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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000354-MR

LONNIE DALE RIGGS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 10-CI-01748

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: By order entered February 6, 2012, the Hardin Circuit Court found Appellant Lonnie Riggs' claim for underinsured motorist (UIM) benefits against Appellee, State Farm Automobile Insurance Company, to be contractually time-barred, and granted summary judgment in State Farm's favor.

The issue before this Court is the reasonableness of the limitation provision in the parties' insurance contract requiring any action for UIM benefits be brought within two years of the date injury or the last basic reparations benefit paid, whichever is later. For the reasons set forth in this opinion, we find such a provision unreasonable. Accordingly, we reverse and remand for additional proceedings consistent with this opinion.

I. Facts and Procedure

On August 26, 2008, Riggs was a police officer with the City of Vine Grove. While on duty, Riggs was injured in an automobile collision with Phillip Richards. Riggs received workers' compensation benefits for his injuries; he did not seek or receive basic reparation benefits. His vehicle was insured by State Farm; his insurance policy included UIM coverage.

Nearly two years after the accident, on August 5, 2010, Riggs filed suit against Richards alleging negligence and commenced discovery. Thereafter, on August 26, 2011, with leave of court, Riggs amended his complaint to assert a claim against State Farm for UIM benefits.

Prior to trial, Richards' liability insurance carrier, Allstate Insurance Company, settled Riggs' negligence claim against Richards for $100,000.00, Richards' liability policy limits. Riggs communicated this to State Farm, who elected to waive its subrogation rights against Richards.[1]

[1] See *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), now codified in KRS 304.39-320, for an in-depth discussion concerning settlement of a tort claim, UIM benefits, and preservation of a UIM carrier's subrogation rights.

Despite the settlement between Riggs and Richards, Riggs' contractual claim for UIM benefits against State Farm remained. Because Riggs believed his damages exceeded the amount of his settlement with Richards, he continued to pursue the UIM claim. Discovery ensued. On December 2, 2011, State Farm moved for summary judgment asserting Riggs' UIM claim was time-barred pursuant to a contractual limitation clause contained in Riggs' insurance policy with State Farm. That clause states:

> There is no right of action against us [State Farm]: . . . under uninsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced not later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

State Farm pointed out that the accident occurred on August 26, 2008, but Riggs chose not to sue State Farm for UIM benefits until August 26, 2011, three years later. Consequently, State Farm argued, Riggs filed his UIM claim outside the two-year contractual limitations period, rendering his UIM claim time-barred. The circuit court agreed and granted State Farm's summary-judgment motion, relying squarely on an opinion of the United States Court of Appeals for the Sixth Circuit – *Pike v. Government Employees Insurance Company*, 174 Fed. Appx. 311 (6th Cir. 2006). Riggs promptly appealed.

II. Standard of Review

"An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions

and no factual findings are involved." *Hallahan v. The Courier–Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Additionally, whether an action is time-barred is a legal, not factual, inquiry. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010). Our review proceeds *de novo*. *Id.*; *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

III. Analysis

Riggs asserts the circuit court erred as a matter of law when it found the two-year contractual limitation clause in his insurance policy with State Farm to be reasonable, and because it is, in fact, unreasonable, it is invalid. He argues, therefore, that the fifteen-year statute of limitations for general actions on written contracts, set forth in Kentucky Revised Statutes (KRS) 413.090, should apply. We agree and hold that the circuit court erred when it declared Riggs' claim for UIM benefits to be time-barred.

We begin our analysis by reiterating three well-settled points in this area of law.

First, parties to an insurance contract may establish the time period in which an insured shall sue an insurance company for uninsured (UM) or UIM benefits, provided the limitation is reasonable. *Gordon v. Kentucky Farm Bureau Ins. Co.,* 914 S.W.2d 331, 333 (Ky. 1995) (holding insurance companies may contract "with their insureds for a shorter period of time to file a contractual claim" than the fifteen years permitted for general actions on a written contract, but "[s]uch period of time must be 'reasonable'"); *Elkins v. Kentucky Farm Bureau*

Mut. Ins. Co., 844 S.W.2d 423, 425 (Ky. App. 1992) (reiterating the "shortening of the limitation period in which an action must be brought is" permitted provided the limitation is not "restrictive, unreasonable, [or] limits coverage otherwise allowed by statute"). The touchstone, then, is reasonableness.

Second, absent a valid and enforceable – that is, reasonable – contractual limitation, the "fifteen-year statute of limitations for general actions on a written contract" set forth in KRS 413.090(2), rather than the two-year tort statute of limitations in KRS 304.39-230(6), controls. *Gordon*, 914 S.W.2d at 332-33; *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 801 (Ky. 2005). Unless a reasonable contractual provision provides otherwise, the limitations period for a contractual UM or UIM benefits claim is fifteen years. *Gordon*, 914 S.W.2d at 333.

Third, heretofore we have but one explicitly articulated, bright-line rule – a one-year contractual limitation on bringing a suit for UM or UIM benefits is not reasonable. *Elkins*, 844 S.W.2d at 424-25 (declaring unreasonable, and therefore invalid, "a one-year contract limitation requiring that an uninsured motorist claim be commenced within 12 months of the date of loss"); *Gordon*, 914 S.W.2d at 331.

Riggs asserts that Kentucky's appellate courts have not yet spoken on the precise issue of whether a two-year contractual limitation is reasonable. Consequently, Riggs relies upon the decision of the United States District Court for the Western District of Kentucky in *Brown v. State Auto*, 189 F. Supp. 2d 665 (W.D. Ky. 2001), in which the district court held that a two-year "contractual

limitation on bringing underinsured motorist benefits claims is unreasonable and therefore invalid." *Id.* at 670.

In response, State Farm notes its policy language parrots KRS 304.39-230(6).[2] State Farm concedes this statutory limitations period is not controlling. *Gordon*, 914 S.W.2d at 332-33. However, State Farm argues the two-year contractual limitation cannot be said to be unreasonably short because it is the exact same time limitation established by the Kentucky legislature in which a person may bring a tort suit against a claimed negligent driver. State Farm urges that, in this regard, the contractual limitation does not offend the mandates expressed in *Elkins* and *Gordon* that an insured need not sue his or her insurance company before the insured would be obligated to sue a negligent driver. *Gordon*, 914 S.W.2d at 332; *Elkins*, 844 S.W.2d at 424-25 (declaring an insured seeking uninsured benefits from his insurer "should have the same rights as he would have had against an insured third party").

Furthermore, State Farm, like the circuit court, cites and relies on the Sixth Circuit's opinion in *Pike*, *supra.* In that case, Pike was injured when his motor vehicle collided with a vehicle driven by an underinsured motorist. Pike settled his personal injury claim against the underinsured motorist for the motorist's liability policy limits. Pike then sued his own insurance company seeking UIM benefits. Pike's insurance policy had a contractual limitations period that was effectively the

[2] KRS 304.39-230(6) provides, in full: "An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs."

same as Riggs' in that it required Pike to file suit for UIM coverage "within the period prescribed by Kentucky law for the filing of a personal injury action arising out of a motor vehicle accident[,]" *Pike*, 174 Fed. Appx. at 313, *i.e.,* within "two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs." KRS 304.39-230(6). The trial court concluded, and the Sixth Circuit affirmed, that Pike's claim for UIM coverage was time-barred because he failed to file suit within the contractual limitations period. The Sixth Circuit found "the flexible limitation period contained in Pike's policy, which period was coextensive with that contained in the MVRA," reasonable because "[n]othing in Pike's UIM policy require[d] Pike to file a claim for UIM benefits prior to suing a tortfeasor." *Pike*, 174 Fed. Appx. at 316. The Sixth Circuit quoted with approval the reasoning of the trial court:

> The GEICO policy in issue here contains a provision which looks to the tort liability limitation in the MVRA. The MVRA prescribes a period of two years which may be extended by the payment of reparation benefits. Thus the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor, no less than two and possibly more than two years from the date of the injury. This period, which dovetails with the tort liability period of limitation, is reasonable inasmuch as it does not require the insured under any circumstance to file suit for UIM benefits prior to the expiration of the limitation period for filing suit against the tortfeasor.

Id.

For the reasons we set forth below, we do not find the Sixth Court's analysis persuasive, and decline to follow the rationale of *Pike*. *See Commonwealth*

Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718, 725 (Ky. 2005) (emphasizing Kentucky courts are not bound by Sixth Circuit precedent). A closer examination of the underlying nature of a UIM claim reveals the fallacy inherent in the Sixth Circuit's, and in turn State Farm's, reasoning.

In *Pike*, the Sixth Circuit found the contractual limitation reasonable because, *inter alia*, "the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor[.]" 174 Fed. Appx. at 316. State Farm adopts and forcefully reiterates this logic. However, in *Gordon*, our Supreme Court found "it illogical to adopt a general rule which would require a plaintiff to sue his own insurer ***before discovering*** whether or not the tort-feasor is in fact an uninsured [or underinsured] motorist." 914 S.W.2d at 332 (emphasis added). A contractual limitation clause that parrots the language of KRS 304.39-230(6), like the one in *Pike* and in this case, might very well require the insured to do just that – to bring suit against his insurer before discovering whether the tortfeasor is uninsured or underinsured.

Until an injured party files suit against the alleged tortfeasor and engages in discovery to ascertain the limits of the tortfeasor's liability insurance, the injured party cannot determine whether the tortfeasor is indeed an underinsured motorist. This is so because the UIM carrier's liability, and the amount and limits of that liability, is predicated upon the prior determination of the shortfall between the insured's claimed damages and the coverage of those damages available under

the tortfeasor's policy of insurance. *G & J Pepsi-Cola Bottlers, Inc. v. Fletcher*, 229 S.W.3d 915, 918 (Ky. App. 2007) ("UIM carrier's liability is measured by the liability of the tortfeasor."); *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 315 (Ky. 2006) ("The tortfeasor's liability insurance is the primary coverage, and the UIM insurance is the secondary or excess coverage[.]"). Stated differently, the UIM carrier can only be held liable for those damages exceeding the limits of the tortfeasor's liability insurance. Until the injured party discovers those limits, he or she cannot conclusively discern whether the tortfeasor is underinsured. While, of course, a tortfeasor or his insurance carrier may freely notify the injured party of the tortfeasor's liability policy limits, we know of no statute or procedural rule that compels a tortfeasor or his insurance company to do so absent a proper discovery request.[3]

It is not uncommon that an injured party will not discover whether the tortfeasor is an underinsured motorist until after the injured party first commences suit against the tortfeasor, and receives the results of discovery. While the contractual limitation at issue here (and in *Pike*) does not require the injured party

[3] The federal procedural rules and the Kentucky rules treat disclosure of insurance agreements differently, the former making it automatic and compulsory, the latter making it discretionary with the party seeking it. Federal Rule of Civil Procedure 26(A)(iv) requires that "a party *must*, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." (Emphasis added). On the other hand, Kentucky Rule of Civil Procedure (CR) 26.02(2) says "[a] party *may* obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." (Emphasis added). Whether this made a difference in the Sixth Circuit's analysis in *Pike* is not discernible from that opinion.

to sue his or her UIM carrier prior to suing the tortfeasor, the limitation has the possibility of compelling an injured party to file a protective suit against the carrier before the two years elapses, even though a prior suit against the tortfeasor might not yet have yielded discovery that would disclose any need to pursue UIM coverage, *i.e.*, "before discovering whether or not the tort-feasor is in fact an uninsured [or underinsured] motorist." *Gordon*, 914 S.W.2d at 332. To require the filing of a protective lawsuit is not only unreasonable, it is a waste of legal and judicial resources. *See Brown*, 189 F. Supp. 2d at 671 (declaring "it unreasonable to require an insured to sue her insurer for underinsured motorist benefits prior to being required to sue the tortfeasor, and thus to determine whether or not the tortfeasor is in fact underinsured"). It could also create an issue under CR 11.

Nevertheless, State Farm urges that we follow *Perry v. Kelty*, No. 2011–CA–000160–MR, 2012 WL 1556311 (Ky. App. May 4, 2012),[4] which summarily stated that "this Court has previously held [that] a two-year limitation of this nature for suits against an underinsured carrier is not unreasonable." *Id.* at *3. There are three reasons we are not bound by, and choose not to follow, *Perry*.

First, the opinion was designated not to be published. Although State Farm is entitled to submit the unpublished case to this Court for consideration, we are not bound to follow the reasoning of that decision. CR 76.28(4)(c) ("Opinions that are not to be published shall not be . . . used as binding precedent in any other case

[4] We note that two members of the panel deciding this case (Acree, C.J., and Taylor, J.) were associate judges in the case of *Perry v. Kelty*.

in any court of this state"). And we will not follow the reasoning of an unpublished opinion that is not sound.

Second, and more importantly, the issue in *Perry*, an appeal of the grant of summary judgment in favor of, coincidentally, State Farm, was not the reasonableness of the limitations period. The issue was whether "a genuine issue of material fact existed concerning [the insured's] notice and receipt of the new insurance policy along with its amendatory endorsement limitations." *Perry*, 2012 WL 1556311, at *1. Perry never raised the reasonableness of the two-year limitation as an issue before the circuit court or the Court of Appeals. Our comment on the reasonableness of the contractual two-year limitation period was, therefore, *dicta*.

Third, the *dicta* relied upon *Elkins*, but did not accurately interpret it. *Elkins* simply held that any period less than the two-year period of KRS 304.230(6), including the one-year period at issue in that case, must necessarily be unreasonable; it did not hold that a two-year period *was* necessarily reasonable. *Elkins*, 844 S.W.2d at 425 ("[W]e . . . find . . . Farm Bureau's one-year limit unreasonable.").

We find a contractual limitation for filing a UIM claim that parrots the tort statute of limitations period set forth in KRS 304.39-230(6) to be unreasonable. Therefore, the contractual limitation contained in the insurance policy between Riggs and State Farm is unreasonable. The fifteen-year statutory

period for commencing contract claims applies, and the circuit court erred in finding Riggs' UIM claim against State Farm to be time-barred.

IV. Conclusion

The Hardin Circuit Court's February 6, 2012 order is reversed. We remand for additional proceedings consistent with this opinion.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The majority opinion advances some persuasive rationales for overturning the contractual time limitation for bringing an action for underinsured motorist benefits. In my view, however, a time limitation that dovetails with the limitation contained in KRS 304.39-230 is reasonable and comports with public policy. *Pike v. Gov't Employees Ins. Co.*, 174 Fed. Appx. 311, 316 (6th Cir. 2006). I would affirm the Hardin Circuit Court's judgment.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Timothy R. McCarthy Louisville, Kentucky	Kim F. Quick Elizabethtown, Kentucky