quoting Nat'l Union Fire Ins. Co. v. Bauman*, No. 90 C. 0340, 1992 WL 1738, at 10 (N.D.Ill. Jan. 2, 1992). By ignoring this fact, this Court is giving the insured that for which they did not bargain, and is breaking rank with the overwhelming majority of jurisdictions all over this country who have repeatedly held that failure to notify an insurer within the policy period in a claims-based policy defeats coverage under the policy. *See, e.g*., *CheckRite, supra*; *Nat'l Union, supra*; *Ehrgood v. Coregis Insurance Co*., 59 F.Supp.2d 438, 446 (M.D.Pa 1998); *Pantropic Power Prods v. Fireman's Fund Ins. Co*., 141 F.Supp.2d 1366 (S.D.Fla. 2001); *Gulf Ins. Co. v. Dolan Fertig & Curtis*, 433 So.2d 512 (Fla. 1983); *U.S. v. A.C. Strip*, 868 F.2d 181 (6thCir. 1989).[3]

[3] Further, it is important to note that the two cases the majority cites to: *Cast Steel, supra* and *Helberg, supra*, are the only two cases I could find, nationwide, to have been decided in the manner in which the Court decides today's case. Moreover, *Cast Steel* presents an "eleventh hour" situation, which we clearly do not have presented before us today. *Cast Steel* presented a situation where the entity's agent failed to file the claim at the time it was instructed to do so by the company. *Id*. Even so, *Cast Steel* also presented a situation where the claim was filed within mere hours of the policy's lapse. *Helberg* involved a circumstance where the claim accrued only two months before the policy's end and was reported only six weeks after the initial policy period had lapsed. *Id*. I cannot find where *Cast Steel* has ever been cited to by another court. Moreover, the only three courts which have cited *Helberg* saw fit to distinguish it. Regardless, *Helberg* and *Cast Steel* clearly represent a distinct minority position.

In fact, today's decision is directly contrary to the position taken by our own circuit and our own district courts. *See, U.S. v. A.C. Strip*, 868 F.2d 181 (6thCir. 1989); *Trek Bicycle Corp. v. Mitsui Sumitomo Ins. Co., Ltd*., 2006 WL 1642298 (W.D.Ky. 2006).[4] Indeed, the Western District of Kentucky has stated:

> If a court were to allow an extension of reporting time after the end of the policy period [in a claims-based policy of insurance], ***such [would be] tantamount to an extension of coverage to the insured gratis***, something for which the insure[d] has not bargained. This extension of coverage, by the court, so very different from a mere condition of the policy, in effect [would rewrite] the contract between the two parties. This we cannot and will not do.

(Emphasis added). *Trek Bicycle Corp., supra*.

This case does not present a situation where the occurrence happens on the eve of the policy period's lapse and cannot reasonably be reported until after the policy has ended. In such a case, certainly, a workable exception could be adopted by our courts, allowing the insured a reasonable time in which to report. Instead, today's decision jumps wildly afield, allowing occurrence-based coverage for all claims-based policy holders in the Commonwealth. Such a leap will surely have ramifications in insurance premium costs to professionals and professional organizations all over this great Commonwealth.

---

[4] It should be noted that the proscription against citing unpublished cases in CR 76.28(4)(c) does not apply to federal cases. Nonetheless, even unpublished state cases may be viewed as persuasive, and this case certainly outlines the Western District's clear stance on claims-based professional liability policies.

BRIEF FOR APPELLANT:

Robert S. Walker, III
Lexington, Kentucky

BRIEF FOR APPELLEE TAMMY TUSSEY:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEE PIKE COUNTY BOARD OF EDUCATION:

Neal Smith
Pikeville, Kentucky