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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002051-MR

COUNTRYWAY INSURANCE COMPANY APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 10-CI-00689

UNITED FINANCIAL CASUALTY COMPANY
AND SHARON BARTLEY APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

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

JONES, JUDGE: This appeal concerns the priority of coverage between two uninsured motorist ("UM") policies, one issued by Appellant Countryway Insurance Company ("Countryway") and the other issued by Appellee United Financial Casualty Company ("United"). The Warren Circuit Court determined that the policies contained mutually repugnant excess coverage provisions and,

therefore, damages should be prorated between the two policies. On appeal, Countryway asserts that the trial court should have deemed United's policy primary because it covered the vehicle involved in the accident. For the reasons more fully explained below, we hold that the policy covering the injured person should be deemed primary to the policy covering the vehicle. Accordingly, we reverse the Warren Circuit Court's order prorating the coverage.

I. Factual and Procedural Background

The underlying facts are undisputed. On September 27, 2007, Joey Bartley was driving his semi-tractor in Warren County. His mother, Appellee Sharon Bartley, was a passenger in the semi-tractor. Gregory Gaskey, an uninsured motorist, negligently struck the Bartleys' semi-tractor, injuring Sharon Bartley.[1]

At the time of the collision, Joey Bartley maintained a United commercial auto insurance policy on the semi-tractor. The United policy provides UM coverage up to $50,000 per person and $100,000 per accident. It also contains an "other insurance" provision that states:

> If there is other applicable uninsured or underinsured motorist coverage, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all available coverage limits. However, any insurance we provide shall be excess over any other uninsured or underinsured motorist coverage, except for **bodily injury** to **you** and, if the named insured is a natural person, **a relative** when occupying an **insured auto** or **temporary substitute auto**.

[1] Gaskey passed away on November 6, 2008. By Order rendered August 7, 2013, he was dismissed as a party to this appeal.

> **We** will not pay for any damages which would duplicate any payment made for damages under other insurance. [Emphasis in original].

At the time of the accident, Sharon Bartley was insured under her husband's personal auto policy through Countryway. The Countryway policy provides UM coverage up to $100,000 per person and $300,000 per accident. Like the United policy, it also contains an "other insurance" provision. Countryway's other insurance provision states:

> If there is other applicable insurance similar to the insurance provided by this endorsement, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectable insurance similar to the insurance provided by this endorsement.

Sharon Bartley pursued UM claims against both United and Countryway. The insurance providers conceded that Sharon Bartley was eligible for UM benefits under both policies. The providers, however, could not agree on the priority of the UM coverage because Sharon Bartley fell within the "other insurance" provisions of both policies.[2] Countryway argued that Kentucky common law and public policy mandated that United's policy was primary because

[2] Coverage under the Countryway policy was deemed excess because Sharon Bartley was also eligible for UM benefits under United's policy and was seeking UM benefits arising out of injuries she sustained in a vehicle the policyholder, her husband, did not own. The terms of United's policy also deemed its coverage excess because Sharon Bartley was not named as an insured in United's policy and did not reside with her son, the named insured, at the time of the accident.

it covered the vehicle involved in the collision. United argued that the excess coverage provisions in the two policies were mutually repugnant and, therefore, the damages should be prorated between the two policies.[3]

On October 26, 2012, the trial court rendered an order in United's favor on the priority of coverage issue. The trial court recognized that in *Farm Bureau Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803 (Ky. 2010) (hereinafter referred to as "*Shelter*"), the Kentucky Supreme Court rejected the apportionment rule in favor of deeming the vehicle owner's insurance primary where excess liability clauses clashed. However, the trial court ultimately concluded that *Shelter* was not dispositive because it dealt with liability coverage under Kentucky's Motor Vehicle Reparations Act ("MVRA"). The trial court concluded that the public policy concerns at issue in *Shelter* did not apply to mutually repugnant excess UM provisions that fell outside the MVRA. Accordingly, the trial court applied Kentucky's general apportionment rule and ordered damages prorated between United and Countryway. This appeal followed.

II. Standard of Review

The question before us is a purely legal one regarding coverage under insurance policies. Our standard of review, therefore, is *de novo*. *Dowell v. Safe Auto Ins. Co.*, 208 S.W.3d 872, 875 (Ky. 2006). Under *de novo* review, we owe no

[3] Sharon Bartley agreed to settle her UM claims in exchange for $22,500. United and Countryway agreed that United would pay the proceeds and could seek contribution from Countryway if the trial court found in United's favor on the priority issue.

deference to the trial court's application of the law to the established facts. *Grange Mutual Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

III. Analysis

A. UM Coverage

"[T]he purpose of uninsured motor vehicle coverage is to make available to injured parties from their own insurer a stated minimum amount of insurance coverage when no other valid or collectible insurance exists with respect to the vehicle causing the damage." *Commonwealth Fire & Cas. Ins. Co. v. Manis*, 549 S.W.2d 303, 305 (Ky. App. 1977). "We have noted on several past occasions that in enacting KRS [Kentucky Revised Statutes] 304.20-020, the General Assembly did not presume to write an uninsured motorist policy, but merely gave a general outline of the coverage required, the legislature recognizing that the limits and terms of the statute's general outline of required coverage would of necessity be specifically defined by reasonable 'terms and conditions' in the various insurance contracts." *See State Farm Mut. Auto. Ins. Co. v. Christian*, 555 S.W.2d 571, 572 -73 (Ky. 1977).

While Kentucky requires insurers to make UM coverage available under all automobile liability policies of insurance, it does not require owners and operators of motor vehicles to carry UM coverage. *See* KRS 304.20-020 ("[T]he named insured shall have the right to reject in writing such coverage; and provided further that, unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the

named insured had rejected the coverage in connection with a policy previously issued to him or her by the same insurer.")

"From its inception, [Kentucky courts] have recognized UM coverage is *first party coverage*, which means that it is a contractual obligation directly to the insured which must be honored even if the tortfeasor cannot be identified." *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993). Given the personal nature of UM coverage, we have held that it follows the insured regardless of whether the insured is injured as a motorist, a passenger, or as a pedestrian and such coverage is only limited by the actual, valid exclusions of each insurance policy. *Dupin v. Adkins*, 17 S.W.3d 538 (Ky. App. 2000).

B. Other Insurance Provisions

Other insurance provisions are standard in contracts of insurance. "Other insurance clauses are generally of three types: (1) calling for proration of coverage between the multiple policies; (2) stating that the policy will be 'excess' to any other applicable coverage; (3) seeking to avoid any contribution at all." *12 Couch on Insurance*, *Third Edition* § 169:9 (1995). Historically, other coverage provisions have been upheld as generally valid under Kentucky law. *See Calvert Fire Ins. Co. v. Stafford*, 437 S.W.2d 176, 179 (Ky. 1969).

Not surprisingly, where more than one policy of insurance is at issue, the other insurance provisions in the policies will often conflict with one another.

In such cases, at least prior to *Shelter*, Kentucky followed the rule of repugnancy. *See Government Emp. Ins. Co. v. Globe Indem. Co.*, 415 S.W.2d 581-582 (Ky. 1967); *Ohio Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 511 S.W.2d 671 (Ky.1974). Under the repugnancy rule, if the two competing excess clauses could not be applied without canceling each other out, the courts deemed them mutually repugnant. *See Great Am. Ins. Co. v. Lawyers Mut. Ins. Co. of Ky.*, 492 F. Supp. 2d 709 (W.D. Ky. 2007) (citing *Ohio Cas. Ins. Co.*, 511 S. W.2d at 674-675). Both provisions were considered void and the courts apportioned liability between the two policies with neither policy receiving priority over the other. *Id.*

C. Case Law Prior to Shelter

Despite acknowledging the existence of the general rule of repugnancy in Kentucky law, Countryway asserts that even prior to *Shelter* there was a longstanding common-law rule that the UM coverage for the vehicle involved in the accident is deemed primary if two or more policies are potentially applicable, irrespective of the existence or effect of any excess coverage provisions. We have carefully reviewed the common law prior to *Shelter* and find no persuasive authority to support Countryway's position.

In *American Auto. Ins. Co. v. Bartlett*, 560 S.W.2d 6 (Ky. App. 1977), the passenger's estate brought a claim against the passenger's carrier for UM benefits. The passenger's carrier argued that the other insurance clause in its policy rendered the driver's UM insurer liable to the limits of its coverage first. The

passenger's estate and the driver's insurer had entered into an agreement that would operate to prevent the estate from retaining any of the proceeds collected under the driver's uninsured motorist policy. The trial court refused to allow the passenger's insurer to file a third-party complaint against the driver's insurer. On appeal, the court determined that the driver's policy was primary where the passenger's other insurance provision was applicable. The court specifically noted that this result conformed to the terms of the policies and gave effect to the other coverage provision, which was only contained in the passenger's policy.

The only principle of law *American Auto* establishes is that the policy provisions control priority if they can be reconciled. It does not address how a court should proceed if the policy provisions cannot be reconciled. That is the situation we face because each policy before us contains an applicable other insurance provision.

Countryway also relies on *Hamilton Mut. Ins. Co. v. U.S. Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky. App. 1996), to support its position that the common law places UM priority on the vehicle involved in the accident. In *Hamilton Mut.*, three different UM policies were at issue. The court determined that all three policies were applicable. It then examined the terms of the policies to determine how to apportion liability between the three. The policy covering the automobile that was involved in the accident, a Lincoln, stated that it provided primary insurance on any covered auto. The court concluded the policy language was "clear on its face" that the coverage it provided was primary because the

Lincoln was a covered automobile. The court then turned to the other two policies, which contained almost identical excess coverage provisions. The court held that the excess clauses nullified one another, making the two excess insurers "co-insurers with the obligation to provide pro rata coverage toward any excess amount remaining after USF&G [the primary insurer] has exhausted its limits." *Id.* at 470.

If anything, *Hamilton Mut.* undermines Countryway's position. Priority as between the primary and excess insurance carriers was determined by the policy language, not general public policy or common law. The court determined that the policy covering the Lincoln was primary because the policy made it primary, not merely because it was the vehicle involved in the accident. Having determined that one of the three policies was primary by its terms, the court then turned to the secondary policies. The court determined that it was impossible to assess priority between the two other providers because their virtually identical excess clauses nullified one another. It held that in that situation the two excess providers were responsible on a pro rata basis.

The last pre-*Shelter* case relied on by Countryway is *Metcalf v. State Farm Mut. Auto. Ins. Co.,* 944 S.W.2d 151 (Ky. App. 1997). The issue in *Metcalf* was whether an insured's settlement with the primary underinsured motorist "UIM" carrier for less than primary UIM benefits precluded the insured from recovery of excess UIM benefits against the excess/secondary UIM carrier. *Id*. The court observed only that the trial court had correctly determined the issue of

priority based on the policies. The court did not address how to determine priority if UM/UIM coverage is deemed excess under two mutually repugnant policies.

Thus, prior to *Shelter*, Kentucky followed a general two-prong analysis when two or more other insurance provisions were at issue. The court consulted the provisions in the policies to determine if the provisions could be applied consistent with one another. If so, the court applied the policies according to their terms. If not, the court apportioned liability between them. There were no recognized exceptions for UM or any other type of coverage.

D. Shelter

Shelter involved competing excess coverage provisions for liability coverage. The driver in *Shelter* was driving his parents' vehicle when he negligently struck another vehicle, injuring its occupant. Two insurance policies were applicable, the driver's policy and the policy covering the vehicle. The policies contained mutually repugnant excess insurance clauses. On appeal, the Supreme Court of Kentucky declined to apply the standard rule of mutual repugnancy. Instead, the court held that the policy covering the vehicle involved in the accident was the primary policy as mandated by the spirit and intent of the MVRA. *Shelter*, 326 S.W.3d at 803.

The court noted multiple problems with the two-step framework required by the mutual repugnancy rule. First, the court recognized that it encouraged insurance companies to engage in a "battle of the policies" and led to repetitive litigation. *Id.* at 807. Second, the court also expressed concerns

regarding the complexity of properly apportioning competing policies noting that none of the apportionment methods achieved an entirely just result. *Id.* at 808.

In opting to place primary liability on the insurance covering the vehicle, the court was ultimately guided by the policies underlying the MVRA. *Id.* at 811 ("We glean from the legislative intent underlying the MVRA that the General Assembly intended, that in instances where both the vehicle owner and non-owner driver are separately insured, the vehicle owner's insurance shall be primary."); *id.* at 805 ("[W]e decline, in this instance, to further embroil Kentucky courts in unduly complicated two-step insurance policy interpretations ... because such considerations are inconsistent with the policies and intent of the MVRA."). Citing the purposes section of the MVRA statute, the court rejected the bifurcated approach in liability insurance cases in order to bring the law in this area more in line with the goals of the MVRA. *Id.* at 810.

However, the *Shelter* court did not reject the repugnancy rule as the default approach in all conflicts between insurers. "[T]he apportionment methods are an attempt at fairness and at times they must be adhered to…." *Id.* at 810. The court further reiterated Kentucky's longstanding rule that parties are free to contract for insurance coverage as they see fit and courts should honor their contractual provisions so long as they do not conflict with public policy or statute. *Id*. at 811. Furthermore, the *Shelter* court was careful to note that its result was consistent "with the general rule which places primary liability on the insurer of the owner of the automobile involved rather than on the insurer of the operator, *where we are*

dealing with the standard automobile liability policy." *Id*. at 810 (emphasis added).

E. Applicability of Shelter to UM Policies

Upon careful review, we conclude that the Kentucky Supreme Court's rationale for rejecting apportionment in *Shelter* applies with equal force when dealing with UM policies, the issue before us. The same basic public policy concerns of ensuring prompt payment to injured victims and reducing litigation are also present when dealing with UM coverage. Abolishing the rule of apportionment for UM coverage is a logical and natural extension of *Shelter*. It will undoubtedly lead to quicker payment to injured victims of uninsured motorists, cut down on the battle of the forms, and reduce litigation.

This does not mean, however, that *Shelter* must be applied in the same manner to UM coverage as to general liability coverage. After the *Shelter* court decided to do away with apportionment where general liability insurance provisions clashed, it closely examined the nature of general liability insurance and the purpose of the MVRA. The rule adopted by *Shelter* followed the general rule which places primary liability on the insurer of the owner of the automobile involved in the accident at issue rather than on the insurer of the operator. *Shelter*, 326 S.W.3d at 805.

Kentucky courts have repeatedly distinguished UM coverage from liability coverage. Significantly, in almost every other context, Kentucky courts have plainly held that UM coverage follows the person, not the vehicle, regardless

of whether the insured is injured as a motorist, a passenger or as a pedestrian. *Dupin*, 17 S.W.3d 538 (Ky. App. 2000). "[U]ninsured motorist coverage is personal to the insured; [] an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and [] it is contrary to public policy to deprive an insured of purchased coverage, particularly when the offer of such is mandated by statute." *Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754, 756 (Ky. 1990).

Moreover, unlike liability coverage, mandated for the benefit of others, UM coverage is not mandatory. To be certain, an insurer must make UM coverage available, but the insured can reject it. Thus, the *insured* has the ability to control the risk. Given the personal nature of UM coverage and the insured's ability to reject it under Kentucky law, it seems counterintuitive to follow *Shelter's* exact priority rule to place primary UM coverage on the vehicle. This would be contrary to how UM coverage has been treated under Kentucky law for the last four decades.

Since an insured can validly reject UM coverage, a passenger has no reasonable expectation that the driver of the vehicle she is riding in has procured the coverage. The only way the passenger can be certain she is covered is to secure personal UM coverage. The purpose of the UM statute is to make that coverage available to all Kentucky insureds to the extent they want it.

Given the difference between liability insurance and UM insurance, adopting the *Shelter* rule to place primary liability on the insurer of the vehicle, as

Countryway urges us to do, would fundamentally change the dynamic of UM coverage. In the case of a passenger, UM coverage would cease to be personal. The coverage selected, or not, by a third party would take precedence over that selected by the individual for her own benefit and protection. This is not a sound or just result.

While we agree with Countryway that *Shelter*'s underlying logic in favor of a bright-line rule should be adopted with respect to UM coverage, we do not agree that *Shelter* compels us to follow the same order of priority when dealing with UM coverage as when dealing with general liability coverage. After a review of the applicable statutes and relevant case law dealing with UM coverage, we conclude that because UM coverage is first-party coverage, it should follow the person, not the vehicle, as a matter of priority.

In conclusion, we hold that under *Shelter* the repugnancy rule and apportionment are no longer applicable where two excess/other insurance UM provisions clash. Instead, the UM policy covering the injured person, in this case, Countryway's policy, will be deemed primary as a matter of public policy and judicial economy.

IV. Conclusion

For the foregoing reasons, we reverse the October 26, 2012, order of the Warren Circuit Court, finding that the damages should be prorated between the two insurance providers, and remand for action consistent with this opinion.

ALL CONCUR.

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