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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001298-MR

DANIELLE N. BIDWELL — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 09-CI-00592

SHELTER MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Danielle N. Bidwell appeals a summary judgment of the Kenton Circuit Court finding that a provision of a Shelter Mutual Insurance Company motor vehicle insurance policy purporting to limit coverage to the legal minimum coverage for permissive users of an insured vehicle is sufficiently conspicuous, plain and clear to be enforceable. We affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The facts leading to the present controversy are straight forward.

Bidwell was injured when an automobile operated by Joshua Tarlton and owned by Missy and Frank Gaines was involved in a single vehicle accident. Although the automobile liability policy issued by Shelter to the Gaineses had indemnity limits of $250,000, it also contained what is commonly referred to as a permissive user step-down provision that limited indemnity coverage to the minimum limits of liability coverage specified by the financial responsibility law. KRS 304-39.110. Tarlton had no other automobile insurance coverage.

Kentucky law provides that an insurance policy must provide a minimum of $25,000 of liability insurance for bodily injury. After Shelter asserted that the policy provided only $25,000 of coverage, Bidwell filed a complaint for declaratory judgment requesting the trial court to declare the permissive user step-down provision unenforceable. In her subsequent motion for summary judgment, she argued that the provision was inconspicuous and ambiguous and, therefore, unenforceable as a matter of law. Shelter responded to the motion and filed a cross-motion for summary judgment. It contended that the location of a provision in an insurance policy cannot render the provision inconspicuous, that it was not ambiguous, and that Kentucky permits statutes to be incorporated by reference into insurance contracts. In a well-reasoned opinion, the circuit court granted summary judgment in Shelter's favor. This appeal followed.

Because the language and organization of the Shelter insurance policy is pivotal to the dispute, a description of the policy is necessary with emphasis on the declarations page and the step-down provision.

The index page indicates that the declarations include "[t]he named insured, additional listed insureds, insured vehicle, policy period, types of coverage and amount of insurance" provided. The declarations page states that "THE LIMIT OF THE COMPANY'S LIABILITY IS STATED IN THE POLICY AND APPLIES AS FOLLOWS." (emphasis original). It then lists coverage in pertinent part as follows:

> • each person ($250,000) and each accident ($500,000) for bodily injury;
>
> • each accident ($100,000) for property damage;
>
> • each person ($50,000) and each accident ($100,000) for uninsured motorist;

The declarations page does not mention the permissive user step-down provision.

The initial reference to the permissive user step-down provision appears on page ten of the policy and is included in the "Auto Liability" section, subsection "Additional Definitions," where insured is defined:

> Any individual who has permission or general consent to use the described auto. However, the limits of our liability for individuals who become insured solely because of this subparagraph, will be the minimum limits of liability coverage specified by the financial responsibility law applicable to the accident regardless of the limits stated in the Declarations.

The step-down provision again appears on page thirteen of the policy in the "Limit of Our Liability" section as the fifth of six caveats. It states:

> Regardless of the limit of liability shown in the Declarations, the limit of liability under Coverages A and B for persons who meet the definition of insured solely because they have permission or general consent to use the described auto will be the minimum limits of liability insurance coverage mandated by the financial responsibility law applicable to the accident.

The clauses pertaining to permissive users were not otherwise labeled as to content nor emphasized.

Bidwell does not assert that all step-down provisions are prohibited by statute or public policy. Thus, her argument is essentially that the Shelter step-down provision is inconspicuous and ambiguous because of its location within the policy and the language used.

Bidwell points out that although the declarations page states the actual amount of coverage for each person and each accident for bodily injury, it omits any reference to the step-down provision and its limitation on liability for permissive users. She refers this Court to California, New Jersey, and Ohio cases, all of which she purports hold that limitations on liability provisions, similar to the step-down provision presented, must be included in the declarations page. We do not so broadly interpret the cases cited.

In *Haynes v. Farmers Ins. Exchange*, 32 Cal. 4th 1198, 1206, 89 P.3d 381, 387 (Cal. 2004), the Court concluded that the permissive user step-down provision was inconspicuous and unenforceable, in part, because:

> [N]o reason appears why the actual dollar coverages for permissive users could not have been placed with the policy coverages on the declarations page, where one would expect an insured to look to determine the policy limits.

However, the California court did not hold that the omission from the declarations page of any reference to the step-down provision rendered it unenforceable as a matter of law. To the contrary, the Court stated that the deficiencies in the placement of the provision did not render it *per se* unenforceable. *Id*. It then read the policy in its entirety and concluded that the permissive user limitation in the particular policy examined was not plain and clear. *Id*.

We likewise reject Bidwell's analogy to *Lehrhoff v. Aetna Casualty & Surety Company*, 271 N.J.Super. 340, 638 A.2d 889 (1994). It is true that based on the reasonable expectations doctrine, the insured was entitled to coverage for all drivers listed on the declarations page which could not be defeated by express policy provisions to the contrary. However, the permissive user in this case was not listed on the declarations page, nor could he have been, because his identity was unknown at the time the policy was written. Thus, he was a secondary insured. Thus, the reasoning of the *Lehrhoff* Court is not helpful.

Finally, we address the unpublished opinion by the Ohio Court in *Long v. Long*, No. C-050567, 2006 Ohio App. Lexis 2203 (Ohio Ct. App. May 12, 2006). In that case, the permissive user step-down provision was inconspicuously placed in endorsements titled as "other insurance." The Court accepted the argument that the title could be read to mean that the step-down provision applied

only when some other policy or type of insurance was involved. Thus, the terms of the specific policy rendered the provision inconspicuous. However, the Court did not articulate a general rule of law mandating any particular location of a permissive user step-down provision in an insurance policy or the language that must be used to render the provision effective.

Shelter has cited cases from other jurisdictions that have enforced similar step-down provisions and that arguably support its position. *See e.g. Balboa Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 17 Ariz. App. 157, 496 P.2d 147 (1972); *Lehman-Eastern Auto Rentals, Inc. v. Brooks*, 370 So.2d 14 (Fla.App. 1979); *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814 (Ind. App. 1993). Without delving into the specifics of each case cited, it is sufficient to state that we have reviewed those cited and, as did the cases cited by Bidwell, conclude that each turned upon the specific insurance policies involved. Thus, we believe that our review of the Shelter policy is to be controlled by the law within our own jurisdiction, including the applicable rules of construction.

Kentucky courts are required to apply certain general rules of law when construing an insurance contract, which can be briefly summarized.

An insurance policy, like any other contract, fixes, defines, and measures the parties' rights and requires a reasonable interpretation as a whole to carry out the intention of the parties within the clear meaning of its terms. *Brotherhood of Railroad Trainmen v. Wilkins*, 257 Ky. 331, 78 S.W.2d 6, 8 (1935).

However, if the policy is ambiguous, our Courts must apply specific rules of interpretation.

The doctrine of reasonable expectations is a basic premise of insurance law. Citing R.H. Long's *The Law of Liability Insurance* § 5.10B, in *Simon v. Continental Insurance Company*, 724 S.W.2d 210, 212-213 (Ky. 1986), the Court explained the doctrine:

> The gist of the doctrine is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.
>
> ....
>
> The doctrine of reasonable expectations is used in conjunction with the principle that ambiguities should be resolved against the drafter in order to circumvent the technical, legalistic and complex contract terms which limit benefits to the insured.

Exclusions from coverage are to be narrowly construed and all ambiguities resolved in favor of the insured. *Koch v. Ocean Accident & Guaranty Corp.*, 230 S.W.2d 893 (Ky. 1950). The doctrine of strict construction applies to exceptions and exclusions so as to render the insurance effective. *State Automobile Mutual Insurance Co. v. Trautwein*, 414 S.W.2d 587 (Ky. 1967). Because the policy is drafted by the insurance company and is a contract of adhesion, it is held strictly accountable for the language used and any ambiguity construed against the insurer. *Simon*, 724 S.W.2d at 211.

Finally, because the construction and legal effect of an insurance contract is a matter of law for the court, it is subject to *de novo* review. *Abney v. Nationwide Mut. Ins. Co*., 215 S.W.3d 699, 703 (Ky. 2006).

We now review the Shelter policy terms for conspicuousness and clarity. We agree with the trial court that no single factor is determinative; rather, the policy when read in its entirety must render the step-down provision conspicuous and clear.

In viewing the entire policy to determine if the step-down provision is conspicuous and clear, the structure of the policy as well as its language are properly considered. *Simon*, 724 S.W.2d at 212. Bidwell argues that the fact situation presented is analogous to that in *Simon*, where our Supreme Court held an underinsured motorist provision to be inconspicuous. *Id.* at 213. Similar to the present case, the declarations page indicated that underinsured coverage was purchased, but did not provide a dollar amount limit. The plaintiff contended that the limit of underinsured motorist's coverage was the same as the limit for the full liability coverage while the insurance carrier claimed the limit was the same as for uninsured coverage.

Although the Court emphasized that the declarations page did not contain a limit for underinsured coverage, its decision did not turn upon the single omission. The Court stressed that the definition of underinsured was "buried" in a lengthy definitions section that dealt with uninsured motorists. Creating even more ambiguity as to the coverage provided, the policy stated that an "uninsured

highway vehicle includes an underinsured highway vehicle." The Court concluded that the definition was "an 'oxymoron', a combination of incongruous words, because the word 'uninsured' by any normal definition would necessarily *exclude* 'underinsured' as a contradiction in terms." *Id*. at 212. (emphasis original). The present policy does not suffer the same ambiguities.

Although Shelter certainly could have placed the permissive user step-down provision on the declarations page, we agree with Shelter that it was not required to do so. As a practical matter, the declarations page is but a single page briefly describing the various coverage and maximum limits. Any reasonable insured is aware that the pages that follow contain the actual policy, including the specific exclusions and limitations on liability. Indeed, the Shelter policy cautions the insured, in bold print, to "READ YOUR POLICY CAREFULLY."

Although the step-down provision is not referenced on the declarations page, it is contained in the definition of insured which clearly states that coverage for a permissive user is limited to the minimum limits of liability coverage specified by the financial responsibility law applicable to the accident "regardless of the limits stated in the Declarations." Not only is the language clear, the location in the policy of the step-down provision is logically placed so that a reasonable insured would look to the definition of insured to determine whether a permissive user is covered under the policy.

The provision on page ten and its continuation on the following page do not, as Bidwell suggests, render the step-down provision any less conspicuous.

Again, an insured is deemed to have read an insurance policy in its entirety and is bound by its unambiguous terms. It is entirely reasonable to expect that the insured would turn the page to continue reading the limitations of the policy. Moreover, it is immaterial that the provision was listed as the fifth of six caveats limiting liability. We agree with the common sense approach taken by the trial court and adopt its reasoning:

> Bidwell's argument would require an insurance company to choose which of its limitations were of greatest importance and list same first in order to avoid the risk that any such limitation may be found inconspicuous and thus unenforceable, if listed further down the list. Accepting Bidwell's logic in this area would create a vexatious and incurable problem for the insurance industry.

Bidwell also contends that the step-down provision should have been in the policy's section defining "exclusions" rather than the "additional definitions" and "limitations of liability" sections and that it should have been emphasized to the insured. The step-down provision was a limitation on liability, not an exclusion. Thus, the logical location for the provision is precisely where it was placed.

While perhaps bold print or some other method of calling the insured's direct attention to the provision may have made it more conspicuous, that is simply a factor when considering inconspicuousness and is not alone dispositive. We have reviewed the Shelter policy in its entirety and conclude that the step-

down provision is sufficiently conspicuous to be enforceable. We now turn to the remaining two points presented by Bidwell.

She contends that even if the step-down provision is conspicuous, it is nevertheless ambiguous because the declarations page and the language in the "premium payments" and "limit of our liability" sections refer only to the declarations page and not the step-down permissive user provision. We have addressed the contents and purpose of the declarations page and reiterate that it is a brief statement of the *maximum* liability coverage provided the insured. It does not state that the limits stated are final and without exceptions, including limitations on coverage. The insured is specifically advised to read the contents of the entire policy.

Finally, Bidwell argues that Shelter could not incorporate by reference existing statutory law regarding the minimum limits of liability coverage set forth in Kentucky law. She asserts that to determine the amount of coverage provided, the insured "is expected to decipher" the law. Bidwell relies on *Twin City Fire Ins. Co. v. Terry*, 472 S.W.2d 248 (Ky. 1971), and proposes that it broadly prohibits incorporation by reference under all circumstances.

The factual background in *Twin City Fire Ins*. reveals the distinction between the incorporation by reference of statutes into insurance contracts and ancillary documents unavailable to the public. In *Twin City Fire Ins*., under the guise of the incorporation by reference doctrine, the insurance company attempted to bind the insured to a form that was accidently omitted from the policy and that

contained a provision requiring suit to be filed within twelve months from the date of loss. Significantly, there was no clear reference to the contents of the form in the policy and nothing to put the insured on notice or inquire as to its contents. *Id*. at 250. Under the circumstances, the Court rejected the insurance company's attempt to incorporate the omitted form by reference. *Id.*

In the present case, the statute pertaining to the minimum limits of liability insurance coverage is expressly and clearly incorporated by reference. It is well entrenched in our case law that all citizens are presumed to know the law. *Midwest Mutual Insurance Company v. Wireman*, 54 S.W.3d 177 (Ky.App. 2001). Kentucky's statutes are published, routinely and timely updated, and readily available to the public. In the context of automobile liability insurance, express and clear incorporation by reference of mandatory coverage is not only permissible, but serves the purpose of ensuring that insurance policies remain current and compliant with changes in our statutory law. We reject Bidwell's contention that the incorporation by reference doctrine is inapplicable.

After a review of the Shelter policy, we cannot say as a matter of law that the permissive user step-down provision is inconspicuous, unclear, or ambiguous so as to be unenforceable. Succinctly stated, we hold that an insured is obligated to read the policy of insurance in its entirety and is bound by its conspicuous and unambiguous terms. If the General Assembly concludes that permissive user step-down provisions are repugnant to the public interest in this Commonwealth, it is within its authority to enact laws prohibiting such provisions.

Based on the foregoing, the order of the Kenton Circuit Court is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION:

MOORE, JUDGE, DISSENTING: Respectfully, I dissent from the majority's well-written opinion. I believe the language of the policy regarding the step-down provision is buried many pages after the insureds are directed to check the declarations page to ensure the coverage is what the insureds requested and after a provision wherein Shelter agrees to pay the coverage limits listed on the declarations page, without including any reference to exclusions for permissive users. In my view, the provision is not conspicuous and because Shelter agrees to pay the amounts included on the declarations page, an ambiguity exists regarding whether the insureds can rely on the coverage listed in the declarations page. Thus, this should be construed in favor of coverage.

On the declarations page, it states that "THE LIMIT OF THE COMPANY'S LIABILITY IS STATED IN THE POLICY AND APPLIES AS FOLLOWS[.]" Thereafter, in clear language the policy limits are listed for bodily injury, property damage, medical payments, accidental death, uninsured motorists, etc. The declarations page does not include an exclusion for permissive users. Thereafter, there are three pages of endorsements, which are also identified on the declarations page.

On the first page of the policy, it states

> Please read this policy carefully. If you have questions, contact your Shelter Agent for answers. No agent can know your exact coverage needs or budget considerations, so it is your responsibility to examine the policy and make sure it provides the types of coverage you need in the amounts you requested.
>
> If you are involved in an accident, please read this policy again so that you will be reminded of your rights and obligations. **It is very important for you to recognize that this insurance policy is a legally binding contract. If any insured fails to perform an obligation required by this policy, the coverage which it might otherwise provide could be lost.**

The following page does state **READ YOUR POLICY CAREFULLY** and after explaining that the policy language controls, it states **IT IS THEREFORE IMPORTANT THAT YOU READ YOUR POLICY.** On this page, it lists where information regarding the policy can be found and contains definitions including "**DECLARATIONS**--Person or persons insured by the policy" and "**AUTO LIABILITY COVERAGE**--explains the coverage (including limitations) if you are liable for Bodily Injury or Property Damage to other people."

An index follows on the next page. At the top of the index, it provides "**Declarations**--the named insured, additional listed insureds, insured vehicle, policy period, types of coverage and amount of insurance you have."

Thereafter, the terms of the policy are defined on pages 3

through 5.[2] Terms including accident, auto, bodily injury, and claim are defined.

For purposes of this review:

> **General consent** means the authorization of the **owner** of an **auto** for another to **use** it on one or more occasions, without the necessity of obtaining **permission** for each **use. General consent** can be expressed or implied.
>
> ***
>
> **Insured** means the **person** defined as an **insured** in, or with reference to the specific coverage or endorsement under which coverage is sought.
>
> ***
>
> **Permission** means the prior authorization of the **owner** of an item of personal property for another to utilize it on a specified occasion and for a specified purpose. The specified occasion can be more than one day in duration. **Permission** exists only on that specific occasion and only while the item is being utilized for the specific purpose. Permission can be expressed or implied.

At the completion of the definitions on page 5, the policy provides "GENERAL AGREEMENTS ON WHICH INSURING AGREEMENTS ARE BASED." Thereafter, it provides that

> **YOUR** DUTY TO MAKE SURE **YOUR** COVERAGES ARE CORRECT[.] **You** agree to check the Declarations page each time **you** receive one in order to make sure that:
> (1) all the coverages **you** requested are included in this policy; and
> (2) the limit of our liability for each of those coverages is the amount **you** requested.
> **You** agree to notify **us** within ten days of the date **you** receive any Declarations page if **you** believe the coverages or amounts of coverage it shows are different from those **you** requested. If **you** do

[2] The declarations page and endorsement pages are not included in the pages numbered in the policy. They are a total of five pages.

not notify **us** of a discrepancy, **we** will presume the policy meets **your** requirements.
PREMIUM PAYMENTS
We agree to insure **you** based on **your** promise to pay all premiums when they are due. If **you** pay the premium when due, this policy provides the insurance coverage in the amounts shown in the Declarations.

Several pages thereafter general terms of the policy, such as subrogation, cancellation, assignment, etc., are explained. Half way down on page 10 it provides:

PART I- AUTO LIABILITY
COVERAGE A- **BODILY INJURY** LIABILITY;
COVERAGE B- **PROPERTY DAMAGE** LIABILITY.

Here and continuing on the next page, additional definitions are listed including that an "**insured**" includes *inter alia*

Any **individual** who has **permission** or **general consent** to **use** the **described auto**. However the limits of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits on liability insurance coverage specified by the **financial responsibility law** applicable to the **accident** regardless of the limits stated in the Declarations.

The majority opinion has succinctly set forth the doctrine of reasonable expectations and the standards for reviewing a contract for insurance coverage. I disagree, however, with the majority's application of the doctrine of reasonable expectations and *Simon v. Continental Insurance* Co., 724 S.W.2d 210 (Ky. 1986).

In the *Simon* case, the Court determined that an ambiguity existed

> [w]hen considered from the standpoint of:
>
> (a) a [declarations page] that provides limits for uninsured motorist coverage but omits limits for underinsured motorist coverage;
>
> (b) a section in the policy on uninsured motorist insurance which mentions "underinsured" but only in limited and confusing terminology; and
>
> (c) the reasonable expectations of an insured which would accompany the purchase of underinsured motorist coverage absent "an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage". . . .

Id. at 213 (internal citations omitted).

In the case at bar, as in the *Simon* case, the declarations page is silent on a limitation included later in the policy, although the provision drastically limits the amount of coverage that is listed on the declarations page. Moreover, in this case, the policy states that it "provides the insurance coverage in the amounts shown in the Declarations."

Next, the Court in *Simon* determined that the section dealing with underinsureds was "buried" in a lengthy definitions section. Here, the step-down provision is also buried many pages after the declarations page, and there is little to draw the attention of the insureds that liability for permissive users is being greatly limited. The first mention of the limitation on liability for permissive users appears on page 11 in the policy, without any headings or print that would direct the insureds' attention that limitations were actually being placed on permissive users.

As in the *Simon* case, I view the step-down provision as obscured in the policy and lacking text or emphasis that draws the insureds' attention to the drastic reduction in coverage. When this is taken into the consideration with the emphasis Shelter places on the declarations page and its agreement to provide the coverage listed on the declarations page, the step-down provision violates the doctrine of reasonable expectations.

The emphasis Shelter places on the declarations page includes, *inter alia,* that:

> --The declarations page lists the amount and types of insurance the insured has.
>
> --The insured has the "DUTY TO MAKE SURE YOUR COVERAGES ARE CORRECT" by "agree[ing] to check the Declarations page each time you receive one, in order to make sure that:
> (1) all the coverages you requested are included in this policy; and
> (2) the limit of our liability for each of those coverages is the amount you requested."
>
> --We agree to insure **you** based on **your** promise to pay all premiums when they are due. If **you** pay the premium when due, this policy provides the insurance coverages in the amount shown in the Declarations. . . .

The latter statement is patently inconsistent with the step-down provision, contained many pages later in the policy, which provides that

> Any **individual** who has **permission** or **general consent** to **use** the **described auto**. However the limits of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits on liability insurance coverage specified by the **financial responsibility law** applicable to the **accident** *regardless of the limits stated in the Declarations.*

(Italics added).

Thus, the insureds are required to agree to check the declarations page to be certain that it contains the coverage they want. And, Shelter agrees to pay the amounts listed *on the declarations page*. Yet, several pages later in the policy, Shelter limits its coverage *regardless* of what is listed on the declarations page.

As the majority noted,

> [t]he gist of the doctrine [of reasonable expectations] is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.

(Opinion at p. 7) (citing *Simon*, 724 S.W.2d at 212) (quoting R.H. Long's The Law of Liability Insurance, § 5.10B).

In my opinion, the step-down provision is not placed or printed in a matter that alerts the insureds that coverage is being limited. And, while Shelter promises to provide the liability limits on the declarations page, it later greatly reduces its coverage to permissive drivers. Shelter should place such limitations on the declarations page where it agrees to pay the limits listed on the declarations page. In my opinion, the tension between Shelter's agreement to provide the coverage on the declarations page and a later provision that limits this coverage in regard to permissive users creates an ambiguity, which should be construed in favor of coverage.

Finally, under the facts of this case, the statement informing the insureds to read the entire policy is not dispositive-- particularly given that the insureds are specifically directed to check only the declarations page to ensure they have the coverage they requested and given that Shelter promises *it will pay the amounts shown on the declarations page*. Certainly reading the entire policy is the better and encouraged practice. However, when an insurer places so much weight on the coverage listed on the declarations page, courts should not tolerate the alteration of the terms of coverage much later in the policy. Thus, because Shelter agrees to pay the coverage listed on the declarations page, it should not be relieved from paying that amount where it fails to qualify this agreement in reference to limitations and exclusions contained within the policy.

For the reasons so stated, I would reverse on this issue.

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