

RENDERED: JANUARY 4, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000020-MR

KAYLA BANDY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 09-CI-00036

INDIA BELL BEVINS AND  
NATIONWIDE MUTUAL INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kayla Bandy appeals from a summary judgment finding that her automobile insurance did not provide underinsured motorist (UIM) benefits because an identical amount was available under the tortfeasor's liability insurance benefits, requiring an offset under Bandy's policy and Virginia law.

Bandy was injured in a car accident in Pikeville, Kentucky, allegedly caused by India Bell Bevins when she failed to yield for a left hand turn and was struck by Bandy's car. Bandy filed this action against Bevins, who was covered by insurance provided by Northbrook Indemnity Company (Northbrook), and Bandy's own insurance company, Nationwide Mutual Insurance Company (Nationwide), for UIM benefits. Bandy claimed that she incurred bodily injury as a result of the accident, including a shoulder injury which damaged her ability to compete as a professional bowler, and that the coverage from Bevins was insufficient to compensate for her injuries.

The Nationwide policy is a Virginia contract listing Bandy's parents, David and Pamela Bandy, residents of Danville, Virginia, as the named insureds on the declarations portion of the insurance contract. Bandy is listed as an insured driver and not as a named insured. At the time of the accident, Bandy was an undergraduate at Pikeville College using the insured vehicle primarily in Kentucky, but had a Virginia driver's license and the vehicle was registered in Virginia.

The declarations for both the Nationwide and Northbrook policies provide up to \$100,000 for personal injury per person per accident, with Nationwide providing this amount pursuant to UIM coverage. Nationwide filed a summary judgment motion requesting that it be dismissed because the UIM coverage it provided was identical to the liability coverage provided by Northbrook to Bandy and, therefore, under the policy's offset provision and Virginia law, it

had no liability. The circuit court agreed, granted Nationwide's motion for summary judgment and dismissed Nationwide.

Bandy's Nationwide policy contains the following relevant language:

#### **Part D—Uninsured Motorists Coverage**

##### **Insuring Agreement**

A. We will pay, in accordance with Va. Code Ann. Section 38.2-2206, damages which an **insured** . . . is legally entitled to recover from the owner or operator of . . . an **underinsured motor vehicle** because of:

1. **Bodily injury** sustained by an insured and caused by an accident; and

...

We will pay damages under this coverage caused by an accident with an **underinsured motor vehicle** only after the limits of liability under any applicable bodily injury liability . . . policies have been exhausted by payment of judgments or settlements.

...

D. "**Underinsured motor vehicle**" means a land motor vehicle . . . for which the sum of:

1. The limits of liability under all liability . . . policies;

...

that is **available for payment** is less than the sum of the limits of liability applicable to the **insured** for Uninsured Motorist Coverage under this policy or any other policy.

"**Available for payment**" as used in this Paragraph (D.) means the amount of liability coverage applicable to the claim of the **insured** as reduced by the payment of any other claims arising out of the same occurrence.

However, underinsured motor vehicle does not include any vehicle . . . to which a bodily injury or property

damage . . . policy applies at the time of the accident but the . . . insuring company:

1. Denies coverage; or
2. Is or becomes insolvent.

...

### **Limit of Liability**

A. The limit of Bodily Injury Liability shown in the Declaration for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident. Subject to this limit for each person, the limit of Bodily Injury Liability shown in the Declarations for each accident for Uninsured Motorists coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident.

...

B. Any damages payable under this coverage:

1. Shall be reduced by all sums paid because of **bodily injury** or **property damage** by or on behalf of persons or organizations who may be legally responsible.

...

Summary judgment should be granted “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 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). Granting of a summary judgment motion “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Our initial inquiry is whether Virginia or Kentucky law applies.

The test used in Kentucky to determine which state’s law should apply is “the most significant relationship test,” which requires the application of the law of the state with the most significant relationship to the transaction and the parties. *Lewis v. American Family Ins. Group*, 555 S.W.2d 579, 581 (Ky. 1977). In most cases, the law of the **residence of the named insured** will apply to determine the scope of the coverage. *Id.* at 582; *Poore v. Nationwide Mut. Ins. Co.*, 208 S.W.3d 269, 271 (Ky. App. 2006). The location of the tort or residence of the tortfeasor is insufficient to require the application of Kentucky law to an insurance contract involving another state’s residents. *Bonnlander v. Leader Nat'l Ins. Co.*, 949 S.W.2d 618, 620 (Ky.App. 1996); *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 855, 856–857 (Ky.App. 1998); *Kentucky Nat'l Ins. Co. v. Lester*, 998 S.W.2d 499, 503 (Ky.App. 1999).

It is undisputed that Bandy’s parents are the named insureds, they reside in Virginia, they purchased the policy and the policy covers Virginia registered vehicles in accordance with listed Virginia Code provisions. Bandy is listed only

as an insured driver and not as a named insured. Although Bandy maintained a temporary residence in Kentucky to attend college, she remained a Virginia resident. Accordingly, Virginia law applies.

Under Virginia law, as in Kentucky, the interpretation of a contract is a question of law subject to *de novo* review. Under the rules of contract interpretation, interpretation of an unambiguous contract is limited to its four corners. *Eure v. Norfolk Shipbuilding & Drydock Corp., Inc.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002). An insurance policy construed under Virginia law is considered to incorporate the Virginia statute on UIM into its policy. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 899, 140 S.E.2d 817, 819 (1965).

Under the plain language of the Nationwide policy, Bevins' vehicle is not an underinsured motor vehicle and, therefore, Bevins is excluded from being an UIM. The policy states that an underinsured motor vehicle is one for which the amount available for payment is less than the insured could recover under the UIM provisions of the Nationwide policy. Because both the Northbrook and Nationwide policies provide for the same \$100,000 coverage, Bevins cannot be considered an UIM.

Additionally, pursuant to the Nationwide policy terms Nationwide will only pay damage amounts for personal injuries caused by an UIM after the limits of the tortfeasor's bodily injury liability policy is exhausted by the amount available to pay pursuant to a judgment or settlement. Nationwide's declaration liability of \$100,000 for UIM bodily injury coverage is its maximum limit of liability per

accident. Any damages that it pays under this coverage “[s]hall be reduced by all sums paid because of **bodily injury** or **property damage** by or on behalf of persons or organizations who maybe legally responsible.” Therefore, Bandy cannot obtain a recovery from both Northbrook and Nationwide, because any amount obtained from Northbrook would be offset by Nationwide under this provision. Accordingly, if Northbrook paid its \$100,000 maximum, that would completely offset the maximum \$100,000 that Nationwide could pay.

Therefore, under the contractual language of the Nationwide policy, Bandy cannot recover damages pursuant to UIM coverage for the accident.

The Nationwide policy is consistent with Virginia statutory provisions. Under Virginia law, Nationwide is obligated to pay “for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section.” Va. Code Ann. § 38.2-2206 (West). Section B defines “underinsured” and “available for payment” in a manner consistent with Nationwide’s provisions:

**A motor vehicle is “underinsured” when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.**

“Available for payment” means the amount of liability insurance coverage applicable to the claim of the injured

person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

(Emphasis added). The Virginia statute specifies that if UIM benefits equal or are less than the liability insurance coverage provided by the tortfeasor which is available for payment, the tortfeasor's vehicle is not considered underinsured and UIM benefits do not apply. Because the total amount of Bevins' policy is available for payment, there is an equal amount of UIM and liability coverage, resulting in no recovery under the Nationwide UIM coverage.

We recognize that Virginia law differs from other states, including Kentucky. Our Supreme Court has explained that there are two differing views on the purpose of UIM coverage and, therefore, contrasting statutes.

Under the narrow view, the insured's UIM coverage is always setoff or reduced by the tortfeasor's liability limits. The purpose of the narrow view is to place the insured in the same financial condition that he would be in if the tortfeasor had liability limits equal to the insured's own UIM limits. Under the broad view, UIM coverage is triggered when the insured's damages exceed the tortfeasor's liability limits, at which point the insured is entitled, if damages require it, to receive the full amount of the UIM policy. The public policy underlying the broad view is to provide full recovery to the injured party.

*Philadelphia Indem. Ins. Co. v. Morris*, 990 S.W.2d 621, 627 (Ky. 1999). Virginia has chosen to follow the narrow view. *See Dyer v. Dairyland Ins. Co.*, 267 Va.

726, 731, 594 S.E.2d 592, 594 (2004); *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 575-576, 363 S.E.2d 703, 704-705 (1988).

Finally, Bandy claims that Nationwide is compelled to provide UIM coverage equivalent to what Kentucky offers under KRS 304.39-100. However, in *Snodgrass*, this Court rejected the argument that insurance companies doing business in Kentucky are compelled to provide underinsured motorist coverage to non-resident insureds pursuant to KRS 304.39-100(2). *Snodgrass*, 992 S.W.2d at 857; *Bonnlander*, 949 S.W.2d at 620-621.

Because Virginia law applies and no factual issues remain as to Bandy's claim against Nationwide, summary judgment was proper. The summary judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn Martin Hammond  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

C. V. Reynolds  
Lisa Stumbo  
Prestonsburg, Kentucky