RENDERED: DECEMBER 16, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000434-MR

MARY LARKIN AND THE ESTATE
OF MICHAEL L. LARKIN — APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CI-00129

UNITED SERVICES AUTOMOBILE
ASSOCIATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Mary Larkin, individually, and the Estate of Michael L. Larkin (hereinafter collectively referred to as "Appellants") appeal from a Summary Judgment rendered in Hardin Circuit Court in their action to collect underinsured motorist ("UIM") benefits from United Services Automobile

Association ("USAA"). The Appellants contend that the trial court erred in concluding that a provision of a USAA insurance contract is enforceable and not contrary to public policy. That exclusionary language provided that if the insured was operating an uninsured motor vehicle owned by that insured at the time of the accident, the insured was not entitled to UIM benefits. We find no error in this conclusion and the resultant entry of Summary Judgment, and accordingly affirm.

The facts are not in controversy. On July 10, 2009, Michael Larkin was killed as a result of a collision between a motorcycle he was operating and another motor vehicle. Larkin was not at fault in the accident, and his estate collected the policy limits of the at-fault driver's liability insurance. At the time of the accident, Larkin had not obtained any insurance coverage on the motorcycle. Larkin did have an automobile insurance policy with USAA, however, which covered two other vehicles.

After the Appellants collected insurance benefits from the driver of the other vehicle, they filed the instant action to collect UIM benefits from USAA. As a basis for the action, the Appellants maintained that the UIM coverage on Larkin's insured vehicles should provide UIM benefits for the bodily injury he sustained on the uninsured motorcycle he was operating at the time of his death. Thereafter, the Appellants and USAA each filed motions seeking Summary Judgment. In support of its motion, USAA directed the court's attention to an exclusion in the policy language which provided that if the insured was operating

an uninsured motor vehicle owned by that insured at the time of the accident, the insured was not entitled to UIM benefits.

After determining that the policy language at issue was not ambiguous, the trial court characterized the issue before it as whether the exclusion was void as against public policy. The court concluded that the exclusion was not against public policy and therefore valid. As a basis for this conclusion, the court noted that to hold otherwise would encourage individuals not to insure their own vehicles. The court also relied in part on extra-jurisdictional case law which upheld the application of this exclusion in other jurisdictions. On February 11, 2011, the court rendered a Summary Judgment in favor of USAA, and this appeal followed.

The sole issue before us is whether the Hardin Circuit Court properly determined that the exclusionary language at issue does not run afoul of public policy considerations which would render it void. That is, the question is whether the court properly found as valid and enforceable a motor vehicle insurance policy provision barring the payment of UIM benefits where the insured was operating an uninsured vehicle owned by the insured at the time of an accident.

We must answer this question in the affirmative. We first note that the purchase of motor vehicle insurance is mandatory in Kentucky, and a motorcycle is a motor vehicle requiring insurance coverage. *See generally*, KRS Chapter 187. As such, Larkin was required to purchase motor vehicle insurance for the motorcycle he owned and operated at the time of the accident. It is

uncontroverted that the insurance coverage that Larkin previously had on the motorcycle, which was issued by another carrier, had lapsed several weeks prior to the accident. At the time of the motorcycle accident, however, Larkin had insured through USAA a 2007 Mercury Mountaineer and a 1993 GMC Sierra 1500, and he had UIM coverage as a result.

It is the Appellants' contention that the exclusion at issue is against public policy. As a basis for this claim, they argue that the exclusion should be declared unreasonable and against public policy by the "doctrine of reasonable expectations" because it takes the coverage away from the person and applies it to the vehicle, which is contrary to *Chaffin v. Kentucky Farm Bureau Insurance Company*, 789 S.W.2d 754 (Ky. 1990), and other rulings of the Kentucky Supreme Court. That is to say, the Appellants maintain that Larkin reasonably expected to receive UIM coverage because, 1) he was an "insured" with USAA, and the coverage of his two insured vehicles provided UIM benefits, 2) the damages were a result of bodily injuries sustained in the accident, and 3) the at-fault driver's underinsured status necessitated the decedent's claim for UIM benefits.

To a large degree, the trial court's calculus involved balancing Larkin's reasonable expectations regarding his UIM coverage with the public policy and statutory law mandate that persons must insure their own motor vehicles, as well as the unambiguous policy exclusion. Would it be reasonable for Larkin to operate an uninsured motor vehicle, and then expect entitlement to UIM benefits for damages arising from the operation of that uninsured vehicle? We

think not, for a multiplicity of reasons. First, Larkin entered into an insurance contract which expressly excluded his entitlement to UIM benefits under the facts at bar, and the Appellants acknowledge that the policy so states. Second, it is uncontroverted that Larkin's motorcycle is not shown as a "covered auto," which is defined by the policy as "[A]ny vehicle shown in the Declarations . . . ." The policy's Declarations Page lists only the 2007 Mercury Mountaineer and 1993 GMC Sierra 1500 as covered autos. And third, if the Appellants' argument is taken to its logical conclusion, a person could insure a single vehicle with USAA and then operate a fleet of other uninsured vehicles for which USAA would be liable for UIM benefits despite not having assumed the risk nor received any premiums for those uninsured vehicles.

We acknowledge that both UIM and uninsured motorist coverage is personal to the insured, and does not relate to a specific vehicle. *Dupin v. Adkins*, 17 S.W.3d 538 (Ky. App. 2000). However, "[t]he purpose of UIM coverage is not to compensate the insured or his additional insureds from his own failure to purchase sufficient liability insurance." *Windham v. Cunningham*, 902 S.W.2d 838, 841 (Ky. App. 1995). Though the facts of *Windham* are distinguishable, it demonstrates that UIM coverage is limited by the policy language to which the parties agree, and the reasonable expectations of the parties.

In the matter at bar, the policy exclusion at issue is not only directly applicable to the instant facts, but does not run afoul of a public policy requiring that an insured receive what he reasonably expects his policy to provide. Larkin

could not reasonably expect to receive UIM benefits on an uninsured vehicle which he owned, and one which was expressly excluded by the policy language. While Larkin was an insured for the limited purpose of operating the 2007 Mercury Mountaineer and a 1993 GMC Sierra 1500, he cannot reasonably be construed as an insured for purposes which exceed the policy language, or for all conceivable purposes. Ultimately, the burden rests with the Appellants to overcome the strong presumption that the trial court's rulings were correct. *City of Jackson v. Terry*, 302 Ky. 132, 194 S.W.2d 77 (1946). The Appellants have not overcome that presumption.

The applicable 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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "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 proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), *citing Steelvest, supra. See also O'Bryan v. Cave,* 202 S.W.3d 585, 587 (Ky. 2006); and *Hallahan v. The Courier–Journal,* 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo. Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001).

When viewing the record in a light most favorable to the Appellants and resolving all doubts in their favor, we cannot conclude that the trial court's entry of Summary Judgment in favor of USAA was erroneous. The policy's exclusionary language is applicable to the facts at bar, and a provision limiting UIM coverage to insured motor vehicles does not run afoul of public policy. As such, we find no error.

For the foregoing reasons, we affirm the Summary Judgment of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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