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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002359-MR

BRADLEY ELMORE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 07-CI-02210

STATE FARM — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

STUMBO, JUDGE: Bradley Elmore appeals from an Order of the Boone Circuit Court granting Summary Judgment in favor of State Farm Insurance Company in Elmore's action to recover underinsured motor vehicle benefits. Elmore was the

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

passenger in a vehicle owned by his employer and operated by a fellow employee when he was injured in an automobile accident. He contends that the trial court erred in failing to conclude that he was entitled to benefits arising under his employer's Underinsured Motorist coverage ("UIM"). For the reasons stated below, we affirm the Summary Judgment on appeal.

The facts are not in controversy. Elmore was a passenger in a motor vehicle owned by his employer, Eckler Plumbing, and operated by fellow employee, Bobby Saylor. The vehicle, which was insured by State Farm, was involved in an accident occurring during the course of Elmore's and Saylor's employment.

Elmore prosecuted claims against State Farm and Saylor to recover damages arising from the accident. The claim against Saylor was dismissed by way of an Agreed Order entered on August 25, 2008, and Elmore went on to prosecute a claim for Workers' Compensation Benefits. Elmore's claim against State Farm sought benefits for UIM coverage.

State Farm argued below that Elmore had no valid legal claim against it because both the policy language and UIM statutes precluded Elmore's recovery of UIM benefits because the vehicle was insured by State Farm. State Farm asserted this argument in a Motion for Summary Judgment. Upon considering the Motion, the Boone Circuit Court cited *Pridham v. State Farm Mutual Insurance Co.*, 903 S.W.2d 909 (Ky. App. 1995), in concluding that the underinsured motorist coverage provisions of the State Farm policy exclude from the definition

of an underinsured motorist vehicle any vehicle owned or regularly used by State Farm's insureds. It also determined that this language did not contradict the intent of the UIM statute. The court granted State Farm's motion for Summary Judgment, and this appeal followed.

Elmore now argues that the Boone Circuit Court erred in granting Summary Judgment in favor of State Farm. While acknowledging that the policy language in question prevents a claimant from receiving UIM coverage on a vehicle insured by State Farm, Elmore contends that it should be void as against public policy in instances where – as in the matter at bar – the claimant is also unable to recover under the liability coverage. In support of this argument, Elmore claims that he is barred from recovering under the liability portion of the State Farm policy under the "Fellow Servant Rule" because Saylor is a fellow employee. The corpus of his argument on this issue is that a claimant should not be barred from the recovery of UIM benefits in circumstances where recovery of liability benefits is also unavailable. Elmore directs our attention to *State Farm Mutual Ins. Co. v. Slusher*, 2009 WL 485027 (Ky. App. 2009),[2] wherein a panel of this Court determined that a plaintiff's receipt of workers' compensation benefits did not bar him from seeking uninsured motorist benefits ("UM") or UIM. While acknowledging that the facts of *Slusher* are distinguishable, Elmore maintains that the holding supports his contention that the State Farm policy should not be

[2] Kentucky Rule(s) of Civil Procedure (CR) 76.28(4)(c) permits consideration of unpublished opinions of Kentucky Appellate Courts if there is no published opinion that would adequately address an issue.

interpreted as barring his recovery of UIM benefits. In the alternative, Elmore maintains that the policy language is sufficiently ambiguous as to preclude the entry of Summary Judgment.

We have closely examined the record and the law, and are not persuaded that *Slusher* is applicable. In *Slusher*, the decedent died during the course of his employment when an unattended coal truck rolled into the building where he was located. A panel of this Court determined that the decedent's estate could prosecute a claim for UM or UIM benefits despite having previously received workers' compensation benefits arising from the same event.

Slusher is distinguishable from the facts at bar, because in the matter before us Elmore was not denied UIM benefits based on his prior receipt of workers' compensation benefits. Rather, Elmore was denied UIM coverage because it was precluded by the language of the insurance contract between Eckler Plumbing and State Farm. That policy excludes from UIM coverage any vehicle also under coverage by a State Farm liability policy. It states at Section III, "UNDERINSURED MOTOR VEHICLE – COVERAGE W" that, "An underinsured motor vehicle does not include a land motor vehicle: 1. insured under the liability coverage of this policy . . . ." This language is not ambiguous, and it is uncontroverted that the vehicle in which Elmore was injured was insured under a State Farm liability policy.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* And finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Elmore and resolving all doubts in his favor, we must conclude that there are no genuine issues of material fact and that State Farm is entitled to a judgment as a matter of law. Elmore was a passenger in a vehicle expressly excluded from UIM coverage by the language of the insurance policy at issue. While he correctly argues that the intent of this provision is to prevent the stacking of benefits, the effect under the instant facts is to bar Elmore's recovery of UIM benefits. We are not persuaded by Elmore's contention that public policy demands that he be availed of UIM benefits under the facts presented. The Boone Circuit Court properly so found, and accordingly we find no error.

For the foregoing reasons, we affirm the Summary Judgment of the Boone Circuit Court.

KNOPF, SENIOR JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I write separately only to distinguish *Slusher.* In *Slusher*, I believe it was of pivotal importance that the UM and UIM coverage at issue was purchased by Slusher on his private vehicle. In *Slusher*, it was found that the intent of the UIM statute was to allow an insured, herein Elmore, to purchase additional coverage so as to be fully compensated for damages when injured by the fault of another individual. In the facts *sub judice*, the insurance coverage was that of the employer and not of Elmore, a substantial difference.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Dennis C. Mahoney Cincinnati, Ohio	James M. West Edgewood, Kentucky