RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001693-MR

BRENT HORN APPELLANT

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CI-00270

MICKAYLA SESCO as Administratrix of
the ESTATE OF BRADLEY E. STAFFORD,
deceased; TOWER INSURANCE COMPANY
OF NEW YORK; and BRIDGFIELD CASUALTY
INSURANCE COMPANY APPELLEES

and

NO. 2012-CA-001835-MR

TOWER INSURANCE COMPANY OF NEW
YORK CROSS-APPELLANT

v.

CROSS-APPEAL FROM MARTIN CIRCUIT COURT
HON. JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CI-00270

MICKAYLA SESCO, Administratrix of the
ESTATE OF BRADLEY E. STAFFORD, deceased;
BRENT HORN; and BRIDGEFIELD CASUALTY
INSURANCE COMPANY, INC. CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

COMBS, JUDGE: This is an appeal and cross-appeal from a summary judgment of the Martin Circuit Court which ruled that Tower Insurance Company of New York (Tower Insurance) had no duty to defend or to indemnify Brent Horn under the terms of a liability policy that Tower Insurance issued to B & B Contracting, LLC (B & B).[1] After our review, we reverse and remand for further proceedings.

B & B is in the business of highway mowing and landscaping. At the time of the proceedings below, its fleet of trucks was insured under a business auto policy issued by Tower Insurance. The policy excluded coverage for any injuries for which B & B might be liable under the workers' compensation law "or any similar law." Policy, Section II, B(3).

On September 26, 2011, during the course of his work day, Bradley E. Stafford, an employee of B & B, fell from a pick-up truck owned by B & B. At the time of the accident, the truck was being operated by the appellant, Brent Horn. Although Horn was not an employee of B & B, he was operating the vehicle with the company's permission. Stafford died from his injuries.

[1] Tower Insurance styles its brief as a combined brief for the "Appellee/Cross-Appellant," but it has presented no argument with respect to its cross-appeal. Therefore, we have not addressed the cross-appeal in this opinion.

On November 4, 2011, Connie Stafford, the administratrix of Stafford's estate, filed a wrongful death action against Horn.[2] Horn claimed that the liability policy insuring B & B's trucks covered the tort claim asserted against him by the Estate. He demanded that Tower Insurance defend him against the action and pay any damages awarded. Tower Insurance filed an intervening complaint seeking a declaration of rights with respect to its obligations to defend and indemnify Horn.

After a period of discovery, the parties filed cross-motions for summary judgment. On September 13, 2012, the Martin Circuit Court granted the motion of Tower Insurance. The circuit court concluded that the insurance contract between Tower Insurance and B & B created coverage for Horn as an "insured" pursuant to an omnibus provision in the policy. However, it held that coverage of Stafford's claim against Horn was excluded by a clause barring coverage of claims asserted by employees (the "employee-exclusion clause").

Horn filed a notice of appeal. He argues that the trial court erred by concluding that the policy's employee-exclusion clause applied under the unique facts of this case.

Summary judgment should be granted only where the pleadings, the discovery, the admissions, the stipulations, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as

[2] Mickayla Sesco was substituted in place of Connie Stafford, Administratrix of the Estate of Bradley E. Stafford, in an order entered in the Martin District Court on February 18, 2013. Upon her motion, Sesco was substituted as a party Appellee in place of Connie Stafford, administratrix, by this Court's order entered on March 28, 2013.

a matter of law. Kentucky Rule[s] of Civil Procedure 56.03. There is no dispute on appeal concerning the facts of this case. Since the proper application and interpretation of insurance contracts are matters of law, we do not defer to the trial court's decision. *Hugenberg v. West American Ins. Co./Ohio Cas. Group,* 249 S.W.3d 174 (Ky. App. 2006). Where the terms of an insurance contract are plain and unambiguous, we must apply them as written. *Nationwide Mutual Ins. Co. v. Nolan*, 10 S.W.3d 129 (Ky. 1999). Policy exceptions and exclusions are strictly construed to make insurance effective. *Kentucky Farm Bureau Mutual Ins. Co. v. McKinney,* 831 S.W.2d 163 (Ky. 1992).

The policy at issue provides that Tower Insurance "will pay all sums that an 'insured'" legally must pay as damages caused by bodily injury and "resulting from the ownership, maintenance or use of a covered auto." The policy defines an *insured* as follows:

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto".
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow. . . .

At the time of the accident, Horn was operating a covered vehicle with the express permission of B & B. Therefore, he qualified as an "insured" under this provision of the policy. Nevertheless, the circuit court determined that any liability that Horn might have to Stafford's estate on its claims for relief is specifically

excluded from the policy's coverage. The exclusion relied upon by the court is framed as follows:

> B. Exclusions
>
> This insurance does not apply to any of the following:
>
> * * * * *
>
> 4. Employee Indemnification And Employer's Liability
>
> "Bodily injury" to:
>
> a. An "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
>
> (2) Performing the duties related to the conduct of the "insured's" business; . . . .
>
> * * * * *
>
> This exclusion applies:
>
> (1) Whether the "insured" may be liable as an employer or in any other capacity; and
>
> (2) To any obligation to share damages with or repay someone else who must pay damage because of the injury.

The court determined that the exclusion "appears to apply clearly" to the Estate's claims against Horn because Stafford "was without question an employee

of the insured." Judgment at 9. Horn argues that the court erred in its conclusion because it failed to apply the policy's severability-of-interests clause. We agree.

A severability-of-interests clause included in the policy provides that the term *insured* refers to any person or organization who qualifies as an insured in the Who-Is-An-Insured provision. The clause provides that "the coverage afforded applies ***separately to each insured*** who is seeking coverage or against whom a claim" is brought. (Emphasis added.) With respect to the coverage, the term *insured* is deemed to refer ***only*** to the insured who is claiming coverage under the policy with respect to the claim then under consideration rather than to the insureds collectively. *See Baker v. DePew*, 860 S.W.2d 318 (Mo. 1993).

Under this policy, B & B is the named insured; Horn is also covered by the policy as *the insured* because he operated the truck with B & B's permission. While both B & B and Horn are insured under the policy, only Horn is claiming the benefit of the coverage as the party against whom the Estate brought its wrongful death claim. Consequently, pursuant to the severability-of-interests clause, the references in the policy to the *insured* refer only to Horn and not to B & B in this case.

Since Stafford was an employee of B & B, the policy's exclusion undoubtedly creates an exception to the duty of Tower Insurance to cover B & B's liability to Stafford's estate. However, if the exclusion is applied in a way that gives meaning to the severability-of-interests clause, the exclusion must be

examined independently with respect to the duty of Tower Insurance to cover Horn's liability to the Estate.

By its terms, the employee-exclusion clause applies only where the injured party is an *employee of the insured* **and** the injury arises out of and in the course of that employment. The severability-of-interests clause identifies the entities or persons to whom the phrase *the insured* applies. In this case, the clause limits the term to Horn alone – and Stafford was not Horn's employee.

If the exclusion barred coverage for bodily injury to an employee of "any" insured, a different analysis would be required. See, *Penske Truck Leasing Co., Ltd. Partnership v. Republic Western Ins. Co.,* 407 F. Supp.2d 741 (E.D.N.C. 2006)(applying North Carolina law and discussing the doctrine of severability and the difference between the term "*the* insured" and "*any* insured"); *Petticrew v. ABB Lummus Global, Inc.,* 53 Supp.2d 864 (E.D. La. 1999)(where exclusion barred coverage for "bodily injury to an employee of *any* insured," as opposed to "*the* insured," severability-of-interests provision does not require coverage nor does it render the exclusion ambiguous); *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203 (Tex. App. 2003)(explaining that the effect of the separation of insureds clause on a particular exclusion in an insurance contract depends upon the terms of that exclusion and comparing the term *any insured* to the term *the insured*.)

Under the provisions of this policy, the exclusion bars coverage for bodily injury to an employee of "the" insured. The policy specifically designates the

"insured" as the entity seeking coverage; *i.e.,* Horn, who is being sued by an individual who is not his actual employee. Since the language of the contract is plain and unambiguous, it must be applied as written. Thus, the employee-exclusion clause cannot apply to preclude coverage to Horn.

Tower Insurance rejects this analysis and contends that the Supreme Court of Kentucky has rejected it as well. In support of its argument, Tower Insurance refers us to *Brown v. Indiana Ins. Co.,* 184 S.W.3d 528 (Ky. 2005). That case resolved the following question:

> whether a commercial automobile liability insurance policy affords coverage for damages sought in a tort action *brought against the insured employer* for the wrongful death of its employee, where the action would have been barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act but for the fact that the employer failed to procure a policy of workers' compensation insurance.

Brown, 184 S.W.3d at 531 (emphasis added). However, this case does not involve the "fellow-employee" exclusion addressed in *Brown*. Horn, the alleged tortfeasor, was neither Stafford's employer ***nor*** his fellow-employee. Moreover, a careful reading of the court's reasoning in *Brown* indicates that the majority did not consider the language or the effect of a severability-of-interests clause. Therefore, *Brown* is not controlling.

As an alternative, Tower Insurance cites us to the decision of the Supreme Court of South Dakota in *Northland Ins. Co. v. Zurich American Ins. Co.*,

743 N.W.2d 145 (S.D. 2007). In *Northland*, Chad Loebs was operating a tractor-trailer at a construction site operated by Upper Plains Contracting, Inc. (UPCI). Michael Fetzer, a UPCI employee, claimed that he was injured when the tractor-trailer struck the handle of a tool he was using on site. Fetzer filed a civil action against Loebs. The trailer pulled by Loebs's tractor was owned by UPCI and insured by a Zurich American commercial insurance policy. Under the terms of the policy, Loebs qualified as an additional insured, but Zurich American denied coverage on the basis of the policy's employee-exclusion clause. The trial court granted Zurich American's motion for summary judgment.

On appeal, the Supreme Court of South Dakota affirmed. The court concluded that the terms of the employee-exclusion clause were unambiguous and applied to exclude coverage to the omnibus insured since the term *insured* referred to "*any* person or organization qualifying as an insured" pursuant to the severability-of-interests clause.

A majority of courts have rejected this analysis. Instead, most courts addressing the effect of an automobile insurance policy's severability-of-interests clause (worded like the one under consideration in this case) have construed the clause to limit the employee exclusion only to situations where the insured claiming coverage is being sued ***by his employee***. See, Charles W. Benton, Annotation, *Validity, construction, and application of provision in automobile liability policy excluding from coverage injury to, or death of, employee of insured,* 43 A.L.R. 5th 149 (1996). However, if we were to follow the reasoning of

the Supreme Court of South Dakota and decide that the interplay between the severability-of-interests provision and the employee exclusion was unclear, we would be bound to construe the ambiguity in favor of Horn, the insured, and not in favor of Tower Insurance, the drafter of the disputed language. See *Kentucky Farm Bureau Mutual Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992), (the contract should be liberally construed and all doubts resolved in favor of the insureds).

Finally, Tower Insurance contends that it is unreasonable to afford greater coverage to Horn, the ***additional insured***, who paid no premium for the policy, than to the ***named insured***, B & B, which did pay for the policy. Citing *Liberty Mutual Ins. Co. v. State Farm Mut. Auto. Ins. Co.,* 522 S.W.2d 184, 186 (Ky. 1975), Tower Insurance argues that we are bound to apply the employee-exclusion clause against Horn since the purpose of a severability-of-interests clause is to guarantee the same coverage to all the insureds and not to "take exclusions out of the policy." Brief at 10, citing *Liberty Mutual*, 522 S.W.2d at 186.

In *Liberty Mutual*, the court considered whether a "household exclusion" contained in an automobile liability insurance policy applied to an additional insured under the omnibus clause of the policy.[3] In that case, Rebecca Payne, the daughter of State Farm's insured, J.E. Payne, was injured while a

[3] "Household exclusion" clauses in automobile liability and other liability insurance policies were held invalid and unenforceable as violative of public policy by the Supreme Court of Kentucky in *Lewis v. West American Insurance Co.,* 927 S.W.2d 829 (Ky. 1996).

passenger in her father's vehicle. At the time of the accident, the vehicle was being driven by Rebecca's brother, John D. Payne, who was an agent of Bardstown Road Presbyterian Church. The church was an additional insured under the omnibus clause of State Farm's policy. Rebecca filed an action against her brother and Bardstown Road Presbyterian Church.

The trial court decided that State Farm's policy exclusion applied to the church since the purpose of the household exclusion was to protect the insurer from collusive "overly friendly civil actions." In affirming on appeal, the appellate court concluded that:

> [e]ven though the injured party may not be a relative and member of the household of an additional insured, whose liability is derivative, there still is the relationship existing between the insured operator of the automobile and the injured party, with the likely result of an over-friendly lawsuit.

The court held that the purpose of the exclusion would be defeated if the additional insured were afforded coverage under the circumstances.

The rationale underlying the court's holding on this point is irrelevant to the circumstances under our consideration, and Tower Insurance does not argue otherwise. Instead, Tower Insurance relies on *obiter dictum* included in the court's opinion indicating that it is not reasonable to afford greater coverage to an additional insured who has paid no premium for coverage than to the named insured. We are not bound by the court's observation since it was not essential to its determination of the case. *Cawood v. Hensley*, 247 S.W.2d 27 (Ky. 1952).

Moreover, the court expressly declined to consider the effect of the policy's severability-of-interests clause upon the coverage exclusion since the clause applied only where two or more insureds had been named in the declarations and not to situations involving an *additional* insured. It was only in the case of two or more *named insureds*, the court concluded, that the clause was meant to guarantee the same protection to each of them.

Even if the court's reasoning in *Liberty Mutual* were applicable under the facts and circumstances of this case, its conclusion would render the severability-of-interests clause meaningless. The clause included in Tower Insurance's liability policy explicitly directs that the policy be applied "separately to each insured who is seeking coverage. . . ." The highly unique facts of this case dictate that Horn is deemed to be an insured because of his permissive use of B & B's vehicle. Because Stafford was not Horn's employee, Horn enjoys a unique status and is **not barred** from coverage – either for purposes of defense or indemnification. The omnibus exclusion clause drafted by Tower Insurance does not extend to exclude Horn in these circumstances.

Therefore, we reverse the trial court's summary judgment in favor of Tower Insurance and remand this matter for further proceedings.

TAYLOR, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent.

I do not agree with the appellant's assertion that "the [Trial] Court failed to correctly apply the severability[-of-interests] clause"; rather, I do agree with the trial court's conclusion that "the same exclusions would apply to the claims against Horn as would apply against B & B, and that the severability clause did not alter the application of the exclusion for Employee Indemnification and Employer's Liability." (Appellant's brief, p. 5).

The majority's grammar-based analysis is too technical a reading of the insurance policy. This same analysis was rejected in *National Insurance Underwriters v. Lexington Flying Club, Inc.*, 603 S.W.2d 490 (Ky. App. 1979).[4] In that case, the Lexington Flying Club purchased general liability insurance for itself and its members. Members and their spouses were named insureds. One member and his spouse, Mr. and Mrs. Hardin, and their non-member son, Steven, were killed when the plane owned by the Flying Club and piloted by Mr. Hardin crashed. The policy, however, did "not apply to . . . death of any person who is a named insured or who is a member of the named insured's household." *Id*. at 492. Therefore, the insurer brought a declaratory judgment action seeking a determination that this policy language excluded coverage for the claim of Steven's estate.

[4] Judge Wilhoit's dissent in *Lexington Flying Club* makes clear that the majority's reasoning in the case before us has been rejected. Judge Wilhoit embraced the grammatical analysis upon which the majority bases its reasoning. He states, "It is obvious to me from reading the entire policy the terms 'the named insured' and 'a named insured' are not used interchangeably to describe any named insured." *Lexington Flying Club*, 603 S.W.2d at 494 (Wilhoit, J., dissenting). His analysis was rejected. It is certainly arguable that the majority opinion in the case *sub judice*, by embracing Judge Wilhoit's analysis, is effectively overruling *Lexington Flying Club* which this Court may accomplish only by a majority of the fourteen Judges of this Court sitting *en banc*.

Like the majority opinion here, the trial court in *Lexington Flying Club* considered the impact of the severability-of-interests clause on the exclusions clause. The trial court also focused its attention on the insurer's decision to use the article "the" in the exclusions clause rather than "an" or "any" and held "that the [insurer] owed the Flying Club a defense, and a summary judgment was entered to that effect. Based upon several rules of construction and other provisions in the same policy of insurance," this Court "disagree[d] with this construction" and reversed the trial court. *Id.* at 493.

We addressed the grammar argument head-on, saying,

> Admittedly the article "the" causes a problem in construing the clause of the present insurance policy. However, it should not be automatically construed against the insurer. A contract is to be construed as persons with usual and ordinary understanding would construe them. *Washington National Insurance Co. v. Burke*, Ky., 258 S.W.2d 709 (1953). While we respect the trial court's analysis and agree that the clause at issue gives rise to a technical ambiguity, we feel that the rule in the *Burke* case[5] precludes judicial construction of a clause which is not ambiguous to persons with usual and ordinary understanding.

Id. Then, we properly went on to consider the language as would persons with usual and ordinary understanding, and we considered that language in the context of the entire contract. *International Union of Operating Engineers v. Jones Const. Co.*, 240 S.W.2d 49, 54 (Ky. 1951) (contract to be considered as a whole and entire

[5] The exact language from *Burke* is that "provisions are to be read in context and according to the natural and probable import of the language used, or as persons with usual and ordinary understanding would construe them." *Burke*, 258 S.W.2d at 710.

instrument considered to determine the meaning of each part). We should be doing the same in this case.

We also should be applying the mandate that "[a]n insurance contract must be construed according to its true character and purpose, and in accordance with the intentions and expectation interests of the parties" who drafted, negotiated, and executed it. *Lexington Flying Club*, 603 S.W.2d at 493 (citing *Kentucky Water Service Co. v. Selective Ins. Co.*, 406 S.W.2d 385 (Ky. 1966) and others). Doing so prompts this question: Would a person with usual and ordinary understanding believe that B & B intended to buy insurance that *would insure* an additional insured but *not insure* B & B against the same claim? I believe the only conclusion to be drawn is that if there is no coverage from this insurance for B & B, it would be an unreasonable interpretation of the policy to require the insurer to cover B & B's additional insured. I am not alone in this view. *Couch on Insurance*, Third Edition, 8 Couch on Ins. § 111:19 ("[I]f the named insured is not covered for a specific use, an additional insured may not claim coverage for the identical use under the 'omnibus' clause.").

As support for the very point that it would be unreasonable to construe an insurance policy as affording greater coverage to an additional insured than to the named insured, the appellee cites *Liberty Mutual Insurance Co. v. State Farm Mutual Insurance Co.*, 522 S.W.2d 184 (Ky. 1975). The majority labels this citation *obiter dictum*. Looking at the long history of jurisprudence on this point, I cannot agree.

The first court to apply Kentucky law to the question, including the implications of the severability-of-interests clause, was the Sixth Circuit in *Kelly v. State Auto Insurance Association*, 288 F.2d 734 (6th Cir. 1961). In *Kelly*, State Auto Insurance issued a policy to its named insured, Underwood Transportation Company. The injured appellant and third-party claimant under the policy of insurance in question was an Underwood employee named Pothast. He was injured by the negligence of Nolan and Thompson who were additional insureds under Underwood's policy, but they were not Underwood employees. *Id.* at 734-35. After the Sixth Circuit found "no decision on the question by the Kentucky courts[,]" it noted a split of authority, then declared itself "free to adopt the rule which we think is sound and supported by the better reasoning." *Id.* at 736.

The court set forth Pothast's argument that,

> the obligations of the insurer to the named insured and the additional insured should be treated separately and the exclusion provision treated as if a separate policy had been issued to the person invoking its coverage. So considered, Pothast was not an employee of either Nolan or Thompson and therefore, the exclusion provision would not apply.

Id. This is the same argument the appellant here has made. The Sixth Circuit rejected the argument, stating,

> Certainly Underwood, having paid for workmen's compensation insurance for the protection of its employees would not ordinarily take out liability insurance at its own expense to protect itself from any claim its employees might have against it or any third person. In other words, Underwood was paying for the

> protection of its liability insurance against claims asserted by the public, and not by its own employees.
>
> In our judgment, if it was intended by the severability of interests clause to provide coverage in a case like the present one, the language used was inadequate for that purpose.

Id.

No doubt the majority here would note that in *Kelly* "the Policy Exclusions provided no coverage for bodily injury liability to . . . 'any employee of *an* Assured, while engaged in the employment of such Assured . . . ,' " *id.* at 735 (emphasis added), while the article used in our case is "the." But subsequent case law shows there is no meaningful distinction among exclusion clauses based on the article the insurer may have chosen, whether "the" or "an" or "any."

Only two years after *Kelly*, the Sixth Circuit considered similar facts, but this time the exclusion clause read: "This policy does not apply . . . to bodily injury to or sickness, disease or death of any employee of *the* insured arising out of and in the course of his employment by *the* insured . . . ." *Liquid Transporters, Inc. v. Travelers Ins. Co.*, 308 F.2d 809, 809 (6th Cir. 1962). As I further quote *Liquid Transporters*, I emphasize the court's description of both the exclusion and severability-of-interests clauses as "virtually identical policy provisions" to those addressed in *Kelly* – clearly, the choice of article was irrelevant. The court said:

> A substantially identical employee exclusion provision was before this court for construction in *Kelly v. State Automobile Insurance Association*, 6 Cir., 1961, 288 F.2d 734. The policy there under consideration contained not only an 'Employee Exclusion' provision (as did the

> policy considered in *Travelers Insurance Company v. Ohio Farmers Indemnity Company*, 6 Cir., 1958, 262 F.2d 132)[(applying Kentucky law)] but also a 'Severability of Interests' clause (not present in the *Travelers* case, *supra*). The later case held this difference not to constitute a distinguishing factor, and following the earlier decision held that no coverage was afforded to an additional insured for claims for personal injuries asserted by an employee of the named insured. Both the *Travelers Insurance Company* case and the *Kelly* case (which concerned *virtually identical policy provisions to those here before us*) were subsequently followed by this court in *American Fidelity and Casualty Company, Inc. v. Indemnity Insurance Company of North America et al*., 6 Cir., 1962, 308 F.2d 697 [(applying Ohio law)], and in the absence of Kentucky court of last resort decisions in point no reason appears for not following these cases. Thus we not only reject defendant's specific suggestion that the *Kelly* case be overruled but also decline the implied invitation to overrule the *American Fidelity* case.

Id. at 810 (emphasis added).

Of course, these are federal cases and we are not bound by them. *Embs v. Pepsi-Cola Bottling Company*, 528 S.W.2d 703 (Ky. 1975). And that brings us, full circle, back to *Lexington Flying Club* where *Kelly* is cited with approval for the proposition that a plain reading of an exclusion clause will not admit of an unreasonable interpretation, *i.e.*, that the named insured would pay for insurance that would (1) protect its additional insureds but not itself, and (2) cover injuries sustained by an employee already covered by Workers' Compensation.

I note that the majority in the case now before us did not find the policy language ambiguous, nor could it have. As this Court said when it decided *Lexington Flying Club*,

> While we are aware that ambiguities are to be strictly construed in favor of the insured, this rule only comes into play when both constructions of policy language are reasonable. *Louisville Gas and Electric Co. v. American Ins. Co.*, 412 F.2d 908 (6th Cir., 1969). The evidence shows that to construe the policy so as to provide for more coverage than was anticipated or bargained for by either party at the time of contracting is not reasonable.

Lexington Flying Club, 603 S.W.2d at 494. I cannot imagine that the named insured and the insurer in this case, or either of them, anticipated or intended to bargain for the coverage the majority held exists under this policy. Appellant's interpretation of the policy language, in my opinion, is not reasonable.

Perhaps the majority would claim that my interpretation rewrites the clause. But *Lexington Flying Club* also addresses this assertion, stating,

> Although the trial court held that this holding would substitute the article "any" for the article "the" in the exclusion, to affirm the trial court [or to agree with the majority in the case before us now] would be to substitute the words "the insured who is claiming coverage under the policy."

Lexington Flying Club, 603 S.W.2d at 494 (citations omitted).

Furthermore, interpreting the words "the" and "an" and "any" as interchangeable is not a foreign concept. Kentucky law requires that statutes be written "in a clear and coherent manner using words with common and everyday meanings." KRS 446.015. As a corollary rule we allow that "[a] word importing the singular number only may extend and be applied to several persons or things, as well as to one (1) person or thing, and a word importing the plural number only may extend and be applied to one (1) person or thing as well as to several persons

or things." KRS 446.020(1). I believe the legislature wisely recognized the need to remind us that the average citizen does not read words and phrases in quite the same pedantic, even procrustean, way lawyers are taught.

Like statutes, insurance policies must "be written in language easily readable and understandable by a person of average intelligence and education." KRS 304.14-440(1). And while there is no express guidance in the insurance code similar to KRS 446.020(1), I have to ask why we should reserve this concept only for the salvage and intent determination of imperfectly-drafted legislation.

The bottom line for *Lexington Flying Club*, and for me, is that use of the article "the" does not make the exclusions clause ambiguous, nor does it justify the unreasonable interpretation that the majority now embraces.

Finally, rather than constituting *obiter dictum*, I believe the appellee's citation to *Liberty Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 522 S.W.2d 184 (Ky. 1975) is entirely on point. More importantly, this Court found it on point in *Lexington Flying Club*. When it was argued there, as it was here, "that the policies underlying the severability[-of-interests] clause would negate the plain language of the exclusion[,]" we rejected the argument, stating,

> This argument must fail in light of *Liberty Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, Ky., 522 S.W.2d 184 (1975). There it was held that: "The purpose of this clause is to guarantee the *same protection to all persons named as insureds* and not to take exclusions out of the policy."

Lexington Flying Club, 603 S.W.2d at 492. I believe this is the point the appellee is making, and that this language makes it clear that if under the exclusion clause there is no coverage for the named insured who purchased the policy of insurance, there can be none for any insureds whether they are named insureds or additional insureds.

For these reasons, I respectfully dissent.

BRIEF FOR APPELLANT/CROSS-APPELLEE HORN:

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