RENDERED: FEBRUARY 26, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001559-MR

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 13-CI-00648

LARRY ARMFIELD AND
TENA ARMFIELD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: JONES, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: In Kentucky, one spouse's loss of consortium claim is derivative of the other spouse's personal injury claim. The issue we must resolve in this case is whether the Laurel Circuit Court erred in holding that Larry and Tena Armfield, husband and wife, whose bodily injuries were expressly excluded

from underinsured motorist coverage by an auto policy issued by Kentucky Farm Bureau Mutual Insurance Company (hereinafter "KFB"), could nevertheless recover under a loss of consortium claim against KFB. We hold that the trial court did err and therefore reverse its summary judgment in favor of the Armfields.

I. Factual and Procedural Background.

On July 29, 2012, Larry Armfield was driving a motorcycle on which Tena Armfield was riding as a passenger. They were both injured when a vehicle driven by Blake Rojas hit the motorcycle. Mr. Rojas was allegedly underinsured. At the time of the accident, the Armfields had underinsured motorists (UIM) coverage through KFB. The policy contained the following language as to underinsured motorist coverage:[1]

> **INSURING AGREEMENT**
>
> A. We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:
>
> 1. Sustained by an **insured**; and
> 2. Caused by an accident.
>
> . . .
>
> **EXCLUSIONS**
>
> A. We do not provide Underinsured Motorists Coverage for **bodily injury** sustained by any **insured**:
>
> . . .
>
> 4. While **occupying** or operating a motorcycle owned by any **insured**.

[1] The policy contains identical coverage and exclusions for Uninsured Motorists.

The Armfields cannot recover UIM benefits for actual bodily injury they received; however, they both brought suit against KFB alleging they each are entitled to UIM coverage for their respective claims of loss of consortium flowing from the bodily injury suffered by the other. Both parties moved for summary judgment on the issue of whether KFB's UIM policy provided benefits for a loss of consortium claim. The trial court granted summary judgment in favor of the Armfields, relying upon the unpublished case of *Hoskins v. Kentucky Farm Bureau Mut. Ins. Co.*, 2011-CA-001454-MR (Ky. App., Oct. 12, 2012).[2] In *Hoskins*, a previous panel of this court found that a loss of consortium claim resulting from a motorcycle accident was not excluded from UIM coverage by policy language identical to the language in the case at hand. This appeal followed.

II. Standard of Review.

> The standard of review on appeal of a summary judgment 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. Kentucky Rules of Civil Procedure (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 his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480,

[2]Although unpublished, this Court's opinion in *Hoskins* may be accessed through the Kentucky Court of Justice website: http://apps.courts.ky.gov/supreme/sc_opinions.shtm (as of Jul. 22, 2015). The commercial database citations for the opinion are 2012 Ky. App. Lexis 213 and 2012 WL 4841094. As of July 22, 2015, the opinion was not accessible through Westlaw.

> *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "It is well established that construction and interpretation of a written instrument are questions of law for the court. We review questions of law *de novo* and, thus, without deference to the interpretation afforded by the circuit court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998) (citations omitted).

III. Analysis.

Prior to addressing the substance of this appeal, we note that this court's prior decision, *Hoskins*, was originally ordered to be published by the panel which rendered it. The Kentucky Supreme Court then granted discretionary review, which automatically resulted in depublication of this court's opinion. CR 76.28(4)(a). The Supreme Court did not issue an opinion in the case. Instead, it entered an order reporting that its vote on the case was 3-3, with one justice having recused. Pursuant to SCR[3] 1.020(1)(a), when the Court is equally divided, the judgment being appealed from "shall stand affirmed." The Supreme Court's order confirmed that the opinion of the Court of Appeals "hereby stands affirmed and is ordered not to be published."[4] Under CR 76.28(4)(c), "[o]pinions that are not to be published shall not be cited or used as binding precedent[.]" While the rule goes

[3] Rules of the [Kentucky] Supreme Court.
[4] *Kentucky Farm Bureau Mut. Ins. Co. v. Hoskins*, 2012-SC-000731-DG (Ky., Dec. 19, 2013).

on to state that unpublished decisions may be considered if no other published opinion adequately addresses the issue before the court, in our view the opinion in *Hoskins* ignored the published precedent of both the Kentucky Supreme Court and this court, and is not therefore persuasive.

In 1970, the legislature enacted KRS 411.145(2) which provides that "[e]ither a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third person."[5] In discussing this right of action, the Kentucky Supreme Court has stated that "[l]oss of consortium is an independent cause of action[.]" *Floyd v. Gray*, 657 S.W.2d 936, 938 (Ky. 1983). Such an action, therefore, "can continue even when the injured spouse or the estate has settled or otherwise been excluded from an action, because there is not a 'common and undivided interest' in the spouse's claim for loss of consortium and the underlying tort claim." *Martin v. Ohio Cnty. Hosp. Corp.*, 295 S.W.3d 104, 109 (Ky. 2009).

Although the right of action is independent, case law also recognizes that a spouse's claim for loss of consortium is not a separate injury, but is derivative of the injured spouse's personal injury claim. *Daley v. Reed*, 87 S.W.3d 247, 248 (Ky. 2002). In *Daley*, the court distinguished between statutory and common law rights of action and claims under insurance policies, noting that "the existence of a cause of action does not mean that those damages are *ipso facto*

[5] 1970 Ky. Acts ch. 200, §1. KRS 411.145(1) sets forth the definition of consortium as "the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband."

recoverable from a particular policy of insurance. . . . Of more significance . . . is the additional observation in *Blevins* that 'both the personal injury and the loss of consortium claim derive from the same injury.'" 87 S.W.3d at 249 (quoting *Dep't of Educ. v. Blevins*, 707 S.W.2d 782, 785 (Ky. 1986)). As noted in *Moore v. State Farm Mut. Ins. Co*., 710 S.W.2d 225, 227 (Ky. 1986) (Leibson, J., concurring), "'the true nature of the action for damages for loss of consortium . . . is derivative in nature, arising out of and dependent upon the right of the injured spouse to recover.'" If no liability attaches for the injured plaintiff's personal injury claim, the plaintiff-spouse's claim for loss of consortium should be dismissed. *See, e.g., Godbey v. Univ. Hosp*., 975 S.W.2d 104, 106 (Ky. App. 1998) (stating that "[a]s far as the claim of [the wife] to damages for loss of consortium, if no causation is established for the injuries which she alleges caused her loss, no recovery can be had. Her cause of action is derivative of her husband's[]"). In other words, a loss of consortium claim is entirely dependent on the success of the underlying injury claim. *Id*. In *Mullins v. Marathon Petroleum Co., LP*, Civil Action No. 12-108-HRW, 2013 WL 2285140 (E.D. Ky., May 22, 2013) (applying Kentucky law), the court noted

> Loss of consortium is a wholly derivative claim that merely provides access to an additional category of damages if a defendant's liability can be established under another legal theory. *Rehm v. Ford Motor Co*., 365 S.W.3d 570, 577 (Ky. App. 2011). Because Plaintiffs cannot establish liability against the non-diverse individual defendants on any of their other substantive claims, they have no right to an award of consortium damages against these defendants. *Id*.

2013 WL 2285140, at *4. *See* 41 Am. Jur. 2d *Husband and Wife* §227 (2005) (stating "[a] plaintiff in a loss of consortium claim is subject to all defenses that would have been available against the injured person[]").

In this case, KFB's policy clearly and unambiguously excluded UIM coverage for bodily injury sustained by an insured while occupying an owned motorcycle.[6] Neither spouse has a substantive, bodily injury claim against KFB under the policy. Recognizing that they were not covered in this instance, the Armfields attempted an "end run" and filed a complaint based solely on each spouse's loss of consortium with the other due to the other's non-covered, non-compensable bodily injury. Armfields are not entitled to coverage under the KFB policy for their "bodily injury," and consequently neither may recover for loss of consortium as a result of the bodily injury to the other spouse.

IV. Conclusion.

Based on the foregoing, the Laurel Circuit Court erred in granting the Armfields' motion for summary judgment, and in denying KFB's motion. Under the undisputed facts of this case, summary judgment in favor of KFB was

[6] As noted *supra*, n. 1, coverage was excluded for uninsured and underinsured motorist coverage while the insureds were occupying or operating an owned motorcycle. In addition, we cannot help but note that under every other part of the policy in question, Part A (Liability Coverage), Part B (Medical Payments Coverage), and Part B/1 (Personal Injury Protection Coverage), exclusions were written so as not to provide coverage for the ownership, maintenance or use of any vehicle which has fewer than four wheels, or while the insureds were occupying or operating a motorcycle. While we are not unsympathetic to the Armfields, the policy is clear that KFB did not undertake to insure the Armfields' activities while they were operating a motorcycle. If the Armfields wanted that protection, no doubt such coverage was available from some company at some price.

appropriate. The Laurel Circuit Court's judgment is reversed and this matter is remanded to that court for further proceedings in conformity with this opinion.

JONES, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: I dissent from the majority opinion because I find the reasoning set forth by *Hoskins v. Kentucky Farm Bureau Mut. Ins. Co.*, 2011-CA-001454-MR (Ky. App. Oct. 12, 2012), persuasive.

The *Hoskins* Court cited to *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626 (Ky. 2005), for the proposition that "uncertainties and ambiguities" in an insurance contract "must be resolved in favor of the insured." *Id*. at 630 (citations, footnote, and internal quotation marks omitted). The *Hoskins* Court also cited to *Bidwell v. Shelter Mut. Ins. Co.*, 367 S.W.3d 585 (Ky. 2012), and stated that "[t]o be enforceable, Kentucky law requires a limitation of insurance coverage . . . to be clearly stated in order to apprise the insured of such limitations. [N]ot only is the exclusion to be carefully, expressed, but . . . the operative terms clearly defined." *Id*. at 588 (citations and internal quotation marks omitted). The *Hoskins* Court held that although the claims derive from the same injury, "there is no provision in the insurance agreement stating that recovery for loss of consortium or other derivative claims is barred if the underlying claim is excluded under the terms of the policy." *Hoskins* at 5.

If Kentucky Farm Bureau wanted to exclude both direct and derivative claims under the policy, it should have explicitly done so in order to resolve any doubt; therefore, I would affirm the judgment of the trial court.

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