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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002133-MR
and
NO. 2001-CA-002193-MR

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT/ CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM BOYD CIRCUIT COURT
v. HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 98-CI-00873

CONTINENTAL CASUALTY INSURANCE COMPANY — APPELLEE/ CROSS-APPELLANT

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: State Farm Mutual Automobile Insurance Company (State Farm) appeals and Continental Casualty Insurance Company (CNA) cross appeals from a judgment and orders entered by the Boyd Circuit Court. The court determined that State Farm and CNA "shall share equally the expenses of litigation, settlement and/or judgment" resulting from a personal injury automobile accident between Lou Castle and Charles Runyon, Jr., "up to $100,000 per person, $300,000 per accident, each." We affirm.

On February 6, 1998, Castle was test driving a 1998 Ford Explorer owned by Boyd County Ford, Inc., when she was

involved in an automobile accident with an automobile occupied by Charles W. Runyon, Jr., Charles Runyon, III, and Christie Runyon. At the time of the accident, Boyd County Ford maintained a motor vehicle liability/garage policy with CNA. Castle was insured under an automobile liability policy issued by State Farm to her husband, John Castle.

A civil action was filed in the Boyd Circuit Court by each of the Runyons, alleging personal injuries and damages to each of them as a result of the accident. The Runyons' civil action was filed against both Castle and Boyd County Ford. State Farm defended Castle, and the case proceeded to a verdict with damages being awarded to each of the three Runyon plaintiffs.

State Farm and CNA were unable to reach an agreement as to the percentage of liability under each policy for the Runyon claims against Castle and to the cost of Castle's defense. Castle was covered by the "non-owned car" provision of the State Farm policy, and the coverage applicable to her included an "excess" insurance provision. It stated that "[i]f a *temporary substitute car,* a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle* has other vehicle liability coverage on it, then this coverage is excess." Boyd County Ford's garage policy with CNA only covered the damage to Boyd County Ford's automobile and expressly denied liability coverage for a Boyd County Ford customer like Castle. A policy endorsement provided the language that excluded customers like Castle from coverage. Because State Farm and CNA disagreed concerning the extent each were liable in connection with the

Runyon-Castle accident and litigation, State Farm sought a declaration of rights from the Boyd Circuit Court concerning State Farm's and CNA's respective liability.

State Farm argued to the trial court that liability should be apportioned 91% to CNA and 9% to State Farm. This argument was based on liability coverage of $1,000,000 per accident in the CNA policy and coverage of $100,000 per person and $300,000 per accident in the State Farm policy. On the other hand, CNA argued to the court that it had no liability in connection with the Runyon-Castle litigation because of its policy provision excluding coverage of customers like Castle.

On December 6, 2000, January 31, 2001, and September 4, 2001, the Boyd Circuit Court entered a judgment and orders finally disposing of the issue. First, the court determined that CNA's endorsement excluding customers from coverage was "void as against public policy." It then analyzed the case as if CNA provided the coverage mandated by public policy and compulsory insurance laws, specifically KRS[1] 190.033. Further, the court determined that each insurer attempted to provide "excess" coverage. Finally, it concluded that State Farm and CNA should "equally share the expenses of litigation, settlement and/or judgment" in the Runyon-Castle litigation "up to $100,000 per person, $300,000 per accident, each." This appeal by State Farm and cross appeal by CNA followed.

We first address CNA's argument that it has no liability due to the policy endorsement which excluded customers

[1] Kentucky Revised Statutes.

like Castle from coverage. KRS 190.033 provides in relevant part:

> The bond or policy for all dealers except automotive recycling dealers shall provide public liability and property damage coverage for the operation of any vehicle owned or being offered for sale by the dealer or wholesaler when being operated by the owner or seller, his agents, servants, employees, prospective customers, or other persons.

KRS 190.033. [Emphasis added.] CNA acknowledges that its policy did not provide coverage to Castle although it was required to do so by the statute. Nevertheless, CNA argues that "when the dispute is between two insurance companies, and not members of the public, public policy is never implicated. Accordingly, the respective terms and conditions of the insurance policies control." Thus, CNA asserts that, although the statute would have provided protection for Castle despite the policy endorsement, "such protection does not exist for State Farm, an insurance company." The trial court disagreed, and so do we.

In support of its argument, CNA cites Royal-Globe Ins. v. Safeco Ins. Co., Ky. App., 560 S.W.2d 22 (1977); Omni Ins. v. KY Farm Bureau Mut. Ins., Ky. App., 999 S.W.2d 724 (1999); and Empire Fire and Marine Ins. v. Haddix, Ky. App., 927 S.W.2d 843 (1996). However, these cases do not give insurance companies a free hand in contravention of public policy and statutory mandate. Rather, the coverage required by public policy was provided in each of the cases. Moreover, the cases reflect that when public policy is satisfied and compulsory coverage is provided, a dispute between two insurance companies involving a question of the extent of each insurer's liability only requires

an analysis of the policy language. Royal-Globe, 560 S.W.2d at 24-25; Omni Ins., 999 S.W.2d at 727; Empire Fire, 927 S.W.2d at 845. Because compulsory coverage was not provided by CNA and public policy was not satisfied, we conclude the cases cited by CNA are not applicable.

When an insurance policy fails to provide or attempts to take away what public policy and KRS 190.033 require be given, the offending provision is void. See Universal Underwriters Ins. Co. v. Veljkovic, Ky. App., 613 S.W.2d 426, 428 (1980). Thus, the policy endorsement to the CNA policy was void. Nevertheless, the policy remains in effect and is deemed to provide the minimum coverage required by public policy. Id. The statute prescribes the mandatory minimum coverage of $100,000 per person and $300,000 per accident. KRS 190.033. Accordingly, CNA was deemed to provide the $100,000 per person and $300,000 per accident minimum coverage to Boyd County Ford customers such as Castle. In short, the trial court ruled correctly in this regard.

Having determined that CNA must provide liability coverage in accordance with the mandatory minimum amounts stated in the statute, we now turn to the question of how the liability is to be allocated between State Farm and CNA. The trial court correctly focused upon the language of the respective policies in making this determination. See Royal-Globe Ins., 560 S.W.2d at 24-25. It determined that the parties agreed each policy contained an excess coverage provision and that the liability under the judgment in the Castle-Runyon litigation should be shared equally.

State Farm argues in its "Combined Reply Brief and Brief of Cross-Appellee" that CNA's coverage is primary. We have several problems with this argument. First, as we have noted, the trial court stated in its judgment that the parties agreed that their respective policies contained excess coverage provisions. Second, State Farm did not raise the issue in its appeal; rather, it raised the issue in its combined reply brief and cross-appellee brief. In fact, on page 12 of State Farm's appellant's brief, it seems to agree that CNA's coverage in this regard would be excess coverage in accordance with CNA's declarations page. Third, any argument by State Farm that CNA had primary coverage appears to be at odds with its argument to the trial court and to this court in its appellant's brief that liability should be apportioned on a 91% to 9% basis. Fourth, State Farm asserts that CNA has primary coverage due to language on page 11 of CNA's policy. However, in reviewing the policy it is apparent that the language does not relate to the liability coverage portion of the policy but to the garage conditions portion. In short, we disagree with State Farm's argument that CNA had primary coverage.

On the other hand, CNA argues that its policy contains a "non-standard escape" clause. It contends that this clause precludes liability since a non-standard escape clause will prevail over an excess clause. See Empire Fire, 927 S.W.2d at 845. However, CNA overlooks the fact that the non-standard escape clause was not a part of the policy because it was changed by the endorsement.

"The policy and its endorsements validly made a part thereof together formed the contract of insurance, and are to be read together to determine the contract actually intended by the parties." Kemper Nat. Ins. Cos. v. Heaven Hill Distilleries, Ky., 82 S.W.3d 869, 875 (2002), quoting 1 Couch on Insurance 2d, § 4:36. Since the endorsement constituted the insurance contract, the provisions upon which CNA now seeks to rely were not a part of the contract. Therefore, CNA cannot rely upon those provisions as an expression of intent.[2] Accordingly, the trial court correctly determined that CNA's liability, like State Farm's, was excess.

State Farm argues that liability between it and CNA should be apportioned at 91% and 9% respectively because CNA's policy provides a liability limit of $1,000,000 while its policy provides a limit of only $100,000. However, this argument overlooks the fact that CNA is only liable up to $100,000 per person and $300,000 per accident. Veljkovic, 613 S.W.2d at 428. State Farm's policy also provides the same limits of liability. Furthermore, as State Farm and CNA were responsible only for "excess" coverage, the policies were "mutually repugnant." See State Farm Mut. Auto. Ins. Co. v. Register, Ky. App., 583 S.W.2d 705, 706 (1979). As such, the trial court properly found State Farm and CNA equally responsible for the litigation,

[2] CNA's reliance upon Lewis v. West American Ins. Co., Ky., 927 S.W.2d 829 (1996), is misplaced. That case states only that where the void clause is separable from the remainder of the policy, the remainder is enforceable. Id. at 836. In the case *sub judice*, the issue is whether a clause in an earlier version of the policy became again effective when the endorsement which changed it was declared void.

settlement, and/or judgment arising from the Castle-Runyon litigation.

The judgment and orders of the Boyd Circuit Court are affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

John F. Vincent
Ashland, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

Patrick M. Hedrick
Ashland, Kentucky