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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002664-MR

DEVIN NEWSOME — APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 00-CI-00307

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY; CHARLES VANCE, INDIVIDUALLY AND D/B/A VANCE FURNITURE; JANET VANCE, INDIVIDUALLY AND D/B/A VANCE FURNITURE; AND FLOYD GREENE INSURANCE COMPANY — APPELLEES

AND NO. 2005-CA-000046-MR

CHARLES VANCE, INDIVIDUALLY AND D/B/A VANCE FURNITURE; AND JANET VANCE, INDIVIDUALLY AND D/B/A VANCE FURNITURE — APPELLANTS

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OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Devin Newsome, Charles Vance and Janet Vance, d/b/a Vance Furniture, have appealed from a declaratory judgment entered by the Floyd Circuit Court, which concluded that Kentucky Farm Bureau Mutual Insurance did not owe coverage to the Vances or Vance Furniture for a cause of action asserted against them by Newsome. Having concluded that the trial court did not err as a matter of law by determining that Newsome's accident was not covered under any of the Vances' insurance policies held with Kentucky Farm Bureau, we affirm.

The pertinent facts of this case are not in dispute. When Newsome was seventeen years old and still in high school, he worked part time for the Vances conducting odd jobs at their farm, house, and business, Vance Furniture. Before the accident occurred, Newsome usually worked for the Vances on Saturdays for $5.00 per hour. On Christmas Eve of 1999, the Vances asked Newsome to deliver furniture to a customer. After making the delivery, Newsome pulled out onto the road and heard a "real big popping noise." Shortly thereafter, the steering malfunctioned and Newsome lost control of the vehicle, causing him to hit a second motor vehicle. As a result, Newsome suffered numerous

injuries, including a broken jaw, hip, and leg, as well as injuries to his face, ear, and back.

Although Newsome helped other store employees deliver furniture on previous occasions, this was the first time he ever made a delivery by himself. Additionally, the vehicle he was driving at the time of the accident had previously been wrecked and rebuilt. Furthermore, Newsome's accident was the first time the business used this vehicle since its first wreck.

At the time of the accident, the Vances did not have any workers' compensation coverage for Newsome or any of its employees. The Vances alleged that they never carried workers' compensation because they considered the people who worked for their business to be "contractors." Although the Vances did not have workers' compensation coverage, they did have 12 insurance policies in effect at the time of the accident. Floyd Greene, a Kentucky Farm Bureau agent, sold these insurance policies to the Vances, as well as other insurance policies over a twenty-year period to cover their home, vehicles, and business. Additionally, the Vances had an umbrella policy in effect at the time of the accident to provide coverage that exceeded the coverage amount under their other insurance policies. However, each policy provided an exclusion from coverage under either a business pursuits or an employment exclusion.

After the accident, Newsome filed suit against the Vances, d/b/a Vance Furniture, in the Floyd Circuit Court for negligently furnishing him with a motor vehicle that was severely damaged in a previous accident. The Appellee, Kentucky Farm Bureau, provided the Vances with counsel in defense of Newsome's complaint. The court granted Kentucky Farm Bureau leave to intervene in this action to determine whether it was required to continue to provide counsel for the Vances and to pay any judgment which might be rendered against them on behalf of Newsome. Therefore, Kentucky Farm Bureau petitioned for a Declaratory Judgment and named both the Vances and Newsome as defendants.

Subsequently, Newsome amended his complaint and asserted three additional claims. First, Newsome alleged that the Vances were negligent in failing to obtain workers' compensation coverage. Additionally, Newsome added Floyd Greene Insurance, Inc., as a defendant and alleged that Greene failed to advise the Vances to purchase workers' compensation coverage. Finally, Newsome added claims against Greene and Kentucky Farm Bureau based on bad faith, violations of the Kentucky Consumer Protection Act, and violations of the Kentucky Insurance Fraud Act. The Vances, d/b/a Vance Furniture, filed identical claims against Greene and Kentucky Farm Bureau.

In concluding that the exclusions in the insurance policies were permissible and unambiguous, the Floyd Circuit Court entered a Declaratory Judgment stating that Kentucky Farm Bureau owed no coverage to the Vances or Vance Furniture for Newsome's cause of action. Additionally, because the trial court found that Kentucky Farm Bureau had no obligation to provide coverage, it dismissed the additional claims against Kentucky Farm Bureau based on bad faith, violations of the Kentucky Consumer Protection Act, and violations of the Kentucky Insurance Fraud Act. Furthermore, the trial court entered a subsequent order dated December 7, 2004, amending the Declaratory Judgment to provide that Newsome was still entitled to pursue his personal injury claim against the Vances, as well as his workers' compensation claim. These appeals followed.

Because the interpretation of an insurance contract is a question of law, the *de novo* standard of review should be applied. *MGA Ins. Co., Inc. v. Glass*, 131 S.W.3d 775, 777 (Ky. App. 2004). Furthermore, the terms used in an insurance policy "must be interpreted according to the usage of the average man and as they would be read and understood by him in light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured." *Fryman v. Pilot Life Insurance Co.*, 704 S.W.2d 205, 206 (Ky. 1986).

The Appellants, Newsome and the Vances, d/b/a Vance Furniture, first contend that Newsome was not an employee of Vance Furniture and should not be excluded from coverage under the Vances' insurance policies. The Vances had a personal automobile policy on the vehicle Newsome was driving during the accident. However, an exclusion in the policy stated that "[w]e do not provide liability coverage for any insured for bodily injury to any employee of that insured during the course of employment." However, the Appellants contend that Newsome was not an employee and thus does not fall under this exclusion. Because Newsome worked only one day a week and did various jobs for the Vances, the Appellants claim that Newsome was an independent contractor. We disagree.

As provided in *Ratliff v. Redmon*, 396 S.W.2d 320, 324-25 (Ky. 1965), the nine factors to consider when determining whether an individual is an employee or an independent contractor include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer; and
>
> (i) whether or not the parties believe they are creating the relationship of master and servant.

Applying the factors provided in *Ratliff*, it is clear that Newsome does not qualify as an independent contractor. While all the factors should be considered, the predominate factor to be considered is the Vances' right to control the details of Newsome's work. *Id*. at 327. Because the Vances clearly controlled the details of Newsome's work, we conclude that Newsome was an employee and not an independent contractor. However, applying the other factors, it is also clear that Newsome was not an independent contractor because Newsome was not engaged in a distinct occupation; the type of work done by Newsome usually required direction from the Vances; the odd jobs Newsome did required no particular skill; the Vances provided the instrumentalities, tools, and place of work for Newsome; and

Newsome was paid by the hour. Therefore, the trial court correctly concluded that Newsome was the Vances' employee.

The Appellants also contend that the various insurance policies should be construed under the "reasonable expectations" doctrine to provide coverage for Newsome's accident. The Vances claim that the doctrine of reasonable expectations should apply because Greene continually told Mrs. Vance not to worry about their coverage under the policies and that "you know I've got it fixed if anything ever happened." Therefore, the Appellants contend that the doctrine of reasonable expectations should apply because the Vances reasonably expected that Newsome's accident would be covered under their various insurance policies. We disagree.

In *Brown v. Indiana Insurance Company*, 184 S.W.3d 528, 540 (Ky. 2005), the Kentucky Supreme Court concluded that the doctrine of reasonable expectations applies only when the terms of the policy are ambiguous. Specifically, the Supreme Court stated that:

> the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation. The doctrine of reasonable expectations is used in conjunction with the principle that ambiguities should be resolved against the drafter in order to circumvent the

> technical, legalistic and complex contract terms which limit benefits to the insured.

Id.

The Appellants contend that the exclusion provisions under the personal automobile policy and the homeowner's policy are ambiguous, and thus the doctrine of reasonable expectations should apply. Specifically, the exclusion under the personal automobile policy does not apply to "domestic employees." Because the term "domestic employee" is not defined in the policy, the Appellants contend that it is ambiguous. Additionally, under the homeowner's policy, the exclusion for injuries that arise out of the "insured's business" does not apply to "residence employees." Although the term "residence employee" is defined under the homeowner's policy, the Appellants contend that it also is ambiguous.[1]

Although the term "domestic" is not defined, we conclude that the terms "domestic employee" and "residence employee" in the policies are not ambiguous. Furthermore, it is clear that Newsome was neither a "domestic" nor a "residence" employee. While Newsome did perform odd jobs around the Vance's

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[1] A "residence employee" is defined under the homeowner's policy as:

> (a) an employee of an insured whose duties are related to the maintenance or use of the residence premises, including household or domestic services; or
> (b) one who performs similar duties elsewhere not related to the "business" of an "insured."

farm and house, he was delivering furniture for Vance Furniture at the time of the accident. Because delivering furniture is not work that is done in a residence or related to a domestic service, Newsome was neither a "domestic" nor a "residence" employee at the time of the accident. The lower court therefore correctly determined that Newsome was working as an employee of Vance Furniture at the time he delivered the furniture. Thus, the exclusions provided in both insurance policies apply to Newsome.

Furthermore, the Vances contend that Newsome is excluded under KRS § 342.650(2) from being covered under Kentucky's Workers' Compensation Act and should therefore be covered under the Vances' insurance policies.[2] After reviewing the facts of this case, we conclude that Newsome does not fall under this provision and thus KRS § 342.650(2) is inapplicable.

Finally, the Appellants contend that Kentucky Farm Bureau is vicariously liable for the acts of its agent, Greene, for failing to provide the Vances with coverage for Newsome's accident and that Kentucky Farm Bureau should be estopped from denying coverage based on the alleged statements Greene made to

[2] KRS § 342.650(2) states that the following employees are exempt from coverage:

> Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or if the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his trade, business, or profession.

the Vances about their coverage under the insurance policies. However, because these issues were not raised in the declaratory action, they are not properly before this court on appeal.

For the foregoing reasons, we affirm the order of the Floyd Circuit Court.

ALL CONCUR.

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