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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001305-MR

LEE COMLEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 15-CI-03350

AUTO-OWNERS INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Lee Comley has appealed from the opinion and order of the Fayette Circuit Court granting Auto-Owners Insurance Company's motion for summary judgment and concluding that Comley's homeowner's policy did not cover water damage to his house. Finding no error, we affirm.

Comley is the owner of a residence on Elam Park in Lexington, Kentucky. Comley purchased a homeowner's and personal property insurance policy (Policy Number 96-175-212-01) from Auto-Owners on March 31, 2014, covering this residence. The policy covered accidental direct physical loss to both the residential structure and personal property. In Section 1 – Property Protection, the policy lists several perils Auto-Owners would insure against, subject to several exclusions. For personal property, the policy covered losses due to fire or lightning; a windstorm or hail; explosion; riot; aircraft; vehicles; smoke; vandalism; theft; falling objects; the weight of ice, snow, or sleet; the freezing of an appliance or heating or air conditioning system; electrical currents; and volcanic eruptions. The policy specifically included the "[a]ccidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protection sprinkler system or domestic appliance" in 2.b.(13). But it specifically excluded any loss to the appliance or system from which the water or steam escaped, caused by freezing except as provided for, and, as set forth in subsection 13(c), "caused by or resulting from water from outside the plumbing system that enters through sewers or drains, or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area."

The policy lists several exclusions in section 3, including water damage. The amended version of the water damage exclusion provides as follows:

> a.(3) Water damage meaning:
>
> (a) regardless of the cause, flood, surface water, waves, tidal water, storm surge or overflow of a body of water. **We** do not cover spray from any of these, whether or not driven by the wind;
>
> (b) water or sewage from outside the plumbing system that enters through sewers or drains;
>
> (c) water which enters into and overflows within a sump pump, sump pump well or any other system designed to remove subsurface water which is drained from the foundation area; or
>
> (d) water below the surface of the ground. This includes water which exerts pressure on or flows, seeps or leaks through any part of a building, sidewalk, driveway, swimming pool or other structure.
>
> This exclusion does not apply to ensuing direct loss to covered property caused by theft, fire or explosion.

Between September 25 and 26, 2014, while the policy was in effect, a water main owned and operated by Kentucky American Water Company burst, causing water to enter onto Comley's land and into the residence, and damaging both his real and personal property. Pursuant to his policy, Comley filed a claim with Auto-Owners on September 26, 2014, for the damages he incurred from the water main break, but Auto-Owners denied his claim based upon specific

exclusions in the policy. In a letter dated October 15, 2014, Auto-Owners stated in relevant part:

> As we understand the facts of the claim, you filed a claim for water damage to the interior of your home on September 25th, 2014; wherein you explained the cause of loss to be an eight (8) inch water main that ruptured in an area adjacent to your residence causing large quantities of water to flow over the ground and enter into your residence basement through windows, walls, or other openings.
>
> In review of your Homeowners policy we have determined that one or more exclusions in your policy apply to preclude coverage. Specifically, losses resulting from surface water or water below the surface of the ground which flows, seeps or leaks through any part of the building. As a result, it is our determination that there is no coverage for the claim submitted and we must respectfully deny your claim.

Thereafter, Comley filed a complaint on September 9, 2015, seeking damages from both Auto-Owners and Kentucky American Water. Comley alleged that Kentucky American Water was negligent in operating and maintaining the water main and breached its duty to him in failing to do so, which caused him to incur damages to his real and personal property. Against Auto-Owners, Comley alleged causes of action for breach of contract for failing to pay his claim without a reasonable basis, for a violation of the Unfair Claims Settlement Practices Act pursuant to Kentucky Revised Statutes (KRS) 304.12-230, for a violation of KRS

367.170, and for bad faith. Both defendants filed answers disputing Comley's claims.

Comley and Auto-Owners agreed to have the court first address the insurance coverage issue, and both parties filed cross-motions for summary judgment in support of their respective positions as to the application of the water damage exclusion. Auto-Owners argued that Comley's policy did not cover the water damage in this case based upon that exclusion, while Comley argued that the exclusion only applied to natural causes under the doctrine of reasonable expectations, meaning that the exclusion did not apply because it arose from a water main break. Much of the discussion in the motions and responses centered on the definitions of undefined terms in the policy, including flood.

Following a hearing on the motions, the court entered an opinion and order on August 9, 2016, granting Auto-Owners' motion. The court determined that the water damage exclusion applied in this case and that the exclusion was not limited to natural occurrences based upon the language "regardless of the cause." It went on to hold that the word "flood" was not ambiguous and that it encompassed both natural and artificial causes. The court included the necessary language to make the order final and appealable pursuant to Kentucky Rules of Civil Procedure (CR) 54.02, and this appeal now follows.

On appeal, Comley argues that the circuit court erred in granting summary judgment in favor of Auto-Owners because the policy was ambiguous and because the event causing the loss was an explosion. On the other hand, Auto-Owners argues that the terms of the policy excluding coverage for Comley's loss were unambiguous and that Comley's argument that his loss was caused by an explosion had not been raised below and was therefore not preserved for this Court's review.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is '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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d

353, 358 (Ky. App. 1999). Because the matter before this Court is a question of law, we shall review the circuit court's judgment *de novo*.

In *Davis v. Kentucky Farm Bureau Mutual Insurance Company*, 495 S.W.3d 159, 161-62 (Ky. App. 2016), this Court set forth the applicable law for the construction of insurance contracts:

> We interpret an insurance contract as a matter of law and our review is *de novo*. *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010). In doing so, we apply certain rules of construction, including that when the terms of an insurance contract are unambiguous and not unreasonable, the terms will be enforced as written. *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 685 (Ky. 2012). Unambiguously defined terms are "interpreted in light of the usage and understanding of the average person." *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 811 (Ky. App. 2000). Although ambiguous terms are to be construed in favor of the insured, "we must also give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer." *Id*. Moreover, there must be an actual ambiguity. "The mere fact that [a party] attempt[s] to muddy the water and create some question of interpretation does not necessarily create an ambiguity." *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 633–34 (Ky. 2005) (quoting *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003)).

In the absence of an ambiguity, "words which have no technical meaning in law, must be interpreted in light of the usage and understanding of the common man." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky.

2007) (citing *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986)). And any exclusions in a policy of insurance are required to be narrowly interpreted in favor of the insured:

> Kentucky law is crystal clear that exclusions are to be narrowly interpreted and all questions resolved in favor of the insured. Exceptions and exclusions are to be strictly construed so as to render the insurance effective. Any doubt as to the coverage or terms of a policy should be resolved in favor of the insured[.] And since the policy is drafted in all details by the insurance company, it must be held strictly accountable for the language used.

Eyler v. Nationwide Mut. Fire Ins. Co., 824 S.W.2d 855, 859-60 (Ky. 1992) (internal citations omitted).

For his first argument, Comley contends that the policy is ambiguous and unreasonable because the policy simultaneously covers and excludes coverage for water damage and permits Auto-Owners to use "catch-all" language in the policy to deny coverage for any kind of water damage. We find no merit in this claim because, as Auto-Owners states in its brief, the policy excludes water damage losses directly or indirectly brought about by a list of specific events or causes, including flood, surface water, or water below the ground, but specifically covers water damage in other situations. The provisions addressing coverage for water damage and those addressing exclusions do not create an ambiguity in the policy as Comley argues.

Next, Comley argues that his reasonable expectation was that the policy would not cover flooding from natural causes, but would cover flooding from manmade sources. The circuit court construed the term "flood" in the policy to unambiguously encompass both natural and manmade causes because of the clause, "regardless of the cause," which Comley contends was in error. Rather, Comley argues that "regardless of the cause" modifies only subsection (a) of the exclusion and that this subsection only encompasses natural events. The pertinent part of the amended exclusion defines "water damage" as follows:

> a.(3) Water damage meaning:
>
> > (a) regardless of the cause, flood, surface water, waves, tidal water, storm surge or overflow of a body of water. **We** do not cover spray from any of these, whether or not driven by the wind[.]

We must agree with Auto-Owners, however, that the term "flood" as used in the policy does not encompass only natural causes. The *Cambridge Dictionary* defines the verb "flood" as "to fill or become covered with water or to cause this to happen to something" and provides two examples of its usage.[1] The first example is, "A burst pipe flooded the bathroom." The second is, "The basements of many downtown buildings would flood whenever it rained." Thus, the term flood is not

[1] *Flood*, THE CAMBRIDGE DICTIONARY (August 15, 2017), http://dictionary.cambridge.org/us/dictionary/english/flood.

limited to natural occurrences based upon its common usage and does not create any ambiguity in the policy language.

Comley goes on to argue that this Court's unreported opinion in *Olson v. Allstate Ins. Co.*, 2011 WL 2693555 (No. 2010-CA-000612-MR) (Ky. App. July 8, 2011),[2] relied upon by Auto-Owners and the circuit court in this case, is distinguishable. There, this Court upheld the lower court's decision that the policy's exclusion of losses caused by water on or below the surface, regardless of the source, applied to block Olson's claim for damages from water released from his above-ground swimming pool. While the policy language in *Olson* differs from the language in the policy currently before the Court, the same principle applies in both cases; namely, that the phrase "regardless of the cause" encompasses both natural and manmade sources. We do not agree with Comley that the Arkansas case of *Ebbing v. State Farm Fire & Cas. Co.*, 67 Ark. App. 381, 1 S.W.3d 459 (1999), is more persuasive because the "regardless of the case" modifier differs from the one in the present case. Again, we find no merit in this argument.

Finally, we shall address Auto-Owners' assertion that Comley failed to preserve his argument that the loss was caused by an explosion and was

[2] This decision is cited pursuant to CR 76.28(4)(c): "[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

therefore covered under the policy pursuant to an exception in the amended water damage exclusion. Our review of the record confirms that Comley never raised this argument before the trial court, the trial court did not have the opportunity to consider whether this exclusion might apply below, and he did not list this as an issue in his prehearing statement. Comley asserts in his reply brief that this issue is sufficiently preserved because the language related to the explosion exception was within the water damage exclusion at issue and the application of the water damage exclusion was included as an issue in his prehearing statement. He further asserts that this Court should be able to review the language of the exclusion to determine on a *de novo* basis whether the water main break was an explosion.

We disagree and hold that Comley failed to preserve this issue for our review. *See American Founders Bank, Inc. v. Moden Investments, LLC*, 432 S.W.3d 715, 721 (Ky. App. 2014) ("A reviewing court will not consider any argument on appeal that has not been preserved in the trial court. *Brown v. Commonwealth*, 416 S.W.3d 302, 310-11 (Ky. 2013). Was the argument preserved by raising the issue before the circuit court and, if so, when was the issue raised? These questions are inherent and implicit in every review."). Comley did not argue that the explosion exception applied to negate the water damage exclusion in any of his filings below, did not list this particular language from the exclusion in his prehearing statement, and did not include where in the record and how he

preserved this issue for our review in his briefs pursuant to CR 76.12(4)(c)(v). Therefore, we are precluded from reviewing this argument.

For the foregoing reasons, the summary judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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