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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001528-MR

WILLIAM HEFFRON; LORI MOLENAAR; ELLEN HEFFRON; JAMES GARDNER; MICHELLE GARDNER; WILSON GARDNER; AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NOS. 09-CI-01143 AND 09-CI-01144

ROYALTY COMPANY, INC., D/B/A ALL AMERICAN TAXI; KAREN STERLING; AND GATEWAY INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: James W. Gardner, Michelle M. Gardner, Wilson A. Gardner, William Heffron, Lori Molenaar, Ellen Heffron, and State Farm Mutual Automobile Insurance Company, appeal from the Fayette Circuit Court's July 25, 2011, declaratory/summary judgment[1] finding only a single combined limit of $100,000 liability coverage for the Gateway Insurance Company endorsement issued to the Defendant taxicab company, Royalty Company, Inc., d/b/a All American Taxi Company. After careful review of the record and the parties' arguments, we affirm.

This consolidated lawsuit arises from a motor vehicle accident that occurred on June 29, 2008, on Winchester Road in Lexington, Kentucky. Taxicab driver Karen J. Sterling (Sterling) had been waiting for fares on Vine Street and had taken a call from dispatch to pick up a fare at a motel located off Winchester Road. Sterling testified that as she proceeded out Winchester Road, she dozed off and when she woke up, she was unable to stop before impacting other vehicles stopped at a traffic light.

One of the vehicles, and the only other vehicle involved in the instant lawsuit, was driven by Plaintiff Lori Molenaar (Molenaar) and insured by Defendant Liberty Mutual Fire Insurance (Liberty) Policy #A02-281-237440-90-74. The five other individual plaintiffs herein were passengers in the Molenaar vehicle. James, Michelle, and Wilson Gardner were insured by a policy of insurance issued by Defendant State Farm Mutual Automobile Insurance (State

[1] We note that the order was captioned as a Declaratory/Summary Judgment but only provides declaratory relief and denies the cross-motions for Summary Judgment.

Farm) Policy #580-5053-A07-17H. Both Liberty and State Farm were joined as defendants for underinsured motorist coverage.

The taxicab Sterling was driving, Taxi #92, is owned by Royalty Company, Inc., d/b/a All American Taxi Company (hereinafter Royalty/American Taxi) and insured by Intervening Plaintiff, Gateway Insurance Company (Gateway) under Commercial Automobile Insurance Policy No. CAP 613240701 (the Royalty Policy). The Gateway liability insurance policy covering this collision was issued in October 2007 and provides for a combined limit of $100,000 in coverage ("the most we will pay for any one accident or loss") and covers thirty Royalty vehicles. Taxi #92 was not yet in service when the 2007 Royalty Policy was issued. Pursuant to an endorsement (the Endorsement) effective November 29, 2007, the Royalty policy was changed and added Taxi #92. The Endorsement states, "This endorsement changes the policy. Please read it carefully." In the coverage portion, the Endorsement states that it provides coverage for bodily injury liability of $100,000 per person, but no limit per accident is listed.

Because this case turns on the interpretation of the Royalty Policy and the subsequent Endorsement, additional facts about the insurance coverage requested by Royalty are helpful. The deposition of James Bohn, vice president and partner in the independent insurance agency, Kiely Hines & Associates Insurance Agency, Inc. (Kiely Hines Agency) was taken on January 27, 2010, prior to Gateway's intervention in the underlying action. Mr. Bohn testified that he

meets with clients regarding their insurance needs and provides quotes from different insurance carriers for insurance coverage in accordance with the client's business needs and requests. The Kiely Hines Agency works with several different carriers which issue taxicab insurance, in addition to Gateway. Mr. Bohn testified that for taxicab companies, he does not generally bind coverage, but sends the application for insurance to the home office of the insurance carrier from which they are seeking coverage to determine whether the carrier will accept the risk and issue a policy. The Kiely Hines Agency issues certificates of insurance to its insureds at their request. The certificates of insurance are issued by their terms for informational purposes only and reflect the named insured, policy number, policy period, and coverages provided by the identified policy.

Mr. Bohn's agency had done business with Gateway for ten years prior to the instant case. He testified that in submitting an application for insurance coverage, Gateway required the Kiely Hines Agency to provide information on the prior loss history and claims history of the proposed insured, as well as a list of vehicles and drivers. Mr. Bohn described Gateway as preferring to write policies with the state mandatory limits of $25,000/50,000/10,000. It had been Mr. Bohn's experience that Gateway typically did not want to issue policies with limits of $300,000, and it would be a rare occurrence and a case-by-case decision as to whether Gateway would issue a policy with above minimum required limits.

In 2004, Mr. Bohn received a call from Chris Martha, the manager of Royalty/American Taxi, requesting an insurance quote for the business after its

insurance coverage with another carrier had been cancelled. Mr. Bohn and the Kiely Hines Agency acted as the agent for Royalty/American Taxi for their auto coverage from 2004 through the time of the accident in 2008. During that time period, Mr. Bohn had worked with Chris Martha on matters relating to Royalty/American Taxi's insurance coverage. He had not worked with either Iskander Martha or Wai Ping Chan, the other identified principals in Royalty/American Taxi.

Mr. Bohn testified that Chris Martha specifically requested auto liability insurance coverage for Royalty/American Taxi's vehicles providing the limits required by Lexington to operate the taxi service. According to Mr. Bohn, Fayette County required a single combined limit of $100,000 to operate taxis in the county, and that was the limit provided by the Royalty Policy pursuant to the request and application by Chris Martha. Chris Martha testified that he applied for insurance coverage on behalf of Royalty/American Taxi, and he knew that the Royalty Policy provided a combined single limit coverage in the amount of $100,000.

Several months after the issuance of the Royalty Policy in 2004, Chris Martha applied for a policy through the Kiely Hines Agency for a separate corporation, Detroit Coney Island d/b/a All American Taxi, with higher policy limits of $100,000/500,000/100,000, which he advised Mr. Bohn was to allow several taxicab drivers to operate out of the airport. In accordance with the application, Gateway issued a separate policy, Commercial Auto Policy No. CAP

616110701 to the named insured, Detroit Coney Island d/b/a All American Taxi (the Detroit Coney Island Policy), with higher limits, which Mr. Bohn understood was needed to comply with airport requirements for taxis that waited for fares on the airport's premises. As noted by Mr. Bohn, there were two separate corporations, two separate policies, and two separate policy numbers. The Detroit Coney Island Policy only insured two to three vehicles at any one time, and the premiums were higher because it provided higher policy limits. Mr. Bohn advised Chris Martha that taxis not specifically listed on the Detroit Coney Island Policy would not be covered under that policy.

Lexington Airport representative, David Scott Lanter, was produced as currently knowledgeable about the Airport's taxi permit process pursuant to Kentucky Rules of Civil Procedure (CR) 30.06. Mr. Lanter was relatively new to the position of deputy director of public safety and operations, and he testified that prior management at the Airport was no longer there. Mr. Lanter testified that the Airport requires taxicab services operating at the Airport to enter into yearly contracts, which required them to maintain insurance coverage of "not less than $500,000 for personal injury to or death of one or more persons in any one accident and $100,000 for property damage to property in any one accident" to operate on the Airport's premises. Mr. Lanter produced records for the entity he knew as "All American Taxi," which contained a contract signed by Chris Martha as general manager on behalf of Royalty/American Taxi that was in effect for the year of the subject accident.

Mr. Lanter testified that the Airport does not send copies of the contracts to the insurance carrier for the subject taxi company, and in fact he confirmed that the Airport had no direct communications or contact with Gateway, James Bohn, or the Kiely Hines Agency concerning the requirements of the Airport contract or the taxi company's insurance coverage limit requirements under that contract.

As part of the permitting procedure, the Airport required taxicab operators to submit certain documentation, including the permit from the City, proof of insurance, and a certificate of insurance to establish the limits of liability coverage for taxis operating on its premises. Mr. Lanter was aware that the certificates of insurance provided by the entity he referred to as "All American Taxi" were prepared by "All American Taxi's" insurance agent rather than Gateway and had been supplied to the Airport directly by "All American Taxi."

The Airport produced a certificate of insurance listing the named insured as "All American Taxi," Policy No. 616110801. Upon reviewing the original, Mr. Lanter admitted that the certificate of insurance had been altered by placing a black mark across the first line of the named insured, leaving the name "All American Taxi," with coverage limits of $100,000 per person, $500,000 per accident. Mr. Lanter was, however, still able to read the name "Detroit Coney Island d/b/a" through the black mark. Mr. Lanter testified that the Airport would have had no reason to require "All American Taxi" to alter the named insured on the certificate of insurance.

Mr. Lanter conceded that the name on the certificate of insurance "Detroit Coney Island d/b/a" did not match the name of the taxicab entity with which the Airport had contracted, "All American Taxi." He testified that he would have delved into the situation further, had he held his current position at that time. Because his predecessor was gone, he did not know what, if any, actions may have been taken to discover the reason for the discrepancy.

Mr. Bohn was also questioned about the certificate of insurance for the Detroit Coney Island/All American Taxi Policy submitted to the Airport. Mr. Bohn testified that the certificate of insurance, which Chris Martha obtained from the Kiely Hines Agency, accurately documents the policy number and limits of coverage for the policy issued to Detroit Coney Island d/b/a All American Taxi. When shown the Airport's copy of the certificate of insurance, Mr. Bohn stated that it had been altered and would not have been issued by his agency with the named insured "Detroit Coney Island d/b/a" marked out. The certificate mailed by the Kiely Hines Agency to Chris Martha reflected the actual policyholder for Policy No. 616110801 as Detroit Coney Island d/b/a All American Taxi. Copies of the altered and unaltered certificate of insurance appear in the record.

Documents produced at Mr. Bohn's deposition also included correspondence dated February 9, 2007, in which Chris Martha directed the Kiely Hines Agency to alter the certificate of insurance for the Detroit Coney Island policy to reflect the name as "All American Taxi" instead of "American Taxi." Chris Martha's letter stated, "Due to regulations at the airport, please send the

certificate with only the business name 'All American Taxi' listed, and not the corporation name 'Detroit Coney Island.'" After telling Chris Martha they could not change the name of the insured as requested, the certificate of insurance was mailed by the Kiely Hines Agency to Chris Martha showing split limit coverages of $100,000/500,000/100,000. It was thereafter altered and provided by "All American Taxi" to the airport.

Returning to the procedural history of this case, the Plaintiffs have asserted claims against Sterling, Royalty/American Taxi, and their respective underinsured motorist (UIM) carriers, State Farm and Liberty, for personal injuries sustained in the accident. State Farm additionally sought a declaration as to the amount of liability coverage by Gateway for the losses subject to this claim, as well as the priority of coverage between the two UIM carriers.

The coverage issue was briefed, and the trial court held a hearing on May 6, 2011. The trial court entered a declaratory order on July 25, 2011, holding that the Royalty Policy provided limits of $100,000 per accident regardless of the number of vehicles involved or the claims made. Thus, the limit of Gateway's liability under the Royalty Policy was a combined single limit of $100,000 for all claims. The trial court also ordered and declared that the underinsured motorist coverage provided by Liberty is superior to or first in priority to the underinsured motorist coverage provided by State Farm. Finally, the trial court denied the Plaintiffs' cross-motion for summary judgment. This appeal by State Farm and the individual plaintiffs (hereinafter the appellants) now follows. The remaining issue

of damages has been stayed in the Fayette Circuit Court, by agreement of counsel, pending the decision on coverage presented in this appeal.

On appeal, the Plaintiffs argue that the Gateway Endorsement to the Royalty Policy provides $100,000 per person coverage rather than the combined single limit of $100,000. In the alternative, they argue that the Gateway Endorsement is ambiguous and the higher coverage must be afforded. Gateway counters both of these arguments, arguing that the Royalty Policy provides a single limit of $100,000 total per accident. Gateway argues that the Endorsement is not ambiguous, and when read in conjunction with the Royalty Policy, it is clear that the parties intended for Taxi #92 to be included on that policy with a single coverage limit of $100,000 per accident.

Interpretation of an insurance contract is a question of law and the standard of review on appeal is *de novo*. *Cincinnati Ins. Co. v. Motorist Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010). The terms of an insurance contract have no technical meaning in law and are to be interpreted according to the usage and understanding of the average man. *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 630 (Ky. 2005). While ambiguous terms are to be construed against the drafter and in favor of the insured, the Court must give the policy a reasonable interpretation, and there is no requirement that every doubt be resolved against the insurer. *American Commerce Ins. Co. v. Brown*, 168 S.W.3d 386, 388 (Ky. App. 2004). When the terms of an insurance contract are

unambiguous and not unreasonable, they will be enforced. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 226 (Ky. 1994).

The Business Auto Declarations of the Royalty Policy issued for the policy period of October 28, 2007, through October 28, 2008, shows a combined single limit of $100,000 under the heading "LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS." The Limit of Insurance is further described in the Policy in Section II, Paragraph C as follows:

> Regardless of the number of covered "autos," "insureds," premiums paid, claims made or vehicles involved in the "accident," the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

The declarations page clearly sets forth a single combined limit of liability coverage in the amount of $100,000. A schedule of automobiles covered as of October 28, 2007, also titled Form GC 16, is attached to the policy and lists and describes the covered vehicles. The crux of this case is that Taxi #92 is not listed on that schedule, and was added by the Endorsement mentioned above. Also as stated above, Chris Martha requested that Taxi #92 be added to Policy No. CAP 613240701, the Royalty Policy.

Gateway argues that Taxi #92 was in fact added to the Royalty Policy via the Endorsement and that the document reflected a combined single limit of coverage in the amount of $100,000 without any ambiguity. The appellants agree and argue that the Endorsement is not ambiguous. Instead, they argue that the

Endorsement explicitly states that the limits of liability are $100,000 per person and that somehow Taxi #92 was intended to be added to the Detroit Coney Island Policy, or at the very least should provide coverage as if it were added to that policy.

A review of the Endorsement indicates that under the coverages section, Bodily Injury Liability is marked $100,000 "each person" and immediately underneath that box, the box by "each accident" is blank. While the appellants argue that this creates an ambiguity in the policy, we agree with the trial court that no ambiguity exists. The evidence indicates that Chris Martha requested that Taxi #92 be added to the Royalty Policy. Gateway added Taxi #92 to the Royalty Policy, and neither party testifies that anyone ever had any intention of adding Taxi #92 to the Detroit/Coney Island Policy. Furthermore, a higher premium was charged for the two or three vehicles covered under the Detroit Coney Island Policy. There is nothing in the record to indicate that Royalty/American Taxi paid a higher premium for Taxi #92. When viewing the Royalty Policy as a whole, including the declarations and the Endorsement, it is not reasonable that Taxi #92 would be singled out of thirty other vehicles for higher coverage limits, despite the language indicating a combined single limit of $100,000.

Even if we were to determine that the Royalty Policy is ambiguous, we would still conclude that the appellants' arguments that higher coverage of $100,000 per person is not reasonable under the circumstances. Kentucky law mandates that if an insurance provision is subject to two reasonable interpretations,

the interpretation more favorable to the insured is adopted. *Motorist Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 680 (Ky. App. 1996). However, in the instant case, the insured never claimed that it sought out, paid for, or received insurance coverage of $100,000 per person for Taxi #92. Instead, State Farm and the individual appellants argue that this Court should interpret Royalty/American Taxi's policy in a way that benefits ***their*** interests and not the interests of the insured. We simply do not have the authority to do this under Kentucky law.

The appellants argue that the existence of the Detroit Coney Island policy providing higher split limits of coverage demonstrates that Royalty/American Taxi had a reasonable expectation that the higher split limits would also be provided by the Royalty policy insuring Taxi #92, rather than the combined single limits of $100,000 reflected on the declarations page. However, the insured's submission of altered certificates of insurance to the Airport conclusively disproves the appellants' assertion. If Royalty/American Taxi had expected higher split limits, there would have been no reason for it to alter the certificates of insurance it received from its agent to create a false impression of higher limits.

Royalty/All American knew that the policy issued to it contained $100,000 combined single limits, as demonstrated by its deception to the Airport by altering the certificates of insurance issued to the named insured Detroit Coney Island/All American Taxi to show a higher limit of coverage applicable to all of its taxis. The purpose behind this ruse is transparent—Royalty/American Taxi wanted to create the impression that all of its cabs marked with the name "All American Taxi" were

insured with a policy that "nominally" met the Airport's insurance requirements even though it maintained another policy with lower limits on which it insured all but two to three of its taxis. The financial savings to Royalty/American Taxi are obvious. We also note that neither the Kiely Hines Agency nor Gateway would have any incentive to alter the certificates provided to the Airport. In fact both would have an incentive to instead write and receive payment for policies affording higher coverage for which they could receive higher premiums. Thus, the appellants' argument that the existence of the Detroit Coney Island Policy gave Royalty/American Taxi the expectation of higher coverage under the Royalty policy is without merit. Even if the insurance contract were ambiguous, Kentucky law promotes a finding in favor of the insured and not a UIM insurance carrier, as State Farm is here. The trial court's declaration that the Royalty Policy provides coverage of a combined single limit of $100,000 favors the insured, Royalty/American Taxi. The trial court's ruling was supported by the evidence and was not an abuse of discretion. We will not disturb it on appeal.

Based on the foregoing, we affirm the July 25, 2011, order of the Fayette Circuit Court declaring that the Royalty Policy issued by Gateway provides combined single limits coverage of $100,000 applicable to all claims asserted herein against its insured and denying the cross-motions for summary judgment.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

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