COMMONWEALTH OF KENTUCK
KENTUCKY SUPREME COURT
NO. 2023-SC-0239

MOTORISTS MUTUAL INSURANCE COMPANY, Movant

v.

FIRST SPECIALTY INSURANCE CORPORATION, Respondent.

BRIEF OF APPELLEE FIRST SPECIALTY INSURANCE CORPORATION

On Discretionary Review From The Court of Appeals

CASE NO. 2022-CA-0385

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Certificate of Service

I hereby certify that a true copy of the herein Response to Motorists Mutual Insurance Company's Motion for Discretionary Review has been served by first class mail, postage prepaid, upon Michelle L. Burden, Garvey Shearer Nordstrom PSC, 2388 Grandview Dr., Ft. Mitchell, KY 41017; Michael D. Risley and Bethany A. Breetz, Stites & Harbison, PLLC, 400 W. Market St., Ste 1800, Louisville, KY 40202-3352; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 on this day of January, 2024.

/s/ *J. Philip Fraley*
J. Philip Fraley

INTRODUCTION

This case involves a "priority of coverage" dispute between First Specialty Insurance Corporation ("FSIC") as the commercial general liability insurer of property owner Whispering Brook Acquisitions LLC (Whispering Brook") whose policy contained a non-owned auto endorsement, and Motorists Mutual Insurance Company ("MMIC") as the business auto insurer of property manager Alltrade Service Solutions LLC ("Alltrade").

This action was instituted by the parents of Tyshawn Nuby as a wrongful death action because of an accident in which an employee of Alltrade driving his own truck and towing a trailer collided with Tyshawn Nuby, causing his death. The parents sued both Whispering Brook and Alltrade in this action (the parent's claim is referred to herein as the "Underlying Action").

Subsequently, MMIC intervened in this action and brought an intervenor complaint against FSIC. Ultimately, both MMIC and FSIC reached a settlement with the parents, in which FSIC reserved the right to recoup its payment from MMIC based on FSIC's alleged status as excess and MMIC's alleged status as primary. MMIC alleged that FSIC was primary, or at a minimum, MMIC and FSIC were co-primary with a mutual duty to defend. MMIC sought recoupment of fifty percent of its incurred defense costs. With

the parents' cause of action settled, the intervenor action proceeded forward upon cross-motions for summary judgment.

The trial court granted summary judgment in favor of MMIC and against FSIC, ruling that the two insurers were co-primary. The results of that ruling were (1) that FSIC could not recoup its settlement payment from MMIC, and (2) that MMIC could recoup fifty percent of its incurred defense costs from FSIC.

FSIC appealed the trial court's ruling to the Court of Appeals. In its opinion, the court affirmed the trial court as to the insured status of Alltrade and its employees, but reversed the trial court's ruling that the insurers were co-primary, finding that FSIC was excess. As a result, FSIC did not owe MMIC fifty percent of its defense costs.

MMIC then filed a petition for discretionary review to this Court, which has been granted. In MMIC's brief, it makes three arguments comprised of seven argument sections, several of which were not made below or preserved on appeal. As shown herein, MMIC's arguments lack merit. Therefore, this Court should not disturb the Court of Appeals decision.

STATEMENT CONCERNING ORAL ARGUMENT

FSIC does not believe that oral argument is necessary in this case. But, if this Court grants MMIC's request for a "discussion," FSIC requests equal time with MMIC.

ARGUMENT

ARGUMENT

I. This Court Should Not Reverse The Court Of Appeals Based On The Whispering Brook/Alltrade Service Agreement.

As an initial matter, MMIC's argument that this Court should reverse the Court of Appeals ruling based on the Whispering Brook/Alltrade Service Agreement must be rejected, as the argument was not preserved on appeal. Second, MMIC misstates the terms of the Service Agreement.

A. MMIC did not raise this argument in the Court of Appeals.

As noted in MMIC's Brief:

> Finally, the trial court rejected Motorist Mutual's argument that the Service Agreement called for the First Specialty policy to provide primary coverage and the Motorist Mutual policy only excess coverage, holding that "First Specialty's assumption of Whispering Brook's contractual liability under its service agreement with Alltrade has no effect on the issue of priority of coverage."

MMIC Brief, at pp. 8-9.

MMIC did not appeal the trial court's ruling. Only FSIC filed an appeal to the Court of Appeals. MMIC's improper attempt to get a second bite of the apple in this Court after it failed to preserve this issue on appeal must be rejected.

B. The Service Agreement does not call for FSIC's policy to be Primary and MMIC's policy to be excess.

Assuming *arguendo* that this Court might consider MMIC's non-preserved argument, the argument must be rejected nevertheless, because MMIC misstates the terms of the Service Agreement.

The Service Agreement provided in relevant part as follows:

> 5.1 **Owner's Insurance.** Owner … will obtain and keep in force adequate insurance. … Owner shall defend and indemnify Alltrade harmless from any liability on account of the loss, damage, or injury arising out of the operation and/or management of the property.
>
> 5.2 **Owner's Insurance.** … Owner shall add Alltrade Service Solutions as an additional insured on each insurance policy related to the Property.

There is no statement anywhere in the above provisions that FSIC's policy will be primary and MMIC's policy will be excess. There is only MMIC's elaborate interpretation.

In addition, MMIC failed to provide to this Court (1) any finding by any court that Whispering Brook owed Alltrade defense and indemnity in connection with the Underlying Action, or (2) any evidence that Whispering Brook added Alltrade as an additional insured. Alltrade qualified as an "insured" under the FSIC policy, but it was not an "additional insured."

Importantly, MMIC misstates the terms of the Service Agreement. More importantly, as stated above, MMIC failed to preserve this argument because it did not appeal the trial court's ruling. Therefore, MMIC's first argument section must be rejected.

II. The Court of Appeals Did Not Err In Finding FSIC's "Other Insurance" Clause To Be A Non-Standard Escape Clause.

In its second argument section, MMIC relies heavily on *Kentucky Farm Bureau v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803 (Ky. 2010). MMIC Brief at pp. 15, 16, 20, 21-25 for the proposition that the policies' respective "other insurance" provisions should be deemed "mutually repugnant." But at the same time, MMIC states that *Shelter* was decided based on a non-traditional, "different approach" than under prior Kentucky case law "as mandated by the spirit and intent of the MVRA." MMIC Brief, p. 16, fn7.

Further, MMIC concedes that under the circumstances of the instant case, "the MVRA is not implicated and deciding the interplay between the competing coverages cannot be based on the mandates of the MVRA." *Id.* Therefore, MMIC has effectively conceded that *Shelter* is inapposite.

It should also be pointed out that although MMIC's policy is a business auto policy potentially subject to the mandates of the MVRA, the FSIC policy is a commercial general liability policy, which contained a Non-Owned Auto endorsement providing additional coverage at no additional premium whatsoever. *See* Non-Owned Auto endorsement, attached hereto as **Appendix 1**.

MMIC relies on *Shelter's* restatement of Kentucky's "traditional approach," where the court stated:

> Under this approach, the court must first examine each policy. If, after examining the relevant clauses in each policy, the two policies are indistinguishable in meaning and intent, [and] one cannot rationally choose between them [they are held] to be mutually repugnant and must be disregarded.

Shelter, 326 S.W.3d at 807; MMIC Brief at p. 15.

Under Kentucky's "traditional approach" as stated in *Shelter* and the prior Court of Appeals decisions discussed below, two "other insurance" clauses can only be found mutually repugnant if the clauses are "indistinguishable in meaning and intent." MMIC does not even attempt to explain how the two "other insurance" clauses are indistinguishable. To the contrary, MMIC states:

> The First Specialty policy says its coverage is primary, except that it will be excess over any other insurance, whether primary, excess, contingent or any other basis. …
>
> The Motorists Mutual policy says its non-owned auto coverage is excess over any other collectible insurance.

MMIC Brief at p. 20.

The two clauses are clearly not "indistinguishable." The MMIC policy says that for non-owned autos it is excess "over any other collectible insurance," whereas the FSIC policy says it is excess "over any other insurance, whether primary, excess, contingent or any other basis." Thus,

whereas MMIC's clause contains a general statement that it is excess, FSIC's clause is very specific in that it anticipates all other specific types of insurance policies. Kentucky's "traditional approach" as stated in the cases relied upon by MMIC support FSIC's position and the Court of Appeals' decision in the instant action.

The Court of Appeals decision in the instant action is informed by its prior decisions in *GEICO v. Globe Indem. Co.*, 415 S.W. 2d 581(Ky. App. 1967), and *Empire Fire and Marine Ins. Co. v. Haddix*, 927 S.W.2d 843 (Ky. App. 1996). It is through the prism of *GEICO* and *Haddix* that this Court should determine the correctness of the Court of Appeals' decision in this case.

Importantly, Motorists Mutual does not argue that *GEICO* was wrongly decided. Therefore Motorists Mutual does not challenge the reasoning of the Court of Appeals in *GEICO*. where the court stated:

> The driver's policy contained what is known as an "excess insurance" clause. In substance, it provided that in case of a loss arising out of use by the insured of a nonowned automobile the policy would be "excess insurance over any other valid and collectible insurance."
>
> The owner's policy also contained an "excess insurance" clause. However, by an endorsement, it contained in addition an "escape" clause which provided in effect that the policy would not cover a person other than the named insured and his employees, if other valid and collectible insurance, "either primary or excess" was available to such person.
> ***
> The **distinguishing feature** of the owner's policy in the instant case is that its "escape" clause is not standard; it denies liability if other

> insurance, whether primary or excess, is available to the driver. This means that the owner's insurer anticipated the possibility of the existence of an "excess insurance" clause in the driver's insurance policy, and expressly contracted against liability in that situation.

GEICO, 415 S.W. 2d at 582 (emphasis added).

In finding that the owner's policy was not liable, the *GEICO* court did not apply the "mutually repugnant" approach, because the court found the two excess clauses to be distinguishable.

The instant action involves the same circumstances as in *GEICO*. MMIC's clause provides that it is excess "over any other collectible insurance." MMIC Brief at p. 6. FSIC's clause provides that it is excess over any of the other insurance, whether primary, excess, contingent or any other basis." *Id*. Therefore, unless *GEICO* was wrongly decided, the Court of Appeals' decision in the instant action was correctly decided. And, as stated above, MMIC does not argue that *GEICO* was wrongly decided.

Although MMIC argues that the decision in *Haddix* was "flawed," that decision was consistent with *GEICO*, which MMIC does not contend was "flawed." *Haddix* involved nearly identical language from a substantive perspective. As the court noted:

> Haddix's automobile insurance policy contained the following clause: … However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.
> ***

> The Empire policy contained the following clause: … For any covered "auto," the insurance provided by this policy is excess over any other collectible insurance … whether such insurance … is primary, excess, or contingent.

Haddix, 827 S.W.2d at 845.

In finding that the Empire policy was excess over Haddix's policy, the *Haddix* court merely followed *GEICO*. Therefore, MMIC's argument that *Haddix* was "flawed" while not arguing that *GEICO* was "flawed" lacks any merit whatsoever.

There is no contrary opinion from the Court of Appeals on this issue. In other words, the application of the policies' respective "other insurance" clauses in the instant action is the same application that has been employed by that court for well over 50 years.

There is also no conflict presented by federal court decisions applying Kentucky law. The United States Sixth Circuit Court of Appeals relied on *GEICO* and *Haddix* in *Great American Assurance Co. v. American Cas. Co. of Reading, PA*, 511 Fed. Appx. 431 (6th Cir. 2013), where that court stated:

> Kentucky courts have **clearly** held that a non-standard escape clause prevails over an excess clause.

Id. at 437 (emphasis added). (Citations omitted). Likewise, no federal district court applying Kentucky law has disagreed with *GEICO* or *Haddix*.

Moreover, if the Sixth Circuit believed that Kentucky law was unclear, or that this Court might reach a different result if presented with the facts of its case, it could have certified the question to this Court. But it did not. Instead, it concluded that Kentucky law was clear as quoted above.

The gist of MMIC's argument throughout its second argument section is that the Court of Appeals decision in the instant case is "flawed" because it relied on *Haddix*, which is also "flawed." MMIC Brief at pp. 17-21. Its position is primarily based on *Shelter*, which it agrees was determined based on the meaning and intent of the MVRA, which MMIC concedes is inapplicable. Its position is secondarily based on Kentucky's "traditional approach," which is applied when competing "other insurance" clauses are "indistinguishable," which is clearly not the case in the instant action.

With respect to *Shelter*, a few points need to be made. First, *Shelter* discussed Kentucky's "two step" approach. The first step is to determine whether the two policies' excess clauses are "indistinguishable." If the court finds the policies to be distinguishable, the court then decides which is primary and which is excess. The second step only comes into play if the court finds the two clauses to be "indistinguishable," and therefore "mutually repugnant." *Shelter*, 326 S.W. 2d at 805-806.

Second, the two clauses in *Shelter* were as follows. Shelter's clause provided:

> If there is other insurance which covers the insured's liability with respect to a claim also covered by this policy, [liability] Coverages A and B of this policy will apply only as excess to such other insurance.

Farm Bureau's clause provided:

> Any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance or self-insurance whether primary, excess or contingent.

Id.

Thus, the first clause was an excess clause whereas the second was a non-standard escape clause, which this Court also referred to as an "excess over excess" clause. *Id.* In other words, the two competing clauses were substantively identical to the two competing clauses in both *GEICO* and *Haddix.*

Third, having noted the distinction between the two competing clauses in *Shelter*, and having noted that the Court of Appeals had found the two clauses "mutually repugnant," this Court reversed the Court of Appeals' decision. *Shelter,* 326 S.W. 3d at 805. Only after having made the above analysis, this Court then discussed the policies and intent of the MVRA and held that the insurer of the vehicle (Shelter) was primary. *Id.* at 805-806. As

stated above, in the instant action neither insurer insured the vehicle, which was owned and operated by Alltrade employee Tanzilla.

It is important to note that in *Shelter*, although this Court discussed perceived problems with respect to Kentucky's "two step" approach, *id.* at 807-810, it did not question or criticize either *GEICO* or *Haddix.* FSIC believes this is a significant point, especially in light of the fact that this Court did in fact overrule several other Court of Appeals decisions to the extent they were inconsistent with this Court' reasoning. *Shelter,* 326 S.W. 3d at 810-811.

FSIC believes that the Sixth Circuit Court of Appeals accurately stated the effect of *Shelter* in *Great American Ass. Co. v. American Cas. Co. of Reading, PA*, 511 Fed. Appx. 431 (6th Cir. 2013). In that case, Great American argued that in *Shelter* this Court "abrogated the distinction between standard and non-standard escape clauses … ." *Great American*, 511 Fed. Appx at 438. The Sixth Circuit stated that Great American was reading *Shelter* "far too broadly." *Id.* The court further stated:

> There is nothing in the [*Shelter*] opinion suggesting, as Great American urges, that it abrogated the distinction between standard and non-standard escape clauses… .

Great American. 511 Fed. Appx. At 439. FSIC contends that the Sixth Circuit was correct.

Finally, in the alternative to finding the FSIC and MMIC policies to be co-primary, MMIC requests that this Court find the FSC policy to be primary and the MMIC policy to be excess. MMIC Brief at 10-14, 28-31. MMIC made that argument to the trial court. However, the trial court ruled that the policies were co-primary. MMIC did not appeal the trial court's ruling. Therefore, MMIC is foreclosed from making that argument in this Court.

III. MMIC's "Other Relevant Considerations" Must Be Rejected.

MMIC argues that it "is fundamentally unfair for an insurer to be paid for primary coverage but then not provide primary coverage." MMIC Brief at 25, 26. That statement misses the point. MMIC was paid for primary business auto coverage. FSIC, on the other hand, was paid for primary commercial general liability coverage. The Non-Owned Auto endorsement provided additional coverage with no additional premium. *See* **Appendix 1.**

In the alternative, MMIC argues that a court can simply "ignore" the "other insurance" provisions. MMIC Brief at pp. 26-28. This is another novel argument that was not made below or preserved by MMIC. As such, this argument should be rejected.

Finally, MMIC makes six arguments as to why FSIC's coverage is, at a minimum, co-primary. First, it argues that FSIC was paid a primary premium for its coverage. MMIC Brief at p. 28-29. As stated above, however, FSIC

was paid a primary premium for commercial general liability coverage, and was not paid any premium for the additional Non-Owned Auto coverage.

Second, MMIC argues that it was not paid a primary premium for non-owned auto coverage. That is not quite accurate. MMIC was paid a primary premium for business auto coverage, albeit with an excess provision regarding non-owned autos.

Third, MMIC merely restates its previous argument re "drafting battles."

Fourth, MMIC argues that the Service Agreement makes FSIC's coverage primary. MMIC Brief at pp. 29, 30. As stated above, and aside from MMIC's interpretation of the Service Agreement being inaccurate, the trial court flatly rejected that argument, and MMIC did not appeal that ruling. Thus, that argument must also be rejected.

Fifth, MMIC argues that FSIC told its insureds that "if its policy provided coverage to those insureds, its coverage would be co-primary with the Motorists Mutual coverage. MMIC Brief at p. 30. MMIC argues that an insurer should not be allowed to "go back and take a diametrically opposite position. *Id.*

To agree with MMIC on this issue, this Court would necessarily have to find coverage by "waiver' or "estoppel." Although MMIC cited FSIC's

coverage letter below, MMIC never argued for coverage by waiver or estoppel below, and therefore, cannot make this argument for the first time in this Court.

Sixth, MMIC argues that FSIC "abdicated its duty to participate in the defense of" the Alltrade defendants. MMIC Brief at pp. 30, 31. That argument merely states MMIC's belief that the FSIC policy should provide primary, or co-primary, coverage, which argument was rejected by the Court of Appeals. This argument raised no issue not already raised in MMIC's previous argument sections.

CONCLUSION

For the reasons stated above, this Court should affirm the ruling of the Court of Appeals in the instant action.

Respectfully submitted,

/J. Philip Fraley/
J. Phillip Fraley

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