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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000805-MR

LENORA SIMMONS, EXECUTRIX
OF THE ESTATE OF CHARLES
EDWARD SIMMONS, AND LENORA
SIMMONS, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR, JUDGE
ACTION NO. 13-CI-00402

GEICO INDEMNITY COMPANY
(GEICO); AND MICHAEL B. MUNDY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND CLAYTON, JUDGES.

ACREE, JUDGE: This case involves a dispute over insurance coverage. The issue presented is whether the decedent's estate may recover Underinsured Motorist (UIM) benefits on behalf of the decedent under a policy of insurance

tendered by appellee Geico Indemnity Company. The circuit court found it could not. We affirm.

I. Facts and Procedure

On August 16, 2012, the decedent, Charles Simmons, was a passenger in a 2003 Chevrolet Blazer that he owned. Charles' step-son, Michael Mundy, was driving. Mundy, traveling westbound, crossed the center line and collided head-on with an eastbound vehicle. The collision claimed Charles' life.

The Blazer was insured pursuant to a policy issued by Geico to Charles and Lenora Simmons. The policy provided liability coverage up to $25,000 per person ($50,000 per occurrence) and included UIM coverage with policy limits of $25,000.00 per person. Mundy was named an "additional driver" under the policy.

Appellant Lenora Simmons, in her individual capacity and as Executrix of the Estate of Charles Simmons, filed the underlying action seeking a declaratory judgment that the Geico policy provided UIM benefits to which the Estate was entitled. Geico counterclaimed, requesting a declaration that the policy's express terms explicitly excluded UIM coverage for this particular collision because the vehicle driven by Mundy was not an "underinsured auto."

The parties filed competing motions for declaratory summary judgment. By Order entered April 15, 2014, the circuit court granted Geico's motion, finding the insurance policy did not provide UIM coverage for the subject collision. Lenora appealed.

II. Standard of Review

When a declaratory judgment has been entered "and no bench trial held, the standard of review for summary judgments is utilized." *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010). The question before us 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). We "need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

III. Analysis

The sole issue, as framed, is whether Charles was entitled to UIM benefits under his own insurance policy with Geico for this particular accident. The answer is no: the clear and unambiguous terms of the Geico policy reveal UIM coverage is not available in this circumstance.

"As a general rule, the construction and legal effect of an insurance contract is a matter of law for the court." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007). We must "give clear and unambiguous terms in an insurance policy their plain and ordinary meaning." *Edwards v. Carlisle*, 179 S.W.3d 257, 259 (Ky. App. 2004).

The policy at issue states Geico will provide UIM coverage "for damages an ***Insured*** is legally entitled to recover for ***bodily injury*** caused by accident and arising out of the ownership, maintenance, or use of an ***underinsured***

auto." (R. at 534). Therefore, if we agree with the appellees and the circuit court that the Blazer was not an "underinsured auto," we must affirm. We do so agree.

An underinsured auto does not include any vehicle or equipment which is an insured auto. *Id.* An insured auto is one that is "described in the declarations and covered by the Bodily Injury Liability coverage of this policy." *Id.* It is undisputed that the 2003 Chevrolet Blazer involved in this accident was described in the policy's declarations and the policy provided liability coverage for Mundy's negligent acts. By definition, it is an insured auto, and concomitantly, not an underinsured auto, under this policy. There is no UIM coverage available to the Estate under this policy.

The policy's language is plain, clear and unambiguous. We must enforce the policy as written. *Edwards*, 179 S.W.3d at 259; *Ky. Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 630 (Ky. 2005) ("When the terms of an insurance contract are unambiguous and not unreasonable, they will be enforced.").

Our decision is consistent with Kentucky law and Kentucky's underinsured motorist statute, KRS 304.39-320. In pertinent part, that statute says UIM is coverage whereby:

> the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the ***other vehicle*** exceeds the liability policy limits thereon . . . .

KRS 304.39-320(2) (emphasis added). Interpreting the statute, the Kentucky Supreme Court affirmed that it "contemplates that the underinsured tortfeasor will be operating a different vehicle than the vehicle providing UIM coverage for the injured claimant." *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 449 (Ky. 1997). KRS 304.39-320 simply "does not authorize recovery against both the liability and UIM coverages of the same policy." *Id.*; *see also Pridham v. State Farm Mut. Ins. Co.*, 903 S.W.2d 909, 911 (Ky. App. 1995) (an insured cannot recover under the UIM provision of the same policy that provides liability coverage).

Of course, the policy itself may authorize recovery under both the liability and UIM provisions. *Id.* ("[T]he insurance contract could provide broader coverage than required by the statute."). The Geico policy in this case contains no such endorsements. It must be remembered that "[t]he purpose of UIM coverage is not to compensate the insured or his additional insureds from his own failure to purchase sufficient liability insurance." *Windham v. Cunningham*, 902 S.W.2d 838, 841 (Ky. App. 1995).

Lenora attempts to side-step these principles and the language of the Geico policy by invoking the doctrine of reasonable expectations. Citing *Bidwell v. Shelter Mutual Insurance Company*, 367 S.W.3d 585 (Ky. 2012), she argues the Geico policy creates an ambiguity and runs afoul of the reasonable expectation of UIM benefits when it sets out UIM coverage on the Declarations Page – and

describes that coverage a few pages later[1] – but then "buries" language later in the policy purporting to exclude UIM coverage. We are not persuaded.

The doctrine of "reasonable expectations" requires the insured be entitled to all coverage he may reasonably expect to be provided under the policy. *Bidwell*, 367 S.W.3d at 589. A "limitation of insurance coverage" must be "clearly stated in order to apprise the insured of such limitations." *Id.* at 588 (citation omitted). Combining these principles, "only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat" one's reasonable expectation of coverage. *Id.* at 589 (citation omitted).

In *Bidwell*, the Declarations Page stated that the policy provided bodily injury liability limits of $250,000 per person and $500,000 per occurrence. Later, the policy contained a "step down" provision that limited the amount of liability coverage for non-permissive drivers, but it did so by referencing "the financial responsibility law applicable to the accident." The Court held that the reference to the "financial responsibility law" was cryptic and ambiguous:

> What makes this provision particularly confusing is that it purports to limit coverage to some indeterminate

[1] The UIM descriptions referenced by Lenora state:

> Underinsured Motorist coverage pays when you are injured in an automobile accident and the party at fault does not have enough Bodily Injury Liability to pay for your injuries. Your Underinsured Motorist coverage will then pay up to the limit you have selected, depending upon the extent of your injuries.

(R. at 421, 425). Significantly, this language is contained in correspondence related to a policy that expired on March 17, 2012. The accident occurred in August 2012. This language has little value. *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky. 2010) (it is the terms of the policy, not correspondence or other informational documents, that are controlling).

> figure, indicated by a cryptic reference to some "financial responsibility law applicable to the accident" [and] leaves the policyholder guessing as to this provision's meaning . . . . In sum, . . . the step-down provision in the [insured's] policy contain[s] "limited and confusing terminology," and [is] anything but "clearly stated in order to apprise the insured of such limitations."

Id. at 590-91. Unlike the "cryptic" and "insufficiently plain and clear" exclusion in *Bidwell*, the UIM exclusion in the Geico policy is conspicuous, clear, and unambiguous. It describes the UIM exclusion in plain language. We perceive no ambiguity. We fail to see in *Bidwell* support for Lenora's argument.

Further, the placement later in the policy of the exclusion language does not defeat any reasonable expectation created by the declarations page. "[I]nsured persons are charged with knowledge of their policy's contents . . . . [T]he declarations page is but a single page briefly describing the various coverage and maximum limits[.]" *Bidwell*, 367 S.W.3d at 592 (citations omitted). It is manifestly unreasonable to expect an insurance carrier to describe fully the workings of each coverage option in the Declarations page. An insurance policy must be read as a whole. *See id.*

"The reasonable expectation of the average person who purchases UIM coverage is that she will be entitled to UIM benefits if she is struck by another driver whose liability limits are not sufficient to satisfy her damages." *Windham*, 902 S.W.2d at 841. To adopt the view propounded by Lenora "simply stretches the purpose and scope of underinsured coverage beyond the bounds of reason or common sense." *Id.* We decline to do so today.

IV. Conclusion

The Clark Circuit Court's April 15, 2014, Order is affirmed.

ALL CONCUR.

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