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IN THE
COURT OF APPEALS OF INDIANA

GENERAL CASUALTY COMPANY OF WISCONSIN,	)	
Appellant-Defendant,	)	
vs.	)	No. 02A03-0701-CV-21
THE OHIO CASUALTY INSURANCE COMPANY, ERIE INSURANCE EXCHANGE, BENCHMARK CONSTRUCTION, LLC, GERIG'S DUMP TRUCKING, INC., ANTHONY M. MANNING, TROY L. ASH and RON STEIN,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Stanley A. Levine, Judge
Cause No. 02D01-0502-CC-149

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

General Casualty Company of Wisconsin ("General Casualty") appeals the trial court's denial of its motion for summary judgment. We reverse.

Issue

General Casualty raises one issue, which we restate as whether the trial court properly concluded that General Casualty is required to provide primary coverage and a defense for Stein and Benchmark.

Facts[1]

On October 2, 2002, Ron Stein, an employee of Benchmark Construction, LLC, ("Benchmark"), was directed to prepare a road widener to be transported to a construction site. A road widener is a piece of equipment used to widen roads during the construction process. It is ten to twelve feet long, has an engine and four wheels, and has a maximum speed of ten to fifteen miles per hour. Stein moved the widener from Benchmark's storage yard to a shop where he repaired the blade. After completing the work, Stein secured the swinging arm located on the driver's side with a pin and clip. Stein returned the widener to the yard where it sat for approximately ten minutes.

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[1] We state these facts as they relate to the declaratory judgment action only. They have no bearing on the merits of Manning's negligence claims.

Stein and another person loaded the widener onto a trailer owned by Benchmark and insured by Erie Insurance Exchange ("Erie"). Benchmark also maintained a commercial package insurance policy and umbrella policy issued by Ohio Casualty Insurance Company ("Ohio Casualty"). Once the widener was loaded onto the trailer, Stein left the trailer to be attached to a semi-tractor owned by Gerig's Dump Trucking, Inc., ("Gerig's") and insured by General Casualty. Gerig's had loaned the semi-tractor to Benchmark while Benchmark considered purchasing it.

Troy Ash was employed by Benchmark as a driver and heavy equipment operator. Ash secured the road widener to the trailer and attached the trailer to the semi-tractor. While Ash was driving the semi-tractor to the construction site, the arm of the widener came loose and struck the windshield of Anthony Manning's vehicle. According to Stein the only way for arm to come off was "for the clip to break in the pin." App. p. 146. The pin Stein used to secure the arm was never found.

On September 20, 2004, Manning filed a complaint against Benchmark, Ash, and Stein alleging negligence. Apparently at least one of the insurance companies sought a declaratory judgment regarding the responsibilities of each of the three insurance companies' obligation to provide coverage and defenses for Manning's negligence claims.[2]

Erie, Ohio Casualty, and General Casualty all filed motions for summary judgment. The trial court denied General Casualty's motion, concluding that it has

[2] Among other things, General Casualty did not include the Erie policy, the Ohio Casualty policies, or the other summary judgment motions in its appendix.

primary coverage and a duty to defend and indemnify Benchmark, Ash, and Stein. The trial court also granted in part Erie's and Ohio Casualty's motions for summary judgment and denied them in part. The trial court concluded that Erie's coverage and obligation to defend and indemnify are implicated only in excess of General Casualty's limits. The trial court also concluded that Ohio Casualty's commercial package policy does not provide coverage and that it has no duty to defend or indemnify until the General Casualty and Erie limits are exhausted, at which point the umbrella policy is implicated.[3]

General Casualty filed a motion to correct error, which was denied. General Casualty now appeals the denial of its motion for summary judgment.[4]

Analysis

General Casualty argues that the trial court improperly denied its motion for summary judgment. Summary judgment is used to terminate litigation about which there is no factual dispute and which may be determined as a matter of law. Bushong v. Williamson, 790 N.E.2d 467, 474 (Ind. 2003). The standard of review for summary judgment is the same as that used in the trial court: "summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. at 473 (citing Ind. Trial Rule 56(C)). Although a trial court's specific findings and conclusions offer insight into the rationale for the judgment and facilitate appellate review, they are not binding on this court.

[3] In its order, the trial court stated, "This Order shall be final for the reason that there is no just reason for delay." App. p. 12.

[4] Although Erie filed an appearance on appeal, it did not file an Appellee's brief. Ohio Casualty did file an Appellee's brief.

Cummins v. McIntosh, 845 N.E.2d 1097, 1103 (Ind. Ct. App. 2006), trans. denied. We will affirm on any theory or basis supported by the designated materials. Id.

Insurance contracts are subject to the same rules of interpretation as other contracts. Morris v. Economy Fire and Cas. Co., 848 N.E.2d 663, 666 (Ind. 2006). On appeal, unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70, 74 (Ind. Ct. App. 2006), trans. denied. Where the terms of a contract are clear and unambiguous, they are conclusive. Id. We will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. The terms of a contract are not ambiguous simply because the parties disagree as to the proper interpretation of the terms. Id. "A contract is ambiguous only where a reasonable person could find its terms susceptible to more than one interpretation." Cummins, 845 N.E.2d at 1104. If the contract is unambiguous, the intent of the parties is determined from the four corners of the document. Id.

The relevant part of the General Casualty policy provides:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". . . . However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply.

App. p. 70. The policy defines "insured" as "[y]ou for any covered 'auto,'" "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow," and

"[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability."[5] Id.

Based on the policy language, General Casualty is providing coverage for and defending Ash and Benchmark against Manning's claims. At issue on appeal is General Casualty's obligation to provide coverage for and defend against Stein's alleged negligence and Benchmark's liability as Stein's employer. General Casualty concedes "[t]he semi-tractor (owned by Gerig), the trailer and road widener (owned by Benchmark) are all within the definition of "covered autos" contained in General Casualty's policy. For the purpose of this appeal, General Casualty will assume that every conceivable vehicle in this case is a covered auto." Appellant's Br. p. 7.

General Casualty argues, however, that it need not provide coverage for or defend Stein because he did not "use" a covered auto. General Casualty then asserts that Stein did not use Gerig's semi-tractor. "Stein did not load the semi-tractor, nor did he exercise any guidance or control over the operation of the semi-tractor. At the very most, he loaded the road widener onto the trailer which was subsequently hitched to the semi-tractor by Ash." Appellant's Br. p. 10. General Casualty concludes that Stein's actions are not sufficient for him to be considered an insured under its policy.

Ohio Casualty responds, "Benchmark is an insured under the General Casualty policy because it, through its employees, was using a covered auto that resulted in the accident which is the subject of the Manning claim." Appellee's Br. p. 4. Ohio Casualty

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[5] "You" is defined as the named insured. Gerig's is included as a named insured.

goes on to argue, "It is therefore immaterial whether Stein 'used' the tractor or trailer; it suffices for coverage purposes that Stein was an employee acting for an admitted General Casualty insured, Benchmark, when Stein's allegedly negligent acts contributed to the Manning accident." Id.

Although Ohio Casualty's point regarding Benchmark acting through its employees and coverage following is well taken, it is overbroad. We are not convinced that because Ash was an employee of Benchmark and General Causality is providing coverage and a defense for Ash and Benchmark, General Casualty is also liable for any of Stein's alleged negligence simply based on his employment relationship with Benchmark. Contrary to Ohio Casualty's argument, General Casualty must insure Stein and Benchmark only to the extent the policy requires. In our view, the relevant inquiry is whether Stein's alleged negligence (the preparation of the widener) amounts to the use of a covered auto owned by Gerig's so as to make Stein and/or Benchmark insureds.

Taking General Casualty's concession that the semi-tractor, trailer, and widener were covered autos at face value, when Stein's alleged negligence occurred, neither Stein nor Benchmark was involved with or otherwise using a covered auto owned by Gerig's, as is required by the General Casualty policy's definition of "insured." Stein's involvement with the widener ended when he loaded it onto the trailer. From there, Ash secured the widener to the trailer, hitched the trailer to the semi-tractor, and drove it toward the construction site. Only the semi-tractor was owned by Gerig's, and only use associated with that vehicle creates an obligation for General Casualty to provide coverage and a defense.

To illustrate this point, we cannot conclude that Stein was using a covered auto owned by Gerig's when he repaired the widener and loaded it onto the trailer because the trailer upon which Stein loaded the widener could have been attached to another semi-tractor or could have simply remained in Benchmark's storage yard. Under those scenarios, General Casualty's policy would not have been implicated regardless of Stein's alleged negligence in securing the arm. General Casualty's policy did not create an obligation to cover and defend Stein, or Benchmark through Stein, until the semi-tractor owned by Gerig's was used.[6] Because Stein did not use the semi-tractor, he is not an insured.

Conclusion

Because Stein's actions are not covered by the General Casualty policy, the trial court erroneously denied its motion for summary judgment. We reverse.[7]

Reversed.

NAJAM, J., and RILEY, J., concur.

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[6] In its conclusions to the contrary, the trial court relied on Columbia Mutual Casualty Insurance Company v. Coger, 811 S.W.2d 345 (Ark. Ct. App. 1991), for the proposition that "'Loading' and 'use' of a vehicle includes securing the load. Therefore, when a load becomes loose in transit and causes damage, the cause of the damage is the 'loading' and 'use' of the vehicle." App. p. 41. In that case, however, the insurance policy at issue specifically defined "use" to include operation and "loading or unloading." Coger, 811 S.W.2d at 346. The General Casualty policy contains no such language. Coger is not helpful to this analysis. For similar reasons, Vann v. United Farm Family Mutual Insurance Company, 790 N.E.2d 497 (Ind. Ct. App. 2003), trans. denied, is of no assistance here.

[7] We offer no opinion as to the priority of the other insurance policies.