

Summary of SC93502, *Ken Allen, Janet Allen and Franklin Quick Cash LLC v. Continental Western Insurance Company*

Appeal from the Franklin County circuit court, Judge John B. Berkemeyer

Argued and submitted April 2, 2014; opinion issued May 27, 2014

Attorneys: Continental was represented by Bethany K. Culp, Yvette Boutaugh and Christopher M. Garcia of Hinshaw & Culbertson LLP in St. Louis, (314) 241-2600; the Allens and Franklin Quick Cash were represented by Bradley H. Lockenvitz, an attorney in Columbia, (573) 280-8365, and Frederick H. Schwetye of the Frederick H. Schwetye Law Offices LLC, (636) 583-3800.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: An insurance company appeals a judgment finding it had a duty to defend a lending company, which intentionally but incorrectly repossessed a vehicle, against a lawsuit filed by the vehicle's owner. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri reverses the judgment. The circuit court erred in finding the insurer had a duty to defend the company that made the repossession. Because the company intended to repossess the vehicle, there was no potential for coverage under the policy at the outset of the vehicle owner's suit. Judgment is entered in favor of the insurer.

Facts: Stephanie Whipple sued Franklin Quick Cash LLC, a payday and title lending company, claiming it unlawfully took possession of her vehicle on two separate occasions. Franklin asked Continental Western Insurance Company, from whom it had purchased a commercial general liability insurance policy, to defend Franklin in the Whipple suit. Continental declined to do so after determining the policy's exclusion for "expected or intended" acts precluded coverage for Franklin's intentional repossession of Whipple's vehicle. Whipple then amended her petition. Franklin again asked Continental to provide a defense, but Continental again declined to do so. The underlying suit against Franklin still is pending. In the meantime, Franklin sued Continental, claiming wrongful refusal to defend. The court entered judgment in favor of Franklin, finding Continental owed Franklin a duty to defend and ordering Continental to pay Franklin's costs of litigating the Whipple suit and this suit. Continental appeals.

REVERSED AND JUDGMENT IS ENTERED FOR CONTINENTAL WESTERN INSURANCE COMPANY PURSUANT TO RULE 84.14.

Court en banc holds: The circuit court erred in finding Continental had a duty to defend Franklin. An insurer's duty to defend arises only from potential coverage under the policy based on facts that are alleged in the petition or that are known by or reasonably apparent to the insurer at the outset of the case. There was no potential for coverage, however, under Franklin's policy with Continental at the outset of Whipple's case. Even considering facts outside the petition that Continental would have known at the outset of that case – that Franklin made a mistake about either Whipple's default or the validity of its security interest in her vehicle – there was no potential for coverage under the policy. When an insurance policy's language is unambiguous, it

must be enforced as written. The policy Franklin had with Continental explicitly provides coverage for accidental property damage, which includes loss of use of the property, but explicitly states that the insurance “does not apply to ... ‘property damage’ expected or intended from the standpoint of the insured.” This exclusion unambiguously bars coverage because, regardless of whether it was mistaken in doing so, Franklin intended to repossess Whipple’s vehicle and the resulting harm that is the subject of her lawsuit – the loss of her vehicle. Further, Franklin admits in its filings with the circuit court that Whipple’s claim is based on Franklin’s intentional exercise of control over her vehicle. Because Franklin intended to repossess the vehicle, there was no potential for coverage under the policy at the outset of the Whipple suit because the policy plainly barred coverage. Rule 84.14 directs this Court to make final disposition of the case, giving the judgment that ought to be given. Judgment, therefore, is entered in favor of Continental.