

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002533-MR

BOWLING GREEN-WARREN COUNTY
COMMUNITY HOSPITAL CORPORATION,
d/b/a THE MEDICAL CENTER AND
COMMONWEALTH HEALTH CORPORATION

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NOS. 97-CI-01147, 97-CI-01148,
97-CI-01149, 97-CI-01150, 97-CI-01151,
97-CI-01152, 97-CI-01153, 97-CI-01154,
97-CI-01155, & 97-CI-01156

CHUBB GROUP OF INSURANCE COMPANIES
D/B/A FEDERAL INSURANCE COMPANY AND
FEDERAL INSURANCE COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND MILLER, JUDGES.

MILLER, JUDGE: Bowling Green-Warren County Community Hospital Corporation, d/b/a The Medical Center and Commonwealth Health Corporation (collectively referred to as appellants) bring this appeal from a July 15, 1999, summary judgment of the Warren Circuit Court. Ky. R. Civ. P. (CR) 56. We affirm.

On October 1, 1997, several employees and former employees of appellants filed an action in the Warren Circuit

Court. Therein they allege exposure to asbestos during employment with appellants and sought damages therefor. Appellants filed a third-party complaint against appellees. It appears that appellees issued an "Executive Protection Policy" (policy) to appellants in August, 1994. Relying upon such policy, appellants assert that appellees had a duty to defend and indemnify appellants in the underlying action. Appellees disagreed and filed a motion for summary judgment. On July 15, 1999, the circuit court entered summary judgment in favor of appellees; same was amended on September 27, 1999. This appeal follows.

Appellants contend the circuit court committed error by entering summary judgment. Summary judgment is proper where there is no material issue of fact and movant is entitled to judgment as a matter of law. CR 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). We believe resolution of this appeal centers upon interpretation of the policy.

At issue is Exclusion 5(g) and Section 15 of the policy:

5(g) based upon, arising from, or in consequence of (i) the actual, alleged or threatened discharge, release, escape or disposal of **Pollutants into or on real or personal property**, water or the atmosphere; or (ii) any direction or request that the **Insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**, or any voluntary decision to do so; including but not limited to any **Claim** for financial loss to the **Insured Organization**, its stake holders

or its creditors based upon, arising from, or in consequence of the matters described in (i) or (ii) of this exclusion; (Emphasis added.)

15. DEFINITIONS

. . . .

Pollutants means any substance located anywhere in the world exhibiting any hazardous characteristics as defined by, or identified on a list hazardous substances issued by, the United States Environment Protection Agency or a state, county, municipality or locality counterpart thereof. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants, or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials.

Pollutants shall also mean any other air emission, odor, waste water, oil or oil products, infectious or medical waste, asbestos or asbestos products and any noise. (Emphasis added.)

Upon the foregoing, the circuit court concluded that Exclusion 5(g) was applicable and that appellees were not liable under the policy. Conversely, appellants assert that the exclusion is inapplicable. They view the term "atmosphere" as found in the exclusion to be ambiguous and subject to two reasonable interpretations; atmosphere could simply mean air in any given space or it could mean the gaseous envelopment surrounding the earth. As insurance contracts are to be interpreted in favor of coverage, appellants maintain that the exclusion is only applicable to generalize pollution of the atmosphere or environment, as opposed to pollution existing within a building.

See Motorist Mutual Insurance Company v. RSJ, Inc., Ky. App., 926 S.W.2d 679 (1996). As the employees were exposed to a pollutant (asbestos) in a building, appellants contend the exclusion is simply inapplicable and thus the policy provides coverage under the circumstances. We are compelled to disagree.

We do not believe interpretation of the exclusion revolves around the term "atmosphere." Rather, we must agree with the circuit court's interpretation of the exclusion. To determine coverage under the policy, the circuit court read the exclusion as a whole with particular emphasis upon the phrase "into or on real or personal property." See City of Louisa v. Newland, Ky., 705 S.W.2d 916 (1986). The circuit court's ratiocination was as follows:

The exclusion in the . . . policy also uses the "real or personal property" language, thus evidencing the intent of the exclusion to apply to situations other than pollution occurring in the natural environment or broadly dispersed environmental pollution. (Footnote omitted.)

. . . .

The . . . exclusion uses the terms "into or on real or personal property," which evidences the drafters' intentions to craft an exclusion that applies to situations other than broadly dispersed environmental [sic] pollution. The Court holds that the language of the . . . exclusion includes exposure to asbestos inside buildings owned and being renovated by CHC.

We believe the exclusion to be clear and unambiguous -- excluded from coverage is liability based upon the "discharge, release, escape, no, or disposal of **Pollutants** into or on real or personal property . . ." See Aetna Life and Casualty Insurance

v. Layne, Ky. App., 554 S.W.2d 407 (1977). As the employees were uncontrovertedly exposed to asbestos (pollutants) in a building, we are of the opinion that Exclusion 5(g) is applicable and that appellants are not entitled to coverage under the policy.

We view appellants' remaining contentions as moot.

In sum, we hold that the circuit court did not commit error by entering summary judgment.

For the foregoing reasons, the summary judgment entered by the Warren Circuit Court is affirmed.

ALL CONCUR.

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