



Kentucky Appellate Court Decision on Surface Water Exclusion

July 26, 2016

In a case of first impression, the Kentucky Court of Appeals upheld a surface water exclusion in *Dr. Caroline Hendy v. Maryland Casualty Company*. The underlying claim stemmed from a large commercial water loss in London, Kentucky, following a heavy rainstorm. The insurance policy excluded losses resulting from surface water, but there was an exception to the exclusion if the loss occurred due to a backed up sewer or drain.

Plaintiffs argued the policy language was ambiguous and under the doctrine of reasonable expectations, there should be coverage. The Court of Appeals disagreed and found the policy was not ambiguous. The Court of Appeals also upheld the concurrent cause of loss analysis used by the trial court.

While this unreported decision was perhaps not as broad as preferred, it is still significant on several levels. First, although it is limited in its scope, the decision provides guidance and support for the enforcement of surface water exclusions. Second, while it may be more difficult to prevail on summary judgment in Kentucky than in other states, this decision demonstrates insurers should never dismiss a summary judgment as an “impossible” option.

If you have any other questions regarding this decision or its impact, please do not hesitate to contact me.

With offices in **Ft. Mitchell** and **Louisville**, SRS’s Kentucky team of insurance law professionals is glad to answer any questions you may have on the implications of this decision. Please feel free to call on us at any time.



Thomas F. Glassman, Esq.



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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001030-MR

DR. CAROLINE L. HENDY; INSIGHT PROPERTIES,
LLC; AND EYE DEAL EYE CARE II, PLLC

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 12-CI-01094

MARYLAND CASUALTY COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Dr. Caroline L. Hendy, Insight Properties, LLC and Eye Deal Eye Care II, PLLC, appeal from an Order Granting Defendant’s Motion for Summary Judgment rendered by the Laurel Circuit Court. Appellants contend that the trial court erred in holding that the “Back-Up of Sewers and Drains” coverage provided under Maryland Casualty’s policy is subject to a “concurrent cause”

exclusion. They argue in the alternative that a material issue of fact existed as to the cause of a water backup which should have precluded the lower court's Summary Judgment. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

FACTS AND PROCEDURAL HISTORY

Dr. Caroline Hendy, a London, Kentucky optometrist, operates her practice under the name Eye Deal Eye Care II, PLLC. The business is located in an office building situated at 1370 West Fifth Street, London, Kentucky. The building is owned by Insight Properties, LLC, of which Dr. Hendy is the sole member. Defendant/Appellee Maryland Casualty Company ("MCC") and Kentucky Farm Bureau ("KFB") issued policies of insurance to Hendy, Insight and Eye Deal which were in effect on November 30, 2010.

On that date, and after a period of heavy rain, surface water entered Appellants' premises causing extensive damage to the building's structure and contents. As a result, Dr. Hendy suspended her eye care practice for approximately 4.5 days. Appellants and adjoining businesses undertook remediation efforts during this time by renting a commercial pump to limit additional flooding. It was later determined by Appellants' engineer that the flooding was caused by a collapsed drainage tile on an adjacent property under construction.

On March 7, 2011, various office park tenants - including Appellants herein - prosecuted a civil action against various Defendants alleging negligence

which proximately resulted in the collapsed drainage tile and resultant damages.¹

MCC and KFB were not parties to this action. During the pendency of this action, referred to in the record as the *City of London* case, Appellants submitted claims to MCC and KFB seeking coverage and insurance proceeds for damaged business property, repair and mitigation expenses, and continuing loss of business income they alleged sustained as a result of the flooding.

On September 4, 2013, the trial court in *City of London* rendered a Judgment in favor of Appellants and other office park tenants upon concluding that the City was solely responsible for maintaining and repairing the drainage tile at issue. The City did not appeal and the Judgment in favor of the Appellants in the amount of \$88,894.96 subsequently was satisfied in full.²

Prior to resolution of the *City of London* case, Appellants filed a separate action against MCC and KFB alleging breach of contract and bad faith. Specifically, Appellants asserted that MCC and KFB improperly denied coverage based on flood and surface water exclusions and/or other provisions of the

¹ Defendants and Intervening Plaintiffs included the City of London, Bacho Development Corporation and Big Blue Enterprises, LLC. Bacho Development Corporation had purchased several tracts of land with the intent of developing a commercial area. The parcels were situated adjacent to the Plaintiffs, the Sampson Branch watershed, and the buried drainage tile which was near or within an easement in favor of the City of London. The action centered on the Plaintiffs' claim that the City of London improperly allowed a contractor to pile more than 10 feet of dirt over the plastic drainage tile, which resulted in the tile's collapse and subsequent flooding of surface water.

² In ruling in favor of the Appellants and other office park tenants in the *City of London* proceeding, the court entered findings that 1) the natural flow of the Sampson Branch Watershed was interrupted by commercial development, 2) a drainage tile referred to by the court as "the Pipe" collapsed and clogged, 3) the collapsed drainage tile was a symptom of the flooding but not the cause, and 4) that the flooding caused by the development proximately resulted in the Appellants' damages.

respective insurance policies, which proximately resulted in attorneys' fees, litigation costs and other damages. They further maintained that through the insurers' contrived efforts to avoid payment, the insurers breached the respective policies and committed bad faith for which additional compensatory and punitive damages were recoverable.

After the submission of various motions, a settlement was reached between Dr. Handy and KFB. This resulted in an agreed order of partial dismissal rendered on March 16, 2015. The action continued as against MCC.

The following day, the Laurel Circuit Court disposed of MCC's Motion for Summary Judgment, wherein MCC argued that 1) Appellants' claims were barred by collateral estoppel arising from the *City of London* case, and 2) the MCC policy did not provide coverage under these facts because an exception for "backup of sewers and drains" did not supplant the MCC policy coverage exclusions for surface and flood water.

In sustaining MCC's motion, the court determined that while collateral estoppel did not bar Appellants' claims, the concurrent causes of heavy rain and overflow "likely contributed to Appellants' damages." Specifically, the court found that, 1) the MCC policy excluded from coverage damages caused by surface and flood water, and 2) that such losses were excluded under the policy regardless of any other contributory or concurrent event. The court went on to find that the policy language also addressed a specific form of water damage, wherein the policy excluded "Water that backs up or overflows from a sewer, drain or sump

but only if Back-Up of Sewers and Drains is shown as ‘Excluded’ in the Declarations.” (Emphasis added). Ultimately, the court determined that the *City of London* Judgment did not specifically hold that the drain tile was the sole cause of the damages, that the concurrent causes of heavy rain and consequent overflow likely contributed to the flooding, and that as a matter of law the Appellants could not prevail on their claim. Accordingly, the court rendered Summary Judgment in favor of MCC. Appellants’ subsequent Motion to Alter, Amend or Vacate was denied, and this appeal followed.

ANALYSIS

Appellants now argue that the Laurel Circuit Court committed reversible error in granting Summary Judgment in favor of MCC and by denying Appellants’ Motion to Alter, Amend or Vacate. Their argument centers on the assertion that the “Back-Up of Sewers and Drains” coverage is subject to the “concurrent cause” exclusion. They assert that this provision could lead the insured to believe that this coverage is not subject to any of the other language within the exclusion provisions. Appellants maintain that there is no language within the policy that in any way defines or limits the parameters of this coverage. While acknowledging that there are no Kentucky decisions addressing this narrow issue, they argue that the policy’s floodwater exclusions should be limited in accordance with the insureds’ reasonable expectations. Appellants argue that the

“Back-Up of Sewers and Drains” exception is ambiguous and requires the insurance contract to be strictly construed against MCC. In the alternative, they contend that there exists a material issue of fact as to the cause of the water backup which would have precluded the entry of Summary Judgment.

The policy language at issue provides as follows:

II. COVERED CAUSES OF LOSS

A. EXCLUSIONS

2. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
- (2) Mudslide or mudflow;
- (3) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings; or
- (4) Water that backs up or overflows from a sewer, drain or sump but only if Back-Up of Sewers and Drains is shown as “Excluded” in the Declarations.

If the language of an insurance contract is clear and unambiguous, it must be enforced as drafted. *Osborne v. Unigard Indemnity Company*, 719 S.W.2d

737, 740 (Ky. App. 1986). Only when policy language is ambiguous is the insured entitled to all the coverage he may reasonably expect to be provided under the policy. *Simon v. Continental Insurance Company*, 724 S.W.2d 210, 212 (Ky. 1986).

In the matter at bar, the policy utilizes semicolons and the conjunction “or” between each of the exclusions to coverage, which operate to link alternatives. “In common and natural usage the word ‘or’ is disjunctive and expresses an alternative as between either of two or more separate subjects or conditions and implies an election or choice as between them.” *Board of Nat. Missions of Presbyterian Church in U.S. of America v. Harrel's Trustee*, 286 S.W.2d 905, 907 (Ky. 1956) (citation omitted). As applied herein, we conclude that the application of the “Back-Up of Sewers and Drains” language became irrelevant when the court determined that “flood” or “surface water” contributed to Appellants’ loss.

In its Order Granting Defendant’s Motion for Summary Judgment, the Laurel Circuit Court expressly held that “the concurrent causes of heavy rain and consequent overflow of the creek likely contributed to the flooding.” Irrespective of this, it is uncontroverted that surface water entered Appellants’ building resulting in damages. “Surface water” is an express exclusion set out in Section II(A)(2)(g)(1).

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

CONCLUSION

When viewing the record in a light most favorable to Appellants and resolving all doubts in their favor, we cannot conclude that the trial court erred in finding that there were no genuine issues of material fact and that MCC was entitled to a Judgment as a matter of law. The policy language is not ambiguous and expressly provides an exclusion from covered loss for damages resulting from “flood, surface water . . . [or] overflow of any body of water”. Because the Laurel Circuit Court determined that its Judgment in *City of London* did not specifically reflect that the damaged drainage tile was the sole cause of the damages, but rather

that heavy rain and creek overflow contributed to the flooding, the court properly determined that Appellants did not sustain a covered loss. This conclusion is supported by the record and the law.

For the foregoing reasons, we AFFIRM the Order Granting Defendant's Motion for Summary Judgment rendered by the Laurel Circuit Court.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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