RENDERED: MAY 5, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001322-MR

ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CI-001083

KAREN LAWSON — APPELLEE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Allstate Property and Casualty Insurance Company ("Allstate") has appealed from the Jefferson Circuit Court's order denying summary judgment on Karen Lawson's claim seeking payment of underinsured motorist ("UIM") benefits. Following a careful review, we dismiss for lack of appellate jurisdiction.

Lawson, a resident of Indiana, was injured in a motor vehicle collision on Interstate 65 in Louisville, Kentucky, on July 29, 2012. The owner of the other vehicle, Victor Gonzalez, was a resident of Tennessee, and the driver, Pascuaul Luiz, had recently moved to Indiana from Georgia. At the time of the collision, Lawson was insured by Allstate under a policy providing $50,000 per person bodily injury UIM coverage. The policy was entered into in Indiana and Lawson's vehicle was "garaged" in that state. The other vehicle was insured by State Farm Insurance Company ("State Farm") under a policy providing $50,000 per person bodily injury coverage.

Lawson filed suit against Gonzalez, Luiz and Allstate seeking compensation for her injuries. Lawson alleged damages exceeding the amount of insurance coverage provided by State Farm's policy, thereby entitling her to payment of UIM benefits from Allstate under her own policy. During the pendency of the litigation, State Farm offered to pay Lawson its policy limits. Lawson informed Allstate of her intent to accept the offer and Allstate elected to waive its subrogation rights.[1]

Subsequently, Allstate moved for summary judgment. In Allstate's view, Lawson was insured under an Indiana policy explicitly calling for application of Indiana law to disputes arising under the policy. Further, citing *Lewis v. American Family Ins. Group*, 555 S.W.2d 579, 581 (Ky. 1977) and

[1] The claims against Gonzalez and Luiz were dismissed based on the terms of the settlement; they are not parties to this appeal.

Bonnlander v. Leader National Ins. Co., 949 S.W.2d 618, 620 (Ky. App. 1996), Allstate contended Kentucky's choice of law rules required application of the laws of the state having the most significant relationship to the parties and the transaction underlying the insurance contract—in this case, Indiana. Allstate posited Indiana substantive law required Lawson's UIM coverage to be offset by the liability limits of the State Farm policy. Essentially, according to Allstate, Indiana law holds a tortfeasor is not underinsured when his liability coverage available is at least equal to the UIM coverage of the injured party. Because State Farm had paid Lawson an amount equal to her UIM coverage, Allstate had no obligation to pay UIM benefits.

Citing *State Farm Mutual Auto Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004), Lawson opposed the motion, contending Allstate's UIM setoff provision was contrary to Kentucky's public policy and thus, an exception to traditional choice of law rules favored application of Kentucky law. She maintained the Legislature's removal of mandatory setoff language pertaining to UIM benefits from the provisions of KRS[2] 304.39-320 evidenced a strong public policy favoring full recovery to parties injured in motor vehicle collisions occurring on Kentucky roadways. Therefore, she argued Kentucky law should apply and her claim for UIM benefits should not be dismissed.

After finding the question of whether Kentucky or Indiana law applied constituted a genuine issue of material fact, the trial court concluded summary

[2] Kentucky Revised Statutes.

judgment could not be granted to Allstate. Allstate moved the trial court to reconsider its ruling, contending the court had improperly relied on *Marley* which had been specifically limited by a recent decision in *State Farm Mutual Auto Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 475 (Ky. 2013). Lawson opposed reconsideration and attempted to factually distinguish *Hodgkiss-Warrick*, alternatively suggested its holding actually supported the trial court's decision. The trial court denied Allstate's motion and subsequently entered an order rendering the denial of the motion for summary judgment final and appealable. This appeal followed.

Ordinarily, the denial of a motion for summary judgment is considered interlocutory and not appealable. However, there is an exception to this rule where: "(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal, under *Gumm* [*v. Combs*, 302 S.W.2d 616 (Ky. 1957)]." *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36, 37 (Ky. 1988). Based on the record before us, it is clear the exception does not apply and Allstate's challenge to the propriety of the trial court's denial is unripe for our consideration.

Allstate moved for summary judgment on a pure question of law—does Indiana law apply? The trial court answered that question in the negative when it denied the motion. While erroneously calling the question itself a genuine

issue of material fact, the trial court's ruling effectively held Kentucky law was applicable. Such a ruling is, by its very nature, an interlocutory order incapable of being made final pursuant to CR[3] 54.02 because it does not adjudicate any claim. CR 54.02 ("court may grant a final judgment upon one or more but less than all of the claims or parties"); CR 54.01 ("A judgment is a written order of a court adjudicating a claim or claims").

Lawson's sole claim against Allstate should have proceeded to adjudication and, after a final judgment was entered and an appeal taken, the interlocutory order denying summary judgment could have been reviewed by this Court in accordance with *Leneave*. In that case, review of the denial of summary judgment was appropriate because "there [wa]s an entry of a final judgment with an appeal therefrom." *Id*. at 37. In *Leneave*, "the motion [for summary judgment] was filed ten days before trial and noticed to be heard on the morning prior to trial[,]" after which trial "judgment was entered in favor of Vance Leneave, appellee, for the sum of $13,500." *Id*. The Transportation Cabinet appealed the final judgment and sought review of the interlocutory order made reviewable by the final judgment in favor of Leneave.

The same procedural posture allowing review existed in *Gumm*, on which *Leneave* relies. In that case,

> The trial judge overruled the motion [for summary judgment], and the case proceeded to trial. Gumm is

[3] Kentucky Rules of Civil Procedure.

> appealing from a judgment awarding $5,000 in damages to Calvin Combs.
>
> Reversal is sought here on the ground that the motion for summary judgment should have been sustained.

Gumm, 302 S.W.2d at 616. In each of these cases, there was an adjudication on the merits of the claim subsequent to denial of the motion for summary judgment, a final judgment was entered, an appeal was taken, and the previous interlocutory ruling was reviewed. Such a sequence of events is not yet present in this case. Thus, this Court lacks jurisdiction to review the matter and dismissal of the appeal is mandated.

For the foregoing reasons, this appeal must be, and is hereby DISMISSED for want of jurisdiction.

ALL CONCUR.

ENTERED: April 28, 2017

/s/ C. Shea Nickell
JUDGE, KENTUCKY COURT OF APPEALS

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