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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001939-MR

ERIC HENRY, AS NEXT FRIEND FOR
KELSEY HENRY AND AS ADMINISTRATOR
OF THE ESTATE OF MARCUS HENRY — APPELLANTS

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 15-CI-00319

TRAVELERS PERSONAL SECURITY
INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND JONES, JUDGES.

JONES, JUDGE: Eric Henry, as next friend for Kelsey Henry and administrator of the Estate of Marcus Henry, appeals an order of the Simpson Circuit Court granting summary judgment in favor of Appellee, Travelers Personal Security

Insurance Company, and dismissing all claims against it. Following a review of the record and applicable law, we affirm the order of the Simpson Circuit Court.

I. BACKGROUND

The underlying facts of this case are not in dispute. On November 7, 2014, Eric Henry and his two children, Kelsey and Marcus Henry (collectively, the "Henrys"), were travelling through Kentucky to look at holiday decorations. While heading eastbound on Scottsville Road in Simpson County, Kentucky, the Henrys' vehicle was struck by a vehicle operated by Jarrette Sanders. As a result of the collision, both Kelsey and Marcus sustained devastating injuries. Marcus Henry ultimately succumbed to his injuries and passed away later that day. Neither Eric Henry nor Sanders maintained automobile liability insurance on their vehicles at the time of the accident.

The following November, Eric Henry, as next friend of Kelsey Henry and administrator of the Estate of Marcus Henry, filed suit against Sanders and Travelers Personal Security Insurance Company ("Travelers"). As relevant to Travelers, the complaint stated that the Henrys all resided in the same household in Tennessee with their mother-in-law/grandmother, Carmen Kirk. The complaint alleged that Kirk had an auto insurance policy with Travelers, which included uninsured motorist ("UM") coverage and extended to all of Kirk's household members. Because Sanders was uninsured at the time of the accident and Kirk's

UM coverage extended to the Henrys, the Henrys contended that Travelers was required to pay them damages resulting from the accident. Following its answer to the complaint, Travelers was granted leave to file a third-party complaint against Eric Henry by which it alleged that Eric was either partially or entirely at fault for the accident.

Following discovery, Travelers moved for summary judgment on all claims asserted against it by the Henrys. In its memorandum supporting that motion, Travelers acknowledged that Kirk maintained a policy with Travelers that included UM coverage. Further, Travelers stated that pursuant to the Tennessee endorsement on Kirk's UM coverage, the Henrys all met the definition of an "insured" under the policy and would be entitled to coverage unless an exclusion applied. Kirk's policy, however, contained the following exclusion:

> A. We do not provide Uninsured Motorists Coverage for "property damage" or "bodily injury" sustained by any person"
>
> 1. While "occupying" or when struck by, any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

There was no dispute that at the time of the accident, the Henrys were occupying a vehicle owned by Eric Henry – a "family member" – that was not insured under Kirk's policy. Therefore, Travelers argued that the exclusion should be enforced to bar any claims brought against it by the Henrys. Additionally,

Travelers argued that because the Henrys and Kirk resided in Tennessee and the insurance policy at issue had been purchased in Tennessee, the law of Tennessee should govern interpretation of the policy language.

In response to Travelers' motion for summary judgment, the Henrys acknowledged that Kentucky courts apply the "most significant relationship" test to resolve which state's law should govern a contract dispute and that, utilizing that test alone, it would appear that Tennessee law governed. However, the Henrys further noted that, regardless of the result of the "most significant relationship" test, Kentucky courts will apply Kentucky law if the law of another state would violate a Kentucky public policy. The Henrys argued that Kentucky law should therefore apply because Kentucky has a strong policy prohibiting enforcement of "owned but not scheduled" exclusions, such as the exclusion asserted by Travelers. Further, the Henrys argued that Kentucky has a strong preference that accident victims injured by uninsured tortfeasors be compensated for their damages, which is evinced by the fact that Kentucky makes it mandatory for insurers to offer UM coverage to potential insureds.

Following a hearing, the trial court entered an order granting Travelers' motion for summary judgment and dismissing all claims by the Henrys against Travelers on November 18, 2016. Therein, the trial court made the

following findings: UM coverage is optional in Kentucky under KRS[1] 304.20-020(1); insureds have the option to reject UM coverage; Tennessee has the most significant contacts with the parties to the case and with the insurance contract transaction; and Kentucky has no applicable overriding public policy. Therefore, the trial court concluded that the law of Tennessee, not Kentucky, should apply to the insurance contract dispute. Because Tennessee law allows for enforcement of "owned but not scheduled" exclusions, the trial court concluded that the Henrys were not entitled to collect under Kirk's UM policy. On November 28, 2016, the trial court amended its order granting summary judgment to include language indicating that the order was final and appealable with no just cause for delay.

This appeal followed.

II. STANDARD OF REVIEW

When reviewing orders granting summary judgment, we must determine "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). "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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because there

[1] Kentucky Revised Statutes.

are no factual disputes before us today and only review of questions of law," we review the trial court's order *de novo*. *Philadelphia Indem. Ins. Co., Inc. v. Tryon*, 502 S.W.3d 585, 588 (Ky. 2016).

III. ANALYSIS

On appeal, the Henrys contend that the trial court erred in finding that UM coverage is optional under Kentucky law based on the fact that an insured has the option to reject such coverage. Pointing to the Kentucky Supreme Court's opinion in *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013), the Henrys contend that the crux of the determination of whether Kentucky public policy overrides the "most significant relationship" test is whether the coverage at issue is mandatory or optional. Travelers maintains that the trial court was correct in determining that Tennessee law should govern interpretation of the insurance contract. In responding to the Henrys' arguments regarding Kentucky public policy, Travelers argues that Kentucky's public policy of ensuring that victims of vehicular accidents are fully compensated only applies to the mandatory liability provisions of the Kentucky Motor Vehicle Reparations Act ("MVRA"),[2] which does not include UM coverage. Additionally, Travelers contends that the exclusion would still be enforceable even if we determine that Kentucky law applies because the exclusion is clear and unambiguous.

[2] KRS 304.39, *et seq.*

Kentucky has adopted the "most significant relationship" test to resolve choice of law issues relating to contract disputes. *Hodgkiss-Warrick*, 413 S.W.3d at 878. Pursuant to that test, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971). The parties agree that, as the Henrys were all residents of Tennessee at the time of the accident and the insurance contract at issue was purchased in Tennessee, Tennessee law would apply under the "most significant relationship" test.

The choice of law analysis, however, does not end with application of the test. Kentucky will override the outcome of the "most significant relationship" test and apply its own laws if "a clear and certain statement of strong public policy in controlling laws or judicial precedent" would be violated in applying another state's laws. *Hodgkiss-Warrick*, 413 S.W.3d at 880. "[P]ublic policy, invoked to bar the enforcement of a contract, is not simply something courts establish from general considerations of supposed public interest, but rather something that must be found clearly expressed in the applicable law." *Id.* at 880-81 (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Thompson*, 1 S.W.3d 475, 476-77 (Ky. 1999)). Absent an express prohibition, public policy will render contract terms

unenforceable only if: (1) "the policy asserted against it is clearly manifested by legislation or judicial decision[;]" and (2) the policy "is sufficiently strong to override the very substantial policies in favor of the freedom of contract and the enforcement of private agreements." *Id.* at 880.

Because of our strong preference in upholding valid, private agreements, it is insufficient to merely find that there is a strong public policy to override the "most significant relationship" test. The critical question is "whether the public policy [is] so strong as to require a Kentucky court to interject Kentucky law into a dispute having none but a fortuitous connection with Kentucky." *Id.* at 882. Therefore:

> To bar enforcement in the case where the contract was valid where made, the Kentucky public policy against enforcement must be a substantial one, a "well-founded rule of domestic policy established to protect the morals, safety or welfare of *our people*." Where no Kentucky resident has been affected, rarely will that standard be met.

Id. at 882 (emphasis in original) (citation omitted) (quoting *R.S. Barbee & Co. v. Bevins*, 195 S.W. 154, 155 (1917)). Accordingly, we must determine if such a substantial public policy against enforcement of "owned but not scheduled" exclusions from UM coverage exists in Kentucky.

A. UM Coverage in Kentucky

KRS 304.20-020 governs UM coverage in Kentucky. Unlike provisions concerning motor-vehicle liability insurance and underinsured motorists' insurance ("UIM") the UM statute is not found within the MVRA, but within the section concerning casualty insurance contracts.[3] *Tryon*, 502 S.W.3d at 588. KRS 304.20-020(1) mandates that all insurance contracts purchased in Kentucky provide UM coverage, "provided that any named insured shall have the right to reject in writing such coverage[.]" This mandate differs from both the law relating to liability coverage and UIM coverage. The MVRA requires all Kentucky drivers to purchase motor-vehicle liability insurance. KRS 304.39-110. "Insurers are required to make UIM coverage 'available upon request to its insureds,'" but there is no mandate that an insured purchase it or that an insurer offer it, absent a request. *Tryon*, 502 S.W.3d at 588 (quoting KRS 304.39-320(2)). Based on the different mandates for each type of coverage, UM coverage falls in the middle ground between UIM coverage and liability coverage. The legislature has a very strong preference that all Kentucky drivers have auto-liability coverage, as expressed by its mandate that all Kentucky drivers have such insurance. It has a

[3] "This difference, however, reflects historical accident rather than legislative intent, and we have observed that no less than its MVRA sibling, the UIM statute (KRS 304.39-320), the UM statute must be construed in light of and in accord with the MVRA." *Countryway Ins. Co. v. United Financial Casualty Ins. Co.*, 496 S.W.3d 424, 434 (Ky. 2016) (footnote omitted).

preference that drivers purchase UM coverage; this is evinced by the fact that UM coverage must be offered in an insurance contract and that an insured must reject such coverage in writing. In comparison, the legislature's preference that Kentucky drivers have UIM coverage is on the lower end of the spectrum – an insurer is only required to offer the coverage if it is requested by the insured.

B. "Owned but not Scheduled" Exclusions

The Henrys direct our attention to *Chaffin v. Kentucky Farm Bureau Ins. Cos.*, 789 S.W.2d 754 (Ky. 1990), in support of their position that "owned but not scheduled" exclusions for UM coverage are unenforceable on public policy grounds. In *Chaffin*, the Kentucky Supreme Court considered "whether an insurance company may enforce an antistacking provision in the uninsured motorist coverage it writes." *Id.* at 755. Chaffin had UM coverage under three separate policies, each of which contained an "other vehicle exclusion," almost identical to the exclusion at issue in this case. *Id.* While driving one of her vehicles, Chaffin was injured by an uninsured motorist. She then tried to collect from her insurer under each of her UM policies. Her insurance company declined and only paid benefits under the policy that insured the vehicle Chaffin had been driving at the time of the accident, contending that the "other vehicle exclusion" barred Chaffin's collection under her other two policies.

The *Chaffin* Court considered the "personal nature of [UM] coverage [and] the insured's reasonable expectations with regard to insurance coverage which has been bought and paid for." *Id.* at 757. Ultimately, the Court concluded that "the coverage bought, paid for and reasonably expected is illusory. Such is contrary to the public policy of Kentucky." *Id.* at 757-58.

Later, in *Snow v. West Am. Ins. Co.*, 161 S.W.3d 338 (Ky. App. 2004), a panel of this Court addressed the enforceability of "owned but not scheduled" exclusions as applied to a much different set of facts – facts more analogous to the case before us today. In *Snow*, one of the appellants was driving in his uninsured vehicle when he collided with another driver. The appellants' daughter died as a result of the injuries she sustained in the collision. The appellants made demands on the insurer of the father's other vehicle, and that insurer denied liability coverage based on a "owned but not scheduled" exclusion. *Id.* at 339. While the appellants in *Snow* argued that *Chaffin* required their insurer to provide liability coverage, this Court found that *Chaffin* was not "relevant in this case due to the failure of [appellant] to obtain coverage for his vehicle." *Id.* at 341. Accordingly, the Court found that the exclusion barred appellants from liability coverage under the policy. *Id.*

In *Tryon*, the Kentucky Supreme Court addressed "owned but not scheduled" provisions under UIM coverage and found that such exclusions were

valid to deny UIM benefits if the "plain meaning of the policy clearly and unambiguously excludes this type of coverage." 502 S.W.3d at 586. Like the appellant in *Chaffin*, Tryon sought to collect benefits in that case under UIM coverage for three separate policies that he had, each of which covered vehicles other than the one that he was using at the time of his injury. *Id.* at 586-87.

In reaching its conclusion, the *Tryon* Court examined the *Chaffin* opinion. The Court noted the differences between UM and UIM policies – one must be included in insurance contracts, the other need not be. *Id.* at 589-90. Additionally, the Court found that "[t]he *Chaffin* Court's holding heavily depended on the doctrine of reasonable expectations as understood in this context to mean that 'when one has bought and paid for an item of insurance coverage, he may reasonably expect it to be provided.'" *Id.* at 589 (quoting *Hamilton v. Allstate Ins. Co.*, 789 S.W.2d 751, 753 (Ky. 1990)). Accordingly, the *Tryon* Court found that, "[b]ecause *Chaffin* relied so heavily on common-law principles and also because there is significant statutory law regulating automobile insurance, *that decision is most appropriately limited to the facts of that case*." *Id.* at 590 (emphasis added).

We note that the above statement was based on the statutory distinctions between UM and UIM coverage, as well as the *Chaffin* Court's use of common law principles. The present case, of course, deals with UM coverage. Nonetheless, in light of this Court's opinion in *Snow*, which dealt with *mandatory*

liability insurance, we cannot find that the same policy concerns found in *Chaffin* apply to the facts in this case. Most notably, in *Chaffin*, the appellant was seeking to stack coverage and had paid premiums on each policy from which coverage was sought. That is not the situation in this case. The Henrys are not attempting to stack coverage. Rather, like the appellants in *Snow*, they are seeking damages under the UM policy because of Eric's failure to have liability insurance on his vehicle. Based on the above analysis and case law, we cannot agree with the Henrys that "owned but not scheduled" exclusions are *per se* unenforceable on public policy grounds.

C. Public Policy Considerations

The Henrys contend that the public policy is strong enough to override the general choice of law tests because the Kentucky legislature has mandated that insurers include UM coverage in all insurance contracts sold in Kentucky. The Henrys' argument on this point focuses on part of the Kentucky Supreme Court's analysis in *Hodgkiss-Warrick*. At issue in *Hodgkiss-Warrick* was whether Kentucky law could be applied to bar enforcement of a "regular use" exclusion in the appellee's UIM coverage when the appellee was a resident of Pennsylvania and her insurance contract had been purchased in Pennsylvania.

The *Hodgkiss-Warrick* Court declined to override the "most significant contacts" test based on the facts as they were in the case. In conducting

its analysis, the Court acknowledged that Kentucky public policy did disfavor "regular use" exclusions. However, the Court noted that UIM insurance "is optional in Kentucky and may be waived by the insured." *Hodgkiss-Warrick*, 413 S.W.3d at 881. The Court contrasted optional UIM coverage with *mandatory* liability coverage. *Id.* at 883. The Henrys argue that, had the coverage at issue in *Hodgkiss-Warrick* been mandatory coverage, the Court would have applied Kentucky law on public policy grounds. As the Henrys contend that UM coverage is mandatory in Kentucky, they argue that Kentucky law should apply in this case.

The Henrys additionally note that *Hodgkiss-Warrick* dealt with a "regular use" exclusion from UIM coverage, which may be enforced if not unreasonable. *Id.* (citing *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997), *as modified* (Feb. 18, 1999)). They contend that their case deals with an unenforceable "owned but not scheduled" exclusion, which differentiates the case *sub judice* from *Hodgkiss-Warrick* and, therefore, creates a stronger policy argument as to why Kentucky law should be applied to the insurance contract. We cannot agree with the Henrys' arguments. As noted above, "owned but not scheduled" exclusions are not *per se* unenforceable. Further, while we acknowledge that the Kentucky legislature's preference for drivers to have UM coverage is stronger than its preference for drivers to have UIM coverage, we cannot find that UM coverage is analogous to mandatory liability coverage.

Despite the strong preference for drivers to have UM coverage, that coverage can be waived. It is not mandatory; it is optional coverage. *See Countryway Ins. Co. v. United Financial Casualty Ins. Co.*, 496 S.W.3d 424, 434 (Ky. 2016) ("[V]ehicle owners are not required to obtain UM coverage as they are required to maintain liability coverage.").

Additionally, even if we were to find that there was a strong public policy against enforcement of the "owned but not scheduled" exclusion as applied to the facts of this case, we could not find that the policy is strong enough to require us to interfere with this dispute. "[T]he fact that a contract, if made in Kentucky, would not be enforceable as a matter of public policy, does not necessarily mean that it is against public policy to enforce such a contract when valid where made." *Hodgkiss-Warrick*, 413 S.W.3d at 882. "Since here no Kentucky resident is affected, nothing requires a Kentucky court to interfere with the balance [Tennessee] has chosen for its citizens." *Id.* at 883.

Deciding that Tennessee law applies to this dispute, the exclusion is enforceable so long as Tennessee law permits it. The Henrys have not contended that the trial court erred in finding that Tennessee law allowed for "owned but not scheduled" exclusions. Therefore, they have waived any contention on the issue. Further, the courts of Tennessee have consistently upheld virtually identical exclusions to UM coverage. *See Hill v. Nationwide Mut. Ins. Co.*, 535 S.W.2d 327

(Tenn. 1976); *Graves v. Tennessee Farmers Mut. Ins. Co.*, 671 S.W.2d 841 (Tenn. App. 1984); *Smith v. Hobbs*, 848 S.W.2d 662 (Tenn. App. 1992). Therefore, the trial court correctly found that the exclusion in Kirk's policy is enforceable under Tennessee law.

IV. CONCLUSION

Based on the above analysis, we affirm the order of the Simpson Circuit Court.

ALL CONCUR.

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