NO. COA01-678

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

WALTER CLARK ERWIN,
Plaintiff

v.

Burke County
No. 99 CVS 278

LENA LOWDERMILK TWEED,
Defendant.

Appeal by plaintiff from order entered 26 February 2001 by Judge Timothy S. Kincaid in Burke County Superior Court. Heard in the Court of Appeals 15 April 2002.

*Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for plaintiff-appellant.*

*Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for unnamed defendant-appellee.*

EAGLES, Chief Judge.

In an earlier appeal, the trial court's judgment regarding the applicability of certain insurance policies to Walter Clark Erwin ("the plaintiff") was affirmed in part, reversed in part and remanded. *Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803, *disc. review denied*, 353 N.C. 724, 551 S.E.2d 437 (2001). While the earlier appeal was pending, plaintiff moved for a determination from the trial court that North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") be allowed a credit of $37,334.00

towards Farm Bureau's Underinsured Motorist ("UIM") coverage. The trial court denied plaintiff's motion and allowed Farm Bureau a credit of $50,000.00. After careful consideration of the briefs and record, we affirm.

On 19 December 1993, plaintiff, a fifteen year old boy, was injured while riding his bicycle when he was struck by a vehicle operated by Lena Tweed ("defendant").

The parents of the plaintiff claimed that they were entitled to payment for medical expenses that plaintiff incurred from the date of the accident until plaintiff's eighteenth birthday. The parents settled with defendant's personal automobile liability carrier, State Auto Insurance Company ("State Auto"), for $12,666.00 in 1995 for their claim. Plaintiff entered into a settlement with State Auto for his claim on 27 March 1998 for $37,334.00. State Auto's policy for defendant provided bodily injury liability limits of $50,000.00 per person.

Plaintiff sought binding arbitration which occurred on 19, 21 and 22 September 2000. The arbitrators awarded plaintiff $600,000.00. Plaintiff was an insured under certain automobile insurance policies issued by Farm Bureau. Farm Bureau did not dispute coverage under policy AP 3725121 which provided UIM Bodily Injury coverage in the amount of $250,000.00 per person and $500,000.00 per accident. On 16 October 2000, plaintiff filed a motion in the cause requesting that the court "determine how much of the liability payments herein [are] to be credited specifically to the plaintiff, Clark Erwin, toward the arbitration award."

Plaintiff moved that the court rule that Farm Bureau receive a credit in the amount of $37,334.00 towards the UIM limit. In the alternative, plaintiff moved that if Farm Bureau was entitled to receive a $50,000.00 credit, then the arbitration award should be increased by $12,666.00. Plaintiff entered into a "Release" agreement with Farm Bureau for $200,000.00 in UIM coverage under policy AP 3725121 on 19 October 2000. In this agreement, plaintiff reserved his right to continue with his claim for $12,666.00 in UIM coverage from policy AP 3725121.

Plaintiff's motion was heard at the 26 February 2001 session of Burke County Superior Court before Judge Timothy S. Kincaid. The trial court denied plaintiff's motion. It determined that Farm Bureau was entitled to a $50,000.00 credit towards the $250,000.00 UIM coverage and "that plaintiff [was] not entitled to have the amount of the arbitration award increased." Plaintiff appeals.

Plaintiff raises two issues on appeal. Plaintiff first contends that the trial court committed reversible error in denying plaintiff's motion to allow a $37,334.00 credit toward the $250,000.00 UIM limit of AP 3725121. In the alternative, plaintiff contends that the trial court committed reversible error in denying plaintiff's motion to increase the arbitration award by $12,666.00. After careful consideration, the decision of the trial court is affirmed.

> Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured

> highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.
>
> In any event, *the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident*.

G.S. § 20-279.21(b)(4) (emphasis added).

Plaintiff contends that the limit of UIM coverage that should be available for his claim is $212,666.00. Plaintiff argues that this figure is the difference between the $250,000.00 UIM coverage and the $37,334.00 paid directly to plaintiff from State Auto. Plaintiff contends that $37,334.00 is the figure that should be used since that was "the amount paid to the claimant under the exhausted liability policy." *Id.* Plaintiff argues that the remaining $12,666.00 of the $50,000.00 per person liability limit was paid to his parents for their claim for medical expenses. Farm Bureau contends that the amount of UIM coverage that should apply is $200,000.00. Farm Bureau argues that this figure is the difference between the $250,000.00 UIM coverage and the $50,000.00 paid to plaintiff and his parents under defendant's liability policy.

The parties disagree over the limit of UIM coverage applicable to plaintiff's claim. This figure is determined by taking the difference between the limit of the UIM coverage applicable to the vehicle and the amount paid to the claimant under defendant's exhausted liability policy. G.S. § 20-297.21(b)(4); *N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178, 180-81, 532 S.E.2d 846, 848, *disc. review denied*, 352 N.C. 675, 545 S.E.2d 427 (2000). The limit of the UIM coverage applicable to the vehicle is $250,000.00. This figure is not in dispute. Therefore, the question before this Court is what constitutes "the amount paid to the claimant under the exhausted liability policy" in order to determine the amount of UIM coverage applicable for plaintiff's claim.

A parent has the right to recover medical expenses for treating a child's injuries when the child is injured by the negligence of another. *Flippin v. Jarrell*, 301 N.C. 108, 120, 270 S.E.2d 482, 490 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). However, the parent's claim for medical expense is derivative in nature. *Holt v. Atlantic Cas. Ins. Co.*, 141 N.C. App. 139, 142, 539 S.E.2d 345, 347 (2000); *Howard v. Travelers Insurance Cos.*, 115 N.C. App. 458, 463, 445 S.E.2d 66, 69, *disc. review denied*, 337 N.C. 692, 448 S.E.2d 524 (1994). In *Howard*, this Court

> conclude[d] that the term "all damages" used in the policy's "Limit of Liability" section here is all-inclusive. The parents' claim for the child's medical expenses is derivative in nature; accordingly the parents cannot recover since they themselves have sustained no

> "bodily injury" within the meaning of the policy.

*Howard*, 115 N.C. App. at 463, 445 S.E.2d at 69 (citations omitted). Likewise, *Holt* relied on *Howard* in concluding that a parent's claim for a child's medical expenses was derivative in nature. *Holt*, 141 N.C. App. at 142, 539 S.E.2d at 347. This Court stated that "when Atlantic exhausted the per person limit of $25,000 in settling [the child's] claim, who sustained the direct bodily injury, [the parent's] derivative damage was subsumed within that settlement award." *Id.* at 142-43, 539 S.E.2d at 347.

*Howard* and *Holt* dealt with the derivative nature of a parent's claim for medical expenses incurred as a result of a child's injury in relation to liability coverage under an automobile insurance policy. Here, the insurance coverage at issue is UIM coverage. However, the pertinent language of the "Limit of Liability" sections analyzed by this Court in *Howard* and *Holt* are similar to the "Limit of Liability" provision in the UIM section of the policy here.

"Part C-Uninsured Motorists Coverage" of the policy at issue here contains the following language:

> The limit of bodily injury liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for *all damages* for **bodily injury**, including damages for care, loss of services or death, sustained by any one person in any one auto accident.
>
> Subject to this limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of

> liability for *all damages* for **bodily injury** resulting from any one accident. The limit of property damage liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability for all damages to all property resulting from any one accident. This is the most we will pay for **bodily injury** and **property damage** regardless of the number of:
>
> 1. **Insureds**;
>
> 2. Claims made;
>
> 3. Vehicles or premiums shown in the Declarations; or
>
> 4. Vehicles involved in the accident.

(Emphasis added.) "Part D-Combined Uninsured/Underinsured Motorists Coverage" provides:

> This coverage is subject to all of the provisions of the policy with respect to the vehicles for which the Declarations indicates that combined Uninsured Underinsured Motorists Coverage applies except as modified as follows:
>
> I. Part C. is amended as follows:
>
> . . . .
>
> D. The following is added to the Limit of Liability provision:
>
> The most we will pay under this coverage is the lesser of the amount by which the:
>
> a. limit of liability for this coverage; or
>
> b. damages sustained by an **insured** for **bodily injury**;
>
> exceeds the amount paid under all **bodily injury** liability bonds and insurance policies

applicable to the **insured's bodily injury.**

"[T]he applicable UIM limit under [G.S.] § 20-279.21(b)(4) will depend on two factors: (1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap." *Gurley*, 139 N.C. App. at 181, 532 S.E.2d at 848. This Court went on to state that "when only one UIM claimant exists, the per-person limit under the policy will be the applicable UIM limit." *Id.* at 181, 532 S.E.2d at 849.

"[A] UIM carrier is entitled to credit for the amounts paid to a claimant under the tortfeasor's liability policy." *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 885, *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995). Here, plaintiff is the only claimant seeking UIM coverage from Farm Bureau so the appropriate UIM limit would be the per person UIM limit of $250,000.00. State Auto paid plaintiff and plaintiff's parents from the same per person limit of $50,000.00. Exhaustion occurs when the "limits of liability per claim have been paid upon the claim" or when "by reason of multiple claims, the aggregate per occurrence limit of liability has been paid." G.S. § 20-279.21(b)(4). Here, State Auto's per occurrence limit was not used and only one per person limit was used to pay both the plaintiff and his parents. The per person limit was the limit exhausted by

defendant's liability carrier. While plaintiff directly received only $37,334.00 of the $50,000.00 per person liability limit, the remaining $12,666.00 was paid to the parents for plaintiff's medical expenses incurred by his parents prior to plaintiff turning eighteen. The $50,000.00 paid "exhausted" the liability limit which enabled plaintiff to pursue his UIM coverage. The figure that "exhausted" the limit should be used to calculate the credit for the UIM carrier. Since the parents' claim is derivative and the per person liability limit was used to pay the initial claims, the "exhausted" amount which allows the plaintiff to proceed with a UIM claim should be the $50,000.00 paid under defendant's per person liability limit. This is the amount which was "paid to the claimant."

"The Financial Responsibility Act is a remedial statute and the underlying purpose is the protection of innocent victims who have been injured by financially irresponsible motorists." *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 678, 514 S.E.2d 102, 106, *disc. review denied*, 350 N.C. 831, 537 S.E.2d 824 (1999). The application of $50,000.00 as the credit achieves the purpose of UIM coverage. "'UIM coverage is intended to place a policy holder in the *same position* that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage.'" *Gurley*, 139 N.C. App. at 183, 532 S.E.2d at 849-50 (quoting *Mutual of Enumclaw Ins. Co. v. Key*, 883 P.2d 875, 877 (Or. Ct. App. 1994)) (emphasis in original). If defendant had liability coverage equal to the amount of plaintiff's

UIM coverage, defendant would have had $250,000.00 in liability coverage. Since the plaintiff's parents claim is derivative and subject to one per person limit, if the limit was tendered, plaintiff would have received $237,334.00 and plaintiff's parents would have received $12,666.00. This is the same amount that was actually received by plaintiff by applying $50,000.00 as the credit. Therefore, plaintiff is in the same position as if defendant had had liability coverage in the amount of $250,000.00.

Based on the facts of this case, we conclude that the trial court properly determined that Farm Bureau was entitled to a $50,000.00 credit towards its UIM coverage limit.

Plaintiff next contends that the trial court committed reversible error in denying plaintiff's motion to increase the arbitration award by $12,666.00. We are not persuaded.

G.S. § 1-567.14 "provides the sole means by which a party may have an award modified or corrected." *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 496, 499 S.E.2d 801, 806 (1998). G.S. § 1-567.14 states:

> (a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> > (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
> >
> > (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Plaintiff argues that the application of $50,000.00 as the credit will leave him unable to collect the $12,666.00 that was paid to his parents. Plaintiff contends that in the event he is able to collect the entire arbitration award, he would only receive $587,334.00 rather than $600,000.00. Plaintiff contends that by raising the arbitration award to $612,666.00, he would be able to collect $600,000.00 even with the use of $50,000.00 as the credit.

> "[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts." "If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of 'judges who are of the parties' own choosing.'"

*Palmer*, 129 N.C. App. at 496-97, 499 S.E.2d at 807 (citations omitted).

The trial court properly denied plaintiff's motion to increase the arbitration award as plaintiff did not show that the arbitrators made an evident mathematical error, error relating to form, or error evidencing that the arbitrators exceeded their powers.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).