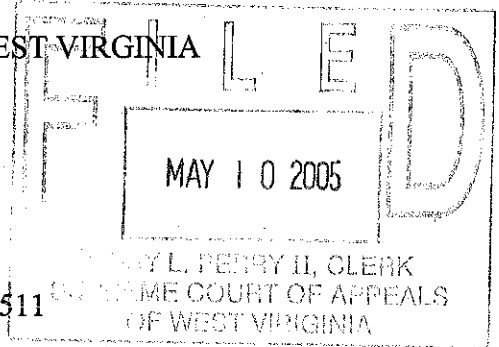


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JESSICA SATTERFIELD,

Plaintiff/Appellant

vs.

No. 32511

ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY,

Defendant/Appellee

APPELLANT'S REPLY BRIEF

APPEAL FROM THE AWARD OF SUMMARY JUDGMENT
GRANTED TO DEFENDANT/APPELLEE IN PLEASANTS COUNTY
CIVIL ACTION NO. 00-C-45

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COPY

REPLY BRIEF

Appellee attacks appellant's position in two ways. First, appellee, attempts to factually distinguish the cases cited by appellant. Second, disregarding the fact that intent of parties to an insurance contract can be gleaned from the text of policy, and not having established in the record what the intent of its insured was, appellee argues that the intent of its insured should be given effect over the clear and unambiguous terms of the subject Pioneer Commercial Auto Insurance Policy. In that appellee's purported distinctions are superficial and are of no consequence appellant will not address appellee's efforts to distinguish the cases cited by appellant. Similarly, appellant will not devote too much time addressing appellee's argument regarding the intent of the parties, other than to state that the most significant reference to the parties' intent can be gleaned from the clear and unambiguous grant of coverage set forth in the subject after acquired auto clause. As the United States Fourth Circuit Court of Appeals stated in *Carey v State Farm Mutual Insurance Company*, 367 F.2d 938, 941-942 (4th Cir. 1966), and as is echoed by the courts in the numerous other cases cited by appellant, "[t]he provision means what it says."

Appellee argues that the clear and unambiguous grant of coverage contained in the subject Pioneer Commercial Auto Insurance Policy is obliterated because the newly acquired car purchased by its insured was added to the declaration sheet of another policy. In making this argument, appellee ignores the fact that its policy imposes no such restriction of coverage. Appellee cites a host of cases from other jurisdictions in an attempt to support its claim, but a close reading of those cases, however, actually supports the position advanced by appellant.

Appellee asserts that a reading of the cases of *Hastings Mutual Insurance Company v. Clyne*, 87 Ohio App.3d 198, 621 N.E.2d 1355 (1993), and *Shelter Mutual Insurance Company v. Baker*, 753 S.W.2d 646 (Mo. App. 1988), will give one insight into the “purpose, basis and public policy considerations of the ‘newly acquired auto clause.’” Those cases actually support appellant’s argument that the clear and unambiguous terms of the subject policy should be given effect.

In *Hastings Mutual Insurance Company v. Clyne*, the policy expressly provided that there would be no coverage provided for a newly acquired auto if coverage was provided by another policy. *Hastings Mutual Insurance Company v. Clyne*, 87 Ohio App.3d at 204, 98, 621 N.E.2d at 1358-1359. Such a holding is important because, as stated by the Fourth Circuit in *Carey v State Farm Mutual Insurance Company*:

“[i]f the defendant intended to insure newly acquired automobiles only as long as no specific insurance was taken out to cover them, it could have stated this expressly. If, as defendant suggests, it is anomalous to have two policies covering the same automobile, specific language obviating this could have been included in the family policy. Indeed, the simple omission of the provision in question would have avoided all questions.”

Carey v State Farm Mutual Insurance Company, 367 F.2d 938, 941-942 (4th Cir. 1966).

In *Shelter Mutual Insurance Company v. Baker*, after agreeing that the “overwhelming weight of authority” holds that a newly acquired auto clause provides automatic coverage during the notice period, the court pointedly stated:

What Mr. Baker may have intended regarding coverage does not change the result. The express terms in a policy providing newly acquired automobile coverage apply and provide coverage within the notice period, notwithstanding the insureds’ intention that other insurance be acquired for

the vehicle by their sibling, *Dolan v. Welch*, 462 N.E.2d 794, 797-798 (Ill.App. 1884), or the insured's intention not to insure the newly acquired automobile, *Central National Insurance Co. v. LeMars Mutual Insurance Co.*, 294 F.Supp. 1396, 1401 (S.D. Iowa 1968).

Shelter Mutual Insurance Company v. Baker, 753 S.W.2d at 648-649.

Appellee cites four other cases which in no way address the issue now before this court. In *Government Employees Insurance Company v. State Farm Mutual Automobile Insurance Company*, 382 So.2d 876 (Fla. App. 1980), the issue was whether or not retroactive effect should be given to the insured's written election that coverage of specific limits be provided under a specific policy. Once effect was given to the insured's election of coverage (such an election was required by the policy) there was no longer a question regarding whether or not coverage would be provided pursuant to the newly acquired auto clause. *Government Employees Insurance Company v. State Farm Mutual Automobile Insurance Company*, 382 So.2d at 877. That is not the issue which is now before this court.

Similarly, the determinative issue in *Morey v. Richards* 142 Ga. App. 742, 235 SE2d 871 (1977) was the fact that the pick-up truck at issue in that case was purchased four years before the effective date of policy in dispute in that case. Because the pick-up truck was not purchased within the subject policy period, there was no coverage pursuant to the newly acquired auto clause. *Morey v. Richards* 142 Ga. App. 742 at ____, 235 S.E.2d at 872. Again, that issue is not what is now before this court.

In *Michel v. Aetna Casualty & Surety Co.*, 252 F2d 40 (10th Cir. 1958), coverage was denied because Aetna, as required by the subject policy, did not insure all of the vehicles owned by its insured. As a result, the newly acquired auto clause was not triggered. *Michel v. Aetna Casualty & Surety Co.*, 252 F2d at 42. One should note that the *Michel* court went out of its way to state “[w]e express no opinion as to what the situation might have been if there had been a lapse of time between the divestiture of ownership of the originally insured automobile and the acquisition of the replacement.” *Michel v. Aetna Casualty & Surety Co.*, 252 F2d at 42.

In *Bankers Ins. Co. v. Griffin*, 244 S.C. 552, 137 S.E.2d 785 (1964) the issue was whether or not the insured was an owner a particular car. It was determined that the insured was not the owner of the subject car, and, as a result, coverage pursuant to the newly acquired auto clause did not become an issue in that case. *Bankers Ins. Co. v. Griffin*, 244 S.C. at _____, 137 S.E.2d at 787. Again, that is not the focal point of the issue presented to this court.

The foregoing is mentioned because the cases cited by appellee do not advance appellee’s argument in the matter now under consideration. It is true, as appellee advocates, that some of the cases cited by appellee have held that there is no coverage pursuant to a newly acquired auto clause set forth in one policy if coverage was expressly provided for by an another policy. See *Hastings Mutual Insurance Company v. Clyne*, 87 Ohio App.3d 198, 621 N.E.2d 1355 (1993); *Bramlett v. State Farm Mutual Automobile Insurance Company*, 205 Kan. 128, 468 P.2d 157 (1970); *Beck v. Aetna Casualty & Surety Co.* (1976) 38 Colo. App. 77, 553 P.2d 397; *Cook v Suburban Casualty Company*, 54 Ill. App.2d 190, 203 NE2d 748 (1964); *Pennsylvania National Mutual Casualty Insurance Company v. Ritz*, 384 So 2d 474 (Fla. App. 1973). That said,

however, there can be no doubt that respective policy language at issue in each of the foregoing cases was a critical factor in the court's respective determination of whether or not there is or is not coverage pursuant to the newly acquired auto clause.

As stated above, the policy at issue in *Hastings Mutual Insurance Company v. Clyne*, 87 Ohio App.3d 198, 204, 621 N.E.2d 1355, 1358-1359 (1993), required that the newly acquired auto not be subject to other applicable insurance. In *Bramlett v. State Farm Mutual Automobile Insurance Company*, 205 Kan. 128, 130, 468 P.2d 157, 159 (1970), the policy provided that "[i]f more than one policy issued by the company could be applied to such automobile the name insured shall elect which policy shall apply."¹ In *Beck v. Aetna Casualty & Surety Company*, 38 Colo. App. 77, 79, 553 P.2d 397, 398 (1976), the policy required that the insured notify the company of the insured's "election to make this and no other policy issued by this company applicable to such automobile." The same policy language was present in *Pennsylvania National Mutual Casualty Insurance Company v. Ritz*, 284 So.2d 474, 477, N.1, (Fla. App. 1973), and in *Liberty Mutual Insurance Company v. State Farm Mutual Automobile Insurance Company*, 262 Md. 305, ___, 277 A.2d 603, 607 (1971). The clear import of the foregoing is that courts, even without expressly so stating, stand by the principal that the policy means what it says.

There is no language in the subject Pioneer Commercial Auto Insurance Policy which limits the grant of coverage set forth in the after acquired auto clause if coverage was obtained

¹ In *Northern Assurance Company of America v. Farm Bureau Mutual Insurance Company*, 249 Kan. 662, 822 P.2d 45 (1991), the Kansas Supreme Court followed its' prior holding in *Bramlett v. State Farm Mutual Automobile Insurance Company*, 205 Kan. 128, 468 P.2d 157 (1970) to deny coverage where the policy at issue required that the insured "pay any additional premium required." *Northern Assurance Company of America v. Farm Bureau Mutual Insurance Company*, 249 Kan. at 665, 822 P.2d at 47. Such a policy requirement to pay additional premiums is not present in the matter at hand.

under another policy. There is likewise no provision in the subject Pioneer Commercial Auto Insurance Policy which requires the insured to pay an additional premium for the coverage provided by the newly acquired auto clause. The grant of coverage set forth in the newly acquired auto clause is clear and unambiguous, and the terms of the policy should therefore be given effect. *See Keffer v. Prudential Ins. Co. of America*, 153 W.Va. 813, 172 S.E.2d 714, Syllabus (1970)("[w]here the provisions of an insurance policy are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.").

Again, as stated by the Fourth Circuit stated in *Carey v State Farm Mutual Insurance Company*, 367 F.2d 938, 941-942 (4th Cir. 1966), and as is echoed by the numerous other courts cited by appellant, "[t]he provision means what it says."

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that on May 9, 2005, *via* ordinary United States mail, a copy of Appellant's Reply Brief, was served upon George Torres, 3901 Briscoe Rd, Parkersburg, WV 26104, attorney for Erie Insurance Property and Casualty Company.

Respectfully submitted:

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