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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000055-MR

AMERICAN MINING INSURANCE COMPANY, INC. APPELLANT

v.

APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 10-CI-00005

PETERS FARMS, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: This is an appeal from the December 16, 2014 order of the Owsley Circuit Court awarding damages and granting partial summary judgment in favor of Peters Farms, LLC (Peters) after finding Ikerd Mining, LLC (Ikerd) mistakenly extracted 20,212 tons of coal from Peters' property. After review, we affirm.

I. BACKGROUND

From 2007 to 2008, Ikerd removed 20,212 tons of coal from Peters' property without a written agreement to do so. Of the 20,212 tons of coal removed, Ikerd claimed 1,200 tons were mined pursuant to an oral lease agreement with Peters. Ikerd claimed the remaining 19,012 tons were mined under a mistaken belief as to the correct location of Peters' boundary line.

In 2010, Peters sued Ikerd for wrongfully extracting the coal. Two years later, Peters added American Mining Insurance Company (American) to the action. Ikerd had become insolvent and American, as Ikerd's insurer, had refused to cover any loss resulting from Ikerd's mining of Peters' property.

In 2014, the parties reached a partial settlement regarding Peters' claims. Under the agreement, American advanced Peters $15,000 to preserve the mining permit on its property. The parties also agreed to submit two issues for the circuit court to decide: (1) whether the American insurance policy covered Ikerd's actions, and (2) whether the proper measure of damages was the reasonable royalty rate, which the parties valued at $75,000, or the market rate of the coal less extraction costs valued at $400,000.[1]

With respect to these issues, American argued Ikerd's policy did not cover Peters' property damage. American also argued, in the event coverage did apply, that the royalty rate was the proper measure of damages. Peters disputed both of American's assertions and demanded $400,000 under the policy.

[1] These values include the $15,000 already advanced to preserve the mining permit. Therefore, the true values in this dispute are $60,000 and $385,000.

After the parties briefed their respective arguments, the circuit court conducted a hearing. At the hearing, Conway Speaks, Ikerd's on-site project manager, confirmed 20,212 tons of coal were removed from Peters' land under the mistaken belief that 19,012 tons came from land owned by Charles Gross and 1,200 tons came from land Peters had authorized Ikerd to mine. Fred Peters (Fred), the sole member of Peters, also testified. During his testimony, Fred admitted that he did not have previous experience mining coal. However, Fred did explain that he had overseen the construction of several apartment complexes and houses in Lexington, Kentucky, and that he had talked with several contractors about potentially mining his property. Fred added that he had the financial ability to support a coal mining operation, but did not have a mining permit. According to Fred, it would take somewhere between six months and three years for him to obtain a mining permit.

Following the hearing, the circuit court concluded Ikerd's mining of the Peters property was an "occurrence" that triggered insurance coverage. The American policy defined coverage as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The circuit court based this conclusion on Speaks' uncontested testimony. The circuit court also concluded that the American Policy provided an additional basis for coverage through an aggregate limit included in the policy titled "Products-Completed Operations Hazard (PCOH)."[2] Finally, the circuit court considered

[2] The policy defined PCOH as follows:

16. PCOH:

Fred's testimony that Peters was capable of extracting coal from its own property and found Peters was entitled to $400,000 for the net market value of the coal. This appeal followed.

II. STANDARD OF REVIEW

A trial court's findings of fact will not be set aside on appeal unless they were clearly erroneous. CR[3] 52.01. Due regard will also be given to the trial court's opportunity to judge witness credibility. *Id.* "A finding of fact is clearly erroneous when it is not supported by substantial evidence." *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883, 884 (Ky. App. 2010). Moreover, substantial evidence is evidence that "has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* Questions of law are reviewed *de novo*. *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 452 (Ky. App. 2006).

III. DISCUSSION

1. Ikerd's acts were covered under the American Policy.

On appeal, American presents several arguments as to why the removal of coal from Peters' property was not covered under Ikerd's insurance policy. First, American asserts that the policy only covered "property damage"

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a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" . . . [.]

The policy further defined "Your work" as "Work or operations performed by you or on your behalf . . . [,] and includes "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work[.]"

[3] Kentucky Rules of Civil Procedure.

and not economic damage for the lost value of coal in the form of restitution. Second, American claims that the wrongful removal of coal from another's property does not qualify as "property damage" under the policy. Third, American challenges the circuit court's application of *Bituminous Casualty Corp. v. Kenway Contracting Inc.*, 240 S.W.3d 633, 638 (Ky. 2007), to the facts of the case because Peters' loss was not "fortuitous" as explained in *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010). Finally, American contends that the PCOH language does not serve as an additional ground for coverage because the PCOH language only creates an exception to a particular policy exclusion that American never asserted. For the following reasons, we agree with the circuit court's determination that coverage extended to Ikerd's removal of the coal.

The construction and legal effect of a written instrument is a question of law. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Contracts, such as settlement agreements and insurance policies, are no exception. *See Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); *Hugenberg v. West American Ins. Co./Ohio Cas. Group*, 249 S.W.3d 174, 185 (Ky. App. 2006). The contract language is given its plain meaning, with ambiguities interpreted against the drafter or insurer. *Kentucky Ass'n of Ctys. All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 630 (Ky. 2005). Moreover, in the context of insurance contracts, "[a]ny limitation on coverage or an exclusion in a policy must be clearly stated in order to apprise the insured of such limitations." *St. Paul Fire*

& Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 227 (Ky. 1994).

Here, Peters experienced "property damage" under the insurance policy. American defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property[,]" and the circuit court found that in addition to removing the coal, Ikerd "removed trees and disturbed the property." This was a reasonable finding of physical injury to Peters' property under both the broad definition provided in the policy and our Supreme Court's recent decision in *Harrod Concrete & Stone Co. v. Crutcher*, 458 S.W.3d 290, 294 (Ky. 2015), which acknowledged the deleterious effects associated with the extraction of *in situ* natural resources from the earth. Therefore, Peters suffered more than mere financial loss as a result of Ikerd's mining activity.

Peters also experienced an "occurrence" under the policy. American defined "occurrence" as an "accident," a term Kentucky law has interpreted to include intentional acts that result in fortuitous losses when viewed from the insured's perspective. *Bituminous*, 240 S.W.3d at 639. The Court later elaborated on this fortuity requirement in *Cincinnati*, 306 S.W.3d at 76, when it considered whether a homebuilder's faulty workmanship qualified as an "accident" under the same definition of "occurrence" provided in the American policy. There, the Court explained that the fortuity requirement has a control aspect in addition to an intent aspect. The Court then held that a fortuitous loss, in the context of faulty

workmanship, is one that is both unintended from the standpoint of the insured and "a 'chance event' beyond the power of any human being to bring . . . to pass, [or] . . . within the control of third persons . . . ." *Id.*

In explaining the fortuity requirement in this manner, *Cincinnati* did not overrule the Court's decision in *Bituminous*, wherein a subcontractor tasked with razing a carport attached to a home mistakenly demolished a substantial portion of the home. Instead, the Court concluded it was unnecessary to address the control aspect of the fortuity requirement in *Bituminous* "because the damage to the property was not the plan, design, or intent of the insured." *Id.* at 77. The Court also recognized a temporal distinction between the "quick destruction of a residence . . . in a flurry of activity on only one day" with the "protracted improper construction of a residence" that "occurred over a period of weeks[.]" *Id.*

Here, although American latches on to *Cincinnati* for the proposition that the improper removal of Peters' coal over a prolonged period time was within Ikerd's control because Ikerd (1) possessed maps (which were also on file with the state) showing the correct boundary lines and (2) knew that it did not have a written lease with Peters, we find the facts of this case are more analogous to the mistaken belief exhibited by the subcontractor in *Bituminous*. The circuit court determined from Speaks' uncontested testimony that Ikerd mined the Peters property in good faith, and thus the property damage was "not the plan, design or intent of the insured." We therefore need not address the control aspect of the fortuity requirement.

2. The net market rate was the correct measure of damages.

Under the terms of the settlement, the parties agreed for the circuit court to either award Peters the royalty rate or the net market value rate. The circuit court chose the net value rate and based its choice on *Bowman v. Hibbard*, 257 S.W.2d 550, 552 (Ky. 1952), which held that the measure of damages when the owner is in a position to mine his own minerals is "the value of the mineral after its taking, less the reasonable cost of mining." According to the circuit court, Peters was in a position to mine its own coal, and thus entitled to the net value rate, because of Fred's construction experience, relationships with coal operators, and financial status demonstrated Peters' overall ability to mine its own coal. This explanation, though reasonable in its own right, was unnecessary in light of *Harrod Concrete*, 458 S.W.3d at 296. There, the Court held as a matter of law that the net market value rate is the "proper measure of damages in all innocent trespass cases" notwithstanding the injured party's ability to mine his property. Accordingly, the judgment of the Owsley Circuit Court is affirmed.

ALL CONCUR.

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