

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001821-MR

ENCOMPASS INSURANCE COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 04-CI-009216

HELEN KUGLAND, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF BERNHARD KUGLAND

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Encompass Insurance Company (Encompass) brings this appeal from an August 23, 2005, summary judgment of the Jefferson Circuit Court determining that the underinsured motorist (UIM) coverage under a motor vehicle insurance policy

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

for three automobiles was stackable for a total of \$300,000.00 in benefits. We reverse and remand.

Bernhard Kugland was involved in a motor vehicle accident that resulted in his death. The tortfeasor, Jeremie Miller, was at fault and his liability insurance carrier tendered the policy limits to the Kugland Estate. At the time of the accident, Bernhard and Helen Kugland were named insurers under a motor vehicle insurance policy issued by Encompass. The policy listed three vehicles and provided \$100,000.00 in UIM benefits "per person/per accident." Upon the face of the policy, a single premium of \$86.00 was charged for UIM coverage upon all three vehicles.

Encompass tendered \$100,000.00 in UIM benefits. However, Helen Kugland, as personal representative of the Estate of Bernhard Kugland, (Kugland Estate) believed that the \$100,000.00 UIM coverage under the policy was stackable for a total of \$300,000.00 in benefits. Encompass disagreed and refused to tender the additional \$200,000.00.

Consequently, the Kugland Estate filed a complaint in the Jefferson Circuit Court against Encompass. Therein, the Kugland Estate alleged entitlement to a total of \$300,000.00 in UIM benefits. Subsequently, both parties filed motions for summary judgment, and the circuit court ultimately entered summary judgment in favor of the Kugland Estate. Ky. R. Civ. P.

(CR) 56. The circuit court concluded that UIM coverage was stackable for a total of \$300,000.00 in UIM benefits. As Encompass previously tendered \$100,000.00 in UIM benefits, the circuit court concluded the Kugland Estate was entitled to judgment for an additional \$200,000.00 in UIM benefits. This appeal follows.

Encompass contends the circuit court committed error by entering summary judgment in favor of the Kugland Estate. Specifically, Encompass believes the circuit court erred by concluding that UIM coverage for the three automobiles under the policy was stackable.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). For the reasons hereinafter elucidated, we are of the opinion the circuit court erroneously entered summary judgment.

In this Commonwealth, the law is clear that UIM coverage under a motor vehicle insurance policy may be stacked when the premium charged for the coverage is based upon the number of vehicles insured. Marcum v. Rice, 987 S.W.2d 789 (Ky. 1999; Swartz v. Metro. Prop. & Cas. Co., 949 S.W.2d 72 (Ky.App. 1997)). Even where the policy on its face charges a single premium for UIM coverage, an insured may still stack such

coverage if the single premium was, in fact, calculated based upon the number of vehicles insured. In determining whether UIM coverage is stackable, the "deciding factor" is "what the insured actually paid for . . . and the manner in which the insurance company calculated and billed the premium." Marcum, 987 S.W.2d at 791.

In this case, the insurance policy expressly provided for a single premium for UIM coverage upon Kugland's three vehicles. As a single premium was charged for UIM coverage, Encompass maintains that UIM coverage under the policy may not be stacked.

Even though the policy ostensibly charged a single premium for UIM coverage, UIM coverage may still be stacked if the single premium was calculated or based upon the number of vehicles insured by the Kuglands. The Kugland Estate concedes that there were no facts in the record demonstrating the single premium was based upon the number of vehicles insured:

Encompass argues that the policy says "see below" with respect to premiums. However, the policy never explains that the premium is the same for one car as it is for three. Because Encompass refused to provide discovery, we do not know. Just because a "single premium" is charged does not mean the "single premium" for one car is the same "single premium" it would be for three cars. Under the rules of construction, Encompass loses this argument because their policy fails to state whether their so called "single premium" is affected by the number

of vehicles when the policy clearly shows coverage on all three vehicles. This in an ambiguity. Contrast the Encompass declarations with Nationwide's and State Farm's.

Appellee's Brief at 20.

The burden of proving how the single premium was calculated in the insurance policy is placed upon the Kugland Estate. See Swartz, 949 S.W.2d 72. It is inappropriate to enter summary judgment in favor of the Kugland Estate in absence of facts showing that the single premium was calculated based upon the number of insured vehicles. As such, we conclude the circuit court erroneously entered summary judgment concluding that UIM coverage was stackable.

The Kugland Estate also alleges that Encompass was responsible for the dearth of facts concerning calculation of the single premium because of its refusal to provide appropriate discovery. The Kugland Estate even claims that summary judgment was entered as a sanction for Encompass' failure to provide such discovery.

In the summary judgment, the circuit court did not state that judgment was a sanction for Encompass' failure to provide discovery. We stress that the circuit court should not use a CR 56 summary judgment in a discovery dispute as a sanction against a party. Baptist Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005). If Encompass fails to

provide the appropriate discovery, the Kugland Estate may move for appropriate sanctions under the Civil Rules. See Baptist Healthcare Sys., Inc., 177 S.W.3d 676. In sum, we are of the opinion that summary judgment was improperly entered.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

A. Campbell Ewen
William P. Carrell II
EWEN, KINNEY & ROSING
Louisville, Kentucky

BRIEF FOR APPELLEE:

Chadwick N. Gardner
Louisville, Kentucky