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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000603-MR

KAREN HODGKISS-WARRICK — APPELLANT

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NOS. 08-CI-00169, 09-CI-00105
AND 09-CI-00117

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Karen Hodgkiss-Warrick appeals from the trial court's grant of summary judgment to defendant, State Farm Mutual Automobile

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by the assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

Insurance Company. On appeal, Karen Hodgkiss-Warrick (hereinafter "Karen") argues that the trial court improperly applied Pennsylvania law in denying her underinsured motorist coverage in violation of the public policy of Kentucky. After a thorough review of the parties' arguments, the applicable law, and the record, we agree with Karen and, accordingly, reverse the trial court's grant of summary judgment and remand this matter for further proceedings.

The facts of this case are not in dispute. Karen, her daughter Heather Hodgkiss, Pamela Reynolds, and Heather Reynolds[2] drove from Pennsylvania to Burnside, Kentucky, to purchase a special breed of puppy. As they were making their way back to Pennsylvania on May 17, 2008, Heather Hodgkiss was driving her 2007 Ford Fusion on highway U.S. 25 in Rockcastle County, when she attempted to turn left onto the ramp to enter Interstate 75 North and her car struck the vehicle operated by Natalie Bussell. As a result of the accident, claims were brought against Heather Hodgkiss and her insurance provider, GEICO, by all the occupants of her vehicle including Karen, and by Natalie Bussell and her husband.

Karen made additional claims against State Farm for underinsured motorist ("UIM") coverage under a policy she has with State Farm and also under her husband's separate UIM policy with State Farm. Karen and her husband are residents of the Commonwealth of Pennsylvania and purchased their State Farm policies in Pennsylvania. Karen had been insured with State Farm for over 25 years.

[2] Pamela and Heather Reynolds are also mother and daughter.

State Farm denied Karen UIM coverage under her husband's policy because Karen and her husband were separated and residing in two separate residences at the time of the accident, since the policy provided coverage to the named insured and any resident relative of the named insured, or any other person occupying the insured's car at the time of the accident. State Farm also denied Karen coverage under her own policy because Karen was residing with her 23-year-old daughter, Heather Hodgkiss, at the time of the accident. State Farm relies upon a policy provision which excludes UIM coverage when the underinsured vehicle is "owned by, rented to, or furnished or available for the regular use of you or any resident relative."

Karen filed a claim against State Farm seeking UIM benefits under both her policy and her husband's. State Farm filed a counterclaim for the declaration of rights to determine if coverage existed under either policy. State Farm subsequently moved the trial court for summary judgment. In granting summary judgment to State Farm, the trial court determined that Pennsylvania law should be applied based on *Saleba v. Schrand*, 300 S.W.3d 177, 181 (Ky. 2009), which noted that Kentucky has consistently applied Restatement (Second) Conflict of Laws § 188(1) (1971), and the "most significant contacts" test to determine which state's laws to apply to contract disputes. *Saleba* at 181. Restatement (Second) Conflict of Laws § 188(1) (1971) states:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most

> significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> > (a) the place of contracting,
> >
> > (b) the place of negotiation of the contract,
> >
> > (c) the place of performance,
> >
> > (d) the location of the subject matter of the contract, and
> >
> > (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Id.

The trial court concluded that Pennsylvania had the most significant contacts to the contract dispute, since Karen was a resident of and domiciled in Pennsylvania; the contract was issued in Pennsylvania for automobiles garaged and licensed in Pennsylvania; and performance was expected in Pennsylvania because the contract contemplates coverage for Pennsylvania residents. Further, the court found that the only contact with Kentucky was the location of the accident giving rise to the

claims. The trial court then applied Pennsylvania law to Karen's claims for coverage.

Under Pennsylvania law, Karen could not obtain UIM benefits under her husband's policy because the policy excluded nonresident relatives from coverage, and Karen did not reside with her estranged husband. The trial court then applied Pennsylvania law and determined that Karen resided with her adult daughter,[3] who insured the car involved in the collusion in Kentucky. The trial court found that, because Karen's injuries occurred in a vehicle owned and operated by her daughter with whom she resided, UIM coverage under Karen's State Farm policy was unavailable based on the policy's exclusions.

The trial court next addressed whether this result violated Kentucky's public policy. The trial court acknowledged that "household" or "family" exclusions in policies of automobile liability insurance have been held to violate public policy in Kentucky; however, the court determined that the issue here was not liability coverage but UIM coverage. As such, the trial court relied on *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.,* 116 S.W.3d 500 (Ky.App. 2002), which held that the "regular-use exclusion," i.e., UIM coverage did not extend to vehicles available for the regular use of an insured or family member, did not violate public policy in Kentucky. The trial court found that the policy exclusions at issue did

[3] The trial court undertook an analysis of whether Karen and Heather resided together in separate sides of a duplex. The duplex allowed for access to either side through a common kitchen and dining area. Rent for the duplex was $750 per month for the entire building. Karen paid the rent in its entirety. The duplex had only one water bill, one electric bill, one cable bill, and one telephone bill. Further, the duplex had only one mailbox and both Karen and Heather received mail there.

not violate Kentucky public policy and granted State Farm summary judgment. It is from this judgment that Karen now appeals.

At the outset, we note that the applicable 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). 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 judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "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).

Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); and *Hallahan v. The Courier-Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal

questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

On appeal, Karen presents three arguments; namely, (1) Kentucky courts do not enforce provisions from contracts entered into out-of-state, if those provisions are against the public policy of this Commonwealth; (2) Kentucky courts do not enforce "family" or "household" exclusions; and (3) this Court's case of *Murphy v. Kentucky Farm Bureau Mut. Ins., supra,* is factually distinguishable from the present case and not in accord with the recent Kentucky Supreme Court holdings on family and household exclusions.

State Farm presents three counterarguments; namely, (1) that the UIM exclusion in this case does not violate Kentucky public policy; (2) that, under our choice of law jurisprudence, we apply Pennsylvania law; and (3) that no coverage existed under either policy. With these arguments in mind, we now turn to the first issue that we must decide: whether this Court should apply Kentucky law or Pennsylvania law given our choice of law jurisprudence.

Karen first argues that our courts do not enforce contract provisions entered into out-of-state that are against our public policy, and that the UIM exclusion in this policy violates public policy, and, thus, is not enforceable. In response, State Farm argues that the UIM exclusion is not against public policy. We find that the trial court correctly noted that, under traditional choice of law jurisprudence, i.e., the most significant contacts test, Pennsylvania law would be

controlling. "However, Kentucky courts have traditionally refused to apply the law of another state if that state's law violates a public policy as declared by the Kentucky legislature or courts." *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 35 (Ky. 2004), citing *R.S. Barbee & Co. v. Bevins, Hopkins & Co*., 176 Ky. 113, 195 S.W. 154 (1917). Given that we find the policy exclusion in the case sub judice to be in violation of Kentucky public policy for the reasons set forth *infra*, Kentucky law, and not Pennsylvania law, will be applied to Karen's claim.

Karen next argues that Kentucky courts do not enforce "family" or "household" exclusions. State Farm does not contest this issue. In *Lewis by Lewis v. West American Ins. Co*., 927 S.W.2d 829, 836 (Ky. 1996), the Kentucky Supreme Court held that the "family" or "household exclusion" clauses contained in liability insurance policies violated public policy. As noted in *Lewis,* courts "have been forced to balance insurance company concerns about collusion against a legislative mandate that victims be compensated, and a judicial policy which disfavors intrafamily immunity." *Id.* at 832 (quoting *State Farm Mut. Auto Ins. Co. v. Wagamon*, 541 A.2d 557, 559 (Del. 1988)). Moreover, because "motor-vehicle policies are largely contracts of adhesion, there is no practical method by which the class of excluded persons may avoid such exposure to risk." *Lewis* at 833. Lastly, in our discussion of *Murphy*, *infra*, we recognize that our Kentucky Supreme Court most recently held that the household exclusion in a personal liability umbrella policy as applied to automobile liability coverage, was against public policy. *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d at 36.

With this in mind, we turn to Karen's remaining argument; namely, that this Court's case of *Murphy v. Kentucky Farm Bureau Mut. Ins., supra,* is factually distinguishable from the present case, and not in accord with the recent Kentucky Supreme Court holdings on family and household exclusions.

We recognize that the exclusion in the case sub judice is known as the "regular-use exclusion." In *Murphy*, 116 S.W.3d at 501*,* this Court held that regular-use exclusions from UIM coverage did not violate public policy, relying on *Motorists Mutual Insurance Co. v. Glass,* 996 S.W.2d 437 (Ky.1997*); Pridham v. State Farm Mutual Insurance Co.*, 903 S.W.2d 909 (Ky.App. 1995); *Windham v. Cunningham,* 902 S.W.2d 838 (Ky.App. 1995); and *Baxter v. Safeco Insurance Co. of America*, 46 S.W.3d 577 (Ky.App. 2001).

Central to the holding in *Murphy* was this Court's learned discussion of UIM coverage and the regular-use exclusion:

> However, the regular-use exclusion at issue in the present case does not deny a family member general liability coverage; it denies UIM coverage if the underinsured vehicle is owned by or for the regular use of the insured or a household member. The justification for the regular-use exclusion is not the possibility of collusion, but rather the fact that the insured or another family member has control over how much liability coverage is purchased. While Austin did not have control over how much liability coverage he had in this accident, his mother did have such control because she owned and insured the car in which he was riding. Unlike the parent in *Lewis*, Tina Murphy had the option of purchasing greater liability coverage for her child. As this Court stated in *Hamilton Mutual Insurance Co. v. U.S. Fidelity & Guaranty Co.*, Ky.App., 926 S.W.2d 466, 469 (1996), "If a different

> result is to come from these differences [in these cases], our Supreme Court must direct it."

Murphy at 503.

Upon our review of our recent caselaw, we believe that the Kentucky Supreme Court has directed a shift in our public policy in *Marley,*151 S.W.3d at 36, which renders *Murphy* and the jurisprudence it relied upon distinguishable from the case sub judice.

In *Marley*, the Kentucky Supreme Court noted that it "is clear that the public policy of Kentucky is to ensure that victims of motor vehicle accidents on Kentucky highways are fully compensated." *Id*. Moreover, "[t]he purpose of UIM coverage is not to compensate the insured or his additional insureds from his own failure to purchase sufficient liability insurance." *Windham v. Cunningham*, 902 S.W.2d at 841. We fail to see how Karen could have obtained more coverage than what she already had purchased through her UIM policy. Unlike *Murphy*, Karen had no control over the amount of insurance her adult daughter purchased through a separate insurance provider on her daughter's vehicle.

Recently, the Kentucky Supreme Court declined to apply the regular-use exclusion in *Williams v. State Farm Mut. Auto. Ins. Co*., 255 S.W.3d 913, 915 (Ky. 2008), when it held that "A vehicle (the pickup) "owned" by the relative (Aaron/driver) in State Farm's Caravan policy is not a vehicle "furnished" by the policy holders (the parents) to the relative." *Williams* at 915. While the regular-use exception in *Williams* was different than that in the case sub judice, we find that, in

light of the Kentucky Supreme Court's holdings in *Williams* and *Marley,* our public policy in Kentucky disfavors the application of the regular-use exclusion when the policy holder has no real control or ability to obtain greater liability coverage on the vehicle involved in the accident. As such, we agree with Karen that she was entitled to UIM coverage under her policy, and that the trial court erred in granting summary judgment.

Accordingly, we reverse and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
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