



Missouri Court of Appeals

Southern District

Division One

UNITED FIRE & CASUALTY COMPANY,)

Plaintiff-Appellant,)

vs.)

ZACHARY HALL, RODNEY HALL,)
CAROLYN HALL, and CHASE HALL,)

Defendants-Respondents.)

No. SD34719

Filed: June 21, 2017

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Gayle L. Crane

AFFIRMED

United Fire & Casualty Company ("United Fire") appeals from the trial court's summary judgment for Zachary Hall ("Zachary"), Rodney Hall ("Rodney"), Chase Hall ("Chase"), and Carolyn Hall ("Carolyn") (collectively, "the Halls").¹ The summary judgment disposed of a declaratory judgment action in which United Fire sought a declaration that two homeowner's policies United Fire issued to Jeffrey Cox ("Jeffrey") did not provide coverage for injuries Zachary sustained in a boating accident. United Fire claims the trial court erred

¹ Because many of the parties share the same last name we refer to the parties by their first names to avoid confusion. No disrespect is intended.

in (1) granting summary judgment to the Halls because the owned-watercraft exclusion in the homeowner's liability insurance policy issued to United Fire's insured was ambiguous and (2) denying United Fire's own motion for summary judgment because the injuries arose from the use of an owned watercraft. The first claim is without merit, and the second claim is moot. The trial court's judgment is affirmed.

Factual and Procedural Background

A boating accident occurred on July 4, 2014, involving Zachary, his brother Chase, and Jeffrey's sons, Lucas Cox ("Lucas") and Jared Cox ("Jared").² At some point, Lucas started the boat's engine, and the propeller struck Zachary who was swimming nearby, severing Zachary's right foot. The Halls filed a petition against Jeffrey, Lucas, and Jared, alleging numerous causes of action.

At all times relevant to the resolution of the issues here, Jeffrey was the named insured on two homeowner's insurance policies, one umbrella policy, and one boat and motor insurance policy, all issued by United Fire. The two homeowner's insurance policies contained identical language, including, as relevant to the issues raised on appeal, an exclusion providing that there was no coverage for bodily injury or property damage arising out of the ownership,

² The facts regarding the events leading up to the injury and the precise nature of the allegations made in the petition are not included in United Fire's statement of uncontroverted material facts. However, "[a] statement of fact asserted in one party's brief and conceded as true in the opposing party's brief may be considered as though it appears in the record." ***New Madrid County v. St. John Levee & Drainage Dist.***, 436 S.W.3d 573, 574 n.2 (Mo. App. S.D. 2013) (quoting ***Rogers v. Hester ex rel. Mills***, 334 S.W.3d 528, 541 (Mo. App. S.D. 2010)). "Furthermore, this Court is authorized to decide appeals based on an agreed statement as the record on appeal." ***Id.*** Here, both parties discuss the petition in their briefs, and neither party disputes the factual contents of the petition. Thus, we include the facts stated in the petition to provide the context necessary to understand the claims raised on appeal.

maintenance, or use of a watercraft "*owned by* or rented to an 'insured'."³ (emphasis added). The Halls and the Coxes settled for the policy limits of the umbrella insurance policy and the policy limits of the boat and motor insurance policy. In consideration of payments received in that settlement, the Halls released Jeffrey, Lucas, and Jared from the claims alleged in the petition. The Halls agreed to seek recovery from United Fire alone under the two homeowner's insurance policies.

United Fire thereafter filed a petition for declaratory judgment, requesting the trial court to enter an order stating there was no coverage under the two homeowner's policies for the injuries alleged in the Halls' petition because those injuries were covered by the owned-watercraft exclusion. United Fire and the Halls filed cross-motions for summary judgment in the declaratory judgment action. In addition to the facts previously stated, United Fire's statement of uncontroverted material facts included these facts: The boat involved in the accident was a 26-foot motor craft titled in the name of the Jeffrey L. Cox Living Trust ("the trust").⁴ Jeffrey was a grantor, the sole trustee, and a beneficiary of

³ The full text of that exclusion stated that coverage for personal liability did not apply to bodily injury or property damage:

Arising out of:

- 1) The ownership, maintenance, use, loading or unloading of an excluded watercraft described below;
- 2) The entrustment by an "insured" of an excluded watercraft described below to any person; or
- 3) Vicarious liability, whether or not statutorily imposed, for actions of a child or minor using an excluded watercraft described below.

Excluded watercraft are those that are principally designed to be propelled by engine power or electric motor, or are sailing vessels, whether owned by or rented to an "insured".

⁴ We acknowledge, as the parties did at oral argument, that "a trust is not a legal entity" capable of owning property. See, e.g., ***Sunbelt Environmental Services, Inc. v. Rieder's Jiffy Market, Inc.***, 138 S.W.3d 130, 134 (Mo. App. S.D. 2004). We use the term "titled" here because that is the language the parties employed in their statements of uncontroverted material facts.

the trust. Lucas and Jared would become beneficiaries of the trust upon Jeffrey's death.

The trial court found the owned-watercraft exclusion cited by United Fire was ambiguous, construed the exclusion in the manner most favorable to the insureds, granted the Halls' motion for summary judgment, and then denied United Fire's motion for summary judgment. United Fire appeals.

Standard of Review

"Whether summary judgment is proper is an issue of law that this Court reviews de novo." ***Manner v. Schiermeier***, 393 S.W.3d 58, 61-62 (Mo. banc 2013). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." ***Farmers Ins. Co., Inc. v. Wilson***, 424 S.W.3d 487, 491 (Mo. App. S.D. 2014). "Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." ***Maxam v. American Family Mut. Ins. Co.***, 504 S.W.3d 124, 126 (Mo. App. W.D. 2016). "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." ***Farmers***, 424 S.W.3d at 491. "The Court reviews the record in the light most favorable to the party against whom judgment was entered without deference to the trial court's findings, and accords the non-movant 'the benefit of all reasonable inferences from the record.'" ***Manner***, 393 S.W.3d at 62 (quoting ***ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 376 (Mo. banc 1993)).

Point One: Owned-Watercraft Exclusion

In its first point, United Fire claims the trial court erred in granting summary judgment to the Halls because "the uncontroverted facts established that an insured owned the watercraft that was involved in the accident[.]" This argument fails because the term "owned by" as used in the exclusion was ambiguous.

The most recent Missouri Supreme Court case considering the interpretation of an owned-vehicle exclusion in an insurance contract is **Manner**. In that case, the Court began with the general rule that "[t]he burden of showing that an exclusion to coverage applies is on the insurer" and also noted that Missouri "*strictly* construes exclusionary clauses against the drafter[.]" **Manner**, 393 S.W.3d at 62 (quoting **Burns v. Smith**, 303 S.W.3d 505, 510 (Mo. banc 2010)). The Court also applied the well-known rule that where a term is not defined in a policy, the term "will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy." **Id.** (quoting **Krombach v. Mayflower Ins. Co., Ltd.**, 827 S.W.2d 208, 210 (Mo. banc 1992)). The Court then reasoned that because there are many dictionary definitions of the terms "owner" and "owned" the terms were ambiguous. **Id.** at 62-63. As a result, the Court noted the policy did not define the term "owned," interpreted the term in favor of the insured, and found that an owned-vehicle exclusion did not apply where the insured was riding a motorcycle which he possessed and had agreed to buy, but to which he did not yet have record title. **Id.** at 63.

Here, similarly, the two homeowner's policies did not define the term "owned by." Moreover, this case involved titled property which was subject to the terms of a trust. Under those circumstances there is a distinction between ownership in an individual capacity and ownership as trustee. *See Moore v. Moore*, 111 S.W.3d 530, 533 (Mo. App. S.D. 2003) ("The fundamental nature of a trust is the division of title; the trustee being the holder of legal title and the beneficiary that of equitable title."). Thus, under the facts of this case, where the policy documents do not define the term "owned by" and there is a separation of the rights of the individuals by virtue of the trust, the term "owned by" is ambiguous. Where policy language is ambiguous, the language must be interpreted in favor of the insured. *Manner*, 393 S.W.3d at 63.

As the Court in *Manner* noted, "the meaning of 'owned' may vary in particular circumstances[.]" *Id.* at 63. Among those various meanings, owned may mean possession of legal title or "the power to 'voluntarily destroy, encumber, sell, or otherwise dispose' of the property[.]" *Id.* Because the language is ambiguous, we must apply the definition which is more favorable to the insured.

Both of the legal definitions quoted above are more favorable to the insureds in this case. First, Jeffrey did not hold legal title to the boat in his individual capacity. Instead, legal title to the boat was held by Jeffrey in his capacity as trustee. *See Sunbelt Env. Services*, 138 S.W.3d at 134 ("the trustee is the legal owner of the trust property"). Second, because of the existence of the

trust,⁵ he did not retain other fundamental incidents of independent ownership, such as "the power to 'voluntarily destroy, encumber, sell, or otherwise dispose' of the property[.]" **Manner**, 393 S.W.3d at 63 (quoting **Lightner**, 789 S.W.2d at 490)). Jeffrey's powers to dispose of the property were limited by law and by the presumed terms of the trust. See § 456.8-801, RSMo Cum. Supp. (2013). In light of the ambiguity of the term "owned by" as used in the policy, the division of interests and the limitations imposed on the trustee must be interpreted in favor of the insured. See **Manner**, 393 S.W.3d at 63 ("any ambiguity will be interpreted in favor of the insured."). In this case, these limitations must be interpreted as showing the insureds did not own the boat (as the term "owned by" is used in the policy) so that the exclusion does not apply and the policy affords coverage.

To support its argument to the contrary, United Fire cites cases providing alternate definitions of "owner," suggesting that "owner" is synonymous with possessor. The problem with this argument is that there are also other definitions which are more favorable to the insureds, and, since there is an ambiguity, this Court must apply the definition most favorable to the insured. See **Farmers**, 424 S.W.3d at 492.

⁵ The trust document was not provided as an exhibit in support of the motion for summary judgment and has not been provided to us as part of the record on appeal. It is the insurer's burden to prove an exclusion to coverage applies. **Manner**, 393 S.W.3d at 62. Moreover, "[a]n exhibit omitted from the record on appeal may be treated by an appellate court either as immaterial to the issues presented or as supporting the judgment of the trial court." **In re Jones**, 420 S.W.3d 605, 610 (Mo. App. S.D. 2013) (quoting **Christian Health Care of Springfield West Park, Inc. v. Little**, 145 S.W.3d 44, 51 (Mo. App. S.D. 2004)). Accordingly, we infer the trust document contained provisions placing such limitations on the trustee.

The term "owned by" is not defined in the policy and it has multiple possible meanings. The trial court did not err in finding an ambiguity and construing that ambiguity in favor of finding coverage. Point One is denied.

Point Two: Concurrent Proximate Cause Rule

In its second point, United Fire argues the trial court erred in denying its motion for summary judgment. In analyzing this point, the parties primarily dispute the application of the concurrent proximate cause rule. The Halls raised the concurrent proximate cause rule below as an alternative argument in case the trial court found the boat was "owned by" an insured. Since we have found the trial court did not err in determining the boat was not "owned by" an insured, the parties' arguments regarding this doctrine are moot. *See Armbruster v. Mercy Medical Group*, 465 S.W.3d 67, 73 (Mo. App. E.D. 2015); *Dale v. Rahn*, 330 S.W.3d 107, 112 (Mo. App. S.D. 2010). Consequently, we need not address this point.

Decision

The trial court's judgment is affirmed.

MARY W. SHEFFIELD, C.J. – OPINION AUTHOR

JEFFREY W. BATES, P.J. – CONCURS

DON E. BURRELL, J. – CONCURS