Kentucky Court Of Appeals
Cases of Note
March-April, 2023

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INSURANCE

FIRST SPECIALTY INSURANCE CORP. v. ALLTRADE PROPERTY MANAGEMENT, ET AL.

2022-CA-0385-MR 4/28/2023 2023 WL 3133176

Opinion by KAREM, ANNETTE; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)
First Specialty Insurance Corporation ("First Specialty") appealed from the Jefferson Circuit Court's grant of summary judgment in favor of Motorists Mutual Insurance Company ("Motorists") and Alltrade Service Solutions and Alltrade Property Management ALC (collectively "Alltrade"). The judgment resolved a dispute over the insurance companies' obligation to cover damages in a wrongful death suit brought against Alltrade and two of its employees, Jeremy Tanzilla and Bruce Key. Alltrade was contracted with Whispering Brook Acquisitions, LLC ("Whispering Brook"), the owner of an apartment complex, "to act as exclusive agent to lease, operate, manage and service" the property. While driving to respond to a maintenance request at an apartment unit, Tanzilla fatally struck a young child with his personal vehicle which resulted in the parents filing suit for wrongful death. Tanzilla was supervised by Key.

Whispering Brook was insured under a commercial general liability policy with First Specialty. Alltrade was insured with Motorists who intervened in the circuit court action to determine the rights and duties and priority of coverage between Motorists and First Specialty for the damages alleged against Alltrade. The First Speciality policy contained two portions which raised interpretative disputes regarding coverage. One was an "auto exclusion" provision which excluded coverage of any bodily injury related damages caused by an automobile of the insured, and the other was a "nonowned auto endorsement" which covered automobiles not owned or borrowed by the insured used with permission in connection with the business of the insured. The circuit court's summary judgment ruled that Alltrade and its employees were entitled to coverage under the First Specialty policy. Additionally, Motorists and First Specialty shared primary liability for the loss and were required to contribute equal shares to defend and indemnify Alltrade and its employees.

The Court of Appeals held that the circuit court did not err when it determined Alltrade and its employees were covered under the First Speciality policy. Tanzilla's personal vehicle was determined to fall within the "covered auto" provision of First Speciality's "non-owned auto endorsement" because the property management agreement gave Alltrade "sole authority to control its employees and contracted labor in the management of the apartment complex." As a result, Whispering Brooks provided Alltrade with an implied delegation of authority allowing Alltrade to give permission to one its employees to use his own vehicle in the maintenance call. Citing American Mut. Fire Ins. Co. v. Reliance Ins. Co., 233 S.E.2d 114 (S.C. 1977), Whispering Brook's actual knowledge of the vehicle's use was not a perquisite for permission because it could "be inferred 'from the broad scope of the initial permission or from the attending

circumstances and the conduct of the parties[.]'" (Brackets in original.) Additionally, the use of the vehicle in response to a maintenance call was in furtherance of Whispering Brook's business. Alltrade, as the apartment's property manager, met the definition of an "insured" under the First Speciality policy, and Alltrade and Key together were covered under the "non-owned auto endorsement" provision as they could be held vicariously liable for the negligence of Tanzilla. The fact Tanzilla was towing a trailer owned by the apartment complex did not implicate the "auto exclusion" provision because there was no allegation or evidence the trailer itself "played any part in causing the collision with the victim."

However, the Court reversed the circuit court's ruling that both the Motorists and First Speciality policies contained "mutually repugnant excess clauses" requiring a pro rata division between the insurers of the costs incurred. The Court agreed with First Speciality's position that the clause at issue in its policy was a nonstandard escape clause, which as a matter of law, takes precedence over an excess clause contained within Motorists' policy. It was stated that the First Speciality clause was "virtually identical" to the provision at issue in Empire Fire and Marine Ins. Co. v. Haddix, 927 S.W.2d 843 (Ky. App. 1996). The case was remanded for entry of an order reflecting that the First Speciality policy contained a nonstandard escape clause and its coverage was the excess over the coverage of the Motorists policy's.

TORTS

KENT E. CULP v. SI SELECT BASKETBALL, ET AL.
2021-CA-1439-MR 3/17/2023 2023 WL 2542625
Opinion by CETRULO, SUSANNE M.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS) This is an appeal from the McCracken Circuit Court's summary judgment in favor of a sports plex and its promoter who were sued after a third-party coach's criminal act resulted in injuries to a referee at a basketball tournament. The referee alleged that the promoter and the facility were negligent for not conducting background checks on all participants or providing security guards; and further, that the attack was reasonably foreseeable, or at least that foreseeability was a jury question. This Court heard arguments, considered the briefs, and held the matter in abeyance for consideration of the Kentucky Supreme Court's opinion in Walmart, Inc. v. Reeves, ___ S.W.3d ___, 2023 WL 2033691 (Ky. Feb. 16, 2023) (not yet final). At issue was whether Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901 (Ky. 2013) was limited to open-and-obvious cases or also applied to cases involving third-party criminal actions like that before the Court. After the Kentucky Supreme Court's ruling in Reeves that Shelton's cabining of foreseeability to a breach analysis is limited to only open-and-obvious cases, this Court looked to the evidence to determine whether the attack was reasonably foreseeable. The evidence was that in 10 years of coaching and promoting tournaments at the sports plex, this promoter had never experienced a fight among participants. The referee produced "run reports" from local law enforcement; however, those reports included only one account of an assault by one participant upon another player in January 2017 at an event that wasn't from the promoter. The referee testified that he had never been concerned about violence there previously; nor had he seen any assaults on other participants or other referees; and, that this assault was completely unprovoked and unexpected. Consistent with Reeves, the Court concluded the evidence presented did not establish a pattern that could have led the promoter to anticipate the assault. The Court further concluded that the criminal acts were not reasonably foreseeable, and the summary judgment was affirmed.

SHERI FLOYD v. THE PARKVIEW COUNCIL OF CO-OWNERS, INC., ET AL
2022-CA-0765-MR 3/31/2023 2023 WL 2718973
Opinion by THOMPSON, LARRY E.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)
Appellant Sheri Floyd slipped and fell on snow and ice in the parking lot of Parkview Condominiums. She was on the premises to visit an owner of one of the condominiums. Ms. Floyd sued Parkview, as it was the owner of the common areas, and the landscapers, who were supposed to remove the snow and ice from the parking lot. The rules and regulations of Parkview stated that it was not liable for the injuries of owners caused by inclement weather and sustained in the common areas. The rules gave a broad definition of an "owner" that included guests and visitors of an owner. Parkview moved for summary judgment claiming that since Ms. Floyd was a visitor, she was an "owner" and could not hold it liable for her injuries. The Jefferson Circuit Court agreed and granted summary judgment. The Court of Appeals reversed and remanded. The Court held that there was no evidence that Ms. Floyd agreed, either directly or indirectly, to be bound to Parkview's rules and regulations or was even made aware of the rules. Thus, Parkview could not unilaterally waive its duty of care.

FAITH HORBACH v. BRIANNA M. FORSYTHE (N/K/A BRIANNA MICHELLE LYDANNE), ET AL.
2022-CA-0216-MR 4/21/2023 2023 WL 3027803
Opinion by JONES, ALLISON; ACREE, J. (CONCURS) AND DIXON, J. (CONCURS) Faith Horbach suffered injuries to her right hand when she was bitten by the Appellees' dog, which she had been hired to walk. She filed suit against the Appellees, asserting both common negligence claims and strict liability under KRS 258.235. After a period of discovery, the Jefferson Circuit Court granted summary judgment to the Appellees, finding that Horbach was an "owner" as defined in KRS 258.095 when she was hired to walk the dog; therefore, she could not sue the Appellees for damages pursuant to Jordan v. Lusby, 81 S.W.3d 523 (Ky. App. 2002).

In a direct appeal from the trial court's denial of the Appellee's motion, the Court of Appeals affirmed in part, agreeing that Jordan operated to bar Horbach's strict liability claims. However, the Court held that the trial court improperly applied Jordan to Horbach's common law negligence claims. Citing Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967), the Court noted a dog's secondary owner may sue the dog's primary owners if the primary owners had knowledge of the dog's vicious propensities, failed to warn the secondary owner, and the secondary owner is consequently injured. Accordingly, the Court vacated the portion of the judgment in which the trial court applied the reasoning from Jordan to the common law negligence claims and remanded for further proceedings.