Not Designated for publication

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-62

CAULEY BOWMAN, PLLC, and BILLBOARD ACQUISITIONS I, LLC APPELLANTS	**Opinion Delivered** September 24, 2008
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV06-5235]
TWIN CITY FIRE INSURANCE COMPANY APPELLEE	HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE AFFIRMED

DAVID M. GLOVER, Judge

In this insurance-coverage case, appellee, Twin City Fire Insurance Company, issued a workers' compensation policy to appellant Cauley Bowman, PLLC, a law firm. The firm sued Twin City, seeking a declaration that the policy provided coverage to a separate business, appellant Billboard Acquisitions I, LLC, owned by one of the firm's partners. The trial court ruled that no coverage was owed to Billboard and granted summary judgment to Twin City. Cauley Bowman and Billboard now appeal, arguing that the policy is ambiguous and that genuine issues of fact remain on the coverage question. We disagree and affirm the summary judgment.

Background

On August 24, 2005, Jerry Matthew Johnson died from electrocution injuries sustained in the course and scope of his employment with Billboard, which had been owned by

attorney Gene Cauley since December 2004. Although Billboard did not have a workers' compensation policy of its own, the Cauley Bowman law firm, in which Mr. Cauley was a partner, carried workers' compensation coverage with Twin City. The firm submitted a claim to Twin City regarding Mr. Johnson's death. Twin City denied the claim on grounds that Mr. Johnson's employer, Billboard, was not an insured under the policy. Thereafter, Mr. Johnson's personal representatives sued Billboard in a wrongful-death action.

Responding to these developments, Cauley Bowman and Billboard asked the circuit court to declare Billboard an insured under the Twin City policy. Twin City moved for summary judgment, arguing that its policy could not be interpreted to include Billboard as an insured employer.[1] Cauley Bowman and Billboard responded that the policy was ambiguous and could reasonably be viewed as providing coverage to Billboard. The court ruled that the policy was clear as to who was an insured and granted Twin City's motion for summary judgment. Cauley Bowman and Billboard filed this appeal.

Standard of Review

Summary judgment should be granted only when there are clearly no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Prock v. S. Farm Bureau Cas. Ins. Co.*, 99 Ark. App. 381, ___ S.W.3d ___ (2007). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Id.* Normally, we determine if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a question of material

[1] Mr. Johnson's personal representatives filed a similar motion.

fact unanswered, viewing the evidence in the light most favorable to the nonmoving party and resolving all doubts and inferences against the moving party. *Id.* However, when there is no dispute on the relevant facts, we need only to determine whether the moving party was entitled to judgment as a matter of law. *Id.*

In reviewing the language of an insurance policy, we adhere to the long-standing rule that, where terms of the policy are clear and unambiguous, the policy language controls. *See Essex Ins. Co. v. Holder*, 372 Ark. 535, ___ S.W.3d ___ (2008). The language in an insurance policy is to be construed in its plain, ordinary, and popular sense. *McGrew v. Farm Bureau Mut. Ins. Co.*, 371 Ark. 567, ___ S.W.3d ___ (2007). If the policy language is unambiguous, we will give effect to its plain language without resorting to the rules of construction. *Id.* However, if the language is ambiguous, we employ the rules of construction. *See Smith v. Farm Bureau Mut. Ins. Co.*, 88 Ark. App. 22, 194 S.W.3d 212 (2004). Under those rules, provisions in an insurance policy are construed most strongly against the insurance company. *Id.* If a reasonable construction can be given to the policy that would justify recovery, it is the court's duty to do so. *Id.* Said another way, if the language of the policy is susceptible to two interpretations—one favorable to the insured and one favorable to the insurer—the interpretation most favorable to the insured must be adopted. *See id.* Where, however, parol evidence has been admitted to explain the meaning of the language, the issue becomes one of fact for the jury to determine. *Id*; *see also Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). In such a case, summary judgment is inappropriate. *See Elam*, *supra.*

Twin City Policy Language

The policy's information page lists Cauley Bowman as the named insured.[2] The insured's business is listed as "Attorneys Offices," and the policy classification states, "Attorney - All Employees & Clerical, Messengers, Drivers." The policy's general section provides that the policy "is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page)." Beneath the heading "Who Is Insured," the following appears: "You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees."

Cauley Bowman and Billboard do not contend that Billboard is an insured under the above provisions. Instead, they argue that an ambiguity arises when the policy's "Notification Of Change In Ownership Endorsement" is considered. The endorsement reads:

> Experience rating is mandatory for all eligible insureds. The experience rating modification factor, if any, applicable to this policy, may change if there is a change in your ownership or in that of one or more of the entities eligible to be combined with you for experience rating purposes. Change in ownership includes sales, purchases, other transfers, mergers, consolidations, dissolutions, formations of a new entity and other changes provided for in the applicable experience rating plan manual.
>
> You must report any change in ownership to us in writing within 90 days of such change. Failure to report such changes within this period may result in revision of the experience rating modification factor used to determine your premium.

According to Cauley Bowman and Billboard, this endorsement may be read to say that the

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[2] Actually, it lists the partnership of Cauley, Geller, Bowman, and Coates as the named insured. Geller and Coates had left the firm by the time the policy went into effect. For convenience, we will refer to the named insured as Cauley Bowman.

policy affords coverage to other businesses purchased and owned by a named insured.

Discussion

We begin our analysis with those portions of the policy that directly address the question of who is an insured. The information page states that the named insured is the law firm of Cauley Bowman. It also calculates a premium based on that classification. No part of the information page reveals an intention by the insurer or the insured to cover any entity except the law firm. Likewise, the general section of the policy describes it as a contract between the insurer and the named insured, which is Cauley Bowman. The description under the heading "Who Is Insured" fits only the law firm or its partners, in their capacity as employers of the firm's employees. Unequivocally, the main body of the policy does not cover Billboard as an insured employer.

The question is whether such crystalline language is rendered ambiguous by the change-in-ownership endorsement. It is not. The endorsement again lists Cauley Bowman as the named insured, near the top of the page. It makes no reference to coverage or the matter of who is an insured; nor does it express any intention to modify the portions of the policy that explicitly address those subjects. Rather, it is concerned with the effect of a change in ownership on the insured's "experience rating modification factor" and the possibility of an accompanying change in premium.

The experience rating modification factor is one of several considerations used to calculate premiums and is based on the prior claims experience of the insured. *See Employers Ins. of Wausau v. Didion Mid-South Corp.*, 65 Ark. App. 201, 987 S.W.2d 745 (1999).

Commonly-owned companies are sometimes permitted to combine their claims histories to produce a single experience rating modification factor. *See Larson on Workers' Compensation*, § 150.06[6] (2000). Several things affect the factor, including the identity of the owner. *See generally Westland Housing Corp. v. Comm'r of Ins.*, 352 Mass. 374, 225 N.E.2d 782 (1967). The above endorsement provides that, if the insured changes ownership or if there is a change in ownership of a company "eligible to be combined with [the named insured] for experience rating purposes," then the experience rating modification factor could change. Consequently, a change in premium might occur. However, there is no mention that, as Cauley Bowman and Billboard contend, a newly acquired company becomes an insured under the policy.

Cauley Bowman's and Billboard's interpretation of the endorsement would lead to an absurd result. *See State Farm Mut. Auto. Ins. Co. v. Fuller*, 232 Ark. 329, 332, 336 S.W.2d 60, 63 (1960) (quoting *Kopp v. Home Mut. Ins. Co.*, 6 Wis.2d 53, 94 N.W.2d 224 (1959) (stating that policies of insurance are to be given a reasonable construction and not one that leads to an absurd result)). Under their theory, the named insured could purchase several new companies, pay no additional insurance premiums, fail to notify the insurer of the purchase until after a work-related injury occurs at one of the new companies, and then be entitled to coverage for the incident, subject only to an invoice for unpaid premiums. Meanwhile, the insurer is covering a risk of which it is unaware and for which it has not calculated a premium. *See generally Essex*, *supra* (stating that the terms of an insurance contract are not to be rewritten under the rule of strict construction against an insurance company so as to bind the insurer to a risk that is plainly excluded and for which it was not paid). Common sense dictates

against such an interpretation.

We therefore uphold the trial court's ruling that the policy does not insure Billboard. However, Cauley Bowman and Billboard argue further that the trial court was required to send this case to a jury because both sides submitted extrinsic evidence in the form of depositions and affidavits to support their interpretations of the endorsement. They cite *Elam*, *supra*, for its statement that, "where the parties go beyond the contract and submit disputed extrinsic evidence to support their proffered definitions of the term, this is a question of fact for the jury." *Elam*, 346 Ark. at 297, 57 S.W.3d at 170.

We disagree that a circuit court must deny summary judgment in all cases where the parties submit depositions and affidavits to support their interpretations of an insurance policy. The circuit court must perform its function as gate-keeper by looking first to the policy language to decide if it is ambiguous. *See Smith*, *supra*. If it is not ambiguous, then no further steps are required. *See Essex*, *supra*. That is the situation here. *See, e.g., Multi-Craft*, *supra*; *Curley v. Old Reliable Cas. Co.*, 85 Ark. App. 395, 155 S.W.3d 711 (2004). Moreover, we note that Twin City's initial motion for summary judgment stated that the policy was not ambiguous, and the motion was unaccompanied by depositions or affidavits. It was only in response to such submissions by Cauley Bowman and Billboard that Twin City offered extrinsic proof. Even at that point, Twin City continued to insist that there was no genuine issue of material fact to be decided.

For the reasons stated, we affirm the summary judgment in favor of Twin City.

Affirmed.

VAUGHT and BAKER, JJ., agree.