

RENDERED: AUGUST 29, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001393-MR

THE ESTATE OF HUGO QUINTERO,  
BY PERSONAL REPRESENTATIVE  
GLORIA QUINTERO; AND CHRISTOPHER MATEO                      APPELLANTS

v.                      APPEAL FROM JEFFERSON CIRCUIT COURT  
                         HONORABLE STEPHEN K. MERSHON, JUDGE  
                         ACTION NO. 05-CI-005560

UNITED STATES LIABILITY INSURANCE GROUP;  
AND EL PARAISO, INC.    APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

DIXON, JUDGE: The Appellants, Christopher Mateo and the estate of Hugo Quintero (collectively Appellants) appeal from an order of Jefferson Circuit Court granting summary judgment in favor of United States Liability Insurance Group (USLIG). We affirm.

In the early morning hours of June 27, 2004, the Appellants were passengers in an automobile driven by eighteen-year old Xavier Jaramillo, who had been served alcohol at two restaurants, El Paraiso and El Noa Noa, in Louisville, Kentucky. At approximately 4:00 a.m., Jaramillo's vehicle was involved in a crash in Indiana, killing Quintero and severely injuring Mateo.

On June 24, 2005, Appellants filed a complaint in Jefferson Circuit Court against the two restaurants and other individual defendants. Thereafter, on December 9, 2005, USLIG filed an intervening complaint against Appellants seeking declaratory relief relating to its liquor liability insurance policy with El Paraiso.<sup>1</sup> Following discovery, USLIG and Appellants filed cross-motions for summary judgment and submitted legal briefs to the court. In a lengthy opinion rendered June 13, 2007, the trial court concluded El Paraiso's insurance policy was *void ab initio* and granted summary judgment in favor of USLIG. This appeal followed.

Summary judgment “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be 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) (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). Accordingly, on appellate review of a summary judgment, we must

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<sup>1</sup> El Paraiso did not participate as an intervening defendant in circuit court; likewise, El Paraiso did not participate in this appeal.

determine “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03).

In October 2002, El Paraiso, through its owner and agent, Roberto Avila,<sup>2</sup> entered into a contract with USLIG for a one million dollar liquor liability insurance policy. In October 2003 and October 2004, El Paraiso renewed the policy. The 2003 renewal application contained the following question:

9. Within the past five years has the insured been cited by the Liquor Control Commission? If yes, describe and advise as to date.

Avila, on behalf of El Paraiso, marked “No” in response to the question and signed the application.

When Appellants filed suit against El Paraiso, USLIG investigated the claim and discovered that, in May 2003, El Paraiso was called to an administrative hearing before the Kentucky Alcoholic Beverage Control Board. The Board issued a final order resolving three citations for alcohol violations issued to El Paraiso by officers of the Kentucky Department of Alcoholic Beverage Control. USLIG concluded that, by failing to disclose the citations, El Paraiso made material misrepresentations in its 2003 and 2004 renewal applications. As a result, USLIG sent a letter to EL Paraiso rescinding the insurance contract and refunding the

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<sup>2</sup> Avila did not personally participate in the circuit court proceedings.

premiums for the 2003 and 2004 renewal policies. Thereafter, USLIG filed its complaint in Jefferson Circuit Court seeking declaratory relief.

Kentucky Revised Statutes (KRS) 304.14-110 states:

All statements and descriptions in any application for an insurance policy . . . shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- (1) Fraudulent; or
- (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
- (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy  
. . . .

Appellants contend that summary judgment in favor of USLIG was improper because material issues of fact exist as to the enforceability of the contract. Appellants assert: 1) the trial court erroneously relied on USLIG's underwriting guidelines; 2) the trial court erroneously considered evidence outside the scope of USLIG's rescission; 3) the insurance application was ambiguous; 4) USLIG had "unclean hands" in rescinding the contract; 5) USLIG failed to investigate El Paraiso's application; and 6) rescinding the contract violated public policy.

In their brief, Appellants failed to cite the location in the circuit court record where their arguments were preserved. CR 76.12(4)(c)(v). “It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). After reviewing the record, it appears that issues three, five and six were raised below. Because Appellants cannot “feed one can of worms to the trial judge and another to the appellate court[,]” we will only address the arguments that were raised before the circuit court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

We first address Appellants’ contention that the application was ambiguous because the term “liquor control commission” used in question number nine was susceptible to multiple interpretations. Appellants point out that USLIG changed the format of the question in the 2004 application and eliminated the term “liquor control commission.”

“The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court.” *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000). In our review, we are mindful that:

Unless the terms contained in an insurance policy have acquired a technical meaning in law, they ‘must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured.’

*Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky. App. 1991)

(quoting *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986)).

However,

[t]he rule of strict construction against an insurance company certainly does not mean that every doubt must be resolved against it and does not interfere with the rule that the policy must receive a reasonable interpretation consistent with the parties' object and intent or narrowly expressed in the plain meaning and/or language of the contract.

*St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 226 (Ky. 1994).

Despite Appellants' argument to the contrary, we are not persuaded that the question was ambiguous. Question nine stated: "Within the past five years has the insured been cited by the Liquor Control Commission?" The facts show that, in addition to the citations issued by the Kentucky Department of Alcoholic Beverage Control, El Paraiso had also been cited by the Jefferson County Alcoholic Beverage Control Commission for three separate violations in 2002.

The language of the question at issue, specifically the terms "cited" coupled with "liquor control commission" are capable of interpretation by a reasonable person based on common usage. Consequently, we believe a reasonable person reading the application would recognize that the question required disclosure of all alcohol-related citations from a regulatory agency. Furthermore, this interpretation is certainly consistent with the object of the

application, as USLIG relied on the information disclosed in assessing the risk of insuring El Paraiso.

Since the application was not ambiguous, we conclude that rescission of the contract was proper. Pursuant to Kentucky Revised Statutes (KRS) 304.14-110(2), it is evident that the omission of El Paraiso's alcohol citations constituted a material misrepresentation affecting both USLIG's acceptance of the risk and the type of hazard USLIG insured. Although Appellants dispute the evidence supporting rescission, we note, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). We find no error.

Appellants next argue that rescission was improper because USLIG failed to investigate El Paraiso's application for accuracy. We note that Appellants offer no authority to support their position.

Despite Appellants' assertions to the contrary, it was El Paraiso's responsibility to ensure that its answers on the application were correct. *Paxton v. Lincoln Income Life Ins. Co.*, 433 S.W.2d 636, 638 (Ky. 1968). USLIG was free to issue the policy based only on the information provided by El Paraiso in its application. *Hornback v. Bankers Life Ins. Co.*, 176 S.W.3d 699, 704 (Ky. App. 2005). Consequently, we conclude USLIG had no duty to investigate the application, and the subsequent rescission of the contract was proper pursuant to KRS 304.14-110(2).

Finally, we address Appellants' alternative theory that rescission was against public policy. Appellants rely on automobile insurance cases interpreting the public policy of the Motor Vehicle Reparations Act (MVRA) (KRS 304.39-010 et. seq.).

Specifically, in *National Ins. Ass'n v. Peach*, 926 S.W.2d 859 (Ky. App. 1996), a panel of this Court concluded that “[t]he provisions of the MVRA . . . coupled with the public policy underlying them, requires that the insurer rather than an innocent third party bear the risk of intentional material misrepresentations made by an insured.” *Id.* at 863.

In the case at bar, Appellants argue the same public policy applies to protect them, as third-party victims of El Paraiso's negligence. We disagree, as *Peach* clearly follows the statutory mandate of the MVRA:

[W]e conclude that the compulsory automobile insurance statutes, when read together, abrogate the right of an insurer to rescind automobile liability insurance so as to deny recovery to an innocent third-party claimant. Rescission of the insurance contract **in this limited instance** is precluded-even though a fraud may have been perpetrated in securing the coverage.

*Id.* (emphasis added). Furthermore, in *Progressive Northern Ins. Co. v. Corder*, 15 S.W.3d 381 (Ky. 2000), also cited by Appellants, the Kentucky Supreme Court discussed *Peach, supra*, and concluded:

where loss must be borne by an innocent third party or by an insurance company which has written a policy **pursuant to a compulsory insurance statute** and accepted a premium therefor, it should be the insurance



company that bears the loss up to the minimum statutory limits.

*Id.* at 384 (emphasis added).

Despite Appellants' reliance on *Peach* and *Corder*, we are not persuaded that the statutory policy considerations of the MVRA are applicable to the type of insurance contract at issue here. In the case at bar, the liquor liability insurance policy purchased by El Paraiso was not compulsory. Accordingly, KRS 304.14-110 bars recovery due to the material misrepresentations in El Paraiso's application.

For the reasons stated herein, we affirm the Jefferson Circuit Court's order granting summary judgment in favor of USLIG.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

D. Keith Pulliam  
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BRIEF FOR APPELLEE:

United States Liability Insurance  
Group:  
Jack E. Ruck  
Louisville, Kentucky

NO BRIEF FOR APPELLEE  
El Paraiso, Inc.