86-LW-4398 (10th)

Southern American Insurance Company, Plaintiff-Appellant, (Cross-Appellee),

v.

Guaranty National Insurance Company, Defendant-Appellee, (Cross-Appellant).

No. 85AP-357.
10th District Court of Appeals of Ohio, Franklin County.
Decided on April 24, 1986.

APPEAL from the Franklin County Court of Common Pleas.

GRAHAM, DUTRO & SPIRITO, MARYELLEN C. SPIRITO and GARY W. HAMMOND, for appellant.

FROST, FREYTAG & HUNTER, and DANIEL R. FREYTAG, for appellee.

OPINION

WHITESIDE, Judge.

Both plaintiff Southern American Insurance Company (hereinafter Southern American) and defendant Guaranty National Insurance Company (hereinafter Guaranty National) have appealed from a judgment of the Franklin County Court of Common Pleas rendering a declaratory judgment that policies of insurance issued respectively by said insurance companies afford coverage with respect to the wrongful death of April Maness and that said policies should be applied on a pro rata basis. In support of its appeal, plaintiff raises seven assignments of error as follows:

"I. The trial court's finding that there were two "other insurance' clauses in the Southern American policy on the date of loss and that Southern American intended that its policy provide coverage on a pro rata basis, and its failure to find that the Southern American policy provided only excess coverage is entirely unsupported by any probative evidence and is prejudicial error to Southern American.

"II. The trial court's decision that typewritten paragraphs 13 and 14, conditions contained on the reverse side of coverage part L0001 of the Southern American policy, represented "changes' requiring the signature of the President, Vice President or Secretary of Southern American for purposes of condition 9 contained on the reverse side of coverage part L0001 of the Southern American policy is entirely unsupported by any probative evidence and is prejudicial error to Southern American.

"III. The trial court's finding that Nancy McCormick was in control of the pond area where the accident occurred is entirely unsupported by any probative evidence and is prejudicial error to Southern American.

"IV. The trial court prejudicially erred as a matter of law in holding that typewritten paragraphs 13 and 14, conditions contained on the reverse side of coverage part L0001 of the Southern American policy, were never effectively made a part of the policy.

"V. The trial court prejudicially erred as a matter of law in holding that the Southern American policy was ambiguous, in finding that there were two "other insurance' clauses in the Southern American policy, and in resolving such conflict in favor of a provision found in the main body of the policy over the provision found in the policy endorsement.

"VI. The trial court prejudicially erred as a matter of law in failing to find that Guaranty National, in accordance with its own primary insurance coverage, owed the entire costs of the defense and attorney's fees, up to its policy limits of $300,000.00, in the Phillips case, where the Southern American policy provided only excess coverage.

"VII. The trial court prejudicially erred in failing to find that Guaranty National has been stubbornly litigious in regard to the matter herein and, as such, as liable to Southern American for the costs and attorney's fees incurred in prosecuting this declaratory judgment action.'

In support of its appeal, defendant raises three assignments of error as follows:

"1. The trial court prejudicially erred when it ruled against defendant Guaranty National on its counterclaim for $15,000.00 since the Guaranty National policy did not extend any coverage beyond the designated premises so as to include an uninsured farm pond.

"2. The trial court prejudicially erred when it ruled against defendant Guaranty National on its counterclaim for $15,000.00 since the exclusion (Q) of the Guaranty National policy specifically excluded coverage for the farm pond.

"3. The trial court prejudicially erred by permitting plaintiff to introduce testimony regarding two witnesses' interpretation of the Southern American policy (thereby invading the function of the trial judge regarding questions of law) and further prejudicially erred by permitting such inquiry in the form of seven leading questions.'

Both plaintiff and defendant had issued a policy of insurance affording liability coverage to employees of St. Joseph Group Home, Inc., including Nancy McCormick, Rose Ramos and Joseph Ramos. St. Joseph Group Home, Inc., operates a group home for retarded women in Columbus, Ohio. The decedent, April E. Maness, died as a result of a drowning accident in a farm pond in Vinton County on July 31, 1980.

It was a custom of St. Joseph's to send residents to a camp during the summer. However, in the Summer of 1980, this was not feasible with respect to some residents of the group home, and it was determined to plan an outing for three of the residents at a farm in Vinton County owned by Rose Ramos and her husband. Accordingly, Rose Ramos and Nancy McCormick took the three residents to the farm for the outing, which was to last several days. On the evening of July 30, 1980, Rose Ramos returned to the group home in Columbus to attend to some administrative tasks, leaving staff member Nancy McCormick in charge. On the afternoon of July 31, the unfortunate accident occurred.

An action for the wrongful death of April E. Maness was brought in the Franklin County Court of Common Pleas against St. Joseph Group Home, Inc., Rose Ramos, Nancy McCormick and Joseph Ramos. This action was settled by each of the two insurance companies, both parties herein contributing $15,000 to a $30,000 settlement, reserving the right to litigate between themselves the question of whether either was entitled to recover from the other all or part of its contribution to the settlement. This action in declaratory judgment was then brought by plaintiff, seeking to recover from defendant not only the amount it contributed to the settlement but also the reasonable attorney fees and expenses expended in defense of the wrongful death action. Defendant filed a counterclaim seeking a similar recovery from plaintiff.

The matter was referred to nonbinding arbitration, resulting in an arbitration report finding that both policies afforded coverage but that plaintiff's policy afforded only excess coverage over that afforded by the policy of defendant, but that plaintiff was not entitled to recover attorney fees because defendant timely entered a defense. Defendant refused to accept the arbitration award and timely filed an appropriate objection.

The matter then came on for trial before the trial court upon stipulations of the parties and evidence. The trial court found both policies afforded coverage, but that, under the terms of the respective policies, the two insurance companies should share in the settlement on a pro rata basis.

Plaintiff's first assignment of error relates to the trial court's finding that there were two "other-insurance' clauses in plaintiff's policy. We find no error. There are, in fact, two "other-insurance' clauses in the policy issued by plaintiff Southern American, one contained in the basic policy and the other contained in coverage part L0001. Although the assignment of error refers to the question of whether the other-insurance clauses provide for only excess coverage or coverage on a pro rata basis, the basic issue raised by this assignment of error is whether the trial court erred in finding both clauses of the policy to be effective, requiring construction to ascertain which controlled. We find no error in this respect, and plaintiff's first assignment of error is not well-taken.

Plaintiff's second and fourth assignments of error are interrelated and pertain to two typewritten paragraphs added to the printed form of coverage part L0001 of plaintiff's policy. The trial court found that these typewritten additions to the printed coverage part form did not constitute part of the policy. We find no error. The evidence indicates that these were added by the insurance agent issuing the policy on his own initiative. There is no indication that the agent had authority from plaintiff to make such a change in the policy form, especially in light of the fact that the printed coverage part form specifically provides in condition 9 that there could be no change in the terms "except by endorsement issued to form a part of this policy, signed by the President, a Vice-President or the Secretary of the Company, and countersigned by an authorized representative of the Company.' Not only was the change not signed by such an officer, but there is no indication that approval was obtained for addition of what is specifically typewritten condition 14: "Any terms, conditions or definitions in the basic policy that conflict with the terms, conditions and definitions of this coverage part, should be resolved in favor of this coverage part.' The trial court's finding that this paragraph 14 is not part of the policy is supported by the evidence and is in accordance with the other terms of the policy itself. Accordingly, plaintiff's second and fourth assignments of error are not well-taken.

Plaintiff's fifth assignment of error raises the basic issue, plaintiff contending that the trial court erred in applying the pro rata clause of the basic policy rather than the excess clause of coverage part L0001. Condition 7 of coverage part L0001 provides that: "If at the time of loss, there is other insurance available to the insured covering such loss or which would have covered such loss except for the existence of this insurance, then the Company shall not be liable for any amount other than the excess other any other collectible insurance applicable to the loss hereunder.' The trial court found that the initial provision of this coverage part containing the words "subject to the limits of liability, exclusions, conditions and other terms of this policy' indicates an intent that the other-insurance clause of the basic policy should apply in the case of conflict between the clause in the coverage part and that in the basic policy. The trial court found ambiguity and resolved the "conflict' by construing the policy against plaintiff and applying the aforesaid clause as the intent of the policy.

However, the finding of the trial court is not supported by the other-insurance clause of the basic policy, which is condition 6 thereof and commences with the following:

> "The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. * * *'

When two provisions of an insurance policy conflict, the first effort by a court must be to harmonize the two provisions, and only where the two provisions cannot be fairly harmonized does an issue arise as to which controls over the other. The other-insurance clause of the basic policy is not unequivocally primary insurance. Rather, it states to the effect that the insurance is primary, except where otherwise provided that it shall be applied in excess of other insurance. The clause in coverage part L0001 is such an other provision within the contemplation of condition 6 of the basic policy. Under such circumstances, we find no reason not to apply the excess coverage other-insurance clause of coverage part L0001, which is the only coverage part included in the policy, the first page of which provides that: "The insurance afforded is only with respect to the Coverage Part(s) indicated below by specific premium charge(s) and attached to and forming a part of this policy.'

Since we have found that plaintiff's policy provides only excess coverage, the remaining issue raised by the fifth assignment of error is whether the trial court erred in finding the parties should share the settlement on a pro rata basis. There is no question but that defendant's policy contains only a pro rata clause; whereas, as we have found, plaintiff's policy contains an excess-coverage clause with respect to other insurance. Plaintiff has cited cases indicated that, in case of conflict between a pro rata clause of one policy and an excess-coverage clause of another policy, the conflict is resolved in favor of the policy containing the excess-coverage clause. On the other hand, defendant contends that the rule urged by plaintiff applies only to those cases applying the doctrine that insurance follows the automobile, such as Motorists Mutual Ins. Co. v. Limited Mutual Ins. Co. (1965), 1 Ohio St. 2d 105. Defendant contends, however, that, in all other situations, the policy containing the pro rata clause is given application. It is unnecessary to resolve this issue in this case since the result does not vary, regardless of which insurance policy is given preference. The other-insurance clause of defendant Guaranty National's policy is set forth in condition 6 and provides as follows:

> "The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance. * * *'

Thus, by the very terms of defendant's policy, there would be no reduction in defendant's liability under its policy because of the existence of other applicable insurance where the other policy provides that only excess coverage is afforded. The pro rata provision of defendant's policy is prefaced by the statement that:

"When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below: * * *'

Accordingly, by the very terms of defendant's policy, the pro rata clause does not apply unless the two policies contain similar other-insurance provisions. In the event that the other policy contains an excess-coverage other-insurance clause, the terms of defendant's policy provides that payment will be first made under defendant's policy. Therefore, plaintiff's fifth assignment of error is well-taken.

Plaintiff's fixth and seventh assignments of error relate to the refusal of the trial court to award attorney fees to plaintiff. By the sixth assignment of error, plaintiff contends that it should be awarded attorney fees with respect to its defense of the underlying case, which was settled. The trial court, however, found that defendant timely undertook to defend and actually defended the underlying tort action. This is supported by the stipulation of the parties that:

"* * * [U]pon demand by Southern American Insurance Company, Guaranty National Insurance Company did timely undertake to defend Rose Ramos, Joseph Ramos and Nancy McCormick in the lawsuit brought by the Administrator of the estate of April Maness with respect to the above-described accident. * * *'

Although plaintiff also continued to defend, we find no error and no abuse of discretion on the part of the trial court under the circumstances in finding that no attorney fees should be awarded plaintiff for such defense. Plaintiff's sixth assignment of error is not well-taken.

Similarly, plaintiff's seventh assignment of error is not well-taken since there is no indication that defendant acted in bad faith in defending this declaratory judgment action. There were justiciable issues raised as indicated by the trial court's decision, even though we have reached a different result in some respects upon this appeal. Accordingly, plaintiff's seventh assignment of error is not well-taken.

Plaintiff's third assignment of error and defendant's first two assignments of error are interrelated, both relating to the trial court's finding that Nancy McCormick was in "control of the pond area where the accident occurred,' even though she was not in control of the entire farm.

Defendant first contends that there was no coverage afforded by its policy because the policy is an owner's, landlord's and tenant's insurance policy covering only designated premises, and the accident did not occur upon the premises designated in the policy. Plaintiff contends, and the trial court found, that the terms of the policy are somewhat broader, covering operations away from the premises, as well as occurrences on the premises. The basic provision of defendant's policy is as follows:

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto * * *.'

The insured premises was St. Joseph Home. However, coverage part L 6415, pertaining to this coverage, sets forth in the declarations as a "Description of Hazards' the printed words "Premises^Operations' and then the typed words "Group home for retarded women, rated as Convalescent or nursing homes; not mental; psychopathic institutions.'

Defendant contends that the words "all operations necessary or incidental thereto' relate only to activities occurring at the insured premises. However, the appropriate interpretation is that those words pertained to the entire phrase "arising out of the ownership, maintenance, or use of the insured premises.'

Plaintiff relies upon Brewer v. DeCant (1958), 167 Ohio St. 411, and Lessak v. Metropolitan Casualty Ins. Co. (1958),

168 Ohio St. 153, as indicating that the words "operations necessary and incidental thereto' are not limited to occurrences on the insured premises but also apply to operations necessary and incidental to the use made by the insured of the insured premises. Defendant, on the other hand, contends that Lessak is distinguishable because of a difference in the policy language in that case from that of its policy. In support of its contention that the policy coverage is limited to operations on the insured premises, defendant relies upon decisions from other jurisdictions, including that in United States Fire Ins. Co. v. Schnackenberg (1981), 429 N.E. 2d 1203, in which the Illinois Supreme Court held to the effect that similar policy language did not extend coverage to an occurrence two and one-half blocks from the policyholder's residence when a child of the policyholder riding a bicycle struck a pedestrian. The Illinois court noted that it had previously recognized a split of authority upon the issue and adopted the more restrictive interpretation of coverage in Cobbins v. General Accident Fire & Life Assurance Corp. (1972), 53 Ill. 2d 285, 290 N.E. 2d 873. In Cobbins, the Illinois court did note a split of authority and specifically rejected the reasoning of the Ohio Supreme Court in Lessak, supra. Thus, the Illinois decisions are of little persuasive authority as to what Ohio law is or should be. However, defendant is correct in its contention that the policy language in Lessak is slightly different from the policy language herein. Likewise, the decision in Brewer is arguably distinguishable because of differences in policy language.

Nevertheless, reading defendant's policy as an entirety, we find that there is no significant difference in meaning between the policies involved in Brewer and Lessak and defendant's policy herein. Although the nature of the use of the premises is not specifically referred to in the coverage clause referred to above, the nature of the use is referred to in the declarations and in the additional declarations contained in coverage part L 6415. In addition, by endorsement, coverage was extended to the insured employees by an endorsement stating in part: "The employees are added as additional insured, but only as respects to the named insured operations.' We find nothing limiting coverage to operations occurring on the insured premises but, instead, as pointed out in connection with defendant's second assignment of error, exclusion (q) specifically provides that the insurance does not apply "to bodily injury or property damage arising out of operations on or from premises (other than the insured premises) owned by, rented to or controlled by the named insured * * *.' This suggests that coverage is extended to operations from the insured premises, as well as to operations on the insured premises. Accordingly, we conclude that coverage was afforded by defendant's policy with respect to operations incidental to the use of the insured premises for a group home for retarded women, even if occurring off the insured premises.

The evidence indicates that the "operation' herein involved was an outing for some of the residents of the group home. The trial court's finding that such outing was an operation incidental to the use of the insured premises for a group home is supported by competent, credible evidence. Thus, defendant's first assignment of error is not well-taken.

Defendant relies upon exclusion (q), however, as a basis for denial of coverage in this instance, even if coverage be otherwise afforded, since the trial court specifically found that the pond area in which the drowning occurred was under the control of defendant Nancy McCormick. As noted, plaintiff contends that this finding of control was erroneous.

We find no error in the trial court's finding that Nancy McCormick was in "control' of the pond area. As we understand the finding, it means no more than that Nancy McCormick was in charge of the pond area at the time in question. Since no one else was in the vicinity at the time, and Nancy McCormick was in charge of the group home residents, she was in charge of the area and the use of the area at the time. To this extent, she was in "control' of the area. However, the trial court specifically found that McCormick was not in charge of the farm itself. Nor did the trial court find that McCormick was in sole control of the pond area. See Harris, Jolliff & Michel, Inc., v. Motorists Mut. Ins. Co. (1970), 21 Ohio App. 2d 81. Generally, the word "control' with respect to real property in an insurance policy connotes possession of the property, with the exclusive right to determine the use thereof to the exclusion of anyone else. Here, to the extent that McCormick was in "control' of the pond area, she was subject to the direction of the owner of the farm. In fact, the evidence indicates that the use of the farm, as well as the "control' of the pond area by McCormick, was the result of a license granted by the owner of the farm, rather than an unqualified right not subject to revocation by the owner.

Additionally, coverage part L 6415 of defendant's policy defines "insured premises' as meaning:

> "(1) the premises designated in the declarations * * * (3) premises as to which the named insured acquires ownership or control and reports his intention to insure such premises under this policy and no other within thirty days after such acquisition; and includes the ways immediately adjoining such premises on land.'

Therefore, additional premises over which the insured obtains "control' are insured premises for thirty days if, within

such period, notification is given to defendant of the insured's intent to insure such premises. Thus, with respect to premises of which the insured gains control, it is contemplated that the control will be of a lasting nature, not just for a few hours or a few days. Accordingly, we conclude that the words "control' in exclusion (q) is not intended to apply to the acquisition of a temporary right to use other premises in an operation incidental to the use of the insured premises for the purpose stated in the declarations.

Defendant's policy did not specifically limit coverage to operations on the insured premises but is fairly capable of the interpretation that it extends to operations off the insured premises if incidental to the use stated in the declarations. This is suggested not only by the declarations but also by the language of exclusion (q) and by the definition of "insured premises.' Accordingly, plaintiff's third assignment of error and defendant's second assignment of error are not well-taken.

By its third assignment of error, defendant contends that the trial court erred in permitting plaintiff to introduce testimony of two witnesses interpreting plaintiff's policy. Although the basis for permitting such testimony is somewhat nebulous, we find no prejudicial error under the circumstances. There is no indication that the trial court relied upon such testimony as the predicate for its interpretation of plaintiff's policy. Nor has this court relied upon such testimony in finding that the trial court erred as to its interpretation of plaintiff's policy. Rather, we have relied upon the policy language of both plaintiff's and defendant's policies in determining the nature of the coverage and the respective rights of the parties. There being no prejudicial error, defendant's third assignment of error is not well-taken.

For the foregoing reasons, plaintiff's fifth assignment of error is sustained, and plaintiff's remaining assignments of error, as well as all of defendant's assignments of error, are overruled; the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this opinion.

Judgment reversed and cause remanded.

MOYER, P. J., and STERN, J., concur. STERN, J., retired, of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.