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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001498-MR
AND
NO. 2008-CA-001557-MR

COUNTRYWAY INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CI-00130

MARGUERITE S. OAKES — APPELLEE/CROSS-APPELLANT

AND

NO. 2009-CA-000958-MR

COUNTRYWAY INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CI-00130

MARGUERITE S. OAKES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Countryway Insurance Company appeals and Marguerite S. Oakes cross-appeals from various orders of the Todd Circuit Court relating to an automobile accident that occurred in Tennessee and a dispute over underinsured ("UIM") insurance coverage. For the reasons that follow, we affirm.

On April 15, 1999, Oakes, a Kentucky resident, sustained injuries in Tennessee when the vehicle she was driving, which was owned by her mother, collided with a vehicle driven by David Thrasher, who was also driving a vehicle owned by his mother. Thrasher had a liability insurance policy with USAA with policy limits of $100,000 per person. The vehicle owned by Oakes's mother was insured under a policy with Cincinnati Insurance Company that provided UIM coverage with policy limits of $500,000. Oakes had UIM coverage with Countryway under three policies: one providing personal vehicle coverage with a $250,000 limit, another providing commercial vehicle coverage with a $250,000 limit, and a third providing umbrella coverage.[2]

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.
[2] The trial court determined that Oakes's umbrella policy provided only excess coverage and was not implicated in this matter. There was no appeal from this decision.

Oakes filed suit against Thrasher in Tennessee on March 31, 2000. Pursuant to Tennessee law, Oakes had Cincinnati and Countryway served with her complaint and notified them of her intention to seek UIM benefits.[3] Both Cincinnati and Countryway filed answers to the complaint. USAA offered its $100,000 liability policy limits to Oakes in settlement of the claim against Thrasher. In accordance with Tennessee law, USAA notified the UIM carriers (Cincinnati and Countryway) of this offer. Tennessee Code Annotated (TCA) § 56-7-1206. Each UIM carrier then had thirty days to give notice to its insured that it consented to the settlement, waived its subrogation rights against Thrasher, and agreed to submit the UIM claim to binding arbitration. *Id*. All parties agreed, and on July 18, 2002, the Tennessee court entered an agreed order of dismissal of the suit against Thrasher and his mother, with the remaining claims reserved.

Thereafter, on October 16, 2002, Oakes filed UIM claims in this state in the Todd Circuit Court against Cincinnati and Countryway. The parties participated in discovery, and on August 24, 2004, they submitted the matter to mediation. Oakes accepted $250,000, or one-half of the available $500,000 UIM limits of the Cincinnati policy, in settlement of her UIM claims against that party.

[3] Under Tennessee law, "suit may not be brought directly against the uninsured motorist insurance carrier[.]" *Webster v. Harris*, 727 S.W.2d 248, 251 (Tenn. App. 1987). However, pursuant to Tennessee Code Annotated (TCA) § 56-7-1206, an insured must serve a copy of the process upon the UIM carrier as though the company was a party defendant, and the company thereafter has the right to file pleadings in the name of the owner and operator of the underinsured vehicle or in its own name. Additionally, the terms "uninsured" and "underinsured" were combined by the Tennessee legislature in the statute so as to allow underinsured plaintiffs to recover under the uninsured motorists provision. *Slutsky v. City of Chattanooga*, 34 S.W.3d 467, 470-71 (Tenn. App. 2000) (citing *Dockins v. Balboa Insur. Co.*, 764 S.W.2d 529, 532 (Tenn. 1989)).

Oakes's claims against Cincinnati were dismissed with prejudice on December 27, 2005. Meanwhile, a show cause order had been entered on April 20, 2004, pertaining to the Tennessee suit, and that case was ultimately dismissed without prejudice.

In August 2006, Countryway filed a "Motion to Enforce the Tennessee Settlement" seeking an order requiring Countryway and Oakes to submit Oakes's UIM claim against Countryway to arbitration. Countryway asserted that the trial court should give full faith and credit to the Tennessee agreed order of dismissal wherein, Countryway claimed, Oakes had agreed to binding arbitration of the UIM claims.

The trial court denied Countryway's motion, stating that it could find no Tennessee judgment in the record that indicated any agreement to arbitrate. The trial court determined that the matter was, therefore, a choice of laws issue rather than an issue of full faith and credit. The court then held that Kentucky law governed the dispute, as Oakes was a resident of Kentucky and the controversy involved an insurance policy written and entered into in Kentucky. Countryway made no further move to advance its claimed right to arbitrate, and it subsequently moved for a jury trial.

On October 30, 2007, less than a month before trial, Oakes filed a motion for partial summary judgment asserting that Countryway was liable for either 100% or 77.7779% of all damages above $110,000, which was the amount

of the underlying liability limits plus no-fault payments.[4] The trial court withheld ruling on the issue of UIM coverage until after the conclusion of the trial.

On November 19, 2007, a jury trial was held to resolve the amount of damages Oakes had suffered as a consequence of the accident. The jury awarded Oakes $240,000 in pain and suffering and $253,120.54 in medical expenses.

Following the trial, Countryway filed a response to Oakes's partial summary judgment motion. Therein, Countryway agreed that it was responsible for damages on a *pro rata* basis, but asserted that its *pro rata* share was only 60% of the damages, rather than 77.7779% as argued by Oakes.

On March 24, 2008, the trial court entered a post-trial order adopting the position advanced by Countryway in its response to Oakes's motion for partial summary judgment that Cincinnati's and Countryway's policies provided for *pro rata* coverage and that Countryway's *pro rata* portion was 60% of the verdict in excess of the $110,000 threshold. The court reasoned that the "Other Insurance" clauses in the UIM policies of Cincinnati and Countryway were mutually repugnant excess clauses and, therefore, that each policy provides *pro rata* coverage. Accordingly, the trial court entered a judgment against Countryway for $233,824.80.

Countryway filed a motion to alter, amend, or vacate the trial order and judgment, claiming that the trial court erred in applying Kentucky law and in

[4] The motion included language only from Oakes's personal auto policy with Countryway and did not contain language from the endorsements to the personal auto policy or from Oakes's commercial auto policy with Countryway.

refusing to order the parties to submit to arbitration and erred in ordering the *pro rata* distribution of the verdict amount. Countryway asserted in that motion for the first time that the Cincinnati UIM coverage was primary and that Countryway's coverage was excess. Countryway made this argument despite the fact that it had previously agreed in its response to Oakes's partial summary judgment motion that its liability was *pro rata* with that of Cincinnati's.

Countryway further claimed that the trial court incorrectly ordered that interest should commence from the date of the jury's verdict rather than the date of the entry of judgment. The trial court granted Countryway's motion in part, ordering that interest would begin to accrue from the date of the judgment, but it denied the remainder of the motion. Countryway subsequently filed a notice of appeal with this Court, and Oakes filed a cross-appeal claiming that prejudgment interest was appropriate.

While this appeal was pending, Countryway also filed a motion for relief under Kentucky Rules of Civil Procedure (CR) 60.02 and 61.02, claiming that Oakes had not provided all of the applicable language in her policies to the trial court in her motion for partial summary judgment. Countryway attached the full policies, including all endorsements, to its motion.[5] The trial court denied this

[5] At the oral arguments of this case, Countryway acknowledged that its counsel at the trial court level had copies of all policies and endorsements while the case was before the court on Oakes's partial summary judgment motion.

motion, finding that the requirements of CR 60.02 had not been met. Countryway appealed the denial of this motion as well.[6]

Countryway first argues that Tennessee law required arbitration of the UIM claims, that Oakes agreed to submit to arbitration, and that the trial court erred in requiring the parties to proceed to trial rather than submit the matter to arbitration. Similarly, Countryway argues that the trial court erred in failing to apply Tennessee law in determining the priority of the UIM coverages.[7] This Court's review of the trial court's legal conclusions is *de novo*, and findings of fact are reviewed for clear error. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

We find no writing in the record evidencing an arbitration agreement between Countryway and Oakes. Rather, Countryway claims a right to arbitration pursuant to Tennessee statute. Tennessee's uninsured motor vehicle coverage statute states that:

> . . . if a party or parties alleged to be liable for the bodily injury or death of the insured offers the limits of all liability insurance policies available to such party or parties in settlement of the insured's claim, the insured or the insured's personal representative may accept the offer, execute a full release of the party or parties on whose behalf the offer is made and preserve the right to seek additional compensation from the insured's uninsured motorist insurance carrier upon agreement of the insured or the insured's personal representative to

[6] Because these appeals arise from the same matter, we have elected to dispose of them in one opinion.

[7] Under Tennessee statutory law, Countryway's coverage was clearly excess to the coverage of Cincinnati. TCA § 56-7-1101(a)(1) and (2).

> submit the insured's uninsured motorist claim to binding arbitration of all issues of tort liability and damages[.]

TCA § 56-7-1206(f).[8]

Countryway argues that upon settlement of her claim against the underlying tortfeasor, Oakes expressly subjected herself to TCA § 56-7-1206, which further provides that once the insured has provided notice to the UIM carrier of settlement with the tortfeasor:

> . . . the uninsured motorist insurance carrier shall have thirty (30) days to give notice to its insured or the insured's personal representative or attorney and the liability insurance carrier or carriers or their attorneys that it consents to the settlement, that it will agree to binding arbitration of the insured's uninsured motorist claim and will waive its subrogation rights against the party or parties to be released in exchange for their written agreement to cooperate in connection with the arbitration[.]

TCA § 56-7-1206(g)(4). Countryway claims that correspondence between the parties proves that this procedure was followed in the Tennessee action, and thus, a valid agreement to submit the claims to arbitration was formed pursuant to Tennessee law.

We fail to see how Tennessee's procedural law on how to resolve insurance disputes has any impact on a Kentucky action involving a Kentucky resident suing on an insurance policy written and entered into in Kentucky. Kentucky courts assign great weight to the residence of the parties to an insurance contract. *Bonnlander v. Leader Nat'l Ins. Co.*, 949 S.W.2d 618, 620 (Ky. App.

[8] As we noted in footnote 3, "uninsured" and "underinsured" are used interchangeably under the Tennessee statutes. *Slutsky*, *supra*.

1996). The Kentucky Supreme Court has taken the position that Kentucky law should apply as a matter of public policy, even where there is a conflicting final judgment from another state. *United States Fid. & Guar. Co. v. Preston*, 26 S.W.3d 145, 147-48 (Ky. 2000). As stated in *Preston*:

> Such an interpretation would cause a Kentucky insurance policy to yield a variety of inconsistent results depending upon the laws of other jurisdictions. Laws unique to other jurisdictions . . . should not bind and define the public policy of Kentucky.

Id. Therefore, we cannot conclude that the trial court erred in refusing to order arbitration.[9]

Countryway's next argument is that, under Kentucky law, the trial court erred because Countryway's policies are excess to Cincinnati's policy and, therefore, could not be utilized until Cincinnati's coverage was exhausted. We need not reach the merits of this issue, however, as we find the doctrine of judicial

[9]Additionally, a waste of judicial resources would result by requiring the parties to submit to arbitration at this late date. While Countryway states that because the trial court's order was interlocutory, it "had no choice" but to continue to trial, Countryway could have moved for interlocutory relief pursuant to CR 65.07, as the Kentucky Supreme Court has found that the denial of a motion to compel arbitration is "akin to a denial of an injunction." *Kindred Hosp. Ltd. Part. v. Lutrell*, 190 S.W.3d 916, 919 (Ky. 2006). Moreover, although it does not appear that Countryway is arguing that a written agreement to arbitrate existed, but rather that the right to arbitrate existed pursuant to Tennessee statute, KRS 417.220 provides a statutory right to interlocutory appeal of a denial of an application to compel arbitration pursuant to a written arbitration agreement. Courts in other jurisdictions have found that the failure to take an immediate appeal of a trial court's decision to deny a motion for arbitration could forfeit the right to arbitration. *Franceschi v. Hosp. Gen. San Carlos, Inc.*, 420 F.3d 1, 3-4 (1st Cir. 2005); *Mitchell v. Owens*, 185 S.W.3d 837, 840 (Tenn. App. 2005) ("the purpose behind the right to immediately appeal a ruling to deny arbitration would be defeated 'if a party could reserve its right to appeal an interlocutory order denying arbitration, allow the substantive lawsuit to run its course (which could take years), and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgment.'"). We find the reasoning in these cases to be equally applicable in this situation.

estoppel to be applicable.[10] *See Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 434-35 (Ky. App. 2008).

> As this Court noted in *Hisle*,
>
> > Although there is no absolute general formula for [the principle of judicial estoppel], several factors have been recognized such as: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id.; *see also Rowe v. Shepherd*, 283 S.W.2d 188, 190 (Ky. 1955) ("The rule of law to the effect that a party to litigation will not be permitted to assume inconsistent or contradictory positions with respect to the same matter in the same or a successive series of suits is well grounded upon familiar principles of estoppel."). The "success in persuading the court" requirement "does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits . . . judicial acceptance means only that the first court has adopted the position urged by the party[.]" *Colston Inv. Co. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky. App. 2001) (quoting *Reynolds v. Comm'r*, 861 F.2d 469, 472-73 (6th Cir. 1988)).

[10] The issue of judicial estoppel was not raised at the trial court level. As an appellate court, we may, however, "affirm the trial court for any reason sustainable by the record." *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991).

From the time that Oakes filed her motion for partial summary judgment in October 2007, Countryway consistently agreed and argued before the court that its policy provided *pro rata* coverage. In Countryway's response to Oakes's motion for partial summary judgment, Countryway stated that it agreed that it was responsible for a *pro rata* share of the damages awarded to Oakes in excess of $110,000. Further on in the response, Countryway stated that "it seems clear that the Cincinnati and Countryway policies both contain 'other insurance clauses' which provide for *pro rata* payment when there is other UIM insurance available." Additionally, in Countryway's post-trial brief, Countryway continued to agree that its policy was *pro rata*. It was only in Countryway's motion to alter, amend, or vacate the trial court's judgment that it argued for the first time that its policy provided only excess coverage. Therefore, its later position was clearly inconsistent with its earlier position.

Additionally, Countryway was successful in persuading the trial court to accept the position that Countryway's *pro rata* share was 60%, the position Countryway had consistently held since the beginning of the litigation. The trial court agreed with the position urged by Countryway in every pleading filed with the court up to that point - that Countryway's *pro rata* share was 60% - and entered an order to that effect.

Moreover, Oakes relied on Countryway's position when settling with Cincinnati. This reliance was obviously detrimental, as Countryway settled with Cincinnati for only half of the available amount, and Cincinnati was subsequently

dismissed from the action. Countryway's counsel had the facts upon which to base a decision as to whether Countryway's policy was *pro rata* or excess. After Countryway made its election to argue that the policy was *pro rata* and presented to the court for acceptance evidence to support its position, Countryway should not now be permitted to change its position and insist that the coverage is excess. Under the circumstances, Countryway is judicially estopped from asserting an inconsistent position, and we affirm the judgment of the trial court

Countryway next argues that the trial court erred in entering a judgment notwithstanding the verdict awarding Oakes the full amount of her medical expenses. At trial, the jury awarded Oakes $253,120.54 in medical expenses, $6,587.50 less that Oakes' claimed damages. The trial court entered a judgment notwithstanding the verdict awarding Oakes the full amount of her medical expenses.

A reviewing court may not disturb a trial court's decision on a directed verdict or a judgment notwithstanding the verdict unless that decision was clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). In this case, the trial court found that the difference in the amount of Oakes's claimed medical expenses and the damages awarded by the jury was equal to the bill from Pain Management Group and that no reasonable jury could have found that the medical expenses incurred in relation to Pain Management Group were unreasonable, unnecessary, and/or unrelated to the collision at issue.

The trial court noted that, under KRS 304.39-020(5)(a), there is a presumption that any medical bills submitted are reasonable and found that Oakes had submitted sufficient evidence to establish that the charges incurred at Pain Management Group were reasonable. Further, the trial court found that Countryway's evidence failed to rebut this presumption, as the evidence focused on whether there was universal acceptance of the discogram procedure administered at Pain Management Group rather than whether the charges were reasonable. We cannot find that the trial court was clearly erroneous in its award of medical expenses and thus affirm.

Further, Oakes has cross-appealed from the granting of Countryway's motion to alter, amend, or vacate to the extent that the trial court found that prejudgment interest should be awarded from the date of the judgment rather than the date of the jury verdict as originally awarded. A trial court's decision to grant or deny a motion to alter, amend, or vacate its judgment lies within the discretion of the trial court. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 579 (Ky. 2009). As such, we review the trial court's decision for an abuse of discretion. *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principle." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Oakes has provided no evidence that the trial court abused its discretion and even admits in her brief that prejudgment interest is a matter of judicial discretion. Therefore, we affirm.

Also, Oakes's cross-appeal requesting sanctions under CR 73.02(4) is not well-taken. CR 73.02(4) states that:

> If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so lacking in merit that it appears to have been taken in bad faith.

Although we have affirmed the opinion of the trial court, we are not convinced that Countryway's arguments are frivolous or so lacking in merit that an appeal should not have been taken or that the appeal was taken in bad faith.

Finally, Countryway also filed an appeal of the denial of its CR 60.02 motion. The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. *Kurtsinger v. Bd. of Trustees of Kentucky Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). Countryway's primary claim in its CR 60.02 motion was that Countryway's original counsel had committed excusable neglect in agreeing that Countryway's policy was *pro rata*.

Kentucky courts have held that attorney neglect does not qualify as excusable neglect under CR 60.02. "Negligence of an attorney is imputable to the client and is not a ground for relief under . . . CR 60.02(a) or (f)." *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984). Further, we do not find that Countryway provided evidence sufficient to reverse the trial court under any of the other situations enumerated in either CR 60.02 or CR 61.02. Therefore, the trial court did not abuse its discretion in denying Countryway's motion for relief pursuant to CR 60.02 or CR 61.02.

Accordingly, the order of the Todd Circuit Court is affirmed.

ALL CONCUR.

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