

RENDERED: FEBRUARY 5, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-001907-MR

ANGELA ELLIS HUNTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 09-CI-000332

UNKNOWN DEFENDANT; AND STATE  
FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Angela (Ellis) Hunter appeals from a summary judgment entered by the Jefferson Circuit Court on September 27, 2012. Hunter argues that the trial court improperly dismissed her uninsured motorist claims against State Farm Mutual Insurance Company (State Farm) arising from actions of an unknown

driver who fled the scene of an accident. However, since the trial court found that the vehicle occupied by the unknown driver was insured, we agree that State Farm's obligation to pay uninsured motorist benefits was not implicated. Hence, we affirm the summary judgment dismissing that claim.

This case arises from an automobile accident that occurred on December 17, 2005, in Jefferson County, Kentucky. Hunter was driving a vehicle on Lower River Road in Jefferson County, Kentucky. The vehicle was owned by Anna Campbell and insured through Founders Insurance Company. Hunter had a personal insurance policy through State Farm, which included both uninsured (UM) and underinsured (UIM) coverage. The vehicle which Hunter was operating was struck by a 1980 Chevrolet Blazer. Hunter and several witnesses state that two intoxicated men exited the Blazer and fled the scene. Neither has been identified. According to the police report, the Blazer had a Kentucky license tag and was registered to Oldham County Auto Sales.

Hunter filed this action on January 12, 2009. As defendants, she named the unknown driver of the Blazer, Oldham County Auto, and its apparent insurance carrier, Acceptance Indemnity Insurance Company. Acceptance answered that it did not have a policy covering Oldham County Auto, and Oldham County Auto stated that it was insured by Occidental Fire & Casualty Co. In its answer, Oldham County Auto stated that it had sold the Blazer to Joanna Hernandez on October 26, 2005, through Clark County Auto Auction in Jeffersonville, Indiana. The state of Indiana issued a title to Hernandez on January

7, 2006. In addition to these parties, Hunter also asserted claims against State Farm for UM benefits and for bad faith, as well as claims against Founders.

The matter proceeded through discovery and several amended complaints. Eventually, the trial court granted summary judgment dismissing Acceptance, because it was not a real party in interest, and Founders, because its only liability would be for personal injury protection benefits, which State Farm had already paid to Hunter. Oldham County Auto moved for summary judgment on the ground that Hernandez purchased the Blazer prior to the accident. The trial court eventually granted the motion, concluding that Oldham County Auto was not the owner of the Blazer on the date of the accident.

Hunter filed an amended complaint adding Hernandez as a party to this action. She also asserted an additional claim against State Farm for UIM benefits for any amounts in excess of Hernandez's coverage. Prior to trial, State Farm moved for an order limiting Hunter's claim against it to UIM coverage. The trial court granted the motion on April 4, 2011, holding that, since Hernandez was the owner of the vehicle and was insured, Hunter's only claim against State Farm could be for UIM coverage of any amounts in excess of Hernandez's coverage. The trial court did not expressly dismiss Hunter's UM claim, nor did it designate the order as final and appealable. The trial court also excused State Farm from further participation in the trial until Hernandez's liability was established.

Subsequently, Hunter moved to reinstate the UM claim based upon Hernandez's statements in discovery that she did not know who was driving the

Blazer but in any case the unknown driver did not have permission to use the vehicle. The trial court denied the motion on September 6, 2011, concluding that Hernandez had not affirmatively pleaded the defense that the unknown driver was a non-permissive user. While the court did not dismiss the UM claim, the order included finality language required by CR<sup>1</sup> 54.02. On September 16, 2011, Hunter filed a motion to alter, amend or vacate that order pursuant to CR 59.05 and CR 60.02. The trial court denied that motion on October 27, 2011.

Following further discovery, Hernandez moved for summary judgment, arguing that Hunter failed to file the claim against her within the two years allowed by KRS<sup>2</sup> 304.39-230(6), and therefore the action was time-barred. The trial court granted the motion on November 22, 2011. Shortly thereafter, State Farm filed a motion for summary judgment on the remaining UIM and bad-faith claims. State Farm noted that it could not be liable for payment of UIM benefits in the absence of liability by the underinsured tortfeasor. In response, Hunter filed an amended complaint reasserting a claim for UM benefits based upon Hernandez's statements that the unknown driver did not have permission to use the vehicle.

On August 24, 2012, the trial court entered an order dismissing Hunter's UIM claim against State Farm. That order included finality language required by CR 54.02. On September 10, 2012, Hunter filed a motion to set aside that order pursuant to CR 59.05 and CR 60.02. Hunter again pointed to her

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Revised Statutes.

revived claim for UM benefits against State Farm. In a separate motion, Hunter also moved for summary judgment on the UM claim.

On September 27, 2012, the trial court entered two orders. The first order denied Hunter's motion for summary judgment, concluding that the August 24 order was a final and an appealable order and dismissed all remaining claims against State Farm. The second order denied Hunter's motion for relief, stating that the motion "fails to cite any irregularity related to the Court's August 24, 2012 Order under CR 60.02." But somewhat inconsistently, the order also granted State Farm's motion to dismiss. The order concludes by dismissing the case with prejudice.

Hunter only appeals from the trial court's order dismissing her claim against State Farm for UM benefits. As an initial matter, State Farm argues that Hunter has failed to appeal from a final and appealable order. We agree with State Farm that Hunter's motion to set aside the August 24 order was not filed within the ten days required by CR 59.05. Consequently that motion was not timely and could not operate to stay finality of the judgment. But contrary to the trial court's understanding in its first September 27 order, the August 24 order only addressed State Farm's motion for summary judgment on the UIM claim. Hunter still had a pending UM claim arising from her Fifth Amended Complaint.

While the trial court apparently believed that the latter claim had been dismissed earlier in the action, the court's prior orders do not reflect an explicit dismissal. Rather, Hunter's UM claim was not formally dismissed until the entry

of the September 27 order. State Farm suggests that the most recent order was not final and appealable due to the absence of finality language required by CR 54.02. However, the finality language is required only when the judgment which adjudicates less than all the claims or the rights and liabilities of less than all the parties. CR 54.02(2) further provides:

When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

The trial court's second September 27, 2012 order conclusively determined all remaining claims between Hunter and State Farm. Although some of the language used is misleading, we conclude that it constitutes a final and appealable judgment. Therefore, Hunter's appeal is properly before this Court.

State Farm also argues that Hunter waived any claim for UM benefits by failing to pursue that matter until her claims against Hernandez were dismissed. The record refutes this position. As noted above, the trial court precluded Hunter from pursuing her UM claims against State Farm while her claims against Hernandez were pending. Furthermore, while the trial court suggested that it had entered a final order dismissing the UM claim, the court's orders do not reflect a dismissal. Since the trial court's orders did not conclusively determine the rights of the parties to the action, the court's inclusion of finality language in some of its orders could not make an inherently non-final order appealable. *See Hale v.*

*Deaton*, 528 S.W.2d 719, 722 (Ky. 1975). Hunter objected to the trial court's earlier orders limiting her claim against State Farm to UIM benefits, and she attempted to revive the UM claim upon receiving Hernandez's interrogatory responses. Under the circumstances, we cannot say that Hunter waived her UM claim against State Farm.

The central issue is whether the trial court properly granted summary judgment dismissing Hunter's claim against State Farm for UM benefits. "The proper function of summary judgment is 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." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate "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 her favor. *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.* Although a party is permitted to move for a summary judgment at any time, a trial court should not take up a summary judgment motion prematurely, but only after the opposing party has been given reasonable opportunity to complete discovery. *Blankenship*

*v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010), citing *Pendleton Bros. Vending, Inc.*

*v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988).

Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scrifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

The trial court found that Hernandez was the owner of the vehicle on the date of the accident and she was insured. Hunter does not appeal from these findings and, consequently, we are bound by those findings in this appeal.

Likewise, Hunter does not appeal from the trial court's dismissal of Hernandez based upon the statute of limitation. Therefore, that matter is beyond the scope of this appeal. The only question is whether Hunter properly asserted a claim against State Farm for UM benefits.

In her response to Hunter's interrogatories, Hernandez stated that she did not know who was driving the Blazer on the night of the accident but the operator did not have her permission to use the automobile. Based on these admissions, Hunter contends that the unknown driver was a non-permissive user and would not be covered under Hernandez's insurance. *See Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 872 S.W.2d 469, 471 (Ky. 1994). Even though Hernandez was insured, Hunter contends that she may still recover UM benefits based upon the liability of the unknown driver.

UM coverage is first-party coverage, which means that it is a contractual obligation owed directly to the insured which must be honored even if



the tortfeasor cannot be identified and without regard to whether the obligation of the tortfeasor can be reduced to judgment. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993). However, neither Hernandez nor her insurer denied liability on the basis that the unknown driver was a non-permissive user. Furthermore, Hernandez admitted that she never reported the vehicle as stolen. Any defense regarding permissive use is foreclosed by Hernandez's dismissal as a party on statute-of-limitation grounds. Consequently, her liability and the status of the Blazer as an insured vehicle are not subject to further litigation.

State Farm's contractual obligation to pay UM benefits is not implicated where there is no dispute that the vehicle was insured. Since Hernandez's insurance covered the Blazer, that vehicle was insured for purposes of State Farm's UM coverage. The actual insurance status of the unknown driver is not controlling. *Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872, 878 (Ky. 2006). Furthermore, Hunter makes no showing that she did not have a reasonable opportunity to conduct discovery about the unknown driver, or that additional discovery would lead to evidence that implicates State Farm's liability for UM benefits. Under the circumstances presented in this case, we conclude that the trial court properly granted summary judgment for State Farm.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEF FOR APPELLANT,  
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No brief for Appellee  
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