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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001275-MR

RICHARD R. TRYON APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 12-CI-004231

ENCOMPASS INDEMNITY COMPANY AND
PHILADELPHIA INDEMNITY INSURANCE COMPANY APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Richard Tryon appeals from an order of the Jefferson Circuit Court granting summary judgment in favor of Encompass Indemnity Company and Philadelphia Indemnity Insurance Company. The circuit court found that Encompass and Philadelphia Indemnity did not owe underinsured motorist benefits

to Mr. Tryon. We find these two companies were not entitled to summary judgment; therefore, we reverse and remand.

On July 20, 2012, Mr. Tryon was riding his motorcycle when he was struck by an automobile being driven by Logan Hopkins. The motorcycle is insured by Nationwide Insurance Company of America. That insurance also includes underinsured motorist (hereinafter UIM) coverage. Mr. Tryon also owns two other vehicles, a Lexus insured through Encompass and an antique Pontiac Firebird insured through Philadelphia Indemnity. Both of these other insurance policies include UIM coverage.

As a result of the accident, Mr. Tryon made a claim under all three insurance policies seeking UIM benefits. Encompass and Philadelphia both claim that they do not owe UIM benefits to Mr. Tryon due to language in their insurance contracts which states that UIM coverage is excluded in instances "[w]hile that covered person is operating or occupying a motor vehicle owned by, leased by, furnished to, or available for the regular use of a covered person if the motor vehicle is not specifically identified in this policy under which a claim is made." Put a different way, since Mr. Tryon was operating a motor vehicle he owned, but did not specifically insure with Encompass or Philadelphia Indemnity, these companies do not owe UIM benefits. Encompass and Philadelphia Indemnity both moved for summary judgment. The trial court granted the motion based on the unpublished case of *Motorists Mutual Ins. Co. v. Hartley*, 2010-CA-000202-MR (Ky. App. Feb. 11, 2011). This appeal followed.

> 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, *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).

We find that the trial court erred in finding *Hartley* controlling in this case. We believe the cases of *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), and *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993), both Kentucky Supreme Court cases, are the controlling precedent.

In *Chaffin*, Betty Chaffin was injured when her vehicle was struck by a vehicle driven by an uninsured motorist. Her vehicle was insured by Kentucky Farm Bureau. Ms. Chaffin had two other vehicles that were also insured by

Kentucky Farm Bureau. All three insurance policies provided uninsured motorist (UM) coverage. The three insurance policies had the following exclusion:

> A. We do not provide Uninsured Motorist Coverage for 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.

Chaffin at 755.[1] Ms. Chaffin made a claim for UM benefits under all three policies. Kentucky Farm Bureau paid one UM claim and argued the exclusion did not require them to pay the other two.

The Kentucky Supreme Court concluded that "uninsured motorist coverage is personal to the insured; that an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and that it is contrary to public policy to deprive an insured of purchased coverage[.]" *Chaffin* at 756. The Court further stated:

> If appellant had been injured by an uninsured motorist while riding in the vehicle of a friend or while walking across a street, uninsured motorist coverage would have been available from all three of her uninsured motorist polices. By its own terms, the other vehicle exclusion in appellant's policy would not be applicable to such facts. It was significantly more probable, however, that appellant would be injured by an uninsured motorist while operating or riding as a passenger in her own motor vehicle and indeed, she was injured under just such circumstances. Inasmuch as uninsured motorist coverage "has a number of aspects of accident insurance," it is contrary to the underlying purpose of such coverage to

[1] This exclusion is commonly referred to as the "owned but not scheduled for coverage" exclusion. While worded differently, it is essentially the same exclusion in the case *sub judice*.

> allow recovery upon multiple policies in the extraordinary situation and deny same in the more conventional circumstance. It is always possible to exclude coverage to such an extent that only in the rarest of circumstances would a claim ever arise. Such, of course, defeats the underlying purpose of insurance.

Id. at 757 (citations omitted). The Court ultimately found that this exclusion was against the public policy of Kentucky. In *Dicke*, the Kentucky Supreme Court applied the same reasoning as in *Chaffin* and held that the "owned but not scheduled for coverage" exclusion as applied to UIM coverage was also against public policy. *See also Hamilton Mut. Ins. Co. v. U.S. Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky. App. 1996) (where this Court found the "owned but not scheduled for coverage" exclusion found in three different insurance policies, from three different insurance companies, that insured three different vehicles was unenforceable.).

As stated previously, the trial court in the case at hand relied on this Court's opinion in *Hartley* when it granted summary judgment in favor of the appellees. *Hartley* is almost identical to this case. Mr. Hartley was injured while riding his motorcycle. He received insurance benefits from the company that covered his motorcycle, but he also sought UIM benefits from Motorists Mutual Insurance Company, which covered another automobile. Motorists Mutual filed a complaint for declaratory judgment seeking a declaration of its rights under the policy. The policy at issue had the "owned but not scheduled for coverage" exclusion. The trial court found the exclusion unenforceable. On appeal, another panel of this

Court reversed the judgment of the trial court and found that the exclusion was enforceable.

The Court found that the public policy holding in *Chaffin* was distinguishable from the facts as they applied to Mr. Hartley because he specifically rejected Motorists Mutual's offer to insure his motorcycle. *Hartley* at 9. In addition, the Court distinguished its case from *Chaffin* because motorcycles are inherently more dangerous. *Id.* at 10. The Court also found as persuasive the case of *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky. App. 2001), which found that provisions that specifically exclude motorcycles from UIM coverage are enforceable.[2] *Hartley* at 10-11.

In the case *sub judice*, we find that the trial court erred in relying on *Hartley* because that is an unpublished opinion and is not binding precedent. CR 76.28(4)(c). We are bound by the *Chaffin* and *Dicke* opinions which hold that the "owned but not scheduled for coverage" exclusion is unenforceable as against public policy.

During oral arguments in this case, counsel for the appellees requested that we apply the reasoning in *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013), to the case at hand. In that case,

> Pennsylvania resident Karen Hodgkiss–Warrick brought suit to recover for injuries she sustained in a motor vehicle accident near Mt. Vernon, Kentucky while riding in a vehicle driven by her daughter, Heather, also a Pennsylvania resident. Because her daughter's liability coverage was insufficient to fully compensate Hodgkiss–

[2] No such provision was found in *Hartley* or is found in any of the policies in the case before us.

> Warrick, she included a claim against her own insurance carrier, State Farm Mutual Automobile Insurance Company, for underinsured motorist coverage pursuant to a policy issued in Pennsylvania and covering a vehicle that Hodgkiss–Warrick registered, garaged and used exclusively in Pennsylvania.

Id. at 876. State Farm denied UIM benefits because Hodgkiss–Warrick's policy provided that

> the company "will pay compensatory damages for bodily injury an insured is legally entitled to recover from the owner or driver of an underinsured motor vehicle," but it plainly excludes from the definition of "underinsured motor vehicle" "a land motor vehicle: . . . (2) owned by, rented to, or furnished or available for the regular use of you or any resident relative." "Resident relative" is defined in pertinent part as "a person, other than you, who resides primarily with the first person shown as a named insured on the Declarations Page and who is: (1) related to that named insured or his or her spouse by blood[.]"

Id. at 878 (footnote omitted). This exclusion is commonly referred to as the "regular use" exclusion. At the time of the accident, Hodgkiss–Warrick was living with her daughter; therefore, the above quoted exclusion applied and UIM benefits were denied.

Hodgkiss–Warrick is irrelevant to the case before us for a number of reasons. First, that case applied Pennsylvania law in coming to the conclusion that the exclusion was enforceable. In addition, the "regular use" exclusion in *Hodgkiss–Warrick* is different from the "owned but not scheduled for coverage" exclusion at issue in the case at hand. Finally, Kentucky courts have held that the "regular use" exclusion is enforceable and does not violate against public policy.

Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 450 (Ky. 1997); *Windham v. Cunningham*, 902 S.W.2d 838, 840 (Ky. App. 1995).

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court and remand for further proceedings.

ALL CONCUR.

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