



Missouri Court of Appeals
Southern District

Division Two

ERIC D. BURNS,)
)
Petitioner - Respondent,)
)
vs.)
)
LYNN M. SMITH,)
)
Defendant,)
)
and)
)
FARMERS ALLIANCE MUTUAL)
INSURANCE COMPANY OF)
KANSAS,)
)
Respondent - Garnishee - Appellant.)

No. SD29217

Opinion Filed:
February 17, 2009

APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY

Honorable James K. Journey, Circuit Judge

REVERSED AND REMANDED

Farmers Insurance Company ("Farmers") appeals from the trial court's finding that its policy issued to Lynn Smith ("Insured") provided Insured with personal liability coverage for a claim brought against Insured by his co-worker, Eric Burns ("Burns"), for a bodily injury Burns suffered as a result of Insured's negligence at work. The trial court concluded that Farmers' "business pursuits" exclusion applied only to bar coverage for business

activities the Insured was engaging in while located on his insured premises. Because we find the language of the policy exclusion clearly and unambiguously excludes coverage for business activities engaged in either on or off the insured premises, we reverse.

I. Facts and Procedural Background

The material facts are not in dispute. Burns was employed as a concrete-mixer truck driver by Kennon Ready-Mix, Inc. ("Kennon"). Insured was Burns's supervisor. While working for Kennon, at its place of business, Insured placed a weld on a salvage water pressure tank over an area that had become corroded and was rusted-through.

Approximately a month or two later, the water pressure tank exploded as a result of the weld, injuring Burns. Burns recovered workers compensation benefits from Kennon and also filed a separate negligence suit against Insured. Insured and Burns entered into an agreement whereby they waived a trial by jury and agreed (pursuant to section 537.065¹) that if Burns recovered a judgment against Insured, Burns would limit his recovery to the policy limits of any applicable insurance. The case was tried to the court without a jury, and Burns was awarded damages in excess of two million dollars plus pre and post-judgment interest in a judgment that was ultimately affirmed on appeal ("the underlying judgment").²

The case now before us is an equitable garnishment action Burns thereafter filed in an attempt to collect the underlying judgment from two of Insured's insurance providers: Oak River Insurance Company ("Oak River"), based on an automobile and personal liability policy, and Farmers, pursuant to a "farmowners-ranchowners policy" it had issued to Insured ("the policy"). Burns eventually settled his claim against Oak River for \$675,000.

¹Unless otherwise indicated, all references to statutes are to RSMo 2000.

² *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007).

The personal liability coverage portion of the farmowners policy agreed "to pay . . . all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence." The policy also contains provisions that exclude coverage under certain circumstances. The applicable policy exclusion in this case provides, in pertinent part, that "[t]his policy does not apply: . . . to bodily injury or property damage arising out of business pursuits of any Insured except activities therein which are ordinarily incident to non-business pursuits or farming."

The term "business pursuits" is not defined in the policy. The word "business," however, is defined under the "general conditions" of the policy to mean: "(1) a trade, profession or occupation, excluding farming, and the use of any premises or portion of residence premises for any such purposes; and (2) the rental or holding for rental of the whole or any portion of the premises by any Insured."³ The policy also provided coverage for both pre and post-judgment interest.

Farmers and Burns each filed motions for summary judgment, and the trial court issued its judgment holding Farmers liable for its policy limits, plus the entire amount of pre and post-judgment interest awarded in the underlying judgment. Farmers now appeals, alleging two points of error. First, that the trial court erred in entering judgment for Burns because coverage for the claim was barred by the policy's "business pursuits" exclusion. Second, that the trial court erred in calculating the amount of pre and post-judgment interest owed by Farmers. Because we find Farmers' first point to have merit, Point II is moot and we do not address it.

³ The policy also describes four activities "business" shall not include; none of which are applicable to this case.

II. Standard of Review

In determining whether a trial court has properly granted summary judgment, we review the matter *de novo* and give no deference to the trial court's decision. *City of Springfield v. Gee*, 149 S.W.3d 609, 612 (Mo. App. S.D. 2004); *Murphy v. Jackson Nat'l Life Ins. Co.*, 83 S.W.3d 663, 665 (Mo. App. S.D. 2002). We employ the same criteria the trial court should have used in deciding whether to grant the motion. *Barekman v. City of Republic*, 232 S.W.3d 675, 677 (Mo. App. S.D. 2007) (citing *Stormer v. Richfield Hosp. Serv., Inc.*, 60 S.W.3d 10, 12 (Mo. App. E.D. 2001)). The interpretation of an insurance policy is also a question of law that is determined *de novo*. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007).

III. Discussion

In general, "an insurance policy is a contract to afford protection to an insured and will be interpreted, if reasonably possible, to provide coverage." *Gibbs v. Nat'l Gen. Ins. Co.*, 938 S.W.2d 600, 605 (Mo. App. S.D. 1997). "Exclusionary clauses in insurance contracts are to be strictly construed against the author thereof and if they are ambiguous, courts are compelled to adopt a construction favorable to the insured." *McRaven v. F-Stop Photo Labs, Inc.*, 660 S.W.2d 459, 462 (Mo. App. S.D. 1983). "Absent an ambiguity, an insurance policy must be enforced according to its terms." *Seeck*, 212 S.W.3d at 132. "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Id.* (quoting *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. banc 1997)). If an insurer seeks to deny coverage based on a policy exclusion, the burden of

establishing that the exclusion applies lies with the insurer. *Am. Family Mut. Ins. Co. v. Arnold Muffler, Inc.*, 21 S.W.3d 881, 883 (Mo. App. E.D. 2000).

"Insurance policies must be considered as a whole and reasonably interpreted so as to be consistent with the apparent object and intent of the parties thereto." *McRaven*, 660 S.W.2d at 462. In construing the terms of an insurance policy, we apply the meaning that an ordinary person of average understanding would apply to the policy. *Seeck*, 212 S.W.3d at 132. If, however, a term is defined in an insurance policy, we must use the policy's definition. *Mo. Employers Mut. Ins. Co. v. Nichols*, 149 S.W.3d 617, 625 (Mo. App. W.D. 2004).

In *Dieckman v. Moran*, 414 S.W.2d 320 (Mo. banc 1967), our Supreme Court held that a policy provision which excluded coverage "as to business pursuits of an insured and activities therein which are 'ordinarily incident to non-business pursuits'" and defining "business" as including "trade, profession or occupation" to be unambiguous because the intent was clear: "business pursuits of the insured are excluded, except activities therein which are ordinarily incident to non-business pursuits." *Id.* at 321-22.

Here, the policy exclusion language provides that coverage does not apply "to bodily injury or property damage arising out of business pursuits of any insured except activities therein which are ordinarily incident to non-business pursuits or farming." If the farmowners policy in the instant case had simply ended its definition of "business" with "trade, profession or occupation," like the policy in *Dieckman*, we would find the policy exclusions sufficiently similar to summarily end the matter in favor of Farmers. We are faced, however, with whether the additional terms -- "and the use of any premises or portion

of residence premises for any such purposes; and (2)" -- added to the definition of "business" make this particular policy exclusion ambiguous.

The crux of the matter lies in determining what the ordinary person of average understanding would believe the word "and" to mean as it is used in the policy's definition of "business." The definition urged by Burns is one familiar to those whose daily tools are those of law and logic: "a logical operator that requires both of two inputs to be present or two conditions to be met for an output to be made or a statement to be executed."

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 46 (Frederick C. Mish ed., 11th ed. 2005). On the other hand, the definition of "and" suggested by Farmers is: "as well as," "in addition to," or other similar phrases which 1) indicate a connection or addition of items within the same class or type; or 2) indicate a supplementary explanation. *See Id.*

The trial court applied the logical conjunctive definition suggested by Burns (requiring both of two conditions to be met) and concluded that for the exclusion to apply the occurrence not only required 1) a trade, profession, or occupation, excluding farming, but also required 2) "the use of the [insured] residence premises for any such purposes." This interpretation is problematic for at least three reasons. First, it ignores the second "and" in the definition of business. Second, it construes "any premises or portion of residence premises" to mean only "[insured] residence premises." And third, it produces an *unreasonable* meaning of "business" in the context of this policy.

A. The Second "And"

As earlier noted, the policy defines the term "business" as: "(1) a trade, profession or occupation, excluding farming, *and* the use of any premises or portion of residence premises for any such purposes; *and* (2) the rental or holding for rental of the whole or any portion of

the premises by any Insured." (Emphasis added). In his attempt to support the trial court's definition of "and," Burns's brief conveniently changes the definition's semi-colon to a period and simply ignores the remainder of the sentence.⁴

Consistently applying Burns's proposed definition of "and" (as a logical conjunctive) in the policy's definition of "business" would result in "business" occurring only when the insured is engaging in: 1) a trade, profession or occupation (excluding farming); AND doing so upon the insured premises; AND while renting (or holding out for rent) the insured premises;⁵ an extremely restrictive definition.

B. "Premises" v. "Portion of Residence Premises"

We also believe the trial court erred by substituting the "[insured] residence premises" for "the use of *any* premises or portion of residence premises." (emphasis added). "Premises" is not defined in the policy, but "Insured premises" and "residence premises" are defined terms.⁶ Both terms appear to mean what we think an ordinary person of average understanding would believe them to mean in the context of a farmowners policy: "insured premises" means the farm, including the residence premises, and "residence premises" is a one or two family dwelling or any other building occupied as a residence excluding any portion used for business purposes. The ordinary definition of "premises" is "a tract or land

⁴ We trust that this revised construct of the definition is simply the result of over-zealous advocacy and not an intentional attempt to mislead the Court.

⁵ There is no evidence to indicate that Insured was either renting his farm or holding it out for rent at the time he was making the weld at issue in the underlying case.

⁶ "[I]nsured premises' means (1) the farm premises (including grounds and private approaches thereto) and the residence premises described in the Declarations of this policy; and (2) Under Section II only: (a) any other residence premises specifically named in the policy; (b) any farm premises (including grounds and private approaches thereto) and residence premises acquired by the Named Insured or his spouse during the term of this policy; (c) any residence premises which are not owned by any Insured but where an Insured may be temporarily residing; (d) vacant land owned by or rented to any Insured; and (e) individual or family cemetery plots or burial vaults."

"[R]esidence premises' means (1) a one or two family dwelling building, appurtenant structures, grounds and private approaches thereto; or (2) that portion of any other building occupied as a residence; provided that such premises is used as a private residence by the Named Insured or his spouse but excluding any portion of the premises used for business purposes."

with the buildings thereon" or "a building or part of a building [usually] with its appurtenances (as grounds)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 980 (Frederick C. Mish ed., 11th ed. 2005).

No matter which of these definitions of "premises" is chosen, we believe that based upon the definitions provided in the policy, an ordinary person of average understanding would interpret "any premises" as used in the policy's definition of "business" as "a trade, profession, or occupation, excluding farming, and the use of *any premises or* portion of residence premises for any such purpose" to mean *any and every* premises, not just the "[insured] residence premises." (Emphasis added). Otherwise, the words "premises or" become irrelevant and the definition would just read "and the use of any . . . portion of residence premises." The fact that "residence premises" is defined to exclude "any portion of the premises used for business purposes" provides further support for the notion that liability coverage for "business purposes" was not intended to be included in this farmowners policy.

C. Only one reasonable interpretation

Finally, if Burns's definition of "and" were adopted it would lead to an absurd result: Insured would be afforded coverage for all of his business activities conducted anywhere in the world *except* on his premises -- the very premises he paid to insure. Under this reading, Insured must be found to have reasonably believed that by purchasing the farmowner's policy he was providing himself with liability coverage for both his personal activities on the farm and for all of his business activities *except* when those business activities were being pursued on his farm. This goes against the concept that people generally separate their business and personal activities for insurance purposes. *See* STEVEN PLITT ET AL.,

COUCH ON INSURANCE § 128:12 (3d ed. 2006) ("People characteristically separate their business activities from their personal activities, and, therefore, business pursuits coverage is not essential for their homeowners' or farmowners' coverage and is excluded to keep premium rates at a reasonable level.").⁷

When examining the context of the entire policy and the complete sentence defining "business," it becomes clear that the plain meaning of the first "and" is to provide a supplementary "parenthetical-like" explanation of the phrase that precedes it while the second "and" means "in addition to" for the purpose of setting forth another activity that would also qualify as a "business" activity. Because Insured's performing of the weld constituted a "business activity," coverage for the event was excluded by the unambiguous terms of the farmowners policy, and the judgment of the trial court is reversed. The case is remanded for further proceedings consistent with this opinion.

Don E. Burrell, Presiding Judge

Lynch, C.J. - Concur

Parrish, J. - Concur

Deborah K. Dodge, of Springfield, MO for Appellant

Paul L. Redfearn III, of Kansas City, MO for Respondent

Division II

⁷ It would also be contrary to Insured's actual belief, as set forth in his sworn affidavit, that he "did not intend for [Farmers] to provide coverage for any incidents arising from [Insured's] separate business pursuit of [Kennon]."